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Litigants in person

Unrepresented litigants in first instance proceedings

Professor Richard Moorhead and Mark Sefton
Cardiff University

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Disclaimer

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Executive Summary

This report explores detailed quantitative and qualitative data on unrepresented litigants from four courts in first instance civil and family cases, excluding small claims cases. It provides a detailed picture of the prevalence and nature of unrepresented litigants and the impact of non-representation on themselves, the courts and their opponents. The main findings are:

1. Unrepresented parties in cases were common. It was usually defendants and not claimants/applicants who were unrepresented. Obsessive/difficult litigants were a very small minority of unrepresented litigants generally, but posed considerable problems for judges and court staff.

2. A large part of the reason for non-representation, especially in civil cases, was in fact non-participation. Some unrepresented litigants were in fact partially represented. Although there was evidence that significant numbers of unrepresented litigants had some advice on, or assistance with, their case, the evidence suggested this help was ad hoc.

3. A small but significant proportion of cases involved at least one active party who was unrepresented throughout the life of their case. Cases where both parties were unrepresented were rare. There were variations in non-representation by types of case and litigant. Some unrepresented litigants indicated vulnerability.

4. Although sometimes less serious and less heavily contested than cases involved in represented litigants, what was at stake for litigants was nevertheless significant. Parties go unrepresented for a range of reasons including choice and the lack of free or affordable representation.

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

6. Participation by unrepresented litigants is not the same as active defence. Levels of activity suggested cases involving unrepresented litigants may have involved more court-based activity than those cases where all parties were represented. Within cases involving unrepresented parties, participation by

unrepresented litigants was generally of a lower intensity than participation by represented parties.

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

8. Unrepresented litigants participated at a lower intensity but made more mistakes. Problems faced by unrepresented litigants demonstrated struggles with substantive law and procedure. There was other evidence of prejudice to their interests.

9. There was at best only modest evidence that cases involving unrepresented litigants took longer, though cases with unrepresented parties were less likely to be settled.

10. Some courts and local advice providers may be more welcoming to, or encouraging of, unrepresented litigants than others. Courts were not confident signposters of unrepresented litigants to alternative sources of help.

11. Judges recognised that unrepresented litigants posed a challenge to the 'passive arbiter' model of judging and responded to that challenge with varying degrees of intervention. Court staff recognised unrepresented litigants' needs but were unsure of what help was permissible because of the way the 'no advice' rule was managed.

12. Court staff and judges perceived that improvements could be made in the way that unrepresented litigants were handled.

1. Introduction

Lord Woolf encapsulated the paradox presented by unrepresented litigants:

> *Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people. (Woolf (1995), Chapter 17, para. 2.)*

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

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

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

Similarly, a detailed consideration of the stages of litigation and the challenges that they pose to litigants in person is important. Unrepresented litigants may pass

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

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

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

In this country, concrete research specifically on unrepresented litigants is minimal. There has been significant work within the context of small claims by John Baldwin (1997 and 2002) and other studies touch on relevant issues (Genn, 1998 and 1999; Shapland et al, 2003). Plotnikoff and Woolfson (1998) have conducted a small survey of litigants' perceptions of the services provided to litigants in person under the Otton Project CABx service. Relatively little work has been conducted on the prevalence of

litigants in person and little systematic data is kept by the Court Service, other than through the trial sampler, which only collects information on representation at civil trials. The Otton report was the fullest review of the prevalence of litigants in person, although it was confined to the Royal Courts of Justice and one other London court and does not deal with unrepresented litigants in provincial courts (Otton, 1995).

Aims and objectives of this research

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

The second aim of the research was to **define the different ways in which unrepresented litigants manifest themselves within proceedings**. This involves a deeper look at the nature of cases involving unrepresented litigants: what was at stake in the litigation, who the parties were, and what procedural and legal issues were raised in proceedings. We examine at what stages parties become unrepresented litigants, and the points at which representation was commenced or discontinued. Available data on help other than representation (non-representative help) was considered (e.g. Mackenzie Friends and/or out of court advisers who do not go on the record) where it was apparent from court files and in interviews.

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

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

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

Research Aims

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

Unrepresented litigants: definitional and practical issues

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

Because so little is known about the identity and prevalence of unrepresented litigants, the research initially takes a wide definition of unrepresented litigant as its starting point. Our profiling of unrepresented litigants then details the prevalence of *different* types of unrepresented litigants in the courts. For the purposes of our data, we treat any person who was party to litigation, but who at some stage during the proceedings was not represented by a lawyer acting on the record, as a litigant in person. We categorise appropriate subsets of this larger group of unrepresented litigants (individuals, firms, those who participate, and those who have some assistance). As we demonstrate, some unrepresented litigants are in fact institutional repeat players (local authorities and housing associations in particular), whereas others are much more like the archetypical private litigants in person: individuals or small businesses. As our analysis develops, we focus on unrepresented individual and business litigants over institutions. This was for conceptual reasons: institutional unrepresented litigants are more like represented litigants in terms of expertise and experience. We also concentrate more on those who participate in some way in their case (in particular, for Phase II data (see below)). This was partly for pragmatic reasons: our pilot work showed that cases involving non-participating litigants ended quickly, and there was often very little data to collect on them, but also because we were interested to explore how unrepresented litigants progressed through the courts. Furthermore, a study of quite different design would have been needed to trace the experiences of non-participating litigants.

Research definition of litigant in person

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

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

What types of cases are studied in this report?

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

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

The courts

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

Methods overview

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

qualitative material. This section outlines our approach to methodology. Appendix A contains further detail.[1]

Phase I: comparative quantitative data

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

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

Phase II: Detailed quantitative data on cases involving unrepresented litigants

Phase II data collection was more detailed, and based on paper files. In Phase I we had identified which of the cases involved unrepresented litigants, in Phase II we ascertained in particular whether cases involved *participating* unrepresented litigants. If they did involve participating (we sometimes refer to these as 'active') unrepresented litigants, we collected more detailed information about the nature of the cases and litigants involved, and on the timing and nature of participation by unrepresented litigants. We stratified our Phase II sample to try and ensure that we had significant numbers of active unrepresented litigants for each main type of case and, where possible, for each type of party acting in person (claimants/applicants and

[1] Data collection forms are available from the first author on request.

defendants, businesses and individuals). Participation was broadly defined and included: filing of documents, attendance at hearings, dealing with the court (whether by correspondence, telephone or attendance at the court counter) or contact with opponents to progress matters through the court. Phase II data also contains detail about the nature of relationships between parties; what documents were filed by represented and unrepresented parties; what applications were made; what hearings there were, and outcomes of cases. In addition, we sought to examine whether assistance short of representation had been obtained, and the nature and source of that assistance. That data is more indicative than definitive, as court files were unlikely to reveal all assistance received by unrepresented litigants, but it provides some insights into these issues. Phase II involved the collection of data from a total of 748 cases of these, 492 involved active unrepresented litigants.

Phase III: observation and interviews

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

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

Interviews and focus groups

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

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

We also conducted 8 focus groups with staff in each of the courts. One group in each court comprised staff working on civil cases, the other on family cases. Focus groups had between 3 and 6 participants covering a range of roles including ushers, administrative staff, court clerks and section managers.

This data is supplemented with qualitative information from our reading of court records and case files, perusal of information displays in courts' public areas, and information materials supplied to us by the courts, as well as observations made during the considerable period of time we spent in courts.

Timing

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

Practical issues

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

Usually it was clear when a litigant was represented, because they instructed outside firms of solicitors. Where proceedings are issued via solicitors, the fact of their acting is indicated on Caseman or Familyman. If they cease to act, notice of this is recorded. Therefore, claimants, applicants and petitioners were treated as

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

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

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

Some businesses or organisations appeared to be unrepresented, in the sense of not instructing solicitors to act for them on the record, but may in fact have been dealing

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

with a case via either an in-house legal department with qualified (solicitor or barrister) staff, or an in-house department using non-lawyers experienced in the handling of claims. Unless clearly represented by a legal department, any such organisations were treated as unrepresented. Organisations which self-represented in this way included local authorities, housing associations and HM Collector of Taxes. When we come on to analyse the data below we refer to these public sector litigants as 'institutional litigants' and any of them that are unrepresented as 'institutional litigants in person'. Where the DSS was involved as a claimant, it was invariably via its centralised Recovery Unit, and given the size and separation of its claims handling function this litigant was treated as represented.

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

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

Structure of the report

Chapter 2 discusses **how many unrepresented litigants** there were in our sample, whether they were usually claimants/applicants/petitioners or defendants/respondents and whether they were more prevalent in certain types of case. We look at the different types of unrepresented litigant: those who participate in some way and those who do not appear to participate; those who were only unrepresented for part of the proceedings (partial representation), and the extent to

which it was apparent that such litigants received some assistance short of actual representation. This largely statistical data is supplemented by qualitative information on the perceived reasons for litigants being unrepresented.

Chapter 3 looks more closely at the **characteristics of litigants in person**. In family cases we were concerned with gender and indications of vulnerability, whether unrepresented litigants divorce on different grounds or take different kinds of Children Act cases than represented parties. For civil cases we concentrate on the extent to which cases were taken between individuals, between organisations or between individuals and organisations.

Chapter 4 looks at the more controversial topic of **difficult and obsessive litigants**. There was some quantitative information on this from our review of court records and files, which enables us to comment on the prevalence of such litigants at first instance. We concentrate particularly on interview and observational data to give an indication of the sorts of problems that manifest themselves. We also discuss the relationship between fee exemption and remission and difficult or obsessive behaviour.

Chapter 5 looks at **levels of activity** on cases and, in particular, compares those cases where there were unrepresented litigants and those where there were not, to see what types of activity were more or less apparent in such cases, and overall whether cases involving unrepresented litigants were more likely to involve court based activity than cases where all parties were represented.

Chapter 6 takes a more detailed look at the **nature of participation** on cases where there was at least one unrepresented party: what types of document were filed, what types of hearing occur, how often litigants attend hearings, etc.

Chapter 7 discusses in detail the **number and nature of errors** in handling cases where there were unrepresented litigants. Because these cases often involved a represented opponent, we were able to compare the level and nature of errors made by unrepresented litigants with the errors made on these cases where there were legal representatives.

Chapter 8, based on our interview and observation work, discusses the **problems posed for unrepresented litigants**: handling paperwork, dealing with hearings, enforcement, settlement and mediation.

Chapter 9 considers the **challenges posed to judges** in dealing with unrepresented litigants: in particular, interviews with judges articulated a strain between the traditionally passive role of judges and the more interventionist approach necessary to ensure some level of equality of arms between represented and unrepresented litigant.

Chapter 10 considers **assistance by court staff**. Notions of neutrality, lack of legal training and customer service were in tension when court staff came to consider what help they could offer litigants. The tension between information, advice and *legal* advice is a considerable difficulty for staff and one which we discuss in detail.

Chapter 11 considers **information on how cases ended**. We have some information by which we can compare the stage at which cases ended, depending on whether litigants were represented or not and we also have some information on the actual outcomes of cases (though this information was limited). Issues to do with court fees and legal costs are also discussed.

Chapter 12 provides a **summary** and broader analysis of the findings.

2. Cases and unrepresented litigants

This chapter sets the scene with a consideration of why litigants are, or become, unrepresented. It then considers our quantitative data to outline the number and types of cases we looked at and then the prevalence of unrepresented litigants within those case types.

Why do litigants become unrepresented?

The observations, interviews and focus groups, together with information from court files, provided data which helps us to interpret some of the quantitative data on the incidence of unrepresented litigants; factors leading to their being unrepresented; and their tendency to participate or not in family and civil proceedings.

What does the literature say?

The literature suggests litigants go unrepresented for a number of reasons. Some of these are the conventional arguments about cost, but others challenge the view that lawyers are perceived as better for clients in handling certain cases or, more subtly, challenge the notion that clients would automatically consider it desirable for a lawyer to represent them (AIJA, 2001). The most common reason given for acting in person by respondents in *Paths to Justice* was that they did not think they had to be represented (Genn, 1999, 22). Interestingly, what is often assumed to be the primary reason for non-representation was, in Genn's study, the *second* most common reason: an inability to afford representation. Intriguingly also, some respondents had been *advised* to represent themselves. This may be lawyers advising on cost-benefit grounds that cases are worth less (in outcome terms) than the costs which needed to be spent on them if a lawyer was to be instructed. It may indicate that lawyers feel that some cases are straightforward enough for clients to handle them, regardless of a costs-benefit analysis (hence a sure-fire winner or a competent client may be advised by an ethical lawyer that they need not instruct them). Or it may indicate a more negative comment on the merits of a client's case (AIJA, 2001).

Mott and Hannaford (2001) and Mather (2003) suggest that the matter should be looked at institutionally, courts encourage and discourage non-representation:

> *Courts are not passive institutions simply to be acted upon by individual litigants, but rather courts themselves communicate to their communities how open they are to self-representation.* (Mather, 2003)

Mather also suggests that personal and case factors lead to decisions to self-represent. Baldwin, in the context of small claims, notes that litigants in person sometimes think they have a better understanding and can present cases better than low level lawyers and suggests there is a cadre of experienced litigants in the commercial/small business sector which may render the services of lawyers less useful, necessary or cost effective (Baldwin, 2002, 30).

Arguably, Baldwin's data can be interpreted as litigants recognising an implicit sense of proportionality; that it is not worth involving lawyers in certain disputes. Another interesting indication of litigants' perceptions of lawyers is the risk that lawyers will make a dispute more adversarial than it needs to be. Hence, it is observed that one of the motivations behind a (usually) commercial organisation's decision to self-represent is that it will allow relations with the other side to be re-established quickly (Baldwin, 2002, 34). The lack of lawyers may be perceived as a means of ensuring that trust is not jeopardised by over-adversarial lawyering, costly and slow proceedings. For ordinary litigants, litigation might only be expected to arise out of desperation or points of principle (Baldwin, 2002, 87).

What did our interviews show

The court staff, judiciary and legal representatives we spoke to offered a variety of suggestions as to why parties may be unrepresented. Leaving aside for now the motivations of a small proportion of litigants often categorised as 'obsessive' (see Chapter 4), there was a strong consensus that few *individuals* were unrepresented by choice. The main reason suggested for acting in person in both family and civil cases was the cost of legal representation, coupled with ineligibility for legal aid, as illustrated by the following quotes:

> *Definitely, that would be the main one, lack of funding.*

> *It is a question of cost. Most people I think would prefer to be represented if they could be. If it's of no cost to them, or an insignificant cost.*

> *It's always money, many would have a lawyer if they could.*

Several respondents with experience of family cases mentioned cost particularly (but not exclusively) in the context of ancillary relief proceedings, suggesting that many

parties had income and/or capital sufficient to make them ineligible for legal aid, but insufficient to meet the costs of instructing solicitors. One District Judge described the problem here as being that,

> *Of course, there's not much point in having ancillary relief applications if there isn't any money. … But generally speaking, if there's some money around, the husband, and it's usually the husband, has got a job, he's going to have to fork out for representation he just can't afford.*

Although most respondents believed that *business* litigants tended to be represented in civil cases other than small claims and housing possessions, several also suggested cost as a factor in businesses being unrepresented other than by choice.

The other main reason suggested for a lack of representation was that it was unnecessary in certain types of proceedings. Of family cases, adoptions and divorce only cases were generally thought to be straightforward enough not to require representation, although for slightly different reasons.

There were two reasons why adoption cases were perceived as straightforward. Firstly, orders freeing children for adoption would often already have been made during the concluding stages of care proceedings. In such cases, the birth parents would no longer be involved by the time an application for adoption came to be made, so there would be no opposing parties for individual applicants to deal with. Secondly, although there were technical aspects of the proceedings which could cause problems for the uninitiated, many prospective adopters received substantial levels of practical advice and support from local authority social workers, who supported the proposed adoption, throughout. This would include help with completing court forms, sometimes payment of court fees, and attendance at hearings. The net result was said to be that, by the time of final hearings, 'everyone's happy really, the applicants are happy, the local authority are happy, everything is done and dusted.'

We also saw evidence of support from social workers in many of the adoption files we looked at, and in one case, a local authority lawyer had written to the court offering to attend a final hearing in order to help resolve an outstanding issue, but questioned whether that would be appropriate as such hearings were 'normally meant to be happy occasions and I must confess that I do not think the presence of a local authority lawyer particularly helps that atmosphere!' Unrepresented applicants however accounted for only half of unrepresented litigants in adoption cases. The

reasons for respondents being unrepresented appeared more complex, and they are discussed below.

Divorce only cases were also perceived by court staff as not requiring legal representation, although this was more because the procedure was considered straightforward for both petitioners and respondents, and therefore one in which the involvement of lawyers would add little, rather than due to the availability of any help from non-lawyers. This was thought to apply to respondents in particular as ordinarily, the only matters they would need to deal with would be the acknowledgement of service and, if appropriate, the statement of arrangements for children (one of the solicitors we interviewed also alluded to there being 'not a great deal for [respondents] to do'). The information leaflets produced by the Court Service indicate that solicitors are 'probably not' needed in such cases, and it was suggested that this was something many divorcing parties would concur with, leading them to represent themselves by choice:

> *There [are] so many people being divorced, somebody in your sphere has been divorced and so, you know, they say, 'Oh, well I went to a solicitor and it was a waste of time, I could have done it myself.' You know, so there's that side of it as well.*

Another reason cited for lack of representation in family cases, was that they might be perceived as straightforward due to the circumstances of the individual cases and the attitudes of the parties, rather than the intrinsic nature of the proceedings involved. It was felt that if relationships remained amicable, the parties would be less likely to feel that lawyers needed to be involved.

The other side of the coin was that there were some areas where it was felt that proceedings were too complex and too adversarial for litigants to act in person. Unrepresented applicants in injunction cases were extremely rare and court staff felt that applicants should be represented. Indeed, staff in two courts said that they actively discouraged applicants from acting in person in injunction cases, and in particular would point out that doing so may involve having to personally serve the respondent, and undertake cross examination at hearings, both of which were likely to be harrowing experiences for unrepresented litigants. This is an interesting example of an area where staff felt able to give advice, and can be seen actively discouraging representation.

On the civil side, there were also certain types of proceedings which were considered by the judges we spoke to as straightforward enough not to require representation, notably housing possessions based on rent arrears, in which institutional litigants would act in person. Social landlords (both local authorities and housing associations) commonly relied on housing officers to conduct such cases, and the perception was that this was because they could deal with matters as competently, if not more so, than lawyers. One District Judge suggested that when landlords did instruct solicitors in cases involving rent arrears, it was of little benefit:

> *The person that comes along from the solicitor's office, really doesn't tend to contribute anything. Because the housing officer's here anyway, because they have got to give the evidence. And they are the people who have been dealing with the punter. And I'm afraid the solicitor gets sidelined, because I want to get at what the case is about.*

This District Judge, and other members of the judiciary, said however that where housing cases were more complex (for example, because possession was sought on other grounds, or where anti-social behaviour was the issue), social landlords would instruct solicitors. Interestingly, there was also a suggestion that despite their relatively straightforward nature, cost was also a factor in housing possession cases. So, in contrast to rent cases, most claimants in mortgage cases were legally represented because, 'they can stick the solicitor's costs on the bill, on the mortgage term.'

It is also possible that a hardening of attitudes amongst solicitors unwilling to take on 'difficult' clients or cases has contributed to the causes of non-representation. It is increasingly the case that risk management practices, encouraged by insurers for example, discourage solicitors from taking on cases for clients who are likely to complain or which might otherwise give rise to claims. The deputy district judge we interviewed (who was also in private practice as a solicitor) reported seeing increasing numbers of civil cases in which litigants had tried to obtain representation and were willing to pay for it, but were unrepresented because they had been unable to find a solicitor willing to take on their case. This was put down to solicitors no longer being willing to 'just take anything on' because:

> *The insurance market has hardened, and they're much more specialised in practice than they used to be, and much more inclined to take the advice which the indemnity insurers have given us. .. over the last sort of three or four years, which is, you know, 'why take on a risky case? Send them off to find somebody else.' But I'm afraid that's the advice I give to my staff, you know, 'if the case smells bad, when you first see it, don't take it on, don't touch*

it.' Whereas previously, most solicitors would say, 'well see what you can do with it', and try and help.

Legal aid firms also report similar difficulties within the context of legal aid contracts where difficulties in justifying costs on cases in the context of costs audits by the Legal Services Commission makes firms more wary of taking on more demanding clients.

Other reasons suggested for litigants representing themselves by choice were mistrust of lawyers, combined with a belief that they could do just as good a job themselves. One solicitor put it thus: 'you have professional people who have a fairly dim view of solicitors anyway, and feel that they're perfectly competent to conduct their own affairs.' Finally, several interviewees noted in relation to partial representation that unrepresented litigants may instruct solicitors when cases became more complex or a final hearing was imminent; also, that some who had been represented may become unrepresented due to either the withdrawal of legal aid, or a falling out with their solicitors. It was suggested that this often followed the receipt of unpalatable advice as to the prospects of success, which some litigants did not wish to accept. In such cases, they would as one judge put it, 'still bat on … … usually with disastrous results.'

Examples of unrepresented litigants motivations from observations

The 11 unrepresented litigants attending the hearings we observed and whom we later interviewed said they were unrepresented for a variety of reasons. In several cases there were multiple reasons, and in addition, the circumstances of one litigant were quite complex. Although cost was mentioned more frequently than anything else as a reason for being unrepresented, interestingly, only two litigants (one a respondent in ancillary relief proceedings, and one making a specified claim in a civil case) cited cost as the only or overriding reason for acting in person. Two others mentioned cost as a significant factor, but in conjunction with a belief that they could conduct the proceedings themselves without too much trouble:

> *Because I haven't got any money. And obviously because it is such a small amount compared to the idea of employing a, of getting a lawyer. … And I guess because I've done it before through a tribunal, and it seemed fairly straightforward, so, I felt safe with that.* (Claimant enforcing Employment Tribunal award)

> *I really thought I could do it on my own … and it was a challenge for me, but I found with reading the books on law and the English legal system*

> *from the library and buying from bookshops, I got quite involved with it. I'd already been to solicitors before and they were just costing a terrific amount of money. So I did find I could, you know, I knew what I was doing.* (Claimant bringing specified claim)

Three litigants who felt that they could afford to pay privately for representation (and had previously done so) also cited cost as a significant factor in their being unrepresented. In these cases, each had however conducted something of a cost benefit analysis, weighing up other factors before deciding to represent themselves. The first of these three litigants combined a worry about costs with a feeling that solicitors provided little or no benefit.

> *Well, I believe you get ripped off by solicitors, myself. … With a divorce it's just you and, just two people basically, and you know everything. All you're telling a lawyer to do, you know, to act on your behalf, which he does, but you can do it yourself because you know exactly what your financial position is, you're only passing on information to a second party.* (Respondent to ancillary relief proceedings)

The second saw the benefit being pursued as either relatively minor or non-legal in nature, and the third had been advised by CAFCASS not to waste their money.

> *I have basically gone as far as I can go on the legal side of things and, I didn't think a solicitor could, you know, do any more for me, because I've got the order, she [the children's mother] was basically sticking by it, well within certain, as I said she is not performing 100%, but I am getting contact. … So to me it was a waste of time and money for a solicitor to come and represent me at that point … I basically thought well this is silly, I can handle it myself, so I went that day and represented myself.* (Applicant for contact order in Children Act proceedings)

> *He [the CAFCASS reporter] said, 'Look, get rid of your solicitor,' that was his advice, 'get rid of your solicitor, don't spend another £650, the chances are, you're going to lose.' … So I have, I decided to go it alone. And the second reason was that, when I went with my solicitor she told me not to speak, and I just wanted to say what I wanted to say.* (Applicant for contact order in Children Act proceedings)

The perceptions of the respondent in ancillary relief proceedings here were particularly interesting. Although having access to assistance from a union help line was another factor in the decision not to instruct solicitors, this litigant was quite sanguine about the importance of financial matters in divorce proceedings, but felt very differently about matters concerning children, and might have instructed solicitors had there been children involved: 'If there was children involved maybe it would be different. … The children are the paramount concern, I think, in divorces anyway. Not the financial aspects.'

Three other litigants were unrepresented at hearings we observed for reasons probably beyond their control. Two were respondents in Children Act proceedings and had instructed solicitors, but were attending first hearings on their own. Of these two, one had been told that their solicitor was unavailable on the day of the hearing, but reading between the lines it seemed that the real reason may have been reluctance on the part of the solicitor to attend without a guarantee of remuneration, as it appeared that legal aid had not yet been granted. In the other case, the usual period for service had been abridged (reduced), and there was no reason to doubt that the solicitor had genuinely been unable to attend court at short notice. Alternative representation had not been arranged as the solicitor had anticipated that the applicant was unlikely to be represented and that the application would be adjourned to another date; based on these expectations, the respondent had felt comfortable attending the first hearing in person. It transpired, however, that the case was not adjourned. The third litigant in this category (a respondent in ancillary relief proceedings) had previously been represented and would have liked to have continued to be represented, but was in dispute with former solicitors over their costs. The former solicitors were exercising a lien over the case papers, and despite approaching several solicitors, this litigant had been unable to find anyone willing to take over the case without access to the papers.

As noted above, the circumstances of one litigant (a defendant to a claim for breach of contract in respect of building works) were quite complex. This litigant had been represented for a substantial part of the proceedings, but had dismissed their lawyers due to a strongly arguable claim for professional negligence. The litigant had previously been paying privately, but their funds were now exhausted, and they were trying to obtain legal aid. Several other firms of solicitors had been approached, but had been unwilling to take on the case. Having finally found a solicitor willing to take it on, legal aid had been refused, and the litigant was appealing against that decision. Lack of legal aid was not the only reason for this litigant continuing to be unrepresented. There were relatives willing to fund further representation, but the litigant had declined their offer, not wanting them to risk losing their money if the case was lost. In this sense, there was an element of choice, albeit a small and unpalatable one, in the litigant's decision to continue unrepresented, but it would be unrealistic to categorise them as unrepresented primarily by choice; cost and inability to obtain legal aid were the overriding factors.

Profiling family cases and unrepresented litigants

This section explains the nature of the family court cases we looked at. This provides a context to our later analysis, but is also of interest in itself as it adds to the data available on the workload of family courts (see, Smart et al, 2003). We collected data on 1,334 family cases.[3] 7 cases were in the High Court, the remainder were County Court cases. The sample was stratified to include cases of the following types, with a similar sample of each case type being taken from each court.

Table 1: Family Sample population

	N	%
Adoption	100	7.5
Ancillary Relief	423	31.7
Children Act	400	30.0
Divorce	211	15.8
Injunction	200	15.0
Total	**1,334**	**100.0**

Our priority was to focus on ancillary relief and Children Act cases as, apart from divorce only cases, these were the most common and most mainstream kind of first instance family cases. We collected relatively fewer divorce only cases on the basis that their progress tends to be straightforward and having reviewed a significant number of divorce files in the pilot, it was clear they would be unlikely to yield as much interesting information as other areas.

Children Act applications

There is some interest in looking at the applications made in Children Act cases. Table 2 contains a breakdown. 61% of Children Act cases involved a contact application and 52% involved a residence application (percentages total more than 100% because more than one application may be made on any one case). Interestingly, these figures are similar to Smart *et al's* recent results from three courts in suggesting a high proportion of Children Act cases that involve residence

[3] The Tables for each court were: Court A 336, Court B 348, Court C 325, Court D 325

applications, and a significant proportion of cases involve both of contact and residence applications.[4]

Table 2: Applications made in Children Act Cases

	n	%
Contact	245	61.3%
Residence	207	51.8%
Parental Responsibility	86	21.5%
Prohibited Steps	53	13.3%
Specific Issue	42	10.5%
Financial (Children Act)	9	2.3%
Join/Cease as party	1	0.3%
Order Directions in existing proceedings	4	1.0%
Totals	400	

Injunction applications

Table 3 shows the breakdown of injunction applications. Familyman data suggests that non molestation order applications were more common than applications for occupation orders seeking the exclusion of a party (usually from the applicant's home). It also appears on this data that without notice (ex parte) applications for non molestation orders were much more common than on notice applications. Without notice (ex parte) applications for occupation orders were also more common than those made on notice, but we believe that is likely to be because many were issued at the same time as without notice (ex parte) applications for non molestation orders, and in those cases, the occupation order application would in fact have been dealt with at a subsequent hearing on notice.

[4] Smart *et al* concentrated on the first application in residence and contact cases. They found 59% of cases brought to court began with a residence application and 41% began with a contact application (Smart *et al*, 2003, 10). They defined residence applications to include cases where a parent was applying for both residence and contact. If our data is reanalysed using similar categorisation and excluding cases that were neither residence nor contact cases, we find that 56% cases involved residence (or residence and contact applications) and 44% involved contact applications (without there apparently being a residence application).

Table 3: Injunctions in Level I

	Injunction	
	n	%
Without notice (ex parte) Non Molestation	139	69.5%
Without notice (ex parte) Occupation	49	24.5%
On Notice Non Molestation	54	27.0%
On Notice Occupation	33	16.5%
Warrant of Arrest	1	0.5%
	200	

How many unrepresented litigants were there in family proceedings?

In family cases, there are three types of unrepresented litigants.

- The main category is **adults** (either respondents or petitioner/applicants). 642 of the cases we looked at in Phase I involved at least one adult litigant in person (i.e. 48% of the family cases in our sample).

- Where the **children** are parties they are invariably represented by a Guardian ad litem. Where the **Guardian ad litem** acts in person without a solicitor representing, they are technically an unrepresented litigant (although the Guardian ad litem is much more experienced than an ordinary adult litigant in person would be expected to be). 8 cases (0.6% of the sample) involved litigants unrepresented in this sense. 6 in adoption cases and 2 in Children Act cases.

- **Local authorities** sometimes appear without apparently being represented by their legal department or a solicitor/barrister from private practice. As with Guardians ad litem, such litgants are likely to be experienced, if not fully qualified solicitors or barristers, and so are rather different from the typical litigant in person. There were 6 such cases in our sample (5 adoption cases and 1 Children Act case).

Given the rather different nature of the non-representation in local authority and Guardian ad Litem cases, we have concentrated on unrepresented adults in the figures that follow.

Table 4: How many unrepresented adult litigants were there in a case?

	Cases involving an unrepresented party			N
	%		%	
Adoption	75.0	Applicant	46.0	100
		Respondent	48.0	100
Ancillary Relief	31.2	Applicant	4.3	423
		Respondent	28.9	423
Children Act	48.5	Applicant	12.3	400
		Respondent	43.5	400
Divorce	69.2	Petitioner	27.5	211
		Respondent	66.4	211
Injunction	47.5	Applicant	1.5	200
		Respondent	46.5	200

It can be seen from Table 4 that most adoption (75%) and divorce (69%) cases involved one or more adult unrepresented litigants. Almost half (48%) of the Children Act and injunction (47%) cases in our sample involved adult unrepresented litigants, as did just under a third (31%) of ancillary relief cases.

For most case types unrepresented litigants are more likely to be respondents than they are to be applicants or petitioners. Adoption is rather different in this respect, where the proportion of applicant and respondent unrepresented litigants is similar.

Even though respondents are more common than applicants, in divorce (27%) and to a lesser extent Children Act cases (12%), there is a significant minority of unrepresented adult petitioners and applicants.

It can also be seen that it was relatively uncommon for both sides to be unrepresented. This was most common in divorce cases (25%). In 7% of Children Act cases both sides were unrepresented, 2% of ancillary relief and 0.5% of injunctions (1 case) in our sample.

Are there differences in the number of unrepresented litigants in each court?

Table 5 illustrates that there were differences in the number of unrepresented litigants in each court.

Table 5: Adult unrepresented litigants (by Court)

		%	Total
Court A	Applicant	13.1	336
	Respondent	37.8	336
Court B	Applicant	12.1	348
	Respondent	45.7	348
Court C	Applicant	11.7	325
	Respondent	50.8	325
Court D	Applicant	15.4	325
	Respondent	38.8	325

The figures for applicants were similar for each court but the difference for respondent unrepresented litigants was statistically significant.[5] Courts B and C have proportionately more unrepresented respondents than Courts A and D. As the courts have very similar levels of each type of work in the sample, the difference is unlikely to be caused by differences in case type.[6]

There are three possibilities for explaining these differences. Firstly, although our analysis suggests otherwise, it is possible that differences are accounted for by chance. Secondly, it is possible that differences in levels of supply of legal services in each of these areas makes it harder or easier to get a lawyer. Thirdly, it is possible that the way the court deals with respondents encourages or discourages representation.

Do unrepresented litigants participate?

Because of our interest in active litigants in person, Phase II data collection was used in part to ascertain whether a sample of unrepresented litigants participated in some way in the proceedings. We had a broad definition of participation, which included: attending hearings, filing documents, corresponding with the courts or the other party, and/or telephoning the courts.

Table 6 shows how many cases involving an unrepresented litigant also involved an unrepresented litigant participating to some degree in the case. We can see that ancillary relief and injunctions involving unrepresented litigants were quite likely to involve inactive litigants. The same is true for Children Act cases. Between 30 and

[5] Applicant Unrepresented litigants Pearson Chi-Square, 3.95, p = .496; Respondent Unrepresented litigants Pearson Chi-Square, 9.20, p = 0.02.

[6] Cross tabular analysis of differences by court for each case type confirms this. Distributions of respondent unrepresented litigants differs significantly by court in all areas (p <.05) save Ancillary Relief where it is near significance (p=.08).

40% of unrepresented litigants in Children Act, Injunction and Ancillary relief proceedings were inactive. Unrepresented parties participated to a much greater degree in divorce proceedings and adoption cases.

Table 6: Proportion of family cases involving adult unrepresented litigants where at least one of those litigants was active

	%	N
Adoption	90.9%	55
Ancillary Relief	62.5%	72
Children Act	67.9%	81
Divorce	88.7%	71
Injunction	59.3%	59

Partial representation

An interesting issue is the extent to which litigants are unrepresented throughout or are represented at some stage in the proceedings. These are sometimes referred to as partially represented litigants (Hunter et al, 2002).

Table 7: How many unrepresented litigants are represented at some stage in the proceedings?

	%	N
Adoption	8.0	50
Ancillary Relief	22.2	45
Children Act	36.4	55
Divorce	1.6	63
Injunction	28.6	35

In 18% of cases, unrepresented litigants were in fact represented at some stage in the proceedings. As we can see from Table 7, partial representation was more common in Children Act cases; injunctions and ancillary relief. Very few divorce cases involved partial representation.

Partial representation did not follow one common pattern for applicants, but for respondents there was a stronger pattern. It was more common for partially represented respondents to start off their cases as unrepresented but become represented later, usually at some interim stage, though occasionally this was very late in the proceedings (two litigants only became represented at the stage where committal proceedings were being commenced). About two thirds of respondents fell

into this category. This suggests that it was not usually the case that unrepresented litigants sacked (or were sacked by) their lawyers either because of disagreements with that lawyer, lack of funds or legal aid problems.

It is sometimes suggested that it is common for unrepresented litigants to 'lawyer shop' by repeatedly instructing then sacking lawyers when they become unhappy with the advice or service they receive. We have some evidence relevant to this. There were no cases involving unrepresented litigants that interspersed periods of non-representation with more than one period of representation (multiple representation) suggesting that 'lawyer shopping' interspersed with periods of non-representation is rare. We did notice in passing that there were some family cases involving wholly represented parties who changed their lawyers, sometimes several times, but because these cases did not involve periods of non-representation we did not collect detailed information on them.

Partial representation and legal aid

Another issue is the extent to which partial representation (or more pertinently, the onset of non-representation) is due to problems with legal aid. Common sense suggests legal aid may have been delayed at the start, or withdrawn later on due to changes in litigants' financial eligibility, advice from solicitors on strengths of cases, or failure to give instructions. A common view of unrepresented litigants suggests legal aid withdrawal is likely to be a significant precursor to non-representation; implying that these are cases which have been neutrally evaluated by the LSC and rejected on the grounds either that the litigant can afford to pay or has a case without sufficient merits.

In family cases, 24 (10%) of active unrepresented litigants had legal aid at some stage. This was more common in Children Act cases (24% of unrepresented active litigants in these cases had legal aid at some stage during their case, figures for the other case types were between 7 and 11%). It was also more common for legal aid to be linked to partial representation because of the granting of legal aid to respondents. Over half of these cases involved a shift from respondents being unrepresented to them being represented because legal aid was not available from the outset of the case (for whatever reason). Only about a quarter of cases involving partial representation involved applicants having legal aid withdrawn and partial representation, as we have already seen, was only experienced by a small proportion of all unrepresented litigants.

This data cannot determine how far refusal to grant legal aid at all is a factor in people being unrepresented in family cases. Such information would not be apparent from court files. What we can see is the extent to which *changes* in the legal aid status of parties relate to non-representation. Changes in legal aid status are not common phenomena, and so not a primary cause of non-representation. That said, the most common problem caused was initial non-representation rather than subsequent withdrawal. This suggests non-representation is more likely to be due to a slow granting of legal aid (either because the applicant is slow in approaching a solicitor or providing relevant details, the solicitor is slow in responding, or the Legal Services Commission is slow in granting) than to subsequent withdrawal of legal aid because of problems with the merits of the case or the financial situation of the client.

Assistance short of representation

Finally, although not represented, there was evidence on the court files that unrepresented litigants had assistance short of representation. The tables below should be viewed with some caution; as we only recorded an unrepresented party as being assisted where there was clear evidence of this on the file. As a result, we are likely to underestimate how often assistance was received. In particular, we think it likely that assistance by court staff is likely to be underestimated. For example, it is likely that many telephone calls seeking information would not be noted on the files. In addition, unrepresented litigants may have received assistance from external sources which did not show up on the files because it did not involve help with drafting of documents or corresponding with the court. Nevertheless it was common for files to show some level of assistance.

Table 8: Case files showing some evidence of assistance short of representation

	%	N
Adoption	36.0	50
Ancillary Relief	28.9	45
Children Act	38.2	55
Divorce	23.8	63
Injunction	28.6	35

Where assistance was apparent it was usually given by a solicitor (sometimes this was from the opponent's solicitor), only once was it apparent that another advice agency was involved, very occasionally it was given by friends or family. Local authority social services departments were common sources of assistance in

adoption cases. The police and the court were also recorded as giving assistance occasionally on Children Act and divorce cases.

Summary of family cases

From the various data presented in this chapter we have estimated the overall position in the five case types we looked at. This is presented in Table 9, with litigant status broken down into four categories: those cases where all parties are represented throughout the proceedings; those where there is an unrepresented adult litigant who does not participate; those cases where one or more adults are unrepresented for part of the case and participate whilst unrepresented; and finally those cases involving an adult party who is unrepresented throughout and participates in their case.

Table 9: Family cases litigants in person summary

	Cases involving fully represented parties	Case involves unrepresented party		
		Inactive	Partial Active	Full Active
Adoption	23.4%	7.0%	6%	64%
Ancillary Relief	68.6%	11.8%	4%	15%
Children Act	50.4%	15.9%	12%	21%
Divorce	31.0%	7.8%	1%	60%
Injunction	52.5%	19.3%	8%	20%

It can be seen that there are significant numbers of unrepresented litigants in divorce cases and adoptions and that about half of Children Act and injunctions cases involve litigants unrepresented for part or all of the proceedings. However, these figures are somewhat inflated by the numbers of inactive unrepresented litigants. About 1 in 5 injunctions and 1 in 6 Children Act cases involve inactive unrepresented litigants. Inactivity is difficult to interpret. It may involve resignation to court proceedings or their perceived irrelevance (e.g. applications for protective residence orders in Children Act cases might be ignored by some respondent fathers) or parents having given up on being able to retain involvement with their children, or things being settled between the parents reasonably soon after issue of proceedings, with the result that there is nothing for an unrepresented parent to do. Similarly with injunctions, the parties may reconcile or go to ground. We suspect also that the ancillary relief figures contain some respondents (often husbands) who refused to engage with the process.

It is relatively uncommon for family cases to involve partial representation: litigants tend to be either represented throughout or unrepresented throughout. We can also see that cases involving active adult unrepresented litigants (outside of divorce and adoption cases) form a substantial minority of cases, about 1 in 5 injunction and Children Act cases involve active unrepresented litigants, and 1 in 6 ancillary relief cases.

Usually, though not always, it is the respondent that is unrepresented. Some courts seem more likely to have unrepresented respondents. We have some comparative information on the nature of cases brought by unrepresented litigants, they are more likely to be contact cases than residence cases in Children Act proceedings and in divorce cases unrepresented petitioners are more likely to rely on five years separation or two years separation with consent than are represented parties.

We now move on to consider the situation for civil cases.

Profiling civil cases and unrepresented litigants

We collected two random civil samples in each court for cases commencing in 2000: a County Court sample, which excluded small claims and cases that would normally have been small claims had they reached allocation, of approximately 200 cases and a High Court sample of approximately 100 cases in each of the courts that had District Registries. Our sample is summarised in Table 10.

Table 10: Phase I Civil Sample Data

	Court A		Court B		Court C		Court D	
	n	%	n	%	n	%	N	%
County Court	200	66.7	200	66.7	200	66.9	199	100.0
High Court (Chancery)	30	10.0	31	10.3	29	9.7		
High Court (QBD)	70	23.3	69	23.0	70	23.4		
Total	300	100.0	300	100.0	299	100.0	199	100.0

It is interesting to note that, even though High Court cases were selected at random, the proportion of Chancery and Queens Bench cases in each of our three High Court District Registries was remarkably similar.[7]

Before we can consider unrepresented litigants, it is helpful to understand the broad characteristics of court caseloads from which we drew those involving litigants in person. This information should also be of interest to the general profiling of work in the courts (Shapland et al, 2002).

Types of case we were looking at

Court computer records (Caseman) record case types under a number of different, and detailed headings. The recording of this data is not always consistent within the courts (for instance there is a code for personal injury cases and a code for unspecified claims: personal injury cases can be, and were, recorded by courts in either of these categories). To overcome some of these inconsistencies, and also to simplify analysis, we grouped case types into four main categories: housing possession cases; specified claims; unspecified claims; and a catch all 'other' category, which consisted of a diverse mixture of cases including commercial

[7] Although in some cases, where Caseman information was unclear, the categorisation of cases as Queens Bench or Chancery is based on an assessment of the best available information by the researcher.

landlord and tenant applications (for approval of new leases) and enforcement of Employment and other Tribunal decisions.

County Court case types

Our Phase I sample for County Court cases is shown under these groupings in Table 11.

Table 11: County Court Case Types (Simplified) by Court

	Court A		Court B		Court C		Court D		All cases	
	n	%	n	%	n	%	n	%	N	%
Housing possession	66	33.0	77	38.5	61	30.5	80	40.2	284	35.5
Specified claims	27	13.5	19	9.5	28	14.0	41	20.6	115	14.4
Unspecified claims	40	20.0	55	27.5	72	36.0	31	15.6	198	24.8
Other	67	33.5	49	24.5	39	19.5	47	23.6	202	25.3
Total	200	100	200	100	200	100	199	100	799	100

We can see that different courts have different profiles of work. In particular, Court D has lower levels of unspecified claims compared to the other courts. Court C has higher levels of unspecified claims relative to other work. Court A has higher levels of other work and Court B has lower levels of specified claims.

Housing possession work

Table 12 shows the breakdown of housing possession cases in more detail. There is relatively little variation between courts in terms of the constituent proportions of rental and mortgage possession. That said, Court C (which was the largest urban centre) had more rental possession work than other courts as a proportion of their housing possession caseload. It can be seen that in general rental possession cases out number mortgage possession cases by more than two to one and that private rental possessions appears to be rare.

Table 12: County Court Housing Possession case type by Court

	Court A		Court B		Court C		Court D		All cases	
	N	%	n	%	n	%	n	%	n	%
Accelerated Possession	1	1.5					2	2.5	3	1.1
Local Authority Mortgage Possession							1	1.3	1	0.4
Mortgage Possession	19	28.8	22	28.6	14	23.0	21	26.3	76	26.8
Private Landlord Possession	2	3.0	3	3.9	2	3.3	1	1.3	8	2.8
Social Landlord Possession	44	66.7	52	67.5	45	73.8	55	68.8	196	69.0
Total	66	100	77	100	61	100	80	100	284	100

High Court case types

Our sample for High Court cases is show in Table 13.

Table 13: High Court Case Types

	Court A		Court B		Court C		All cases	
	n	%	N	%	n	%	n	%
Specified	33	33.0	6	6.0	22	22.2	61	20.4
Unspecified	40	40.0	49	49.0	41	41.4	130	43.5
Other	27	27.0	45	45.0	36	36.4	108	36.1
Total	100	100	100	100	99	100	299	100

As with County Court work, different courts had different profiles. Court B, in particular, had relatively low levels of specified claims.

Transfers in

Only 9 County Court cases were transfers in (from other County Courts or the High Court, 1% of all CC cases sampled). 39 High Court cases (13%) were transferred in from other courts.[8]

Detailed types of civil case that unrepresented litigants are involved in

Table 14 shows the data that it was possible to collect on the status of parties where the specific case type was identified. It was not always possible to identify from Caseman what the case type was, thus these figures only provide crude indications of the sorts of cases that unrepresented litigants were involved in.

[8] These low numbers are due to our samples only including cases which had been allocated a new case number by the receiving court; it was not possible to identify, in a systematic manner which would have allowed for random sampling, cases which had retained their case number from the transferring court.

Table 14: Types of case that unrepresented litigants are involved in (all civil)

	Who is unrepresented?				
	Claimant	Both sides	Defendant	Neither side	N
Contract, goods and services	12.5%	6.3%	25.0%	56.3%	16
Debt	1.5%	6.8%	71.2%	20.5%	132
Enforce tribunal award	0.0%	15.6%	82.2%	2.2%	45
Harassment	0.0%	0.0%	100.0%	0.0%	1
Landlord and Tenant (Commercial Leases)[9]	33.0%	0.0%	0.0%	67.0%	91
Mortgage arrears	0.0%	3.9%	92.2%	3.9%	77
Nuisance				100%	1
Personal Injury (any)	1.6%	0.0%	12.4%	85.9%	185
Professional negligence	25.0%	0.0%	0.0%	75.0%	4
Rent arrears	0.0%	3.2%	96.8%	0.0%	158
Total					388

The most common cases involving unrepresented litigants appear to be mortgage and rent arrears, debt cases, commercial lease cases (which are uncontested) and enforcement of tribunal awards. These are all cases where there may be limited room for substantive dispute.

Numbers and types of unrepresented litigants

Having discussed the broad caseloads of our courts we can begin to look at the prevalence of unrepresented litigants. For the purposes of our analysis we divide litigants into three primary types: individuals, businesses (be they companies, partnerships or sole traders), and public institutions. As we come on to discuss unrepresented litigants, this enables a distinction to be made between 'ordinary' litigants in person (businesses and individuals) and institutional litigants in person who, in spite of the absence of independent, professionally qualified legal representation, are likely to be repeat players and may have sufficient expertise in house to do a similar job of representing themselves as an independent lawyer would do. We categorised litigants as follows.

- Institutional litigants included the following: government bodies such as the DSS and the Collector of Taxes; local authorities; housing associations; health authorities and hospitals; quasi public bodies (e.g. the Motor Insurance Bureau, charities and schools); the police and fire authorities.

[9] These cases are treated as joint applications by the prospective landlords and tenants

- Business litigants included sole traders, partnerships, and (private or public) limited companies. We analysed the name of first defendants in each of these cases to see how many were PLCs, household names, or repeat litigants (and so more likely to have claims departments or in-house legal teams). Very few fell into the first category: 6 were identifiable as PLCs for example; 7 were household names; and none were repeat litigants within our sample, though they may have had other cases within each court's caseload. Although this is a rather rough and ready test, and it only applies to defendants, it does suggest that these companies would not usually be sensibly characterised as institutional litigants.

The remainder are referred to as individuals. We made every attempt to ensure that this category did not include business litigants, although it is possible that some cases involved sole traders.

On our wide definition of a litigant in person (a party who is unrepresented at some stage during the proceedings), two thirds (67%) of County Court cases involved unrepresented litigants, and about a third (34%) of High Court cases involved unrepresented litigants. The figures are broken down by litigant type in Table 15. About a fifth of High Court cases involved unrepresented individual defendants and about 1 in 8 cases involved unrepresented business defendants. Unrepresented claimants were rare, occurring in only 4% of High Court cases.

In the County Court over half the cases involved unrepresented defendants, and 1 in 5 cases (usually housing possession cases) involved institutional litigants who were unrepresented at least at some stage in the proceedings. Unrepresented individual and business claimants were more common in the County Court but still not apparent in large numbers.

Table 15: Summary numbers of unrepresented litigants in County and High Courts (Civil Cases)

	High Court		County Court	
Unrepresented claimants	n	%	n	%
Business	2	0.7	44	5.5
Individual	10	3.3	31	3.9
Institutional			161	20.2
Unrepresented defendants				
Business	38	13.0	72	9.1
Individual[10]	63	22.0	413	52.1
Institutional	3	1.0	6	0.8

These overall tables for unrepresented litigants illustrate how common particular types of unrepresented litigants were within the entire caseload of the four courts. What they do not tell us is what proportion of (say) individual defendants were unrepresented. Hence, another important way of looking at the figures is how common lack of representation is for particular litigant types. Table 16 shows that about 10% of individual claimants in the County Court were unrepresented, whereas such cases made up only 4% of the County Court caseloads (as per Table 15).

Table 16: Likelihood that litigants of a particular type are unrepresented

	High Court		County Court	
Unrepresented claimants	n	%	n	%
Business	2	1.5	44	17.4
Individual	9[11]	5.9	25	9.7
Institutional	---	---	161	55.7
Unrepresented defendants				
Business	38	32.2	72	43.9
Individual	54[12]	52.4	406	85.1
Institutional	3	5.4	6	11.3

This analysis underlines the extent to which defendants, and individual defendants in particular, were unrepresented. 85% of individual defendants in County Court cases were unrepresented at some stage during their case, and over half of individual High Court defendants were unrepresented. Even for businesses defendants, the figures were over 40% and 30% respectively.

[10] The total sample size for these cases is smaller because some cases involved missing data.
[11] One further individual unrepresented litigant was a co-claimant with a business.
[12] There were 9 other cases involving individuals but they were classified separately because 8 were co-defendants with businesses and 1 was a co-defendant with an institution.

Conversely, what is also noticeable is that when bringing cases individuals and businesses tend to be represented. That picture contrasts with institutional litigants (mainly local authorities and housing associations with rent possession cases) who seemed to bring a large proportion of their claims without having representation throughout the case. As already noted above, however, this may be a result of non-legally qualified[13] in-house teams bringing the cases. As a result, it is likely that representation (if broadly defined as specialist conduct of the case, be it by a lawyer or an in-house team) is perceived by litigants as necessary for the bringing of most cases in the County Court beyond the small claims jurisdiction. This certainly appears to be true for businesses and individuals and may also be true for institutional litigants. That said, there was a small but significant minority of business claimants who brought cases without representation (nearly 1 in 5 in the County Court) and 10% of individuals bringing claims in the County Court also conducted their case in person.

This data also shows the variation in levels of representation for the three types of defendants. Individual defendants were much less likely to be represented than individual claimants; and this was also true to a lesser degree for businesses. The position for institutions was reversed from the situation that occurred when they were claimants. When defending proceedings, they almost always chose to be represented throughout. In these cases in-house non-qualified expertise was not apparently enough for them.

There were further variations within case types as can be seen in Table 17.

[13] In the sense that they were not solicitors acting on the record.

Table 17: Lack of representation by litigant type within different case types (County Court)

	Claimants					
	Business		Individual		Institution	
	%	N	%	N	%	N
Housing	8.8	7	40	4	63.4	123
Other	27.6	27	27.1	13	8.9	5
Specified	14.5	10	42.9	3	84.6	33
Unspecified	0	0	2.6	5	---	---
	Defendants					
	Business		Individual		Institution	
	%	N	%	N	%	n
Housing	---	---	98.6	279	---	---
Other	66.7	10	91.7	77	22.2	2
Specified	76.1	51	88.4	38	0	0
Unspecified	12.3	10	17.9	12	9.3	4

Levels of non-representation across the case types for individuals were not uniform. We see, for example, that the rarity of unrepresented individual claimants was partly due to the types of claims where individual claimants were most likely to represent themselves, being uncommon ('other' and specified claims). Put another way, because most claims brought by individuals were unspecified, and because most unspecified claims were brought by represented claimants, there was a relative paucity of unrepresented individual claimants. Where other types of claims *were* brought, unrepresented claimants were quite common: e.g. 43% of specified claims brought in the name of individuals involved a claimant who was at some stage unrepresented (although this percentage is based on a small sample size and so needs to be treated with caution).

Levels of representation among institutional litigants drop for two types of case, rent possessions and specified claims. Both of these are often effectively types of debt collection. To the institutional litigants these cases would be routine and may not involve much 'lawyering' beyond the basic steps of making a claim and (in respect of rent possessions) attending a short hearing, together with enforcing judgment if need be. This may explain, over and above the availability of in house expertise, why the cases do not involve representation. Another possible explanation is that where institutions instigate proceedings they do not perceive them as risky in terms of the likelihood of losing, and so can allow in-house non-lawyer teams to deal with the

work; but where cases are taken against them, they are perceived as risky[14] and requiring the help of their legal department or a solicitor from private practice. A further factor is that housing officers are likely to be presenting cases against unrepresented defendants, whereas when institutions defend claims, their opponents are likely to have lawyers. What is more, for debt proceedings the claimant may, because of the risk of non-recovery, have a greater interest in keeping costs down. Finally, the judges we interviewed felt that generally housing officers were capable of dealing with these cases and had the advantage of having the facts of cases at their fingertips.

Similarly, the case type breakdown of representation for defendants draws out some interesting further differences. Individual defendants in unspecified claims are likely to be represented, probably often funded by insurance companies in personal injury cases, but not for other types of claim. For business litigants the figures are also interesting; they too tend to be represented in unspecified claims, again quite possibly due to the existence of insurance. Representation levels drop for specified claims (mainly debts, which businesses may decide they can handle themselves or which they are not defending) and 'other' cases.

Table 18 shows the figures for the High Court.

Table 18: Lack of representation by litigant type within different case types (High Court)

	Claimants					
	Business		Individual		Institution	
	%	N	%	N	%	N
Other	2.2	46	8	50	---	12
Specified	0	53	0	7	---	1
Unspecified	2.9	34	5.3	95	---	1
	Defendants					
	Business		Individual		Institution	
	%	N	%	N	%	N
Other	50	32	59.6	47	8.7	23
Specified	31.8	22	77.8	36	0	3
Unspecified	22.4	67	21.9	32	3.3	30

[14] They may perceive the risk as low because they are likely to win or the consequences of losing are not serious.

This again shows the likelihood of representation for defendants in unspecified claims and the general tendency of institutions to be represented throughout any case they are defending. Interestingly, businesses were much more likely to be represented for specified High Court claims than for such claims in the County Court. This may well reflect the higher value of specified claims in the High Court. Finally, this table emphasises the frequency with which individual defendants in specified and 'other' High Court claims go without representation.

Were there differences in the number of unrepresented litigants in each court?
Table 19: Unrepresented litigants (County Court by Court) illustrates that there were differences in the number of unrepresented litigants in each court.

Table 19: Unrepresented litigants (County Court by Court)

	Court	Unrepresented claimants		Unrepresented defendants	
		%	N	%	N
Housing	A	62.1	66	98.5	66
	B	23.4	77	98.7	77
	C	70.5	61	100.0	61
	D	40.0	80	97.5	80
Specified	A	51.9	27	81.5	27
	B	52.6	19	78.9	19
	C	14.3	28	60.7	28
	D	43.9	41	85.4	41
Unspecified	A	7.5	40	10.0	40
	B	3.6	55	18.2	55
	C	0.0	72	9.7	72
	D	0.0	31	29.0	31
Other	A	29.9	67	29.9	67
	B	34.7	49	46.9	49
	C	7.7	39	48.7	39
	D	23.4	47	57.4	47

We might expect the variations in representation amongst housing possession claimants that we see in the above figures, as any difference in the policies of social landlords towards conducting such work in-house would be reflected quite dramatically. In respect of the other case types, there are differences which do not have such an obvious explanation. Court C in particular has low levels of unrepresented claimants and relatively low levels of unrepresented defendants. Court D tends to have higher levels of unrepresented defendants. These variations could be caused by differences in case type and individual-organisation parameters, although our analysis suggested this was probably not the case.

Active unrepresented Litigants

It is important to distinguish between those litigants that do not participate in proceedings (who are by definition unrepresented) and those who are unrepresented but do participate. The next table illustrates how often litigants that were unrepresented in civil cases also participated in some way in the proceedings. It should be recalled that we had a broad definition of participation. It included the filing of documents and attending hearings but also evidence of contacting the court (through correspondence or telephone calls, for example) or having dealings with other litigants involved in the case. The wideness of this definition is tempered somewhat by the fact that we could only note participation which was recorded in some way on the file. It is likely, as a result, that we have under recorded participation (in particular there will have been cases where unrepresented litigants dealt with their opponents in order to settle cases without themselves taking any active steps visible to the courts, where the fact of settlement was not notified to the court).

Whether unrepresented litigants could be classified as participating was a filter for detailed data collection during Phase II of the research.[15] Unrepresented claimants were, almost by definition active (if they filed proceedings whilst unrepresented, they had participated in those proceedings). What these figures illustrate is that whilst defendant litigants in person were numerically prevalent, much smaller numbers actually appeared to participate in their case. In the County Court about a third of unrepresented individual and business defendants participated and in the High Court closer to a half of unrepresented business or individual defendants participated in some form.

Table 20: Proportion of cases involving unrepresented litigants where unrepresented litigants participated

	County Court		High Court	
	%	N	%	N
Unrepresented business defendant	36%	62	46%	26
Unrepresented individual defendant	34%	287	58%	43
Unrepresented institutional defendant	20%	5	0%	2

[15] Because of our sampling strategy (see Appendix A), it was possible to sample larger numbers of files and determine for more cases whether or not the unrepresented litigants were active than would proceed to Phase II).

Partial representation (civil)

Unrepresented litigants may not be unrepresented throughout the life of their case. We were interested in determining how often such litigants were partially represented and also examining when partial representation occurred, and whether partial representation might be related to problems with legal aid or other forms of funding, such as Conditional Fee Agreements (although our samples were of cases issued in 2000 and CFA agreements would not have been as prevalent then as they are now). We identified 8 cases involving partially represented claimants. 6 out of 20 (30%) active individual claimants were partially represented, as were 2 out of 20 (10%) business claimants.

19 cases involved partially represented defendants.[16] An unrepresented institutional defendant was in fact partially represented. 5 out of 34 (15%) business defendants were partially represented. Partial representation appeared more likely for unspecified and other claims than for specified claims, though the sample sizes are too small to be sure. 15 out of 115 (13%) of individual defendants were partially unrepresented (again, partial representation appeared more likely for unspecified and other claims than for specified and housing possession claims, though the sample sizes are very small).

There was no clear pattern as to when an unrepresented party had partial representation. (i.e. some were represented at the start of the case and not the end, whereas others were represented for the later stages of cases only). Only two unrepresented litigants had multiple periods of representation, suggesting that litigants who interspersed periods of non-representation between sacking lawyers was rare. As in family cases, this form of lawyer shopping was therefore uncommon.[17]

Legal aid and litigants in person

Another issue is the extent to which problems with legal aid prefigured non-representation. Even more so than with family cases, this too was rare. Only three unrepresented civil litigants had legal aid at some stage. In one case legal aid appeared to stop just before trial, the other two were cases where legal aid was awarded at an interim stage in the proceedings and continued to the end of the case.

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[16] The following numbers do not total 19 as more than one type of partially represented defendants can appear on more than one case.

[17] We cannot be sure that those who became unrepresented did not do so after swapping lawyers but the number of cases where this could have happened was low.

Again, as with family cases, this data cannot indicate (because it would not be apparent from the file) how often unrepresented litigants had tried but failed to get legal aid for their case, so we do not know how often failure to get legal aid, as opposed to its late granting or early termination, were associated with non-representation, though as we shall see our interviewees thought this was common.

Conditional Fee Agreements (CFAs)

Some non-solicitor agencies have reported problems with clients having their Conditional Fee Agreements (CFAs) terminated mid-way through proceedings. There was no evidence that unrepresented litigants had been party to a CFA, or that problems with CFAs contributed to litigants going unrepresented. Of course, we would only be likely to find such evidence amongst the partially represented and the number of such cases was low, meaning we would be unlikely (as it turned out) to find much evidence in any event. Similarly, any such problem may post-date our sample.

Other assistance

65 (27%) active litigants in person appeared to have had some other assistance short of full representation. Usually this was from solicitors, although help was also received from friends and/or relatives fairly frequently. Other agencies and CABx were far less commonly revealed on the files as sources of assistance. In housing cases, letting/management agents sometimes gave assistance. It was also noticeable that the solicitors for other litigants (be they co-claimants or co-defendants or sometimes even opponents) also gave assistance of one sort or another. Interestingly, at least three litigants received assistance from politicians (MPs and the like).

Table 21: Who is shown on the file to have given assistance and to which unrepresented litigants?

	Solicitor	CAB	Law Centre	Other agency	Friend/ relative	N
Individual Claimant	20%	0%	0%	0%	10%	20
Business Claimant	10%	0%	0%	0%	0%	20
Individual defendant (not possession)	17%	0%	0%	0%	4%	54
Individual defendant (Rent possession)	6%	0%	0%	3%	3%	31
Individual defendant (Mortgage Possession)	3%	10%	0%	0%	0%	30
Business defendant	0%	0%	0%	0%	0%	34

As with assistance in family cases it is highly likely that our assessment under records assistance received by litigants in person because we were only able to measure assistance apparent from the file.

Unrepresented but assisted? Qualitative information on assistance in family and civil cases

It is worth exploring the nature of assistance received by the unrepresented litigants we interviewed as examples of the types of help that litigants in person might seek and receive. It is also worth considering the pathways into advice that litigants find.

Routes into advice

As other research has noted, the public's routes into advice are somewhat varied and unpredictable (Pleasence *et al*, 2004; Moorhead, Sefton and Douglas, 2004; Genn, 1999). We saw signs of that unpredictability in our interviews. One unrepresented litigant had tried the then Legal Aid Board (now the Legal Services Commission) and the CAB, without success. They said that by the time they spoke to someone useful at the CAB, their problems had moved on. Another simply walked into a solicitors firm:

> *I just went in and I said to the secretary, is there a solicitor that can deal with children's cases please?*

Another just went through the telephone book searching for anyone that dealt with family law:

> *I had no experience of this sort of thing. So I just had to hope that I found a good one. And in the end it was quite difficult because I think we rang about six before we found one that dealt with family matters.*

Courts as signposters

Court staff and judges said they regularly exhorted litigants to see a solicitor. They tended to suggest solicitors would give some free legal advice, or in some cases might do so under the (now largely defunct) £5 interview scheme:

> *That they can go to a solicitor for, a short interview under the legal aid advice scheme, but for a nominal fee, but they won't be acting for them. And I think that in certain cases that does help move the thing along, if they've got what I call a mental block. (Court staff)*

Another exchange between court staff indicated the rather confused knowledge of staff about the way that solicitors worked:

> *#1: Or you can point out that some solicitors operate the green form scheme, where they give you a half an hour appointment, sort of for free don't they.*
>
> *#2: Like free legal advice? I wasn't even aware of that, you know.*
>
> *#1: Yeah, it's only half an hour you'll get though, they have to be part of this green form scheme.*

These sorts of comments suggest a lack of confidence about routes in to advice for unrepresented litigants which would inevitably affect the clarity with which they are told they can seek help. Although the CLS directory (and local derivatives) were to an extent being employed with a good degree of confidence, and at least some of the courts had developed their own local leaflet from the CLS directory, our focus groups also tended to reveal that staff were uncertain about what services were provided in the locality. Many of the people seemed uncertain about what precisely was provided, saying they would refer to, 'the Community Legal Services Directory because some of them give a free half an hour, don't they?*'* In one court there were workshops for unrepresented litigants advertised in the court building, but staff we asked about them were not aware of them at all.

Help tended to end at this level; staff said for instance they did not usually give out telephone numbers of agencies that people could contact, or of the likely opening hours (information that would be in the CLS directory). In one court, staff explained the rationale for this as being:

> *Well we can say there's the Citizen's Advice Bureau, and we can tell them that the numbers are in the telephone book, and basically because you're not absolutely sure when you're talking to somebody which is their closest one. I mean you could have somebody living in one part of [place name] and another is closer than the one you think, so you've got to be very careful, so 'look up in the book, you can see what their addresses are, pick the one closest to you' and then you're giving the best possible help and you're not sending them on a fool's errand.*

Many staff reported a practice whereby they provided the names of around three perceived specialists in an area of law, but did not make recommendations.

> *We make sure we always give 3 or 4 solicitors who we know can actually deal with this business. Because then solicitors can't criticise us for favouring one over another. Which we've got to be very, very careful about as you can well imagine.*

On occasions the courts, whilst not recommending a specific solicitor, did filter who they regarded as the 'top' solicitors, which actually meant those they dealt with most frequently:

If somebody says 'I need, can you give me a local solicitor' we'll give them half a dozen of the top ones, because obviously we wouldn't want to monopolise them.

TOP ONES?

People like [names three firms]. 'I've got a personal injury claim who can I go to?' 'Well I can't recommend anybody but I can give you a list of people I know who deal with personal injury matters.'

At times this appeared to be a response to the CLS directory being too comprehensive, providing too many names to assist litigants. Another court staff focus group revealed similar practices:

#1: Mind you I have, if someone does say, they do say 'oh have you got any names of anybody in particular?' and I'll just say, I won't actually say 'oh I recommend these but I'll give you about four different, four different solicitors' names.'

WHERE DOES THAT SORT OF POOL OF THE FOUR NAMES COME? …

#1: Just experience, you know we have large firms that we deal with every day. [two others in the group agreed]

#2: I mean certain solicitors are doing more family orientated, like [names three firms]

One staff member however had in an emergency referred a particularly needy client to a single, specific solicitor. Whether staff ought to be signposting clients on in this way is an open question. *Not* providing specific recommendations may inhibit advice seeking (Moorhead, 2000; and see Pleasence et al, 2004, on referral fatigue). However, even short-lists threaten the court's position as a neutral focus in the legal community. One of the judges we interviewed specifically deprecated the practice of named referral:

I don't think we can be, or part of our function can be to direct people to specific agencies or solicitors. Because the court is then perhaps not being seen to be independent. All we can say is that 'you may want to take advice for this, you may want to go and see a solicitor, you may want to go and see Citizens Advice Bureau or some other agency.' But you don't say to them, 'you can go and see x solicitors or you can go and see the Citizens Advice Bureau it's around the corner.'

We were also struck by how CABx were perceived as a safety valve available for those that would not approach solicitors and to sweep up any problems that solicitors would not deal with.

Beyond the more active signposting approaches described above other court staff gave less clear advice to clients about where they could go:

> *We might suggest that they look it up in the yellow pages, for their local office, or the CAB or whatever. Or solicitors again…*

Several of the judges had a set of stock phrases which they used to indicate where litigants could get help from:

> *[My] usual patter goes along the lines of 'I've just explained to you what the order is that I've made' and I'll run through it paragraph by paragraph and I'll explain that it is, and I'll tell them that they can get the source material, if they're in any doubt, they can get copies of the Civil Procedure Rules from the local library, they can get it online, on the Court Service website, if they've got that facility, they can get it online through a local library, or they can get advice from a Citizens Advice Bureau or of course a solicitor.*

One of the family solicitors we interviewed said they habitually referred unrepresented litigants to the Solicitors Family Law Association (SFLA) if they thought they might want to be represented. If they felt the litigant would not qualify for legal aid and would not instruct a solicitor they would consider referring them to a CAB. Another solicitor would refer to the local Law Centre if the matter was civil but would refer them to the court if the matter was a family matter:

Help from opponents

An interesting issue is the extent to which a represented party's lawyer takes on any helping role in relation to unrepresented opponents. A court usher suggested that this was quite common, although what the usher portrays as advice might actually be a form of negotiation, mixed with more general advice about court etiquette:

> *A lot of civil trials I've sat in on where somebody's been in person, they'll always give them advice on, you know 'this is what you should do' you know or, things like that. Family cases again… …they are very helpful, the barristers will always give them advice on you know 'you should take that, because that's all you going to get from this judge' or things like that you know. Or 'this is how you need to speak to this judge' or maybe answer the questions that I can't answer. Because they always come to me first, you know and, but it's usually at that stage once it's come to court it's not really, 'oh what's going to happen?' or anything like that, it's their demeanour in court, you know 'where do I sit, how do I act, what do I say, do I call him his honour, my lord, sir' you know things, general questions like that, you know. But you even get that from solicitors so, you know and you'd think they'd know but, those are most of the questions they ask, somebody in person.*

One of the representatives (a barrister) that we interviewed said that they took extra care to set out the relevant law for the court and the unrepresented opponent, suggesting that there was an accentuated duty to the court:

> *…I have a duty to act scrupulously fairly, particularly when a litigant in person is involved. So what I tend to do is produce skeleton arguments, chronologies, and things like that. The normal way that you would approach the court so as to make it easy on the Judge, so as to define the issues, make sure the Judge knows the appropriate law, and I photocopy all the authorities for the defendant, or the plaintiff or whoever it is, the claimant, so that they know what law I'm going to lead, why I'm leading it and what the points are. I hope very often.*

One of the judges we interviewed suggested that in terms of opponent solicitors helping unrepresented litigants: 'It does happen but it's very infrequent.' A solicitor we interviewed described speaking on behalf of their in person opponent in these circumstances, and as we will discuss later, judges often relied on lawyers to summarise cases when it would ordinarily be the opponent (if represented) who would have done so:

> *I obviously was aware of what was troubling [the litigant in person], and what were her concerns. And because she was unable to say what they were because she was distressed at the time, I could succinctly say what the two issues were and what the court would need to deal with. So, yes you do find that sometimes you do then, you know speak on behalf of the litigant in person, if it's easier to do so or give a summary, because the judge wants assistance.*

We also spoke to a solicitor who had done extra work, such as draw up a consent order, which they would have expected to leave to their opponent's lawyer had they been represented.

> *I would have normally sent the documents to his solicitor and his solicitor would have gone through them with him. But I in fact did that when we were in court.*

The unrepresented litigants too spoke of assistance they received from opposing lawyers. At one level this was expressed in terms of social interaction and politeness as well as basic procedural information:

> *Quite co-operative. Quite pleasant. And she informed me exactly how things would go. And she was very helpful, actually….. She basically, just told me the procedure, when we went in to see the Judge, what would happen, and how things would progress. And it went according to what she said.*

Several of the solicitors spoke of the need to, or expectation that they would do, tasks which would ordinarily be the responsibility of the other side, in particular the preparation of trial bundles. They saw this as inevitable, something beyond the competence of unrepresented litigants, and Judges also said this was necessary to make bundles more organised and relevant. This extended to other forms of documentation: lists of documents, and Scott schedules, for example. Such work was something which their client was, or risked, having to pay for: one of the solicitors we spoke to made clear that this had economic implications for their client as, in family cases, costs would usually not follow the event, any extra preparation costs would be borne by the represented party, even if they were legally aided, because of the statutory charge:

> *Oh yes, always. The bundle. If it's their application I always end up landed with the bundle. Which is, it's not fair, not fair on the, the statutory charge applies…*

Providing assistance to unrepresented litigants was also perceived by solicitors as otherwise causing difficulties for their clients. Another solicitor spoke of the difficulties of being asked by a judge to assist their opponent with filling in a Form E (financial statement in ancillary relief proceedings) prior to a hearing:

> *And you are having to be quite careful, because obviously you can't advise them but, you obviously you just assist them in effectively completing the form.*

Their client had become worried by this process:

> *You're having to explain to your client that you're not assisting them [the unrepresented opponent], and they are not paying you for your time, to assist the other side. Which is actually a difficult one to argue. Because effectively you are assisting them but indirectly it will assist your client if you can get something resolved on that day, rather than having to adjourn it to a future hearing date. So you're having to explain, you know, the reasons why you're doing things.*

There were also difficulties with the unrepresented opponent in this situation who displayed a reluctance to disclose relevant information and a reaction to negotiating with the person who was, albeit somewhat reluctantly, helping them.

> *[O]bviously, when I try to then negotiate with him to try and resolve matters, he then felt that anything I was telling him, I would say because I was acting on behalf of the applicant rather than saying, you know that 'this is the situation, this is how the court would look at it, we need to deal with these issues… We need to look at your pension because it is a relevant asset, a matrimonial asset.' And they were saying 'well that's nothing to do with her because it is mine.' You know and you're trying to*

> *say 'well actually no it is relevant because it is part of the matrimonial assets.'*

It was clear that solicitors sometimes gave procedural advice to opponents, which was not strictly in the interests of their client. This solicitor discussed handling initial hearings in relation to domestic violence cases:

> *[W]hat I normally do is say that 'this is the situation, we will be seeking an order, however, if you want to contest it, and you don't feel able to do so today, we can, you know, there is a possibility you can adjourn it to seek legal representation if you wish to do so.' Now I do see that is usually something that I have to advise them because under the Human Rights Act they have a right to a fair trial, you know, the judge is going to explain that to them when we go into court, might as well save some time by saying it at the outset.*

Solicitors in the background

Overwhelmingly, the unrepresented litigants we interviewed had assistance from some sources. Consistent with our information from files, usually this assistance was derived formally or informally from a solicitor. Some had been partially represented. Some took advice from lawyer friends (one in a civil case had been advised to 'do a Part 36' (i.e. make a formal offer to settle) and had then been able to look it up and decide whether and how to do that); another had looked to lawyer friends for a range of advice about whether they were right to pursue the claim, but also on more technical and cultural questions: 'on court procedure and how to behave in court, how to treat the judges and basically, go ahead with the case really.' Another had some assistance from a solicitor but this was limited because of problems getting insurance to cover the case (presumably some kind of conditional fee arrangement was being contemplated although this was never entirely clear from the interview). In one case a solicitor had been approached but had been unable to attend the hearing. Another had decided to have a solicitor handle their case from there on. As well as general validation (asking the lawyer friend, 'am I doing the right thing?' 'Do I have a case?'); litigants asked solicitors to check letters they planned to send to opponents or the court and sometimes they were provided with more specific advice, such as, in a family case, the level of staying contact that could give rise to a reduction in maintenance/CSA payments.

Unbundling

'Unbundled' legal services can be described as ''discrete task representation'. An attorney who provides a specific service to a client (who is otherwise handling an action) providing one service out of the possible range of 'bundled' services,

otherwise referred to as full representation. Some observers note that this type of service has always been part of the practice of law, although usually in the context of a relationship with an existing client.'[18] The extent to which lawyers are willing to provide unbundled services is an interesting one. In the US, unbundling of legal services is thought to be much more common, partly because of the absence of family legal aid. The impression we gained from our interviews with these litigants was not of a formal, unbundled relationship, whereby lawyers had agreed to do discrete tasks for litigants otherwise running their own cases. Rather, we saw social relationships or previous lawyer-client relationships being exploited to provide limited assistance to the litigant. A couple of the judges had seen a level of unbundling. This judge thought it worked quite well for certain litigants:

> *I wouldn't say I see a lot of it, but I have certainly seen cases where a solicitor has prepared it up to a point … …the litigant deal with the hearing. And it works if the litigant is sufficiently competent to present it. It really works well if the litigant is a reasonably well educated and well informed and self confident.*

This judge also said problems could arise where a lawyer prepares documents that a litigant does not understand. Whilst improvements in paperwork could be very helpful to the judge, it could also leave the unrepresented litigant somewhat stranded:

> *[P]rovided that the paperwork presents the whole argument then it can be very helpful indeed. But there are cases where the paperwork really sets the scenario and doesn't present the argument and then the litigant is rather lost because the litigant in person doesn't really understand what the solicitor has done or what the advice is.*

Another judge felt unbundling was rare:

> *Not that often. Not that often. They might go and get a bit of legal advice on occasions, but not that often I wouldn't have thought.*

Court staff were sometime aware of solicitors helping 'off the record' but could not say how often they felt this was occurring.

Only one of the solicitors we interviewed recalled experience of unbundling but it had happened almost by accident as a result of legal aid problems

> *…he'd been unrepresented throughout. And the judge had asked him to do something for a certain date, and he was really a bit confused about*

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[18] Civil Justice Network: http://www.civiljusticenetwork.org/unbundled.asp, download 21/04/04; see also http://www.unbundledlaw.org/default.htm, the website for a conference on unbundling in law.

> *what was required. ….I thought he should have been eligible, but in fact he'd being doing loads of overtime, and by the time, when he filled in the forms and sent them back to me, it was clear that he wouldn't be eligible. And so I helped him to prepare the statement that was required, setting out various things that the judge asked him to do. So I did that for him and sent it to the court and explained that he wasn't eligible for funding and wasn't able to afford private representation...*

There were a number of reasons why levels of unbundling might be low. Partly it might be resistance on the part of the lawyers, or protection of their market for advice. One unrepresented claimant who had sought some help from a solicitor with claims felt the solicitor did not like giving unbundled assistance: 'I don't think the solicitors in question liked it that I was doing it myself. I think I was taking, doing out of a job for them…

Sometimes advice received without representation was perceived as unhelpful. Court staff referred to CABx and solicitors giving inaccurate or flippant advice which misled the unrepresented litigant into believing something would be done for them which would not (usually this involved CABx advising clients to go and see court staff who would tell them how to fill in forms). There were more extreme examples. A judge put forward a specific example of what is sometimes called 'credit repair'. He described what he called cynical advice as not only unhelpful, it would, if provided by a professional source, have also been unethical:

> *… litigants have said to me frankly that they've been told that they should make an application to set aside judgment, say that they never received the initial papers and not produce any credible evidence to support that, just expecting the court just to accept their word for it when clearly it is just a device to, to avoid credit blacklisting. So in those cases where they've had you know, advice, so say from, from non lawyers it's not actually helpful at all…. … Very often it's clear that they've just been told what to say. It doesn't happen terribly frequently, but certainly in the time I've been sitting I've had five or six applications along those lines.*

CABx

The next most common source of assistance mentioned by interviewees was Citizens Advice Bureaux (CABx). As noted above, they were perceived by court staff, and possibly by the litigants themselves, as a kind of safety valve for those who would not, or could not, go and see solicitors.

Several of the people we spoke to, litigants, court staff and solicitors referred to problems with the limited opening hours of local CABx and problems getting through on the telephone. One interviewee had phoned the CAB 'dozens of times', but, 'they either weren't there, or I found some other solution by the time I got through, or [they]

phone back.'[19] This litigant simply wanted to ask how to get legal representation and they were advised that they ought to fill in an application for legal aid. Another had used a Citizens Advice Bureau for help with enforcing a tribunal award. The litigant had concerns about the disjointed nature of advice 'you always get a different person each time' which led to variable quality 'I've gone in several times and spoken to different people who've given conflicting advice sometimes.' although expectations were not high ('a free service so what do you expect'). Nevertheless, even quite basic advice about keeping records of events was a substantial help to this litigant:

> *They were very good actually at explaining that I needed to create a paper trail of everything. … because of their advice to keep copies of everything, I had a stack of paper. And that was all useful but, the letters he sent me proved very useful. Which helped my case.*

As well as access problems, CABx were also felt to be inappropriate for certain types of problem (such as advanced family disputes). CABx were perceived by one judge as

> *very good on things like rent possession, and sorting out housing benefit, and benefits advice, and that type of thing. They're not much good, in my experience on other things. Other than they, they can sort of point people in the right direction to get advice from somebody else, from a solicitor for example, because they will know which solicitors deal with legal aid and which solicitors deal with disrepair cases and things like that. So they can be useful as a sort of channel, to push people in the right direction. I think on rent cases, particularly where's there housing benefit, they're pretty good.*

Other than solicitors and CABx, few sources of advice were mentioned. One litigant had phoned a trade union advice line 'a few times'. 'They informed me which forms I'd have to fill in and send in etc.' (in an ancillary relief case) and this litigant also called the advice line when he had received certain letters from his opponent's solicitor. Another had got advice from a liquidator who was in effect their opponent. As previously noted, court staff reported that in adoption cases, local authority social service departments typically assisted applicants and, '[for] respondent mothers and fathers you have children's guardians and children and family reporters that go out and explain the situation.

As well as the formal advice sources, several litigants spoke about relying on family or friends for moral support and as sounding boards for their approach to cases.

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[19] Access problems in relation to CABx are demonstrated in more depth by other research (Moorhead and Sherr, 2003; Pleasence et al, 2004; Genn, 1999).

Duty schemes

Several court staff spoke of duty advice schemes, (each of the courts had some form of scheme, usually in relation to housing possession cases) and they were positively received by staff, and judges. However some staff and judges in two courts spoke of schemes going into decline as private practitioners pulled out of voluntary schemes with CABx and Shelter workers taking up the slack. Another interesting phenomenon was that some court staff seemed unsure about whether duty schemes existed and so would be unlikely to refer litigants to them or be able to use the existence of duty schemes as an encouragement for litigants to attend their hearings.

McKenzie friends

Only a few of the court staff, usually the ushers we spoke to, had some experience of McKenzie friends: 'Occasionally, not very often though.' 'Very very rarely I've only ever known of two I think'. 'It's usually like new partners of divorced couples…. … and then you've obviously got to get the judges and then the other side's permission because there can be animosity between them.' One member of court staff referred to an unrepresented litigant who, because of his experience in his own case, had 'represented' at least one other unrepresented litigant in a Children Act case. Others were live to the possibility of 'professional' McKenzie friends (those who might do it for money):

> *I've seen a few where they've come in as McKenzie friends but I don't know if they've actually been from a company, you know that does this as a whole. Sometimes they may be, you know a neighbour who's had some legal experience or something like that and they'll come in to do the talking for them.*

Another spoke of McKenzie friends with resentment and emphasised the difficulties they caused and also spoke of 'professional' McKenzie friends, meaning repeat players, rather than those making money from it:

> *I don't like it but does cause me problems because they come in thinking that it is their right and I have to explain to them that it is at the judge's discretion whether their friend can come in with them, because a friend can take over, can't he? And not let the litigant have, you know, really have their say, but there are one or two that I call professional McKenzie friends that come in, we see the same chap come in with lots of different people.*

In another court, a staff member suggested a confused picture of whether McKenzie friends were allowed in the court, with both court staff and judges having different

views. The confusion is significant as court staff might well be advising litigants on whether they can bring someone along to the hearing:

> *But a lot of people in person still think they can bring their friends in with them just to sit by the side of them and help them. But I'm not clear in my own mind whether we still do McKenzie friends, I mean some of us are of the opinion we are and some of the opinion we're not.*

Her comments suggested that judges took divergent approaches:

> *Well they don't mind, they make their own minds up, some will say 'no, they can't' and others say, 'they'll be all right, as long as they sit at the back and don't interfere with the case.'*

Non-parties ringing up on behalf of litigants could also pose problems in relation to confidentiality:

> *Sometimes we get people who are not the people who are party to the action on the phone, and we are very careful when we get a phone call to establish who is phoning up, because obviously due to confidentiality we can't give information to anyone, people who are not parties to the action, so yeah we do get. I think some people do consult friends and family, and they feel they can't obviously go through with it and they phone up.*

The barrister who had dealt with a chancery matter suggested that it was common for unrepresented parties to come with someone who, although not a lawyer, had some professional qualification, or people who come to provide moral support. The latter were seen as a hindrance:

> *Yes, I mean, very often they come along with their accountant, perhaps an accountant who they know from their social life, somebody very often who is not professionally qualified but has some expertise, so they say. And of course, they come along with somebody who is completely and emotionally committed to their cause. These people are there for moral support but they're not there as McKenzie friends, but they sit in the back, so that they've got some sort of entourage when they come in. But, they just add to the difficulties rather than minimise them.*

Judges of course were well placed to comment on the prevalence of McKenzie friends. One reported that non-qualified housing advisers from Shelter attended housing hearings and were perceived as helpful. Another reported that CABx workers quite often came in, 'They don't usually say a lot but they quite often come in.' He suggested this was usually in relation to rent possession cases, administration orders and attachment of earnings applications. Another judge suggested McKenzie friends were 'very rare'. Written representations were more common:

> *[T]hey might write, they may write a letter. And sometimes, solicitors will write a letter and the litigant in person will produce it and say, 'my solicitor, you know, I've been to see a solicitor.' And sometimes you may say, you know, it may disclose things which you'll say fair enough, we're not going to deal with it today, and so forth. It depends.*

Another judge felt they were similarly rare: 'I would expect to meet a McKenzie friend about once every couple of months. Not all that often, but it happens.' He also spoke of who they were and his general attitude to them making representations on behalf of the unrepresented litigants:

> *Well, I sometimes get people coming to court who are represented, who bring a so called McKenzie friend with them, who isn't really a McKenzie friend, but some officious bystander who is giving them a hand. I've had for example struck off solicitors lending a hand to, to people and trying to speak up on their behalf …I've had people who've brought in their accountants for example, who have got better knowledge than they have about what's going on. But normally …McKenzie friends don't seem to know any more than the litigant himself. The only advantage that they have is that they are not afraid of standing up and speaking, as the litigant may feel too shy to say, on their own behalf.*

Judges clearly had different attitudes and approaches to McKenzie friends. One judge said:

> *I make it a rule not to allow McKenzie friends to normally speak in court. But sometimes it happens that the McKenzie friend speaks up anyway, and I find out that he's so sensible that it's best to listen to him, rather than to have his advice relayed via the litigant himself. But the litigant is not supposed to be represented by a McKenzie friend.*

The tenor of this judge's comments (in this quote but also elsewhere) was that he ought not really be permitting himself to hear McKenzie friends, whereas he has a discretion. Another judge appeared to have a much more open attitude to lay representation:

> *There is no right of audience, but we have a rule in this room which is that anybody who can help me is welcome.*

Housing associations were reported as using non-lawyers by one judge and the standard of representation was generally felt to be very good, although technical legal questions were not usually involved. On the other had, letting agencies sometimes appeared to be assisting or conducting cases for private landlords and judges felt these were handled very poorly. One judge pointed to housing agents appearing on behalf of landlords and apparently conducting litigation in breach of the

Solicitors' Act.[20] He was critical of them in a number of respects, their handling of documents, of evidence, their lack of procedural and substantive knowledge, particularly for accelerated possession proceedings:

> *they generally get it wrong…. …notices, don't accord with the Act, [and] haven't been served. The, agent comes along and, expects his bald assertions of fact to be accepted, when he hasn't got personal knowledge of the facts at all. And you know, they don't understand. The need for evidence in most rent arrears cases is minimal. And yet somehow they always seem to manage to miss, they don't know what they're doing. As I say if it is genuinely a landlord acting in person, you can usually get it sorted out, because he generally does have the personal knowledge, he does know what he wants, he doesn't have get instructions. And to the extent that the court's got a discretion to wander away from the strict procedure, you can do it, and get the right the result. The accelerated procedure is a mine field and, you know there are so many strict conditions before it works, and you need somebody who understands how it works. Which means that very few unrepresented landlords get it right. I should think no lettings agents get it right, and about 50% of solicitors get it right. And all the district judges get it right.*

There is some judicial comment about non-lawyers conducting litigation for unrepresented litigants (Brooke LJ in *Noueiri v Paragon Finance PLC (no 2)*[21]). We were interested to explore in our focus groups whether this was common. On one level court staff might not know. Some pointed out that they were no longer expected to send back claims that were not signed (and unsigned claims might be from litigants or from lay advisers). There were some occasions where they were aware of housing agents filing claims on behalf of landlords. Although they did not suggest this was common.

Brooke LJs comments suggest this sought of conduct should not be permitted, although the staff see it as relatively unproblematic here. Accelerated possessions

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[20] Section 20(1) of the Solicitors Act 1974 states:
No unqualified person shall act as a solicitor, or as such issue any writ or process, or commence, prosecute or defend any action, suit or other proceeding, in his own name or in the name of any other person, in any court of civil or criminal jurisdiction".
This is a wide prohibition preventing those without rights to litigate from taking almost any step in legal proceedings for a litigant in person. As the Court of Appeal emphasised in *Noueiri v Paragon Finance PLC (no 2)* [2001] EWCA Civ 1402; [2002] Fam Law 16, anyone breaching the section commits a criminal offence and is in contempt of the court unless their actions are carried out pursuant to a right of audience or a right to conduct litigation granted under the 1990 Act (ss 27(10) and 28(6)). Acts which have been held to constitute breaches of section 20(1) of the 1974 Act or its predecessors have included completing a form for the entry of an appearance, getting the litigant to sign it, and lodging it with the court and copying it to the other side (*re Hall* (1893) 69 LT(NS) 385); and completing and having signed by the litigant a notice of appearance, a notice to produce documents, a summons and an affidavit, and appearing at chambers hearings before a master and a judge (see *Re Berriman* [1896] 40 SJ 377).

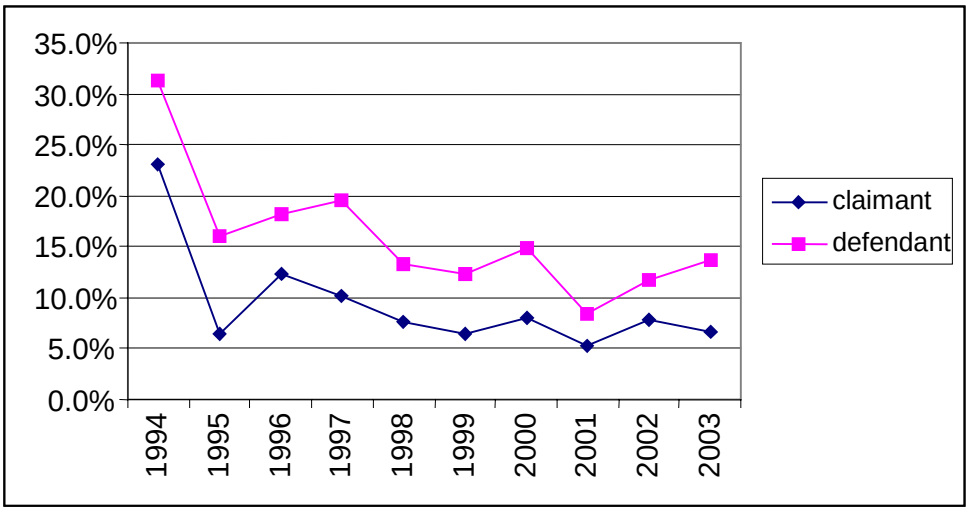
[21] See note 20.

did, however, cause problems because litigants in person failed to file the proper exhibits as required.

Trends over time

It is common to suggest that there has been an explosion in unrepresented litigants (Mitchell, 2004). The court staff, lawyers and judges we spoke to tended to suggest either that they were uncertain about medium and long term trends or that there had been a substantial increase in numbers. There is little longitudinal data on this issue, although the DCA has been able to provide information from trials in civil cases.

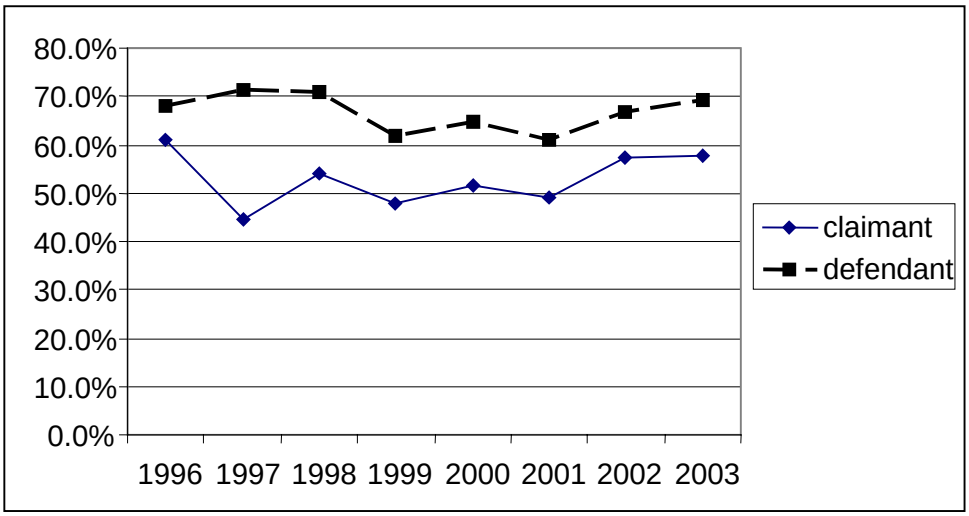
County Court trial: percentage of parties appearing in person



Over the nine years covered by these figures the proportion of County Court trials involving unrepresented defendants or claimants has decreased. The numbers in real terms have also decreased, as the number of County Court trials dropped from 24,219 to 15,167 in this period.[22] The decline is not explained by an expansion in the number of small claim hearings, which increased from 71,822 in 1994 to 98,692 but then dropped to 52,143 by 2003. During that period the proportion of unrepresented parties appears to have remained fairly steady as can see seen in the next graph.

[22] Source: DCA. Recent data for High Court trials is not available.

Small claims hearings: percentage of parties appearing in person



There is no analogous recent data for the High Court or for family proceedings.

Both graphs show a slight increase in the members of unrepresented litigants after 2001, which would be consistent with an increase in non-representation after the introduction of the Access to Justice Act, but it remains to be seen whether this is part of an ongoing trend. Beyond this, the evidence does not support an increase in litigants in person, rather, the opposite. It is possible however that there has been an increase in litigants in person in those cases that do not proceed to trial.

Most of the lawyers, save one that specialised in insolvency work, felt that unrepresented litigants were a relatively minor part of their routine work. They were understandably reluctant to put figures on their experience but most suggested they opposed unrepresented litigants in about half a dozen cases a year, more for family lawyers (10 to 20 a year). Some suggested that the likely trend in numbers was upwards, ‘because of the difficulties in funding.’ Declining eligibility levels in legal aid funding were perceived as causing increasing problems.

Judges too did not feel unrepresented litigants were a daily occurrence, suggesting they dealt with unrepresented litigants (outside of the small claims procedure) about, or less than, once a week. They were, however perceived common in housing and bankruptcy matters. Staff on the other hand suggested they came across them more regularly.

Summary

What does the quantitative data say about family cases?

From the various data presented in this chapter we have estimated the actual position in the five family case types we looked at. This is presented in Table 22, with litigant status broken down into four categories: those cases where all parties are represented throughout the proceedings; those where there is an unrepresented adult litigant who does not participate; those cases where one or more adults are unrepresented for part of the case and participate whilst unrepresented; and finally those cases involving an adult party who is unrepresented throughout and participates in their case.

Table 22: Family cases litigants in person summary

	Cases involving fully represented parties	Case involves unrepresented litigant(s)		
		Inactive	Partial	Active
Adoption	23%	7%	6%	64%
Ancillary Relief	69%	12%	4%	15%
Children Act	50%	16%	12%	21%
Divorce	31%	8%	1%	60%
Injunction	53%	19%	8%	20%

It can be seen that there were significant numbers of unrepresented litigants in divorce cases and adoptions and that about half of Children Act and injunctions cases involved litigants unrepresented for part or all of the proceedings. However, these figures are somewhat inflated by the numbers of inactive unrepresented litigants. About 1 in 5 injunctions and 1 in 6 Children Act cases involved inactive unrepresented litigants. Inactivity is difficult to interpret. It may involve resignation to court proceedings, perceived irrelevance or a form of resistance to legal process. It is uncommon for family cases to involve partial representation: litigants tend to be either represented throughout or unrepresented throughout. We can also see that (outside of divorce and adoption cases) cases involving active adult unrepresented litigants form a minority of cases, about 1 in 5 injunction and Children Act cases involve active unrepresented litigants, and 1 in 6 ancillary relief cases. Usually, though not always, it is the respondent that is unrepresented in these cases.

Civil cases

We summarise the situation for the status of litigants in both High and County Courts in Table 23 by litigant type. Institutional litigants are excluded from these figures.

Table 23: Summary Estimates of Litigant Status in Civil Cases

	Fully represented	Inactive LiPs	Partial LiPs	Active LiPs
High Court				
Individual claimant	94%	0	3%	3%
Business claimant	98%	0%	2%	0%
Individual defendant	48%	22%	13%	17%
Business defendant	68%	17%	3%	12%
County Court				
Individual claimant	90%	0.5%	2%	7.5%
Business claimant	83%	0	1%	16%
Individual defendant	15%	56%	1%	28%
Business defendant	56%	28%	1%	15%

We see a number of things in this table :

- Defendants are much more likely to be unrepresented than claimants;
- Individual defendants are more likely to be unrepresented than business defendants;
- Partial representation is rare (but more common in the High Court);
- For defendants, lack of representation is commonly due to lack of participation.

Why people go unrepresented

The literature suggests litigants go unrepresented for a number of reasons. There are three main categories

- Inability to afford representation;
- A perception that lawyers are not always perceived as necessary or best placed to advance litigants' interests;
- Openness and supportiveness of courts to unrepresented litigants.

The 'lawyers are not best placed' motivation is the most complex. Litigants may perceive themselves as more factually expert in their dispute and more able to

manage it than a novice lawyer. Alternatively, they may wish to 'have their say'. This motivation may in fact include a host of related motivations, including feeling that their point of view has been properly put; or being able to put non-legal arguments (guided by lay notions of fairness) in a legal forum. Lawyers are sometimes perceived as stoking up the adversariality of disputes: it has been suggested that commercial litigants who wish to preserve existing relationships might proceed without lawyers on this basis. The fact that litigants often express the view that they did not think they *had* to be represented suggests that in the mind of some, non-representation is not an obviously second best option. It also suggests that litigants may be conducting informal cost-benefit assessments or perceive cases as being straightforward enough for them to handle themselves.

All of these motivations were evident in our discussions with court staff, judges, lawyers and litigants. Cost and the decline in legal aid eligibility were perceived as particularly problematic in family cases. The court staff we spoke to suggested that, leaving aside difficult or obsessive litigants, few individuals were unrepresented by choice and that cost was the primary reason for non-representation. It was also suggested to us that a hardening of attitudes amongst solicitors unwilling to take on 'difficult' clients has contributed to the causes of non-representation. This view suggests that risk management practices and legal aid contracts disincentivise the taking of certain cases. For the litigants we interviewed cost, or the unavailability of legal aid, was usually a factor in their decision but often combined with other reasons: a belief that they could conduct the proceedings themselves without too much trouble; a feeling that solicitors were unnecessary or provided little or no benefit (either because they were incompetent; or because they expected to lose their case; or were at the end of proceedings arguing over relatively minor details); sometimes lawyers had been instructed but failed to attend because legal aid was expected but had not yet been granted or because of conflicting appointments in the solicitor's diary.

Assistance short of representation

We also saw evidence that significant proportions of unrepresented litigants had sought some advice or assistance usually from solicitors, CABx or friends (who were often solicitors). This advice or assistance generally appeared to be fairly low level in nature and did not appear to be part of a concerted management of cases by the litigants. Rather, they got help where and when they could.

Furthermore, some staff in courts did not confidently assist litigants into the advice system. Our interviews suggested that, some staff were clearly encouraging litigants to use CLS directories, or local lists of providers probably derived from the directories. However, there was considerable evidence of a lack of confidence or specificity about where litigants could turn to for help, and this was supported by observations during our time in the courts. Staff were uncertain about what services were provided in the locality and there was a general expectation that solicitors would give a free half hour interview which may not be borne out in practice. We noticed whilst working in the courts that signposting tended to end with a general suggestion that a litigant go and see either an (unnamed) solicitor, or 'the CAB'. Interviews suggested that a short list of named providers was sometimes provided (who were recognised by the court as repeat players in their locality). Some staff perceived the latter approach as dangerous, a form of favouritism to larger local practices.

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

Our qualitative work also revealed some of the problems caused by lawyers being expected to help with unrepresented litigants where they were their opponents. This creates cost and ethical problems as well as unsettling the adversarial dynamic of litigation-negotiation.

Trends over time

Finally, although our interview evidence supported the view that there may have been an increase in unrepresented litigants in recent years; where there is hard statistical evidence the picture appears to suggest otherwise, at least until recently. There is only evidence for County Court trials and small claims hearings. The number of unrepresented parties in County Court trials declined steadily until 2001. There does appear to be an increase after 2001 but it is too soon to say whether this is part of a trend. This decline has not been offset by more unrepresented parties in small claims. The number of small claims hearings has declined whilst the numbers of unrepresented parties has remained steady. Again there was a slight increase after 2001, which would be consistent with an increase in non-representation after the

introduction of the Access to Justice Act but it remains to be seen whether this is part of an ongoing trend.

There is no longitudinal data on family cases. Anecdotal evidence that there has been an increase in non-representation is supported, on balance, by our interview data.

3. The characteristics of unrepresented litigants and their cases

Having considered the number of unrepresented litigants, this chapter looks at relationships between litigants to see how far existing social and economic patterns related to non-representation. We also consider what was at stake for litigants.

Family litigants

Gender of Litigants in person

An interesting issue is the gender of active litigants in person in family cases. More cases involved male unrepresented litigants than female unrepresented litigants: 48% of cases involved a male litigant in person, 38% involved a female litigant in person and 13% involved both a male and female litigation in person. It is also noticeable that in ancillary relief, divorces and injunction cases, if there was an unrepresented applicant, it was more often a woman that brought the application. Where the respondent was unrepresented, in ancillary relief, divorce and injunctions it was usually the man. The opposite was true for Children Act applications, unrepresented male applicants were more common than female applicants and unrepresented respondents were more likely to be women.

Table 24: Gender of active unrepresented litigants by case type

		Male	Female	Both	N
Adoption	Applicant	3.1%	6.3%	90.6%	32
	Respondent	24.2%	48.5%	27.3%	33
Ancillary relief	Applicant	33.3%	66.7%	0.0%	12
	Respondent	69.8%	27.9%	2.3%	43
Children Act	Applicant	77.8%	22.2%	0.0%	27
	Respondent	30.0%	67.5%	2.5%	40
Injunction	Applicant	33.3%	66.7%	0.0%	3
	Respondent	97.0%	3.0%	0.0%	33
Divorce	Petitioner	0.0%	100.0%	0.0%	16
	Respondent	59.0%	41.0%	0.0%	61
All cases	Applicant	30.0%	37.8%	32.2%	90
	Respondent	56.2%	38.6%	5.2%	210

Relationship of unrepresented litigants to opponents

Another interesting issue is the relationship between parties where one of those parties is an unrepresented litigant. It can be seen that about two thirds of the

Children Act cases involved spouses and ex-spouses, whereas just over half of the injunctions involved cohabitants, or former cohabitants. We have not included adoption cases here as they are a special case (usually there would be no prior relationship between adopter and adoptee although we estimated that about 10% of cases involved ex-spouses (usually where a step parent adopts)).

Table 25: Relationship of unrepresented litigants to opponents

	Spouse	Ex-spouse	Cohab	Ex cohab	Non cohabiting partner	Others	
	%	%	%	%	%	%	N
Ancillary Relief	95.6	4.4				0	45
Children Act	20	45.5		10.9	5.5	18.1	55
Divorce	100					0	63
Injunction	34.3	5.7	8.6	42.9		8.5	35

What was at stake?

For active unrepresented litigants, we collected some data on what was at stake for the unrepresented litigant. This gives an indication, over and above case type, of what the nature of any case was.

What was at stake (adoption)

At first sight, adoption cases would seem to be those involving the highest stakes irrevocably affecting parent and child, though in actual fact the more controversial aspects of cases (the making of orders freeing children for adoption) were dealt with as care matters and were beyond the remit of this research. In the cases we saw, although levels of non-representation were high, the process was largely bureaucratic and local authorities often played a pivotal role in assisting parties through the process.

About a third of adoption cases where a party was active and unrepresented (38%) involved the unrepresented parent 'giving up' the child for adoption. We saw several examples of natural parents in these circumstances expressing understandable ambivalence about what they were doing. For example, one natural mother indicated that she did not want to sign a consent form, even though she had agreed the child should be adopted, for fear that her child would come looking for her in 18 years and point to the document and say, 'you gave me away.' However, beyond such expressions of ambivalence natural parents were generally not resisting the process of adoption at the stage of cases we looked at. That this was a common scenario was suggested by the Judge's notes on another case which recorded that, 'the

mother's position is a familiar one to the family court in that she is clearly not actively opposing this application but cannot bring herself to give written agreement.'

About two thirds of cases (64%) involved the adopting parents being unrepresented, again this technically involved a risk of failing to adopt but because of the role of local authorities in the process leading up to court proceedings it was almost inconceivable, at least on the cases we saw, that adoption would not take place.

What was at stake (ancillary relief)

Ancillary relief cases are shown in Table 26. Often what was being dealt with in cases involving active unrepresented litigants was the former matrimonial home (or the proceeds of sale once it was sold) and usually active unrepresented litigants were the parties likely to be making payments.

Table 26: What was at stake (ancillary relief cases)

	%
The former home or proceeds of sale	64.4
Paying ancillary relief	24.4
Maintenance for children	22.2
Pension	8.9
Receiving ancillary relief	8.9
Vehicle(s)	8.9
Maintenance for former partner	6.7
N	45

What was at stake (Children Act)

Table 27 shows that insofar as there was a tendency one way or the other Children Act cases tend to involve unrepresented litigants who were seeking (some or more) contact and those seeking residence, rather than those seeking to reduce or prevent residence or contact by the other side.

Table 27: What was at stake (Children Act Cases)

	%
Gaining residence	9.1
Losing residence	5.5
Gaining contact	30.9
Specific issue	9.1
Prohibited Steps Order	1.8
Reduced contact	10.9
N	55

It will be appreciated also that there are a number of cases where it was not apparent that any of these issues were at stake. Principally we assessed this as being the case where the application being made (be it for residence or contact) did not appear to be opposed.

Four of the specific issue cases related to a child's surname, though one related to physical punishment and another to the return of a passport. The prohibited steps order related to the removal of a child from his or her mother.

What was at stake (injunctions)

Unrepresented litigants in these cases were usually respondents. 8 cases (23%) involved a risk of exclusion from the home for the unrepresented litigant and the vast majority of cases involved the likelihood of respondents being subject to non-molestation orders. 4 cases (11%) involved an immediate risk of imprisonment. This risk materialised for two unrepresented litigants. For unrepresented applicants there was a risk of violence. Two of our unrepresented respondents also indicated that they were at risk of violence. One of these also said they needed protection for their children.

Vulnerability

We also recoded any indications of vulnerability on the part of unrepresented litigants. Indications of vulnerability included being victims of violence, depression, alcoholism, young, lone parents (18 or younger), drug use, histories of imprisonment, mental illness, living in temporary accommodation with the children, illiteracy, terminal illness, and involvement with social services. There were differences by case type. 30% (15) of adoption cases had an unrepresented litigant with some kind of vulnerability. The figures were 20% of injunctions and 15% of Children Act cases. Only 7% of any ancillary relief cases and 5% of divorce cases contained an indication of vulnerability. Such cases may be less likely to reveal vulnerability (the paperwork on a file may be less revelatory of such personal information) or there may be a degree of correlation between vulnerability and adoption, and injunction and/or Children Act cases.

Do types of application differ by litigant type?

An interesting issue is the extent to which cases involving unrepresented litigants involved those parties in different types of application from cases involving represented litigants. This may tell us something about the nature of cases involving

unrepresented litigants, or it may tell us something about how they conducted those cases. Table 28 shows the figures for Children Act cases.[23]

Table 28: Applications made in Children Act Cases by Party Type

	Who is unrepresented?			
	Neither party	Applicant only	Respondent only	Both sides
	%	%	%	%
Contact	61.2	85.0	56.2	71.4
Parental responsibility	19.9	40.0	21.9	17.9
Prohibited steps	15.0	10.0	12.3	7.1
Residence Order	55.8	45.0	51.4	28.6
Specific Issue Order	9.2	5.0	11.6	17.9
Finance	0.5	5.0	2.7	10.7
N	206	20	146	28

The number of unrepresented applicants is small so one has to be careful in interpreting the data, but this table suggests that unrepresented applicants are more likely to be applying for contact and parental responsibility, than represented applicants and less likely to be applying for residence.[24]

Do unrepresented litigants divorce on different grounds?

One way in which we are able to get a sense of differences between cases involving unrepresented litigants and those that do not involve unrepresented litigants is in relation to the basis of any divorce petition. It is sometimes suggested anecdotally that lawyers are less likely to employ 'hostile' grounds of divorce than would parties left to their own devices. If anything, our data suggests the opposite.

[23] Percentages total more than 100 as parties may have been making or responding to more than one application in the same case.
[24] The difference in distributions by litigant type was near significance (Chi square, p = .06).

Table 29: Basis of Divorce by litigant type

	Who is unrepresented?			
	Neither party	Petitioner only	Respondent only	Both sides
	%	%	%	%
2 years separation	12.1	18.8	22.2	55.2
5 years separation	4.2	6.3	7.6	12.1
Adultery	25.5	25.0	21.1	17.2
Behaviour	58.2	50.0	49.2	15.5
N	330	16	185	58

The difference in the distributions of grounds by litigant type was significant,[25] suggesting that cases where both parties were litigants in person had a higher reliance on separation and consent as the basis for any divorce petition. Cases where both parties were represented were ones where the reliance on separation was generally lower. If one concentrates solely on the status of petitioners: 47% of unrepresented petitioners had petitions based on two years separation (compared to 16% of those who were represented); 11% (compared with 5%) relied on 5 years separation; 19% (compared with 24%) relied on adultery; and, 23% (compared with 55% of represented applicant/petitioners) relied on behaviour.[26]

Thus it seems likely that unrepresented applicants were less likely to rely on contentious divorce grounds. There may be a number of explanations for this. One is that solicitors were more inclined than lay people to use the more contentious grounds for divorce. This could be interpreted as a sign that family lawyers were more adversarial with the divorce petition than unrepresented litigants. We think this is possible, although a more benign interpretation would see a lawyer advising clients that the quickest way of getting a divorce (where there is no sufficient period of separation) is to rely on behaviour or adultery. Perhaps a more likely explanation is that parties were more willing to pursue a divorce themselves if the separation had been fairly amicable (hence the greater incidence of two year separation by consent) or in circumstances where finances and/or arrangements for the children did not demand (or was not perceived to demand) a more rapid divorce (where behaviour or adultery would usually have had to be used). Another possible explanation is that litigants in person were put off using the behaviour and adultery grounds on the basis

[25] Chi-square, $p = 4.0 \times 10^{-12}$.
[26] The difference in the distributions was significant. Chi-square, $p = 1.0 \times 10^{-10}$.

that they did not know what to put on petitions in such circumstances or they were worried about the prospect of handling a divorce unrepresented where allegations were made which they might have perceived as inviting a defence. Consensual separations are obviously less likely to prompt this fear. Court staff reported that some unrepresented litigants struggled to deal effectively will particularising behaviour (though usually by writing too much of irrelevance) and we saw examples of petitions not proceeding because of insufficient descriptions of unreasonable behaviour.

Differences in adoption cases

Although the numbers are smaller for adoption cases and so have to be interpreted more cautiously, it is possible to get a sense of the types of adoption case being considered and which parties were unrepresented within them.

Table 30: Adoption case types by litigant type

Who is unrepresented	Freeing Order	Placement	Proposed Foreign	Step parent
No parties	62.5	5.8		13.3
Applicants only		42.3		33.3
Respondents only	37.5	25.0	100.0	26.7
Both sides		26.9		26.7
N	32	52	1	15

We saw several adoption files where natural parents, as respondents in adoption proceedings, remained unrepresented. As noted above, their motivations were complex: finding it very difficult to bring themselves to consent to adoption, but not actively opposing the application. Thus for many of these cases, the unrepresented respondent's participation was minimal or non existent. We have also seen that local authorities had a key role in hand-holding parties, especially adopting parents, through the process in many of these cases.

What's was at stake in civil cases?

Table 31: What was at stake in unspecified civil claims (County Court)?

	Who is unrepresented?			
	Claimant	Both sides	Defendant	No parties
=< £1,000				0.6
£1,001 - £5,000		100.0	16.0	16.1
£5001 - £15,000	50.0		64.0	44.6
£15,001 - £50,000	25.0		16.0	26.8
£15,001 - £50,000				0.6
>= £50,001 or unlimited	25.0		4.0	7.7
N	4	1	25	168

The difference in distributions of the cases depending on litigant status was not significantly different.[27]

Table 32 shows the average (mean) level of damages claimed in specified claims depending on litigant status.

Table 32: Levels of Specified Claims (High and County Court)

	Who is unrepresented	Mean	N	Std. Deviation
High Court	Defendant	£79,268	34	£116,571
	Neither party	£131,377	23	£187,113
	Total	£100,295	57	£149,757
County Court	Claimant	£7,598	2	£1,544
	Both sides	£8,091	11	£5,225
	Defendant	£14,128	78	£11,504
	Neither party	£19,250	23	£16,718
	Total	£14,465	114	£12,513

This shows two things: the average level of damages claimed was high, even for unrepresented parties and cases with higher values appeared more likely to involve represented parties, although the differences were not significant.[28]

[27] Chi-square, p = .847.
[28] ANOVA, p = .07 for County Court cases and p = .2 for High Court cases.

Civil cases: the organisation-individual matrix

A way of categorising civil cases to provide high level analysis of party relationships derives from Galanter's work on the 'haves' and the 'have nots'.[29] This posits that courts are predominantly vehicles for the interests of the 'haves' (mainly businesses) against, or to the exclusion of, the 'have nots' (mainly poorer individuals). Statistical work building on this tends to use as a proxy a comparison of the existence of cases involving organisations (the haves) and individuals (the have nots). This is a crude analysis and one which may not always be borne out in practice (some businesses may well be more like 'have nots' than 'haves'), but it is worth considering our cases in these terms. This leads to four types of case: organisation vs organisation; individual claimant vs organisation defendant; organisation claimant vs individual defendant; and, individual vs individual. These four combinations are represented in the following matrix.

Table 33: Organisational-Individual Matrix (County Court)

		Defendant		Total	
		Organisation	Individual		
Claimant	Organisation	10.7%	54.5%	65.2%	459
	Individual	20.7%	14.1%	34.8%	245
	Totals	31.4%	68.6%		
		221	483		704[30]

Thus we can see the most common type of County Court cases (over half) were organisations taking cases against individuals. One in five County Court cases involved individuals taking cases against organisations. Taken together the dominant role of these County Courts was to adjudicate (or process) disputes between organisations and individuals: about three quarters of the non-small claims civil cases fell into this category. About 1 in 9 cases involved organisations against other organisations and about 1 in 7 involved individuals against other individuals. As one would expect, this differs by case type: so housing possession cases are dominated by organisations taking individuals to courts; other and specified claims are more likely to involve organisations taking cases against other organisations or individuals;

[29] See, recently, for example, Brace and Gann Hall (2001) and for the original work Galanter (1974).
[30] This data excludes a number of cases where there was essentially no defendant, hence n<799 91 cases were applications for renewal of a commercial lease: effectively a joint application on behalf of both parties (these cases fall into the 'other' section of our case types) and four other cases where pre-issue applications were made without notice being given to a prospective defendant.

unspecified claims are more likely to involve individuals taking cases against organisations or other individuals (often, road traffic accident cases).

The situation is not the same in the High Court. Organisation vs. individual cases do not dominate. 35% of the claims were brought by individuals against organisations and 23% by individuals against individuals. 40% of cases were against individuals; 60% against organisations. This difference probably reflects the absence of housing possession work from High Court cases and the lower levels of routine debt collection in the High Court.

Table 34: Organisation-Individual Matrix (High Court)

		Defendants			
		Organisation	Individual		
Claimants	Organisation	25.7%	23.3%	49.0%	143
	Individual	34.9%	16.1%	51.0%	149
		60.6%	39.4%		
		177	115		292

Absence of representation and the individual-organisation matrix

A further way of looking at this data is to consider representation within the context of the individual – organisation matrix discussed above.

Table 35: Unrepresented Claimants and Defendants in terms of the Individual-Organisation Matrix (County Court)

		Unrepresented claimants		Unrepresented defendants	
		N	%	n	%
High Court	ind v ind	0	0.0	12	25.5
	ind v org	9	8.8	15	14.7
	org v ind	1	1.5	42	61.8
	org v org	2	2.7	27	36.0
County Court	ind v ind	7	7.1	35	35.4
	ind v org	13	8.9	30	20.5
	org v ind	155	40.4	371	96.6
	org v org	25	33.3	52	69.3

It was usually the case that where organisations are taking cases against individuals that levels of non-representation amongst (individual) defendants were highest.

Summary

In family cases, more unrepresented litigants were men than were women. Consistent with the general picture, they were also usually the respondents in proceedings. The one exception was Children Act cases where over three quarters of active, unrepresented applicants were men.

Our analysis of what is at stake in these cases suggests that significant issues were being raised. Ancillary relief cases dealt with matters of substance, not financial or proprety trivia. Children Act cases were more likely to be substantially concerned with contact (though in 1 in 10 cases residence was genuinely in issue at some stage). Worrying numbers of family cases involved vulnerable unrepresented litigants.

It seemed also that unrepresented petitioners in divorce cases were more likely to use non-contentious grounds in divorce cases than represented parties. There could be a range of reasons for this, but it is suggestive of non-representation (in divorce) being associated with less acrimonious disputes. Our impression from files is that this was true also of ancillary relief cases.

In relation to civil cases it is harder to simplify and summarise the relationship, between parties. We have concentrated on whether the parties were individuals or organisations. The County Court list was dominated by organisations taking cases, principally against individuals. It is notable that this latter constellation (organisations vs. individuals) was where most non-representation occurred. As with family cases, there was evidence that the cases were dealing with substantial sums. There was also some evidence that cases involving unrepresented litigants tended to be of lower values than case involving only represented parties.

4. Difficult and Obsessive litigants

A striking, though possibly superficial, impression gained during the conduct of this research has been the extent to which lawyers, academics, court staff and others, on learning of our work, have quickly framed the research issues in terms of difficult, trouble making vexatious or litigants in person. The obsessive litigant, proceeding relitigating cases (or applications within cases), dealing with them with a hostility or disregard for the impact such cases have on the courts and their opponents, and with reckless disregard as to the merits of their position, has a popular and powerful place in the legal imagination. There was a similar, if only slightly less marked, tendency to speculate on a link between such litigants and mental health problems.

This interest in the difficulties posed by obsessive or vexatious litigants has been reflected in the Court of Appeal's Review of the Legal Year (Court of Appeal, 2004) and in recent decisions dealing with obsessive litigants (See, *Bhamjee v Forsdick (No 1)* [2003] EWCA Civ 799 *and Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113. In a very strongly worded preface to the Review the Master of the Rolls says:

> *There has been a significant increase of obsessive litigants determined to have no procedural stone unturned, regardless of whether they have any arguable ground of appeal. Nearly 40% of all who apply for permission to appeal are litigants in person, of whom only one tenth can demonstrate that they have arguable grounds of appeal. Yet each of them is entitled to an oral permission hearing. Each hearing takes about half an hour.*
>
> *In addition to this the two Deputy Masters of the court have to spend about two hours each day on utterly unproductive Registry work: determining and dealing with appellants notices which the court has no jurisdiction to entertain, dealing with groundless applications under Taylor v Lawrence which are flooding in at the rate of 200 a year and dealing with correspondence relating to defective applications. Four officers man the relevant section in the Civil Appeals Office. They handle matters which take up an inordinate amount of the court's time for very little advantage.*
>
> *Further reform of our procedure is required to ensure that our energies can be directed to providing justice for those who have a valid claim on our services.*

There may be specific reasons why the Court of Appeal attracts obsessive litigants, and persistence (if not obsession) is a defining characteristic of appellants, but what is the situation in first instance courts?

It is important to try and define with a little more clarity what we mean by difficult or obsessive litigants. There are three main species of behaviour which, although not uncommonly found in the same litigant, can individually or collectively lead to the judgment that a litigant is difficult or obsessive:

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

Vexatious litigant is a term of legal art[31] and for that reason we avoid using the term here, though such litigants usually have to have indulged repeatedly in the inappropriate issuing of claims or applications.

Are obsessive and difficult litigants common at first instance?

During the course of the research, the picture which emerged from both our scrutiny of court files, and the interviews we conducted, was one in which the number of unrepresented litigants in first instance proceedings who could be categorised as obsessive (or vexatious) was very small. We asked judges, court staff and lawyers how often they encountered unrepresented litigants who they considered to be difficult or even vexatious. District Judges, for example, variously described the proportion of such litigants as being:

> *de minimis*
>
> *a fraction of a per cent*
>
> *a tiny proportion, very, very, tiny*

Another District Judge was very reluctant to discuss obsessive litigants at all, believing that far too much attention was paid to them already. The Circuit Judges reported encountering obsessive litigants perhaps two or three times a year. In each

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[31] Lord Bingham identified the hallmark of a vexatious proceeding as having
.. little or no basis in law (or at least no discernible basis) that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involved an abuse of the court…" *Attorney General v Barker* (2000) 2 FCR 1

of the courts, staff said there were a handful of problem litigants whose names they could reel off immediately; the numbers averaged between four and six, rising to about a dozen in the largest court. Only one of the lawyers, whose practice included dealing with neighbour and boundary disputes, felt that obsessive litigants were a frequently encountered problem (and that lawyer estimated having encountered perhaps five unrepresented litigants in total during the 12 months preceding the interview).

On the family side, unrepresented litigants who presented serious difficulties were more often felt by those we interviewed to be demanding, needy, or abusive than obsessive. Those who were considered obsessive in their conduct of the litigation, were generally said to be even fewer in number, and different in character, to those on the civil side. As one member of staff put it, 'on the civil side you can make small claim after small claim but you know, you can't get divorced every week'. Where problems with obsessive litigants were cited by staff, judiciary and lawyers, it was mainly in the context of disputes over contact with children. One District Judge commented that:

> *you're going to get some people [who] are determined not to be represented because they are feeling very aggrieved and nobody can put forward on their behalf how aggrieved they feel about being denied contact or whatever.*

This District Judge said that unrepresented litigants in such cases could sometimes cause difficulties at hearings by wanting to cross examine the Children and Family Reporter about their qualifications. However, on the whole, the members of the judiciary we interviewed appeared relatively sanguine about having to deal with obsessive litigants at hearings, and spoke far more of their concerns about the impact on the court staff:

> *they are difficult personalities, and so they're the ones who give a lot of hassle to the staff, and they blame the staff for the system, they blame the staff for the judge, and they distract the staff from the work they should be doing.*

Court staff dealing with both family and civil cases reported that some obsessive litigants would regularly attend the court counter, sometimes on average once a week; others would phone just as frequently. Some would also, 'bombard' the court with correspondence. In one court, there was a litigant who faxed the court on a daily basis. One of the Circuit Judges pointed out a particular difficulty caused by such behaviour:

> *It can create problems, undoubtedly because you get this overload, and there is always this worry with litigants in person, that somewhere hidden in the forest is actually a valid complaint, or a valid point of concern, or a valid cause of action. And there is a, you know, you have to be very careful to make sure that, you know, you don't brush it all on one side and say that, 'I can't be bothered to read all this.'*

Most of the staff who worked on sections dealing with issuing of claims felt that on average, they personally had to deal with an obsessive litigant once a week or so. Often, that would involve their being tied up for half an hour or more on each occasion, preventing them from getting on with their other work. Scenarios described by staff as typical included:

> *he's just on the phone all the time, wasting people's time, and wants to know if you think the court is biased… … and the judges are corrupt. And you're going, 'yes, yes, hmm, hmm, can't comment.' And that's it.*

> *they accuse us of not being impartial. I mean, I had somebody yesterday accusing me of me being in breach of Article 6 of the Human Rights Act, because we were allowing a guy to make an application. And she was on the phone for 20 minutes shouting at me. I was trying to calm her down, but she kept saying she was suffering from a, you know, a nervous disposition and stress, so I couldn't. You know, we are entitled to be quite firm with them, but I didn't want to go over the top with her. So, I mean, it was 20 minutes wasted really.*

As this second quote illustrates, staff also said that they sometimes had to deal with personal abuse from obsessive litigants. In one court, we were told of a web site set up by a group of litigants to air their grievances against the legal system generally, on which allegations about a particular member of staff had been posted. Judges had also been subject to defamatory criticism.

There was, however, a strong consensus that despite their small numbers, the behaviour of obsessive litigants had a significant impact on the administration of the courts and on their opponents. One Judge summed the situation up as being that, 'the difficult ones are small in number but create mayhem'. As noted above, court staff and the judiciary said that obsessive litigants were generally encountered more on the civil side, and a fair proportion of these would be in small claims cases. Their *modus operandi* usually involved the issuing of multiple claims (in one case, as many as three per day over a period of several weeks) which disclosed no valid cause of action. Such claims were issued, 'willy nilly' and, 'against all and sundry.'

Some examples of difficult or obsessive behaviour

Our review of files supported the view that obsessive litigants at first instance were rare, and it could not be said that difficult litigants were common either, but it is worth giving some examples of cases we came across that came closest to unreasonable or obsessive behaviour, to alert the reader to the types of situation that can develop.

Misconceived claim based on suspicion rather than fact

In one case which had involved several solicitors being instructed, a claimant alleged professional negligence against a solicitor (their second solicitor) and barrister who had advised that a professional negligence claim against another firm of solicitors (the first solicitor) had no prospect of success, causing legal aid to be withdrawn. The claimant issued separate proceedings against both the first solicitor and the second solicitor and barrister. The central allegation seemed to be that the second solicitor and barrister had a natural bias in favour of solicitors: counsel was said to be biased because barristers generally relied on solicitors for work, and the second solicitors were said to be biased because they would want to prevent the Solicitors' Indemnity Fund having to pay out in respect of claims against fellow solicitors. The claimant however did not plead any specific circumstances giving rise to bias or appear to have any evidence of it.

During the course of the proceedings, the claimant had assistance at various points from a person described as a 'McKenzie friend', and also from two further sets of solicitors. This case therefore appeared to involve 'lawyer shopping': shifting advisers to get more palatable advice or conduct of the case. The involvement of the 'McKenzie friend' appeared problematic in that they had signed the claim form, and also filed an application for an adjournment on behalf of the claimant (this at the same time as one of these later sets of solicitors, who were applying for legal aid to represent the claimant, were themselves seeking an adjournment). Unless possessing qualifications or permission not apparent from the file, it therefore appeared that this person had conducted aspects of the proceedings on behalf of the claimant in breach of statutory provisions prohibiting unqualified persons from doing so, in addition to duplicating efforts by solicitors to deal with matters. That the claimant's conduct of the litigation had caused significant loss to the defendant, and risk to his/her own interests was suggested by the fact that the claim in this case was eventually stayed due to the claimant's failure to comply with an interim order awarding costs in five figures to the defendants.

A wild claim

In another claim, whose details are too specific to be repeated publicly, extremely fanciful allegations were made in support of a claim of a right to privacy and racial discrimination. On issue, court staff referred the claim to the District Judge, who ordered that the claim be stayed without being served on the defendant. The case was listed for hearing with notice being given to the claimant only, and warning that consideration was being given to striking out the claim on the grounds that it disclosed no reasonable cause of action. After hearing from the claimant in person, the District Judge struck out the claim and refused permission to appeal against the order. This claim was nipped in the bud at an early stage, with no costs of defending the proceedings being incurred by the defendant.

A series of repeated claims

In a claim relating to employment, the claim alleged deceit, misrepresentation, negligent/fraudulent mis-statement, breach of implied promise/contract, and negligence. The claimant had been offered and accepted a job with the defendant, subject to the receipt of satisfactory references. The offer was withdrawn following receipt of a reference which the defendant considered unsatisfactory. The claimant had previously issued three other claims in connection with the same matter. The claimant had also previously issued a number of other claims against various defendants, the majority of which appeared to be in connection with employment or related matters, over a relatively short period. None of the other claims issued by this claimant were successful; they were variously struck out, dismissed or discontinued. Four of the earlier claims, which were all issued around the same time, had been referred to the District Judge on issue and before they were served. The District Judge made an order staying the proceedings, and gave notice to the claimant that the court was proposing to strike out each of the claims out, as save for one element of one claim, they had no prospect of success. The claimant was sent a lengthy note of the District Judge's reasons for the order, and given a month to apply for a review of the proposed action, failing which the claims would stand dismissed. By dealing with these claims in this way, the defendants were saved the costs of defending them, but the court was put to some expense. The claim forms were all in dense handwriting, and the District Judge found it necessary to have a member of staff type out copies so that he could read and digest what they were all about before deciding what to do with them.

Confusion and difficult behaviour lead to court error?

This was a High Court claim analagous to a breach of contract. The defendant filed a defence outside the 14 day time limit, with a covering letter saying that the claimant had failed to complain prior to issuing proceedings, and seeking particulars of the claim so that it could be investigated. The claimant wrote to the court complaining about the lateness of the defence. The defence and the claimant's letter were referred to the District Judge, who made an order requiring the claimant to serve the defendant with full particulars of the claim, together with a copy of the receipt issued by the defendant which would prove there had been a contract. Various correspondence and documents from the claimant followed, including a letter querying the necessity of producing a copy of the receipt in question, and others enclosing sample copies of similar receipts issued by the defendant on other occasions but which could have no bearing on this case. Court staff replied to one of these letters at the request of the District Judge, stating that the order to produce the relevant receipt remained, and the claim would proceed no further until it was complied with. Soon afterwards, the claimant did file the correct receipt with the court, and told the defendant that it had been filed, but did not serve it on the defendant as required by the order. The court did not realise that it now had the correct receipt, and following several further exchanges of correspondence, the claim was eventually struck out on the basis that the claimant appeared unable to produce the receipt, and without it the claim was bound to fail.

This was a case in which the claimant was clearly obsessive: the correspondence was littered with various legal phrases and references to case law inserted at random and which made no sense; at one point the claimant threatened the District Judge with prosecution, and was variously copied the letters to the Lord Chancellor, and other politicians. However, the court erred in not picking up that the claimant had eventually produced the correct receipt. That was perhaps understandable given the claimant's previous correspondence and the filing of several other receipts which were irrelevant. Nevertheless, it appeared to us that having had to deal with the claimant's obsessive behaviour, the court had not had sufficient inclination to scrutinise the final receipt closely enough to see that it was the correct one, and that was an important factor in the claim being struck out. There was some likelihood that the claimant suffered loss as the defendant indicated that they may be willing to settle the claim on production of the receipt (although in the circumstances of this case the claim was likely to be of a very low value).

In family cases it was even harder to find cases in our sample where the behaviour of litigants appeared to border on the obsessive. These two cases are where we came closest.

Unreasonable pressure on CAFCASS

A case involving contact, in which the parent with residence of the children, and their partner, were vehemently opposed to staying contact on the basis that the non-resident parent was violent and mentally unwell. The court ordered a welfare report. Prior to receipt of that report, the partner wrote a vitriolic eight page letter to the Children and Family Reporter that included a threat that if the Reporter recommended staying contact with the non-resident parent, and the children suffered harm as a result, the partner would personally make it their life's work to sue CAFCASS, and to ensure that the Reporter lost their job. Annexed to the letter was a 'distribution list' indicating that the letter had been copied to a number of other individuals and organisations. The evidence filed by the first parent and their partner had also included statements totalling in excess of 60 pages, and transcripts of telephone conversations going back several years.

Unusual attempts to stop a divorce

This was a divorce case in which the petition was based on the respondent's behaviour. The parties had married overseas and the crux of the matter was the respondent's resistance to the divorce on cultural and religious grounds. During the course of the proceedings, the respondent appealed against the grant of decree nisi. One of the main grounds for the appeal alleged that the petitioner had received help under the legal aid scheme, when one of the conditions of their entry to the U.K. had been that they should not have recourse to public funds; the respondent's case was that this invalidated the divorce proceedings in some way. Decree Absolute was eventually granted, but the proceedings had taken over a year to reach that stage.

Fee exemption and obsessive litigants

The Court of Appeal has pointed to a relationship between fee exemption and the ability of obsessive litigants to pursue fruitless applications (*Bhamjee (No 1)*, para. 23). The court staff we interviewed said that obsessive claimants tended to be exempt from paying court fees, and this was felt to be a factor in their having no compunction about issuing multiple claims (see below more generally for evidence on fee exemption and remission), as it did not cost them anything. One Circuit Judge recalled a litigant who had not been exempt from paying fees, who had been

declared vexatious after issuing eight or nine claims, but said that was an exception. All four of the individual claimants that we identified from files as obsessive were fees exempt.

It is important to contrast this situation with the general position as regards fee exemption. Some court staff expressed an expectation that a large proportion of unrepresented litigants would be fee exempt. To assess such concerns we collected data on the incidence of fee exemption and remission. This data was collected for unrepresented litigants only, and based on information on Caseman and Familyman.

In family cases, the situation was as follows.

Table 36: Fee exemption/remission for issue fees (family cases)[32]

		Exempt/ remitted	Unrepresented litigant pays	Not applicable	Unclear	N
Unrepresented applicants	%	6.3	66.7	22.2	4.8	63
Unrepresented respondents	%		0.9	98.3	0.9	459
Both sides unrepresented	%	3.7	80.4	8.4	7.5	107

This shows clearly that it was rare for unrepresented litigants to be fee exempt, or have their fees remitted. Only 4 unrepresented applicants were exempt or had fees remitted (6% of all applicants or about 10% of all fee-paying applicants). 67% of applicants paid fees. For 27% the position either was not clear or the applicant was not liable for fees. Even more unrepresented litigants where both parties were represented paid fees (80%), 4% were exempt or remitted and 16% were not liable or the situation was not clear from the file.

In civil cases we also sought information on how often litigants in person were exempted from the payment of court fees or had fees remitted. This only happened in 6 cases, showing clearly that the incidence of fee exemption/remission was rare (although that was to be expected in view of the low numbers of individual unrepresented claimants in our samples).

This data does not support a view that fee exemption/remission is a major source or cause of encouragement for unrepresented family litigants. It is possible that *more* unrepresented than represented applicants benefited from exemption/remission

[32] 35 unrepresented litigants ended up paying fees, other than issue fees. 8 were in ancillary relief, 1 Children Act and 26 divorce cases. Only 2 unrepresented litigants would have paid such fees but were exempt or the fees were remitted.

(though this is unlikely given that a significant proportion of represented litigants would have had the benefit of legal help).[33] This does not counter the interview evidence that fee exemption/remission is a factor when litigants become obsessive but, given the small numbers of obsessive litigants in first instance courts and the relative rarity of fee exemption for unrepresented litigants, a relationships between fee exemption and unreasonable behaviour is only likely to occur in a very small number of cases. This suggests that any general reduction in the provision of fee exemption aimed at stamping out obsessive litigation is likely to be disproportionate.

A circuit judge suggested a more subtle solution targeted at repeat users of fee exemption. This would entail altering the system of fees exemption (and remission). It was suggested to us that provision might be made limiting litigants to a maximum number of fee exemptions during a set period of time. Under such a system, if a litigant reached the relevant limit and wanted to issue further claims or applications during the relevant period, they would not automatically be entitled to fee exemption, but would have to seek permission. As such a provision would place limits on access to the courts, the necessary permission would need to be sought from a judge, and not from court staff. If the judge felt that the proposed claim or application disclosed no cause of action or was otherwise an abuse of the court process, exemption would be refused. The Circuit Judge however perceived practical difficulties with such a system. One was that without a central register, staff and judiciary would only be aware of previous exemptions allowed in their own court, leaving open the possibility that litigants might get round the system by issuing in other courts. There is also the possibility that the system would simply divert judicial resources from arguments about applications to arguments about fee exemption.

What motivates obsessive litigants?

Some members of the judiciary volunteered reasons for litigants becoming obsessive: one felt that, ‘very often it is because they have a conviction that they’ve been wronged in some way’ and another cited situations in which there had been, ‘a germ of a complaint there to start with, but they simply lost the plot basically after that, and came to believe that everybody was against them.’ A third said there had been examples of people who, ‘because they’ve had a quirky win in the past, were just encouraged to litigate and re-litigate, and put in all sort of applications.’ In some

[33] They get exemption if on legal help, under legal aid fees are paid as disbursements.

instances, obsessive litigants were also said to be encouraged by various pressure groups and/or 'professional litigants in person' who assisted with their claims. The lawyer who dealt with neighbour and boundary disputes felt that the parties involved were very often, 'on the fringes of common sense' (although interestingly felt also that in such disputes this applied equally to a proportion of those who were represented).

More generally, obsessive litigants were said to be people whom both staff and judiciary considered, 'absolutely raving', 'having a screw loose' or 'frankly nutters' (in one court, there was said to be a cabinet designated 'the nutters cupboard' where files relating to their cases would be kept). This demonstrates a point we made at the start of this section: the perceived link between mental health problems and obsessive litigation. That this is the prevailing view of obsessive unrepresented litigants is interesting. What might it tell us?

Firstly, as a public institution, courts are likely to attract the attention of outsiders, seeking to validate their view of the world through appeals to justice or simply seeking human contact that has to, to a degree, serve them.

Secondly, those aggrieved by perceived or actual injustice, even if it is only based on the 'germ of a complaint', may respond as if a fundamental part of the social order has been violated and respond aggressively and mistrustfully. Sociologists of the legal profession point to the common role of practitioners in encouraging clients to come to terms with the apparent capriciousness and unpredictability of the administration of justice (See, for example, Sarat and Felstiner, 1986). Part of the job of the professional is to persuade clients to accept the legal process and its judgments, whilst still validating the client's moral judgement and self esteem. Unrepresented litigants, of course, have no such buffer, and no partisan adviser to explain in a way as palatable as possible to them that things are not as unfair as they seem.

A third possibility is a more uncomfortable one for those administering the justice system. As we noted at the outset, many of those we engaged with about unrepresented litigants shaped their immediate reactions around notions that unrepresented litigants were 'bad or mad'. The judges we spoke to were a notable exception and many staff were sympathetic and constructive in their attitude to unrepresented litigants. Many however also displayed a less flattering undercurrent. It could simply be that the 'mad, dangerous and stupid' litigants were what occupied

their thoughts because they posed the greatest challenge to their resources and skills, or that they provided better stories, but a notable effect of this tendency was the stereotypical portrayal of unrepresented litigants which in fact is not borne out by a more considered analysis of how often unrepresented litigants become obsessive.

How were potentially obsessive litigants dealt with?

Staff in each of the courts said they were generally on the look out for claims issued by obsessive or potentially vexatious litigants. They could not refuse to issue such claims, but were encouraged to refer them to a District Judge so that they might be nipped in the bud as soon as possible, and before service on the defendant, in the hope that neither the court nor the defendant would be put to the trouble and expense of dealing with them.

Claims by obsessive litigants were said to often be struck out as a result of District Judges taking the approach described above (and we saw two examples of this on the files). However, that would not necessarily be the end of the matter, as claimants would often appeal against orders striking out their claims (one Circuit Judge thought that such orders were 'inevitably' appealed).

There was also the possibility of seeking to have litigants declared vexatious, which would inhibit their ability to bring further proceedings. However, that route could not always be relied upon; one Circuit Judge said that persuading the Attorney General to embark on the process was 'like getting blood out of a stone' and in any event, 'normally by the time that position arrives, the files are so complicated, that nobody has time to go through them anyway.'

Shortly before we conducted the interviews, the Court of Appeal had approved the use of 'civil restraint orders' (*Bhamjee (No 2))* as an alternative, and although both the Circuit Judges said that these orders would be used where necessary, one felt that notwithstanding the remedies available to the court, controlling obsessive litigants remained 'almost an intractable problem'.

Summary

The characteristics of obsessive litigants are often taken to be the paradigm for unrepresented litigants generally. Making far-fetched or meritless claims, fruitless applications, and indulging in abusive or uncooperative behaviour all occurred in the courts we researched but it was a long way from being the dominant behaviour of

unrepresented litigants in the courts we studied. Nevertheless such litigants do pose resource issues disproportionate to their number and challenge the skills of judges and staff. Fee exemption and remission has been suggested as a catalyst for such litigants. Interview evidence supported the view that being free of liability for court fees ‘encouraged’ obsessive litigants. Our review of files, however, suggested that only a small number of unrepresented litigants were fee exempt.

5. A comparison of activity on cases with and without unrepresented litigants

In this section we are interested in comparing the characteristics of cases involving unrepresented litigants with those where the parties are represented. This is of interest in itself but also enables us to consider some broader issues about unrepresented litigants, such as, do their cases create obvious and sizeable burdens on courts in terms of additional activity on cases.

We were particularly interested to ascertain whether the levels of activity on cases told us anything about the differences between cases involving unrepresented litigants and cases where both parties are represented. Familyman and Caseman record four activities on a case that are of interest: orders made; judicial interventions not expressed as orders; hearings listed and hearings which were effective. From the last two it is possible to ascertain ineffective hearings (which are likely to indicate adjournments mutually agreed between the parties, or hearings vacated because a settlement has been reached). Data on cases in our sample that had been transferred in from another court have been excluded, it often not being possible to determine the level of activity prior to transfer. As a result all our subsequent analysis concentrates on cases commenced in our four courts. Given the period of time elapsed since cases were commenced, these cases were almost all (as far as we can be sure from court records) completed.[34]

Effective hearings in family cases

Table 37 shows summary data for the average (mean) number of effective hearings occurring for different case types using the different litigant–status combinations: where neither party is unrepresented; where only the applicant is unrepresented; where only the respondent is unrepresented; and where both parties are unrepresented. These figures include inactive and active litigants and partially unrepresented litigants are classified as unrepresented for these purposes (unless the contrary is indicated).

[34] We estimated that 15 of the Phase I cases might still be ongoing and 2 of the Phase II cases.

Table 37: Effective Hearings (Family)

	Who is unrepresented?	Mean	Std Deviation	N
Adoption	Neither party	1.4	0.9	16
	Applicant	1.2	0.5	25
	Respondent	2.1	1.1	18
	Both	1.6	1.1	17
Ancillary Relief	Neither party	0.7	1.3	259
	Applicant	1.3	1.4	8
	Respondent	0.8	1.5	102
	Both	0.3	0.5	8
Children Act	Neither party	3.0	2.1	148
	Applicant	4.4	3.3	13
	Respondent	3.2	2.8	110
	Both	3.8	3.3	24
Divorce	Neither party	0.1	0.2	65
	Applicant	0.0	0.0	6
	Respondent	0.0	0.2	86
	Both	0.0	0.0	52
Injunction	Neither party	1.2	1.2	44
	Applicant	3.0	.	1
	Respondent	2.2	1.0	65
	Both	2.0	.	1

In ancillary relief, Children Act and injunction cases, the presence of unrepresented applicants appeared to lead to a higher number of effective hearings. In adoption cases, the reverse appeared to be true. However, analysis of variance suggested that only the differences in injunction and adoption cases were significant.[35] Differences within those categories were also tested.[36] This suggested that cases where only the applicant was unrepresented averaged fewer hearings per case than cases where only the respondent is unrepresented. Another way of comparing the data is to focus solely on the status applicants or respondents (i.e. allocating cases where both parties are unrepresented to both groups). Unrepresented applicants had near significant higher numbers of hearings in Children Act cases (they averaged 4 hearings to 3 hearings where the applicant was represented) and significantly lower numbers of divorce hearings (0.0 to 0.4 hearings on average). The number of adoption hearings was lower for cases involving unrepresented applicants; the difference being near significance.[37] A comparison of cases looking solely at the

[35] Anova: Adoption, p= 0.01; Ancillary Relief, p= 0.4; Children Act, p= 0.2; Divorce, p= 0.2; Injunction, p= 0.0002.
[36] Using a Scheffe test, see Cramer, 1998, 127:Adoption: p=.01; all other comparisons, p>.1.
[37] T-test: Adoption p= 0.08; Ancillary Relief p= 1.00; Children Act p= 0.10; Divorce p= 0.01; Injunction p= 0.42.

status of respondents showed that the number of injunction hearings was higher where the respondent was unrepresented (2.2 to 1.3 hearings on average per case) as was the number of hearings in adoption proceedings (1.9 to 1.3 on average per case).[38]

Ineffective hearings

Table 38 shows summary data for ineffective hearings for the different case types by litigant status. Analysis of variance suggests that the differences in ancillary relief were significant and the differences in Children Act cases were near significance.[39] Within these groups, only cases where only the applicant was unrepresented in ancillary relief cases appeared to give rise to higher numbers of ineffective hearings than other combinations of litigant type. The differences were near significance. [40]

Table 38: Mean Ineffective Hearings by Case and Litigant Type

	Who is unrepresented?	Mean	Std Deviation	N
Adoption	Neither party	0.25	1.00	16
	Applicant	0.00	0.00	25
	Respondent	0.67	1.75	18
	Both	0.24	0.44	17
Ancillary Relief	Neither party	0.36	0.77	259
	Applicant	1.13	1.55	8
	Respondent	0.32	0.81	102
	Both	0.13	0.35	8
Children Act	Neither party	0.78	1.14	147
	Applicant	0.38	0.65	13
	Respondent	0.48	0.75	110
	Both	0.48	0.90	23
Divorce	Neither party	0.00	0.00	65
	Applicant	0.00	0.00	6
	Respondent	0.00	0.00	86
	Both	0.00	0.00	52
Injunction	Neither party	0.32	0.56	44
	Applicant	0.00	.	1
	Respondent	0.18	0.50	65
	Both	0.00	.	1

[38] Adoption p= 0.009; Ancillary Relief p= 0.65; Children Act p= 0.56; Divorce p= 0.16; Injunction p= $6.7x10^{-5}$.
[39] Anova: Adoption p= 0.20; Ancillary Relief p= 0.04; Children Act p= 0.06; Divorce p=.; Injunction p= 0.55.
[40] Scheffe: Applicant Unrepresented litigant compare with: No Unrepresented litigants, p = 0.07; Respondents, p = 0.06; Both Unrepresented litigants, p = 0.10.

If the analysis focuses on the status of the respondent (regardless of the status of the opponent) then ineffective hearings were less likely generally if the respondent was unrepresented (save in adoption where they appeared to be more likely) but the differences were only significant in Children Act cases.[41] If we focus only on the status of applicants, there were no significant differences between the means for represented and unrepresented applicants.[42]

Orders

Table 39 shows the position as regards the number of orders in a case. Analysis of variance suggests that there was significant difference relating to litigant status in all case types save for ancillary relief.[43] Adoption cases where only the respondent was unrepresented had significantly more orders than cases involving unrepresented applicants against represented respondents or cases where both parties were represented. The differences were significant and near significant respectively.[44] In Children Act cases the opposite was true, unrepresented applicants against represented respondents gave rise to more orders than cases where both parties were represented or only the respondents were unrepresented.[45] In divorce cases, it was where both parties were unrepresented that the number of orders was significantly (or near significantly) higher than cases where both parties were represented or only the applicants were unrepresented.[46]

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[41] T-test, p = .02; none of the other differences were significant, p > .1.
[42] T-test, p > .1.
[43] Adoption F= 3.6 p= 0.02; Ancillary Relief F= 0.3 p= 0.8; Children Act F= 3.7 p= 0.01; Divorce F= 5.8 p= 0.0008; Injunction F= 11.2 p= 9.51×10^{-7};
[44] Scheffe: unrepresented respondents compared with no unrepresented parties, p = .07 and unrepresented applicants, p = .04, otherwise p >.1.
[45] Scheffe: unrepresented applicants compared with no unrepresented parties, p = .05 and unrepresented respondents, p = .06, otherwise p >.1.
[46] Scheffe: both parties unrepresented compared with no unrepresented parties, p = .007 and unrepresented applicants, p = .05, otherwise p >.1.

Table 39: Orders by Proceedings Type and Litigant Status

	Who is unrepresented?	Mean	Std Deviation	N
Adoption	Neither party	1.4	1.0	22
	Applicant	1.4	1.0	26
	Respondent	2.7	2.4	27
	Both	1.9	1.7	18
Ancillary Relief	Neither party	4.6	1.9	285
	Applicant	4.8	2.9	10
	Respondent	4.7	2.1	114
	Both	4.3	1.8	8
Children Act	Neither party	3.7	2.6	186
	Applicant	5.9	4.7	16
	Respondent	3.7	3.4	135
	Both	4.9	4.1	28
Divorce	Neither party	2.0	1.4	65
	Applicant	1.3	1.2	6
	Respondent	2.4	1.2	87
	Both	2.7	0.6	52
Injunction	Neither party	1.1	1.2	96
	Applicant	1.5	2.1	2
	Respondent	2.2	1.3	85
	Both	2.0	.	1

Again, if we concentrate solely on whether the applicant was represented, then the differences for divorce (2.2 to 2.6 orders per case on average) and Children Act cases (5.4 to 3.7) were significant,[47] suggesting that cases involving unrepresented applicants in Children Act cases had more orders and divorces less. Where the difference analysed is whether the respondent was represented or not, the significant differences suggest that adoption cases involving unrepresented respondents involved more orders (2.4 on average per case compared to 1.4), divorce proceedings involved more (2.5 orders to 1.9) and the same was true for injunctions (2.2 orders on average per case compared with 1.1).

Interventions short of orders

Our final indicator of activity is any indication that a judge had intervened in a case, short of making an order. Such interventions included judges dealing with queries in correspondence or refusing an application or process without making an order (e.g. sending an application for an ancillary relief consent order back with queries because they were not satisfied that the order should be made).

[47] T-tests: Adoption p= 0.75; Ancillary Relief p= 0.89; Children Act p= 0.01; Divorce p= 0.01; Injunction p= 0.97.

Table 40: Mean Interventions in Family Cases by Case and Litigant type

	Who is unrepresented?	Mean	Std Deviation	N
Adoption	Neither party	0.0	0.2	22
	Applicant	0.4	0.6	27
	Respondent	0.6	1.0	27
	Both	1.0	1.2	18
Ancillary Relief	Neither party	0.4	0.8	288
	Applicant	0.7	1.3	10
	Respondent	0.6	1.0	114
	Both	0.3	0.5	8
Children Act	Neither party	0.2	0.5	188
	Applicant	0.7	1.4	18
	Respondent	0.2	0.4	139
	Both	0.4	0.7	28
Divorce	Neither party	0.1	0.4	65
	Applicant	0.3	0.5	6
	Respondent	0.2	0.6	87
	Both	0.1	0.4	52
Injunction	Neither party	0.0	0.0	104
	Applicant	0.0	0.0	2
	Respondent	0.0	0.2	92
	Both	0.0	.	1

Analysis of variance suggests the differences within the Children Act and Adoption samples were significant.[48] More specifically, the difference between the mean for adoption cases where both parties were unrepresented (where there was an average of one intervention per case) and none of the parties were unrepresented (where there were usually no interventions) was shown to be significant.[49] The mean number of interventions in Children Act cases that only involved unrepresented applicants (0.7 interventions per case) were significantly different from cases where both parties were represented and cases where the respondents were unrepresented (both these types of case averaged only 0.2 interventions per case).

When looking solely at whether there was an unrepresented respondent or not, adoption cases involving unrepresented respondents had 0.5 more interventions per case on average (the difference being significant). Injunctions also had more interventions, although the number of interventions in such cases was very low. [50] In

[48] Anova, Adoption F= 4.8 p= 0.004; Ancillary Relief F= 1.4 p= 0.3; Children Act F= 4.1 p= 0.007; Divorce F= 0.8 p= 0.5; Injunction F= 1.2 p= 0.3.
[49] Scheffe, p = .005. None of the other comparisons were significantly different, p > .1.
[50] Injunctions had a very small but statistically significant difference in the means of 0.03 interventions per case on average. T-tests: Adoption p= 0.01; Ancillary Relief p= 0.2; Children Act p= 0.5; Divorce p= 0.5; Injunction p= 0.08;

terms of the difference related solely to the status of applicants, the difference in Children Act cases was near significance: with a mean difference of .25 more interventions per case if the applicant was unrepresented.[51]

Composite Activity

Finally, we calculated a composite indicator of activity (the sum of the number of effective hearings, the number of ineffective hearings, the number of interventions and the number of orders).

Table 41: Mean Instances of Activity by Case and Litigant Type

	Who is unrepresented?	Mean	N
Adoption	Neither party	3.3	16
	Applicant	3.0	25
	Respondent	6.4	18
	Both	4.9	17
Ancillary Relief	Neither party	5.9	258
	Applicant	8.8	8
	Respondent	6.3	102
	Both	4.9	8
Children Act	Neither party	7.5	147
	Applicant	10.9	13
	Respondent	7.4	110
	Both	8.2	23
Divorce	Neither party	2.2	65
	Applicant	1.7	6
	Respondent	2.6	86
	Both	2.8	52
Injunction	Neither party	3.1	44
	Applicant	6.0	1
	Respondent	4.8	65
	Both	4.0	1

Analysis of variance suggests that there was significant variation in the distributions for all case types save Children Act cases, and the differences for ancillary relief were near significance.[52] Within these specific groupings, the only significant differences were in divorce cases and adoption cases. In divorce cases, the mean level of activity where there were no unrepresented parties was significantly lower than cases where both parties were unrepresented. In adoption cases, cases

[51] T-tests: Adoption 0.1; Ancillary Relief 0.9; Children Act 0.09; Divorce 0.6; Injunction 0.8.
[52] Adoption p= 0.002; Ancillary Relief p= 0.08; Children Act p= 0.2; Divorce p= 0.007; Injunction p= 0.002;

involving unrepresented respondents against represented applicants had significantly higher levels of activity than cases involving only unrepresented applicants and cases where both parties were represented.[53]

If we concentrate solely on the status of applicants, only in divorce cases do the differences between cases where applicants were unrepresented and cases where they were represented approach significance (and cases involving unrepresented applicants had only 0.3 extra instances of activity than cases with represented applicants).[54] Concentrating solely on respondents:[55]

- Adoption cases involving unrepresented respondents had an average of 2.6 more instances of activity than cases where the respondent was represented;
- Divorce cases involving unrepresented respondents had an average of 0.6 more instances of activity than cases where the respondent was represented; and,
- Injunctions involving unrepresented respondents had an average of 1.6 more instances of activity than cases where the respondent was represented.

Summary

Table 42 brings together the individual elements of activity. The tables are the average (mean) number of instances of each activity type per case.

This table suggests that where both parties are represented, there are generally fewer hearings, fewer orders and consistently lower levels of effective hearings when considered by case type. There was no consistent pattern for adjournments (where both parties are represented there are fewer adjournments in divorce cases and more in Children Act cases). Overall levels of activity tended to be lower for cases involving represented parties, although for two types of case (adoption and divorce) cases where only the applicant was unrepresented involved even lower levels of activity (see Table 41).

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[53] Scheffe: Adoption Respondents and Applicants, p = 0.006; Adoption Respondents and None, p = 0.03; Divorce None and Both, p = 0.04. Other combinations, p > .1.
[54] Adoption 0.5; Ancillary Relief 0.4; Children Act 0.2; Divorce 0.07; Injunction 0.6.
[55] Adoption p= 0.001; Ancillary Relief p= 0.5; Children Act p= 0.7; Divorce p= 0.003; Injunction p= 0.0002

Table 42: Summary of activity

		Hearings	Ineffective Hearings	Orders	Interventions	All activity
Adoption	Neither party	1.4	0.3	1.4	0	3.3
	Applicants	1.2	0	1.4	0.4	3
	Respondents	2.1	0.7	2.7	0.6	6.4
	Both	1.6	0.2	1.9	1	4.9
Ancillary	Neither party	0.7	0.4	4.6	0.4	5.9
Relief	Applicants	1.3	1.1	4.8	0.7	8.8
	Respondents	0.8	0.3	4.7	0.6	6.3
	Both	0.3	0.1	4.3	0.3	4.9
Children Act	Neither party	3	0.8	3.7	0.2	7.5
	Applicants	4.4	0.4	5.9	0.7	10.9
	Respondents	3.2	0.5	3.7	0.2	7.4
	Both	3.8	0.5	4.9	0.4	8.2
Divorce	Neither party	0.1	0	2	0.1	2.2
	Applicants	0	0	1.3	0.3	1.7
	Respondents	0	0	2.4	0.2	2.6
	Both	0	0	2.7	0.1	2.8
Injunction	Neither party	1.2	0.3	1.1	0	3.1
	Applicants	3	0	1.5	0	6
	Respondents	2.2	0.2	2.2	0	4.8
	Both	2	0	2	0	4

Where only the applicant was unrepresented there tended to be more hearings (save in divorce cases, where hearings would be rare in any event, and adoption hearings where the applicant was usually being supported through the process by the local authority). There were fewer adjournments, save in ancillary relief (where sample sizes were small in any event). Generally, also there were fewer orders though this was less true in ancillary relief and, in particular, in Children Act cases (where there appeared to be more orders). This would be consistent with unrepresented applicants in Children Act cases looking to the court to resolve more issues than would represented applicants.

Where only the respondent was unrepresented there tended to be fewer hearings than general (save in adoption cases, where there was the highest mean level of hearings). Interestingly this was especially true in divorce cases (where the respondent may well not be defending cases) but also in Children Act cases (where there would likely be a more substantial issue to contest). As regards adjournments, only in injunction and adoption cases did there appear to be higher levels of adjournments than other litigant combinations. As regards orders, the position was again mixed, with Children Act cases giving rise to fewer adjournments than was the case where unrepresented applicants were involved, but more in divorce and adoption cases. Similarly with interventions the position was not consistent, adoptions and ancillary relief cases tended to lead to more interventions. Indeed,

adoption was atypical as far as cases involving unrepresented respondents go, tending to lead to more hearings, adjournments orders and interventions than other litigant combinations.

Cases where both parties were unrepresented had higher levels of hearings in adoption, injunction and Children Act cases, but lower levels in divorce and ancillary relief (suggesting that the ancillary relief cases where both parties were unrepresented were largely uncontested). There were generally fewer adjournments where both parties were unrepresented, and fewer interventions, save in Children Act and Adoption cases. The incidence of orders higher in divorce cases and Children Act cases.

Multivariate analysis is the best method for testing whether differences in level of activity are probably due to the status of a litigant or not when case type is controlled for. Linear regression was used to test for any general relationships between the level of activity (on each of our indicators including the composite indicator), case type and litigant combination. The full results are set out in Appendix C. What the results suggest is that:

- Cases where only the respondent is unrepresented have significantly more effective hearings and significantly higher levels of overall activity;
- Cases where only the respondent is unrepresented appear to have fewer adjournments (a near significant finding);
- Cases where both parties are represented have significantly fewer orders and significantly fewer interventions by the court.

The coefficients from the regression calculations also tended to suggest that other cases where there were unrepresented litigants had more orders and more activity generally, but these findings were not significant.

Thus the picture is a complex one, but supports the view that the presence of unrepresented litigants in the family courts increased the instances of activity (hearings, orders and interventions). The increases were generally modest and not uniform (so certain types of unrepresented litigant appeared in certain circumstances to pose less of a burden on the courts in this sense). Also cases where both parties were represented are more likely to involve ineffective hearings and may suggest either more settlement behaviour (hearings were vacated as settlements are

reached) or more procedural adversarialism (hearings were listed to resolve interim or procedural disputes and were then vacated as these procedural issues were resolved). The settlement explanation is more plausible as we would expect to see greater levels of overall activity if such indicators were picking up greater procedural activism.

Indicators of activity tell us something about the trajectories of cases. Clearly, there were some differences, but of a minor nature. The indicators also tell us something of the impact of unrepresented litigants on the workload of the courts. What information we have, however points to unrepresented litigants increasing the workload of family courts. Whether or not more hearings are likely to take place (for example) is, of course, only part of the story. Hearings might be longer (or shorter) when one (or both) parties are unrepresented.

Civil cases

A comparisons of activity on civil cases with and without unrepresented litigants

Our principal interest here is in comparing ordinary unrepresented litigants (i.e. not institutions) with represented litigants. We thus exclude unrepresented institutional litigants from much of our subsequent analysis. Because we need to concentrate on whole cases we also exclude the small number of cases in our sample that transferred in from other courts.

Our comparison of represented and unrepresented litigants is based on the Phase I data collection. This concentrated on simple but key parameters of the case such as: whether cases were defended; what main activities occurred on cases; when cases ended; what stage cases reached; and, what appeared to be the outcome. As with family cases, non-representation includes the partially represented and inactive litigants.

Were Cases defended?

With the exception of unspecified and specified claims, very few County Court claims were defended or allocated.[56] Data for these claims is shown in Table 43.

Table 43: Was claim defended? Allocated?

	Who is unrepresented?	Defended	Allocated	
High Court		%	%	N
Specified	Defendant	17.1	2.9	35
	Neither party	65.4	15.4	26
Unspecified	Neither party			2
	Claimant	80.0	20.0	5
	Defendant	18.8	18.8	16
	Neither party	54.2	40.2	107
County Court				
Specified	Both sides	27.3	18.2	11
	Claimant	50.0		2
	Defendant	10.3	1.3	78
	Neither party	54.2	25.0	24
Unspecified	Both sides	0.0		1
	Claimant	75.0	25.0	4
	Defendant	40.0	24.0	25
	Neither party	72.0	38.1	168

It is clear from this table that unrepresented defendants were unlikely to defend cases. Cases where only the claimant was unrepresented or both parties were represented had higher incidences of defences (although the sample size for claimant's is small). Regression results suggest that even when case type and whether or not the unrepresented defendant were active are controlled for unrepresented defendants were less likely to defend cases (See Appendix C, Table 76). That is, failure to defend is not simply the result of inactive litigants in person. What we are not able to ascertain is whether failure to defend prejudiced litigants in person in any way. It is conceivable that the only option for such litigants was to not defend and negotiate terms. It is conceivable too that parties who instruct lawyers have stronger defences (worth paying for) and so are more likely to defend cases. Nevertheless, the lower level of defences from unrepresented litigants is likely to indicate some level of prejudice, even if only a weaker bargaining position over settlement instead of a judgment.

[56] Cases involving multiple defendants were recorded as being defended if a defence was entered by one or more defendants.

A similar issue to the filing of defences, is whether or not cases reached allocation. As might be expected, results were similar for whether or not a case was defended. For allocation the regression results suggested that whilst levels of allocation were lower when a claimant or defendant is unrepresented it is only when the defendant alone is unrepresented that a case is less likely to proceed to allocation.

Activity on court files

This section describes the levels of activity on civil cases, in terms of orders made; judicial interventions not expressed as orders; and hearings (both effective and ineffective). We were primarily concerned with substantive activity and so have excluded from this section activity relating to costs assessments and enforcement.

Table 44 shows the average (mean) level of activity of each type on cases where the litigants were represented or not.

Table 44: Mean level of activity on cases (County Court)

		Who is unrepresented?							
		Claimant		Both sides		Defendant		Neither party	
		Mean	N	Mean	N	Mean	N	Mean	N
Housing	Effective hearings	.		0.7	11	1.0	266	2.5	4
Other		0.0	32	0.5	14	0.5	70	0.2	79
Specified		0.0	2	0.6	11	0.1	78	0.3	23
Unspecified		0.0	3	1.0	1	0.3	23	0.5	162
Housing	Ineffective hearings	.		0.2	11	0.1	266	0.8	4
Other		0.1	32	0.0	14	0.2	70	0.2	79
Specified		0.0	2	0.1	11	0.0	78	0.2	23
Unspecified		1.0	3	0.0	1	0.3	23	0.5	162
Housing	Interventions	.		0.1	11	0.0	269	0.0	4
Other		0.3	32	0.0	14	0.1	73	0.1	83
Specified		0.0	2	0.1	11	0.0	78	0.0	24
Unspecified		0.3	4	0.0	1	0.2	25	0.2	168
Housing	Orders	.		1.2	11	1.2	269	6.0	4
Other		0.9	32	1.1	14	1.6	73	1.2	83
Specified		0.5	2	2.3	11	1.1	78	1.5	24
Unspecified		2.3	4	3.0	1	2.2	25	2.5	167

Table 45: Mean level of activity on cases (High Court)

		Who is unrepresented?		Both sides		Defendant		Neither Party	
		Mean	N	Mean	N	Mean	N	Mean	N
Other	Effective hearings	1.5	4	0.0	1	1.7	24	0.7	55
Specified		.		.		0.1	33	0.3	24
Unspecified		1.0	3	1.0	2	1.4	11	0.9	81
Other	Ineffective hearings	0.3	4	0.0	1	0.3	24	0.3	55
Specified		.		.		0.1	33	0.3	24
Unspecified		0.7	3	0.0	2	0.6	11	0.8	80
Other	Interventions	1.5	4	0.0	1	0.3	38	0.2	64
Specified		.		.		0.1	34	0.2	25
Unspecified		0.2	5	0.0	2	0.3	16	0.3	107
Other	Orders	3.3	3	0.0	1	2.9	35	1.6	62
Specified		.		.		1.5	34	2.0	24
Unspecified		1.7	3	1.5	2	3.7	14	3.8	102

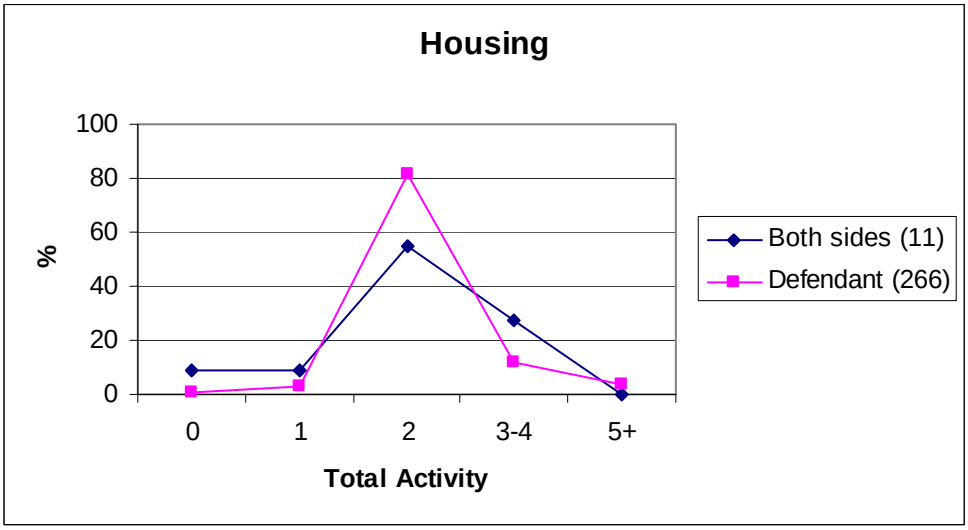
Regression data suggests (Appendix C, Table 78) that:

- There was a significantly higher number of interventions (short of orders) in cases where only the claimant was unrepresented;
- There were a higher number of effective hearings where there was an active unrepresented defendant;
- There were more ineffective hearings (usually these would be agreed adjournments) where both parties were represented.

Composite indicator of activity

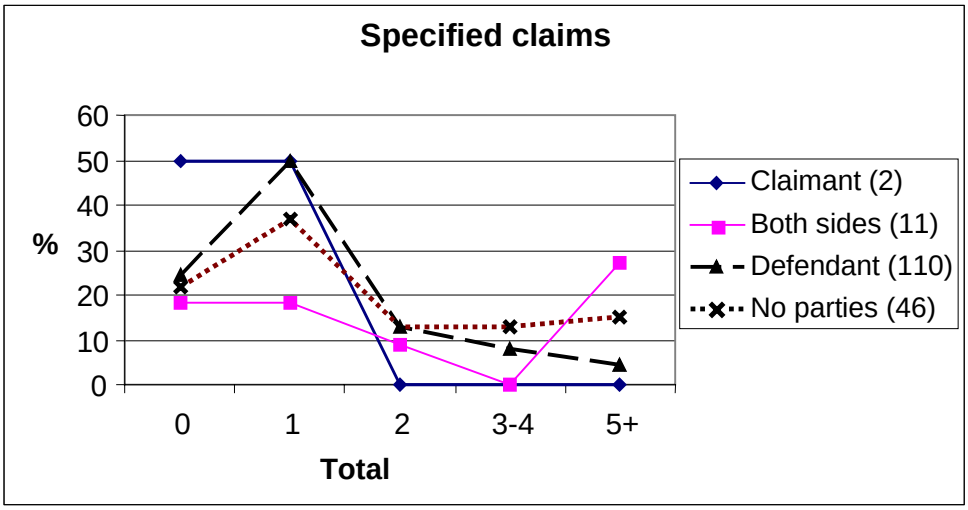
We also calculated a composite indicator of activity on cases. This was the total number of orders, interventions, and hearings (effective and ineffective) as an indicator of activity on the case. The following graphs summarise the situation. Numbers of cases to which the lines on graphs refer are shown in brackets.

Graph of composite indicator of activity (housing)



There is not much to choose between the two types of housing case, the vast majority of cases where only the defendant was unrepresented involved only two instances of activity, whereas where both sides were unrepresented more cases involved very little or slightly more activity than that.

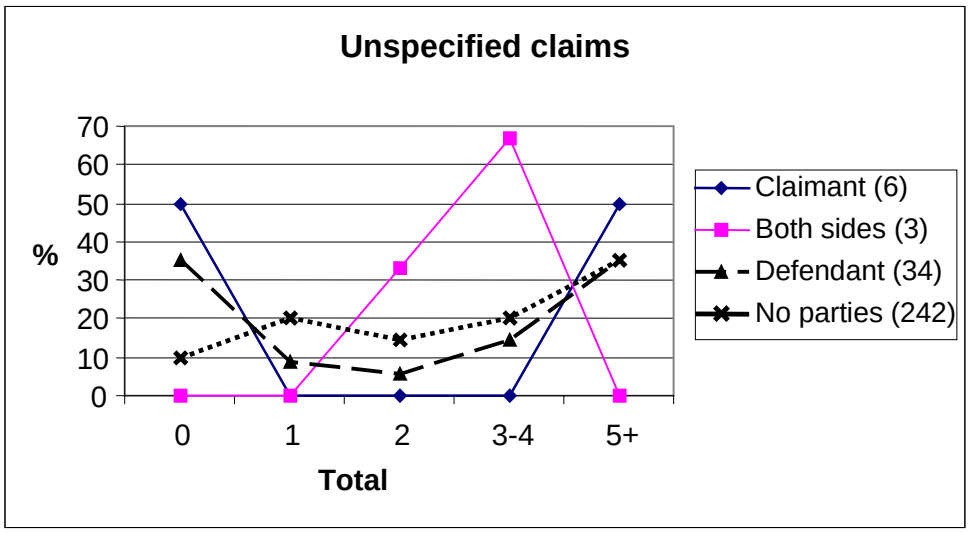
Graph of composite indicator of activity (specified claims)



In specified claims, there is something of a U-effect for the cases where both sides were unrepresented, they either involved minimal activity or quite a lot of activity, although the small number of cases where both sides were unrepresented means these results should be cautiously interpreted. Where only defendants were unrepresented the vast majority of cases had only very limited levels of activity, and less activity than cases where both sides were represented throughout. As we shall

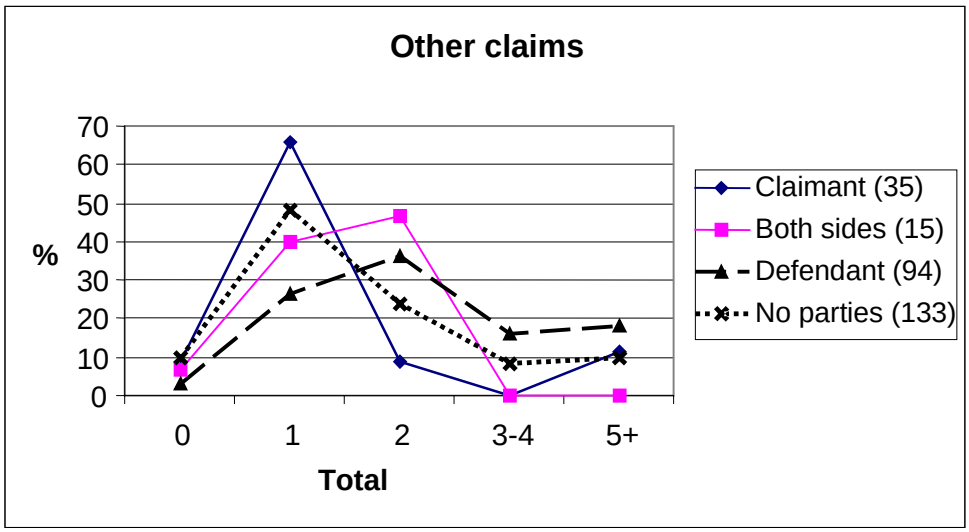
see, it seems likely that this is primarily due to whether or not unrepresented defendants were active or not. Inactive unrepresented litigants had lower levels of activity than unrepresented litigants, suggesting claimants had less to deal with due to other side's inactivity. Active unrepresented defendants had a profile of activity similar to those of represented defendants.

Graph of composite indicator of activity (unspecified claims)



As with specified claims, there was something of a U-effect, with unrepresented defendants tending to have lower levels of activity on more cases, though a significant proportion have high levels of activity. Again, this appears to be largely explained by whether an unrepresented litigant was active or not.

Graph of composite indicator of activity (other claims)



The differences in this graph are more difficult to interpret. All but a small minority of unrepresented claimants had very low levels of activity. This may well be because of the prevalence of commercial lease renewals in this type of work, which were generally straightforward. Cases involving unrepresented defendants appeared generally to involve higher levels of activity than other cases.

Table 46 shows mean levels of total activity by litigant and case type. There is no clear or consistent pattern. Regression results suggest that there were only *significantly* higher levels of overall activity in cases where there was an active unrepresented defendant (Appendix C, Table 79).

Table 46: Total activity by Case and Litigant Type

			Who is unrepresented?			
			Claimant	Both sides	Defendant	No parties
High Court	Specified	Mean	.	.	1.5	2.7
		N			32	23
	Unspecified	Mean	3.7	2.5	5.3	5.3
		N	3	2	11	80
	Other	Mean	7.3	0.0	4.8	2.7
		N	3	1	24	54
County Court	Housing	Mean	.	2.2	2.3	9.3
		N		11	266	4
	Specified	Mean	0.5	3.1	1.2	1.9
		N	2	11	78	23
	Unspecified	Mean	3.7	4.0	2.8	3.7
		N	3	1	23	162
	Other	Mean	1.3	1.6	2.2	1.7
		N	32	14	70	79

These figures do not distinguish between active and inactive litigants in person. The impact of active defendants can be seen in Table 47 where for all case types save housing in the County Court active unrepresented defendants increased the activity on cases fairly substantially. The position in relation to High Court cases was much less clear.

Table 47: Activity by Status of Defendant

		County Court			High Court		
		Active Df LiP	Other Df LiP's (inactive and status uncertain)[57]	Represented Df	Active Df LiP	Other Df LiP's (inactive and status uncertain)	Represented Df
Housing	Mean	2.4	2.3	9.3			
	N	69	208	4			
Specified	Mean	1.9	1.2	1.8	1.6	1.5	2.7
	N	28	62	24	8	24	23
Unspecified	Mean	4.4	2.8	3.7	4.6	5.0	5.2
	N	5	20	164	5	8	83
Other	Mean	3.1	1.8	1.5	5.3	4.1	2.9
	N	19	65	111	11	14	57

How long cases took

We are able to provide an indication of case length from Phase I data by measuring the time from the date of issue (in days) to the last order or step on the file. The following table illustrates how long cases took on average (mean) for different case types in the High and County Courts.

Table 48: Case length (issue to final step on court file) in days

		Who is unrepresented?							
		Claimant		Both sides		Defendant		No parties	
		Mean	N	Mean	N	Mean	N	Mean	N
High Court	Specified	.		.		111.0	35	172.6	25
	Unspecified	355.6	5	22.5	2	298.6	16	351.7	99
	Other	290.3	4	29.0	1	286.9	39	171.4	63
County Court	Housing	.		92.2	10	72.8	267	266.3	4
	Specified	123.0	2	131.5	11	67.4	78	124.8	24
	Unspecified	218.0	4	126.0	1	145.5	24	251.9	162
	Other	28.0	32	34.9	14	108.6	72	58.0	83

In general, cases involving represented claimants against unrepresented defendants appeared to take less long than cases where both parties were represented. Regression results suggest that whilst significant differences in case length were related to the type of case and the nature of the court (High or County Court), the status of the litigant did not have a significant effect (see Appendix C, Table 80). The

[57] This category will in fact include active and inactive because it contains cases identified as containing inactive defendants as part of the filtering exercise for Phase II and cases which were identified as involving unrepresented defendants for Phase I but did not proceed to Phase II for determination as to whether the cases involved an active litigant in person or not.

only exception was where there were active unrepresented defendants, which appeared to have significantly longer cases.

Summary

Family cases

Given the common preconception that unrepresented litigants lead to more court-based activity, the patterns that we found were weak. What the results suggest is that:

- Cases where only the respondent was unrepresented had significantly more effective hearings and significantly higher levels of overall activity;
- Cases where only the respondent was unrepresented appeared to have fewer adjournments (a near significant finding);
- Cases where both parties were represented had significantly fewer orders and significantly fewer judicial interventions by the court.

The picture is a complex one, but supports the view that the presence of unrepresented litigants in the family courts increases the instances of activity (hearings, orders and interventions). The increases although statistically significant were generally modest and not uniform (so certain types of unrepresented litigant appeared in certain circumstances to pose less of a burden on the courts in this sense). Inactive unrepresented litigants, in particular, tended to reduce the amount of court based activity. Also cases where both parties were represented were more likely to involve ineffective hearings and may suggest either more settlement behaviour (hearings are vacated as settlements are reached) or more procedural adversarialism (hearings are listed to resolve interim or procedural disputes and are then vacated as these procedural issues are resolved). The settlement explanation is more plausible as we would expect to see greater levels of overall activity on cases where both parties were represented if such indicators were picking up greater procedural activism.

Indicators of activity tell us something about the trajectories of cases. Clearly, there were some differences, but of a minor nature. The indicators also tell us something of the impact of unrepresented litigants on the workload of the courts. Whether or not more hearings are likely to take place (for example) is, of course, only part of the story. Hearings might be longer (or shorter) when one (or both) parties was

unrepresented. What information we have, however points to active unrepresented litigants increasing somewhat the workload of family courts.

In civil cases, unrepresented defendants were less likely to defend cases than represented defendants. This was true even for those who otherwise participated in proceedings in some way (i.e. failure to defend was not simply due to a failure to participate in proceedings), though for significant numbers of defendants non-representation and non-participation were characteristic of those that do not defend cases.

In spite of cases with unrepresented defendants being less likely to be defended there were some indications that cases involving active litigants in person were more likely to involve greater activity than cases where both parties were represented, though ineffective hearings were more common where both parties were represented (these were usually agreed adjournments). However the findings are not strong ones. The differences that exist are fairly minor in nature – so it is not the case that proceedings involving unrepresented litigants involve much higher numbers of hearings, court orders or other judicial interventions.

6. Nature of Participation

This section is wholly based on Phase II data from files where there were active unrepresented litigants. The first issue we consider is the mode of any participation by unrepresented litigants. From these files we are able to get a sense of the nature and extent of such participation. We were also able to compare their activity with activity by represented parties. This comparison did not enable us to show how the conduct of cases compared generally with cases when the parties were represented but it is a way of benchmarking unrepresented litigant activity against the activity of their opponents.

Family cases

Mode of participation in family cases

This table shows participation by active unrepresented first applicants and respondents.

Table 49: Mode of participation

	Adoption		Ancillary Relief		Children Act		Divorce		Injunctions	
	App	Res	App	Res	App	Res	App	Res	App	Res
	%	%	%	%	%	%	%	%	%	%
Issue/Response	100	38	55	78	77	24	100	93	67	
File documents	67		91	15	81	18	97	5	67	6
Letters or calls to court	21	6	82	29	58	29	29	8	33	15
Attending counter			45	2	4		83	2	67	3
Letters or calls to parties		3	73	78	38	20	34	32	33	6
Meeting with officer[58]	33	72			38	16				
Admissions										
Applications			36	2	12	2	9			3
Attend hearings	76		55	15	96	60		2	67	91
Undertakings						9				15
N	33	32	11	41	26	45	35	60	3	33

There are a number of things of note within this data. Firstly, 'active' respondents were not likely to participate by way of attending hearings, save for injunction cases and, to a lesser degree, Children Act cases.

[58] I.e. with Family Court Reporter, Reporting officer or Guardian ad Litem.

Secondly, unrepresented applicants (as might be expected) were generally more active than unrepresented defendants, they are more likely to have participated by dealing with the initial claim, filing documents, telephoning or writing to the court, making applications and attending hearings.

Thirdly, it is generally the case for both applicants and respondents, that acts of participation concentrate on 'back-office' procedures (dealing with documents and talking to the court staff) rather than hearings. Initiatives to assist litigants in person, such as duty advocates, tend to concentrate on court hearings, whereas the bulk of activity was prior to this. It is particularly interesting to note the high levels of attendance at court counters and correspondence and calls to the court apparent from files involving active litigants in person in ancillary relief, divorce and injunction cases (although the latter was on a very small sample size). Equally, there was not the same reliance on court counters in Children Act cases (ancillary relief and divorce cases being more dependant on paperwork).

As well as the forms of participation noted above, we noted other forms of participation. Other participation often included signing consent orders (in adoption and ancillary relief proceedings) and statements of information (in ancillary relief cases) or statements of arrangements for children (divorce). That this was often the only apparent form of participation from an unrepresented respondent is further evidence of the extent to which respondents do not engage with the process.

Documents in family cases

We collected information on which documents were filed by the parties and what the status of any litigant was when those documents were filed: i.e. whether they were represented, unrepresented, or unrepresented but the documents appeared to have been prepared with some assistance. The main types of documents are recorded in the following table.[59]

[59] Other documents filed by represented and unrepresented parties included notice of hearings, acknowledgements, and statements of service and affidavits of service.

Table 50: Documents filed on family cases involving active unrepresented litigants

	Represented %	Unrepresented %	Assisted %
Acknowledgment	7.7	41.1	1.6
Free standing substantive application	35.1	16.9	4.4
Petition	27.0	16.1	0.4
Application for decree absolute	25.0	15.3	0.4
Application for directions special procedure/decree nisi	26.2	15.3	0.4
Statement of arrangements	17.7	7.7	
Witness statement	24.6	6.5	2
Bundle	0.4	4.8	0.4
Expert report/valuation	0.4	3.6	
Ancillary relief statement of information for consent order	12.9	1.6	1.6
Amended/further supplementary petition	0.8	0.8	
Undertaking	0.8	0.8	0.4
Case history/chronology	6.9	0.8	0.8
Statement of issues	6.0	0.8	0.8
Answer/defence		0.4	
Substantive application within existing proceedings	6.9	0.4	
Financial statement in ancillary relief	3.6	0.4	1.6
Ancillary relief questionnaire	2.4	0.4	0.8
Response to ancillary relief questionnaire	0.8	0.4	
Notice to proceed with ancillary relief	3.6		
Costs estimate	2.4		0.8
Skeleton argument	1.6		

Base: 248

The main aim of this information is to ascertain the types of documents that are filed by unrepresented litigants. As a result, this data has not been separately analysed by case type (which would involve very small sub-sample sizes). A lot of the documents commonly filed by unrepresented litigants were basic steps in the divorce or acknowledgments. Free standing substantive applications were relatively common but still only occurred in a minority of cases. Generally, documentation was more commonly filed by represented parties, and they were more likely to file witness statements. Expert reports and bundles were more commonly filed by unrepresented litigants than represented litigants although the actual instances of such happenings were generally very small and so any differences are quite likely to be due to chance.

Hearings in family cases

During Phase II, we also collected detailed information on any hearings recorded on the case files and the status of parties during those hearings.

Excluding hearings where the litigant in person received no notice of the hearing (usually without notice (ex parte) hearings in injunction cases), there were 271 hearings where we could identify the status of the parties at those hearings.[60] The status of the parties and the nature of their participation during these hearings is shown in Table 51.

Table 51: Global summary for hearings in cases involving unrepresented litigants

	%	N
Mixed (one side represented the other unrepresented)	34	93
All parties represented	20	54
Represented party attends, unrepresented litigant does not	18	49
Both sides unrepresented and attend	11	29
Unrepresented party attends, represented party does not	7	20
Unrepresented litigants do not attend but write or phone	6	16
Represented parties do not attend but write or phone	4	10

As can be seen cases that have involved unrepresented litigants involved a number of permutations when it comes to hearings. The most common type (on about a third of hearings) involved unrepresented litigants appearing against represented opponents. Overall, less than half (45%) of hearings involved unrepresented parties who attended, about a quarter involved unrepresented litigants who did not attend (some of whom wrote or phoned). Interestingly, however, a fifth actually involved all the parties being represented (i.e. by the time of a hearing the unrepresented party had become represented or had obtained representation for that particular hearing).

At only one of these hearings was it apparent that the unrepresented litigant was assisted by a McKenzie friend (or similar). This was an interim Ancillary relief hearing where the opponent was represented.

[60] There were 43 hearings where we could not ascertain the status of the parties and 28 cases where one party received no notice of the hearing.

Civil cases

Mode of participation in civil cases

We noted earlier in the report that only between a third and a half of unrepresented litigants participated in proceedings in any way apparent from the court file. The following tables summarise evidence of participation on those cases where there was an active unrepresented litigant. This is likely to under record actual participation (as not all forms of participation would be evident on court files), but it does give an interesting indication of the nature of participation by different litigant types.

Table 52: Nature of participation (Claimants)[61]

	Business claimant %	Individual claimant %
Issues claim	95	80
Files other documents	65	45
Corresponds or phones court	45	35
Attends court counter		20
Corresponds with other parties	30	15
Defends counter claim	-	-
Makes admissions	-	-
Makes applications	15	15
Attends hearings	30	25
Gives undertakings	-	-
N	20	20

As can be seen from this table, the conduct of claims by unrepresented claimants centres more on the initial paperwork and filing of documents than on applications and attendance at hearings. As well as formal documentation, there was a relatively high proportion of cases where there was correspondence with or telephoning the court. Claimants also participated in ways other than those shown under the main headings above. The same indicators are shown for defendants in the following table.

[61] For Business landlord and tenant cases (lease renewals) it was rare for participation to take any of these forms and they are thus omitted from the table.

Table 53: Nature of Participation (Defendants)

		Individuals		
	Businesses	Not possession	Rent possession	Mortgage possession
Issues counterclaim or similar	0%	2%	0%	0%
Defends or acknowledges claim	24%	24%	39%	43%
Files other documents	38%	44%	6%	3%
Corresponds or phones court	47%	35%	10%	17%
Attends court counter	0%	2%	3%	3%
Corresponds with other parties	35%	28%	26%	27%
Makes admissions	18%	22%	0%	0%
Makes applications	15%	19%	32%	10%
Attends hearings	9%	35%	48%	63%
Gives undertakings	0%	2%	0%	0%
	34	54	31	30

As with claimants, the emphasis in terms of participation appeared to be on filing documents and corresponding with/phoning the court. However, this was much less the case for active unrepresented defendants in rent and mortgage possession cases where the focus was much more on attending hearings. Unrepresented defendants appeared slightly more likely to make applications than unrepresented claimants.

Documents in civil cases

Table 54 shows what documents were filed on cases involving active litigants and the status of the litigant filing the document, at the time they filed the document. Various document types were only ever filed by represented litigants: chronologies/case histories; cost schedules; and joint expert reports. One type of document (an admission) was only filed by unrepresented litigants.

Table 54: Main documents filed by status of litigant

	Assisted	Rep	Unrep
Admission	---	---	10.9%
Allocation questionnaire	0.4%	5.5%	2.9%
Amended statement of case	---	0.8%	---
Bundle	0.4%	5.0%	---
Chronology or case history	---	4.2%	---
Costs schedule	---	8.4%	---
Joint expert report	---	0.4%	---
Listing questionnaire	---	0.8%	0.4%
Request for default judgment	0.4%	5.5%	7.1%
Request for judgment on admission	---	2.9%	1.3%
Skeleton	---	4.6%	0.4%
Witness statement	1.7%	26.9%	10.5%

Base: 238

The only other document filed by unrepresented litigants reasonably frequently were requests for default judgment or judgment on admission (in specified cases). The filing of witness statements was also reasonably common although less common than the filing of witness statements by represented parties in these cases. However, what is most noticeable is that most of the documents on theses cases were filed by represented parties.

Applications

We also recorded the nature of applications made by parties on cases in Phase II.

Table 55: Housing cases applications

	Housing (n=49)			
	court (own motion)	represented party	unrepresented party	Assisted party
Adjourn generally	0%	6%	6%	0%
To adjourn hearing	4%	0%	0%	0%
To set aside order	0%	0%	2%	2%
Enforcement method	--	24%	16%	0%
Suspend enforcement	--	2%	35%	22%

Perhaps unsurprisingly given the nature of housing proceedings, most applications centred around enforcement and its suspension. It is interesting to note that unrepresented litigants often get assistance with the suspension of enforcement.

Table 56: Specified claims applications[62]

	Specified (n=33) represented party	unrepresented party	assisted party
Adjourn generally	0%	3%	0%
Amend case	5%	0%	2%
For further information	3%	0%	0%
Stay proceedings	3%	9%	3%
Strike out	2%	0%	0%
Summary judgment	9%	0%	0%
To adjourn hearing	0%	3%	0%
To extend/vary timetable	0%	6%	0%
To set aside order	6%	12%	0%
To transfer case	0%	6%	0%
Enforcement method	15%	3%	0%
Approve consent order	21%	0%	0%

[62] No applications were made of the court's own motion so they are not included in this table.

There were more varied applications made in the context of specified claims. Represented parties were particularly likely to apply for approval of consent orders, for enforcement or for summary judgement. Unrepresented parties were particularly likely to apply for an order to be set aside, for proceedings to be stayed or the case timetable to be altered. The prevalence of summary judgement and set aside applications suggests cases were being dealt with summarily or by default due perhaps to initial failure to participate by unrepresented litigants, failure in the quality of that participation, or failures in the quality of their cases. The emphasis on stays and adjournment/timetabling issues by unrepresented parties also suggests litigants struggling with proceedings. We are however talking about very small numbers of cases where such applications were made.

Table 57: Unspecified claims applications

	Unspecified (n=16)	
	represented party	unrepresented party
Appeal against final order	6%	0%
Consolidate case	0%	6%
Directions generally	13%	0%
Interloc judgment	6%	0%
Stay proceedings	13%	0%
Strike out	6%	0%
To adjourn hearing	13%	13%
To extend/vary timetable	0%	6%
To set aside order	6%	13%
To transfer case	6%	0%
Rep for enforcement method	19%	0%
Approve consent order	6%	0%
Redetermine payment rate	0%	0%

Only six applications were made in these main categories in unspecified claims by unrepresented litigants. There were no applications by assisted parties or of the courts own motion. They were of a similar nature to those made in specified proceedings suggesting similar problems.

Table 58: Other claims (applications)[63]

	Other (n=43)	
	represented party	unrepresented party
Amend case	6%	0%
Appeal against final order	2%	0%
Directions generally	5%	0%
For further info	2%	0%
Strike out	19%	0%
Summary judgment	5%	0%
To adjourn hearing	19%	12%
To extend/vary timetable	5%	2%
To set aside order	0%	7%
To transfer case	2%	2%
Rep for enforcement method	19%	2%
Approve consent order	13%	0%
Redetermine payment rate	0%	2%
Suspend enforcement	0%	9%

Again, whilst there was a wide range of types of application from represented parties, applications from unrepresented parties were mainly related to adjournments and enforcement.

Hearings

During Phase II, as with family cases, we also collected detailed information on any hearings recorded on the case files and the status of parties during those hearings.

Excluding hearings where the litigant in person received no notice of the hearing, there were 232 hearings where we could identify the status of parties at hearing. The status of the parties and the nature of their participation during these hearings is shown in Table 59.

[63] No applications were made in the main categories of application by assisted parties or of the courts own motion.

Table 59: Global summary for hearings in civil cases involving unrepresented litigants

Mixed (one side represented the other unrepresented)	70	30.2%
All parties represented	31	13.4%
Represented party attends, unrepresented litigant does not	33	14.2%
Both sides unrepresented and attend	13	5.6%
Both sides unrepresented, one party does not attend	53	22.8%
Unrepresented litigants do not attend but write or phone	21	9.1%
Represented parties do not attend but write or phone	11	4.7%
sum	232	100.0%

As can be seen cases that have involved unrepresented litigants involve a number of permutations when it comes to hearings. The most common type (on about a third of hearings) involved unrepresented litigants appearing against represented opponents. Overall, over half (about 60%) of hearings involved unrepresented parties who attended, but equally well over a third involved unrepresented litigants who did not attend (42%, some of whom write or phone). Interestingly, however, about 13% actually involved all the parties being represented (i.e. by the time of a hearing the unrepresented party had become represented).

At 13 of these hearings (6%) it was apparent that the unrepresented litigants were assisted by a McKenzie friend or lay representative.

Non attendance

Unrepresented parties did not attend in about a quarter of hearings in family cases that involved unrepresented litigants. In civil cases the figure was 42% (of which about a quarter wrote or phoned the court instead of attending). This suggests there were significant levels of non-attendance by unrepresented litigants, even though litigants showed some tendency to participate in some form in their case.

In interviews and focus groups we explored possible reasons for this. Court staff suggested a range of problems: litigants were nervous (interestingly, some of their comments suggested the grander the building the more it made them nervous) or frightened or buried their heads in the sand: ‘they think that nothing will happen if they don’t attend.’ Sometimes they felt it was not the court, or fear of being up against trained lawyers, but the thought of facing their opponent, particularly former

partners and spouses, again which led to this sense of dread (although they also felt family litigants were *more* likely to attend than housing possession defendants for instance). Other areas where our respondents (court staff judges and lawyers) suggested people were less likely to attend included respondents to domestic violence injunctions and debtors attending oral examinations.

One judge felt some did not appreciate they ought to come:

> *They don't understand very often is that they are supposed to come to court, particularly on applications to suspend warrants of execution. And applications to set aside judgments, sometimes people don't turn up, for some reason they don't realise that they have to, they think that putting in the application is, going to do the trick. It doesn't….. ..That's their own application. 'I didn't know I had to come.'*

Another was more sceptical and suggested it was a way of playing the system:

> *I could be cynical and say they know how to run the system because if you don't attend and you're a defendant you get an order against you then can apply to have set aside on the basis that you didn't attend and you can string out the proceedings for a very long time. …it's interesting to note how very often we have people breaking down on the motorway on the way on the morning of hearing. … you end up having to explain to the other side, well you can lodge a judgment in default but it will probably be a pyrrhic victory… …it just adds to the hassle.*

This same judge complained that unrepresented litigants never told the other side they would not be attending (something that our conversations with litigants and court staff tended to confirm). One reason for this perhaps is that it is not made clear to the litigants that the obligation is on them to do this.

In such circumstances of course, as the Judge made clear to us, the outcome would be that, without some good reason being stated on the file for non-attendance, the application would be dismissed. Interestingly, non-participation was not, however, perceived as problematic for the judge: 'It's a one sided argument, it doesn't cause the court any problem if they don't participate at all.'

Another judge suggested that the distance some litigants had to travel and the possibility that the case had settled affected people's decision to attend:

> *…Sometimes its distance, we deal with other councils… …and it's a long way for defendants to come.*

One of our litigants had not attended one of the hearings on his case, but blamed this on short notice:

YOU MENTIONED ONE HEARING WHICH YOU WEREN'T ABLE TO ATTEND. COULD YOU JUST TELL ME THE REASON FOR THAT?

It was just too short notice.

AND HOW MUCH NOTICE DID YOU ACTUALLY GET OF THAT?

A couple of, about three days I believe.

Another of the interviewed unrepresented litigants said, commenting on an (also unrepresented) opponent's non-attendance:

> *The fact that the defendant wasn't there. I mean that really speaks volumes. If somebody was suing me for £6000, whether or not I thought I was in the right or the wrong, I would be there to defend myself.*

Non-attendance at hearings by defendants in housing possession cases is a commonly reported phenomenon, which has been the subject of concern in several quarters. When looking at case files, we noticed several cases where there was evidence that unrepresented litigants who did not attend hearings because they had agreed repayment terms with their landlord or mortgage lender.

Dealing with the suggestion of non attendance

Understandably court staff tended to regard last minute reasons for non-attendance as excuses:

> *#1: On the listing section you do get a lot of calls from litigants in person as well, mainly in possession hearings and charging order hearings, day before the hearing saying 'I can't come tomorrow, what can I do?' Nothing and they have to fax us and explain what has happened. …Whether they can or they can't, I don't know, but they do phone and try and get out…[of] it that way and try and get it adjourned. Maybe because they're frightened or maybe it's because they have got a genuine reason and they can't make it.*
>
> *WHAT SORT OF REASONS DO THEY TYPICALLY GIVE?*
>
> *#1: All sorts of reasons. I can't get, mainly travel I would say, 'I can't get to the court.' Some people say 'oh I work shifts and I can't get out of work' and I don't think the judges look on them favourably, travelling and working shifts, you get this date in advance you should have arranged that around it. I mean, we had this one yesterday, this guy was supposed to be attending court, his wife was about to give birth. You get all, they are varied.*
>
> *#2: The child trick.*
>
> *#1: Oh yeah, I've got to look after the children.*

> *#2: Yeah, but you don't know, you can't say, you know, you can't say if they're lying or not.*
>
> *NO OF COURSE.*
>
> *#1: Or you know, we don't care in a callous way. It doesn't matter, because our opinion is totally irrelevant. The probability is, that the judge will have the view, well you've known about this for absolutely ages, so unless this is a convincing argument… …you should have made arrangements.*

Staff in another court emphasised they would get a written explanation and get it to the judge and then *try and adjourn the case* letting the other side know not to attend. These staff were noticeably more sympathetic to the idea that the litigant's reasons for non-attendance could well be genuine.

As we note later on, there was also some ambiguity in the way court staff advised litigants about non-attendance, though some simply said that they had to attend.

Sometimes court staff dealt with litigant fear and uncertainty about hearings very constructively:

> *If they're really, really nervous, I say 'if you want, I'll take you around and I'll show you what sorts of things you can expect on the day.'*

Some staff members gave litigants a rudimentary discussion of who would be where in the court. Another told them they could go and have a look at other (non-private) cases before their's was heard. Litigants wanted reassurance on the basic etiquette, who would be there, whether the hearing was public or not. Court staff felt that litigants came with all sorts of stereotypes of court process which inhibited and frightened them:

> *it's like the bankruptcy cases, they're so afraid of coming in, they don't know what to expect. Because they expect to see a judge in his wig and a gown.*

Summary

Family cases

Just because a respondent in a family case participates in some way in that case it does not mean that they were likely to participate by way of attending hearings. For adoption, ancillary relief and divorce cases participation by way of hearing was unlikely. Only in injunction and Children Act cases was it more common. Participation

often included signing consent orders (in adoption and ancillary relief proceedings) and statements of information (in ancillary relief cases) or statements of arrangements (divorce). That this was often the only apparent form of participation from an unrepresented respondent is further evidence of the extent to which respondents do not engage with the process. Unrepresented applicants (as might be expected) were generally more active, they were more likely to have participated by dealing with the initial claim, filing documents, telephoning or writing to the court making applications and attending hearings than respondents.

It was generally the case for both applicants and respondents, that acts of participation concentrate on 'back-office' procedures (dealing with documents and talking to the court) rather than hearings. Initiatives to assist litigants in person, such as duty advocates, tended to concentrate on court hearings, whereas the bulk of activity was prior to this. It was particularly interesting to note the high levels of contact at court counters and by correspondence and calls to court. Although unrepresented litigants did file documents, generally documents were more often filed by the represented parties in a case.

Finally, where there were hearings, overall, less than half (45%) of family hearings involved unrepresented parties who attended, about a quarter involved unrepresented litigants who did not attend (some of whom write or phone). Interestingly, however, a fifth actually involved all the parties being represented (i.e. by the time of a hearing the unrepresented party had become represented).

Civil cases

Participation by unrepresented litigants, particularly claimants, usually took the form of dealing with initial paperwork and the filing of formal documents. There was also a relatively high level of correspondence or telephone contact with the court. Making applications and attending hearings was less common. Conversely, for defendants in housing possession proceedings attending hearings was the most common form of participation although even so only about half of the cases involved individual defendants in rent possession cases involved that defendant attending at least one hearing. In mortgage possession cases about 63% of cases involving unrepresented defendants involved them attending at least one hearing.

Generally, represented parties on cases involving unrepresented litigants filed more documents than did unrepresented parties. They also filed a greater variety of documents. They filed more witness statements as well. The only document

unrepresented parties were more likely to file than represented parties were admissions and request for default judgements. No represented parties filed admissions.

As we have already noted, the making of applications by unrepresented parties was relatively rare. Represented parties on cases involving unrepresented litigants made more applications and made a greater variety of applications. Most applications by unrepresented parties centred on enforcement (especially in housing possession cases) and also on requesting for adjournment, stays and assessing aside of orders.

In spite of the perception that unrepresented litigants are highly likely to appeal, none of the cases in our Phase II sample contained appeals by unrepresented litigants against all the final orders. There were a small number of appeals but these were all made by represented parties.

7. Errors on cases where unrepresented litigants participated

We also scrutinised court files for evidence of difficulties which unrepresented litigants encountered in coping with proceedings, noting where they made errors and their potential to cause problems for themselves, their opponents and/or the courts. In order to assess whether unrepresented litigants were more or less likely than solicitors to make such errors, we also checked for similar errors by solicitors in the cases we looked at during Phase II of the research.

We were cautious in our identification of errors, limiting the recording of this data in three ways.

Firstly, insofar as unrepresented litigants were concerned, we focused on errors by those who were active and, except where failure to attend a hearing clearly disadvantaged a party, did not classify non-participation as an error.

Secondly, we only recorded those instances where errors were obvious from the file.

Thirdly, we focused on errors concerning procedural or administrative matters; we did not attempt to generally assess the merits of cases or the strategic decisions about how cases were handled. To do otherwise would have strayed into making difficult value judgements based on incomplete information. However, it was quite often possible to identify instances where a case demonstrated fundamental misunderstandings of relevant issues; where litigants had clearly failed to address an essential aspect of their case; and where their approach otherwise appeared especially problematic. We classified those as cases as containing an error.[64]

We also sought to grade the seriousness of errors, and categorised them according to whether they were:

- minor (those which were easily rectified at nominal expense and without delaying progress of the case by more than a few days, or otherwise had no impact on the parties or the court);

[64] In some cases, a party made more than one error, and in others, both sides made errors. To simplify matters, we have categorised cases according to the most serious level of error made by an unrepresented litigant or solicitor. Thus a case in which two unrepresented litigants made errors is only counted once. The total number of errors we found was therefore higher than reported here.

- middling (those which had some impact on the parties or the court in terms of leading to more than nominal expense or more substantial delays; were otherwise likely to have made cases more difficult to deal with, and/or led to unrepresented litigants having costs awarded against them);

- Serious (those which caused significant additional expense or delay; appeared to have affected substantive outcomes of cases, or were otherwise particularly problematic for the parties or the court).

Errors in family cases

Active unrepresented litigants made errors in 93 cases (37%). The errors were minor in 52 (21%) cases; middling in 27 (11%) and serious in 14 (6%) cases. In two of the cases with serious errors we would categorise the unrepresented litigants as difficult or obsessive. Solicitors made errors in 32 cases (13%). The errors were minor in 10 (4%) cases; middling in 19 (8%) and serious in 3 (1%) cases. So solicitors in these cases appeared to make similar numbers of middling errors but fewer minor and serious errors. As we have seen however these error rates need to be assessed against generally higher levels of activity by the represented parties on these cases. Thus unrepresented litigants were consistently more likely to make errors of all types.

Minor errors in family cases

Around two thirds of cases involving minor errors by unrepresented litigants were divorce only cases. Interestingly, such errors were often made by respondents, and although this may be due in part to there being more unrepresented respondents than unrepresented petitioners, it suggests that despite having much less to do in these cases, respondents also found it difficult to get basic aspects of the paperwork correct. The most common errors made by respondents were failing to answer questions on the acknowledgement of service regarding when and where (and sometimes whether), they had received the petition. Generally, these appeared to have been overlooked (it perhaps being felt that where the respondent had confirmed the fact of service by signing the acknowledgment, it did not matter that the time and place had been omitted). Another quite common error was in giving flawed reasons for objecting to paying costs. Those tended to be along the lines of, ‘Yes. I did not file for divorce’ or ‘I can’t afford it’ when a better response would have been that the petitioner was only claiming costs if the petition was defended; the petition was undefended, therefore the question of costs should not arise. However, in such cases there was rarely any detriment to the respondent, as the district judge did not award

costs in any event. Another minor error made by some respondents was in returning the acknowledgement of service to the petitioner's solicitor instead of to the court; in such cases, the solicitors had simply forwarded it on to the court. Minor errors by petitioners tended to involve getting the place of marriage or the wife's name wrong on the petition; where petitions were issued at the court counter, such matters were easily rectified when staff checked the papers.

The remaining minor errors by unrepresented litigants occurred in equal numbers (eight each) of adoption and Children Act cases, and two injunction cases, and were similar in nature to those described in divorce cases. These cases were much more likely to involve errors by applicants, suggesting that unrepresented applicants found it more difficult to deal with basic aspects of the paperwork in these cases. However, the numbers were small, and the imbalance between applicants and respondents may simply reflect the lesser propensity on the part of respondents in these cases to file documents.

Middling errors in family cases

Of the cases involving middling errors by unrepresented litigants, almost half (13) were divorce cases; seven were Children Act cases; six ancillary relief, and one adoption. Ten of the divorce cases involved errors by petitioners such as providing insufficient particulars of behaviour; failing to submit relevant documents, or failing to submit the correct fees. These errors led to petitions issued via the post being returned, and/or decrees being refused, with petitioners and the courts incurring the expense of putting things right, which involved delays (in one case of three months). Two of the three cases involving errors by respondents involved flawed objections to paying costs, where costs were awarded against them. The other case involved the respondent filing an answer out of time, which led to an additional hearing and a delay of three weeks.

Three of the seven Children Act cases involved errors in submitting applications or in serving documents, leading to additional expense and delay. The other four cases involved respondents including inappropriate material when acknowledging service of applications, by either referring to financial matters, and/or submitting statements prematurely. The six ancillary relief cases mostly involved errors in the submission of consent orders, leading to additional expense and delay. One case involved inadequate and inappropriate questions in a questionnaire to the other side (e.g. asking about instructions given to solicitors). In that case, the litigant's questionnaire was corrected by the district judge. The adoption case involved failure by the

applicants to formally notify the local authority of their intention to adopt prior to issuing the application leading to a delay (which it was difficult to quantify precisely as there were other factors which also caused delays in this case).

More serious errors in family cases

The 14 cases in which unrepresented litigants made serious errors were five Children Act cases; five ancillary relief; two divorce; one injunction and one adoption. Of the Children Act cases, two involved fundamental misunderstandings. One applicant was applying for a residence order to be made in favour of the other parent, who had no wish for such an order (this was after a protracted dispute over both residence and contact, during which the first parent had become frustrated at the other's behaviour regarding contact, and had formed the view that it would be simpler if the children went to live with the other parent). One respondent failed to contest an application for a residence order in the belief that as the child was 10 years old, the child's wishes would automatically prevail; the same parent was under the impression that a residence order would specify where the child should live, rather than with whom. One applicant's approach to conduct of the proceedings was generally problematic: the applicant inappropriately raised financial matters; made unrealistic demands about the scheduling of contact visits, and refused to have any dealings with the other parent or their solicitor other than at court, meaning that no progress was possible between hearings. Another applicant appeared to have inappropriately involved three children (the youngest of whom was nine) in the proceedings by encouraging, or at the very least facilitating, their writing directly to the judge complaining about a refusal to make a residence order; the judge called the applicant in to explain their part in the letters, but took no further action.

Four of the ancillary relief cases involved substantial delays by respondents in making the full and frank disclosure relating to finances required under the rules. These delays ranged from two to four months, and in one case eventually led to an application for the unrepresented litigant's committal. The other case involved an unrepresented respondent filing evidence but refusing to serve it on the applicant (who was also in person). The injunction case involved the applicant failing to appear on the first hearing of their application without apparent reason and without notifying the court, resulting in the case being struck out. The adoption case involved a birth mother who had mental health problems submitting several long letters containing plaintive pleas to the court in an effort to prevent the adoption. She appeared hopelessly out of her depth, but failed to seek representation despite efforts by the

child's Guardian ad Litem to persuade her to do so. An adoption order was made in this case and, whilst representation may not have led to the outcome being any different, it may have helped the mother to cope better with the proceedings, and would no doubt have made matters simpler for the other parties and the court.

There were two cases (one a Children Act case and the other a divorce) involving problematic approaches to proceedings by unrepresented litigants whom we would categorise as difficult or obsessive, and we reported the circumstances in Chapter 4.

Errors by solicitors in family cases

The minor errors by solicitors were fairly evenly divided between errors in completing paperwork (across the range of case types) which appeared to have been overlooked by the court, and late submission of documents in Children Act and ancillary relief cases, but which did not appear to have affected timetables or otherwise have prejudiced the other side.

The middling errors by solicitors involved six ancillary relief cases; six Children Act cases; five divorces; one adoption and one injunction. The majority of these involved errors in issuing divorce petitions and applications for consent orders in ancillary relief cases, including submitting the wrong fees, leading to the expense of putting things right and some delay. In several of these cases, documents had to be returned by the court more than once, leading to delays of up to two and a half months. Similar types of errors were made in two Children Act cases, in which one of the applications failed to explain why permission to issue proceedings was not required, and the other failed to provide reasons why the applicant's address should remain confidential.

Three other Children Act cases involved solicitors' flawed approaches to dealing with hearings: in one there was a delay of a month in replying to a letter from the court enquiring after consent to an adjournment. In another, solicitors left it until almost 5.00 p.m. before faxing the court to advise that neither they nor their client would be attending a hearing the following morning. In the latter case, a letter was posted to the unrepresented opponent the day before, but too late to stop them travelling some distance to court for an ineffective hearing. In the third case, there were three parties, two of which had submitted written confirmation of agreed directions, on the basis of which they did not propose to attend a hearing (this appeared to be a commonly accepted practice in family cases where all parties were agreed, to keep costs down). The solicitors for the third party however left it until the day before the hearing

to confirm their agreement, and then did so by post. Not surprisingly, their letter did not reach the court file in time for the hearing, which led to the District Judge making no order, and a fresh application for directions being required.

The three cases in which solicitors made more serious errors were as follows.

A divorce case in which a catalogue of errors in getting the grounds in the petition and the affidavit in support right led to the matter having to go before the district judge four times, and to a seven month delay, before decree nisi could be granted.

Secondly, a Children Act case in which, having been sacked, solicitors did not apply to come off the record, and did not return notice of a hearing, with the result that their former client missed the hearing.

Thirdly, an adoption in which there was a 12 month delay in filing the child's full birth certificate, despite the solicitors clearly being aware that this was required and reminders from the court (this actual delay caused by this failure was less but was difficult to quantify precisely as there were other factors in the case leading to delays).

Errors in civil cases

Unrepresented litigants made errors in 84 cases. The errors were minor in 29 (35%) of cases; middling in 15 (18%) and serious in 40 (48%) cases (the last including four cases in which the errors related to claims by individual litigants whom we categorised as difficult or obsessive). Solicitors made errors in 21 cases. The errors were minor in 5 (24%) cases, middling in 15 (71%) and serious in one case (5%). As with family cases, these figures underestimate the differences between unrepresented litigants and their represented opponents because represented parties were more active in filing documentation. Represented parties' error rates were consistently lower than unrepresented litigants. What is particularly noticeable is the high level of serious errors on civil documentation by unrepresented litigants suggesting a more pressing problem than we saw on family cases. Table 60 below shows the proportions of cases in which unrepresented individual, business, and institutional litigants made errors compared with solicitors. Housing possession cases are separated out as they are more homogeneous than the other case types. The Table for individual claimant cases excludes the four whom we categorised as difficult or obsessive which we discussed in Chapter 4.

Table 60: Errors in civil cases by unrepresented litigants and solicitors

Party making errors	%	N
Individual claimants	30%	20
Individual defendants (non-housing possession)	52%	54
Business claimants	45%	20
Business defendants	35%	34
Individual defendants (rental possession)	42%	31
Individual defendants (mortgage possession)	17%	30
Institutional claimants	10%	69
Solicitors	10%	211

Only unrepresented institutional claimants performed as well as solicitors on this indicator. As already noted, such litigants tended to be repeat players, and that, together with the routine nature of the proceedings, would appear to account for the relatively low proportion which made errors. In contrast, unrepresented individuals and businesses (presumably) unfamiliar with court proceedings made many more errors in dealing with their cases and often also caused difficulties for their opponents and the courts. This is further demonstrated when the seriousness of errors made by unrepresented litigants other than institutional litigants is compared with those made by solicitors. Although a greater proportion of errors by unrepresented individuals and businesses were minor (33% compared to 23%), in cases where errors did have some impact, all but one of those by solicitors were middling, whereas 49% of those by unrepresented individuals and businesses were serious.

Although the numbers for the individual types of unrepresented litigants were quite small, they suggest that unrepresented individual claimants in non housing possession cases fared the worst: all five of their cases involved serious errors. Unrepresented individual defendants in non possession cases, and unrepresented business defendants, also did badly, each making serious errors in more than half of their cases (16 out of 28 and 7 out of 12 respectively). In comparison, business claimants performed relatively well, with only two of their nine cases involving serious errors, as did institutional litigants (one serious error). Individual defendants in possession cases also appeared to do reasonably well on the seriousness criteria: only four of their cases involved serious errors, and two thirds (12 out of 18) involved minor errors. However, we think that is more likely to reflect the nature of these proceedings and the way in which we categorised errors, rather than defendants coping relatively easily with procedural matters in such cases. The impression we gained during the research was that forms of reply filed by defendants assumed less importance in possession cases than in other types of case, as district judges tended

to place more reliance on information presented at hearings. Given this, errors in forms of reply were probably less likely to have any impact on the progress or outcomes of cases, and therefore were more likely to be categorised as minor rather than middling or serious.

Types of errors made by unrepresented litigants and solicitors in civil cases

Minor and middling errors in civil cases by both unrepresented litigants and solicitors were similar in quality to those in family cases. Minor errors tended to involve getting various aspects of the paperwork wrong, without that affecting the progress or outcome of cases. Middling errors generally involved various aspects of procedure not being handled very well by unrepresented litigants or solicitors, for example, defences being filed late, and errors which led to paperwork having to be returned, which led to some additional expense being occurred and to delays of up to three months, but without affecting ultimate outcomes. One of the errors by solicitors involved failing to attend a hearing or arrange alternative representation without notifying anyone in advance. That appeared to have been due to a simple diary error, but their client was left to deal with the hearing in person, and the district judge with little alternative but to adjourn to the next available date, which was two months away.

Serious errors in civil cases

The serious error by solicitors arose in a case in which they were representing individual claimants applying for an injunction. The claim was defended, allocation questionnaires were issued, and the claim was struck out due to failure to file the claimants' questionnaire. There was no indication on the file as to why the questionnaire was not filed, but the time for doing so fell during the period when the solicitors were on the record (they later came off) and we therefore classed this as a serious error (though it may well have been due to the litigant not their lawyer).

Serious errors by unrepresented parties mainly involved misunderstanding the legal and procedural issues involved, resulting in their either failing to address essential aspects of their cases, and/or introducing irrelevant matters. In several such cases, errors appeared to have led to, or at least contributed to, cases being lost. In others, they led to litigants going to the trouble and expense of defending apparently lost causes. They included the following:

An individual making a claim against a public body. The particulars of claim were vague, and failed to plead the existence of any contract or other basis for the defendant's liability. They also failed to state what remedy was claimed. The claim

was defended and allocation questionnaires issued. The claimant filed their allocation questionnaire but failed to pay the necessary fee or make an application for exemption from the fee. Having issued the appropriate warning, the court struck the claim out.

An individual landlord claiming possession of a flat let on an assured shorthold tenancy. The claim was issued under the accelerated possession procedure which (for various technical reasons) was the wrong procedure to use. The claimant alleged non payment of rent, serious damage to the property, and disturbance to neighbours all caused by the tenant. However, despite it being suggested by the district judge that they take legal advice as they might wish to amend the claim, they failed to do so, instead appearing to rely on assistance from a lettings agent. The claim was eventually struck out at a hearing.

A business making a debt claim for approximately £8,700. The claim form was returned 'gone away', and the court informed the claimant that they would need to effect service themselves. No attempt was apparently made by the court to explain what this meant and the claimants failed to effect service, but five months later requested judgment in default, which was refused due to the defendant not being served.

One of two individual defendants to a claim about £20,000 under a guarantee for a bank loan (made to a company of which they had been directors) participated but was unrepresented. The first defendant took no part in the case. The second filed a defence briefly stating that they had not known what they had been signing when they signed the guarantee, and had not had independent advice at the time, but gave no details of the circumstances. The defence was struck out and an order made that unless a further defence containing full particulars was filed, the claimant would be able to enter judgment. The defendant failed to comply, and the claimant obtained judgment in default.

An individual defendant to a complex claim for breach of contract valued in excess of £250,000 which the defendant eventually lost. There appeared to be two main factors in this. Firstly, the defence generally consisted of bare denials and, despite the claimant's solicitors trying to assist by sending an extract from the Civil Procedure Rules indicating what was required in the defence, the defendant failed to rectify this. Secondly, the defendant's case was based on the claimant having orally rescinded a written contract, but the defendant failed to file any evidence of this.

One of two individual defendants to a debt claim for £12,000, arising from a loan taken out by them jointly, and for which they were therefore jointly and severally liable. The second defendant filed a defence in which liability was accepted for a proportion of the debt, but defended the remainder of the claim on the basis that the other defendant had spent the rest of the money. The defence was subsequently withdrawn after the defendant obtained legal advice on their joint liability.

A business defendant (in fact a solicitors' firm) to a claim by a former partner, seeking an indemnity in respect of partnership debts. The defendant failed to attend a hearing at which judgment was given in favour of the claimant. The defendant then submitted an application which appeared to be a request for judgment to be set aside, but did not specify the remedy applied for, and did not indicate that there was a valid defence to the claim. The application was dismissed at a subsequent hearing.

A property development company defending a claim in respect of failure to make good defects in a new build property. The defendant failed to file a defence, and the claimant obtained judgment on liability, with damages to be assessed. The defendant's case was handled by the company secretary who appeared to have some legal knowledge, but dealt with the case without addressing the fact that the question of liability had already been decided, and failed to comply with directions to file a response to the particulars of claim. The ultimate outcome in this case could not be ascertained, but the defendant was eventually debarred from calling evidence, and it was therefore likely that the outcome was not favourable to them.

A housing association claiming possession of a property let under a licence agreement, and also for arrears of payments due under the agreement, but without specifying the amount claimed. The result was that a money judgment was refused, meaning that the claimant would be unable to recover the sums owed unless they issued fresh proceedings.

What interviewees said about paperwork

Litigants generally reported that paperwork was straightforward but time consuming. It was not uncommon for it to be perceived as unnecessary. Staff members, judges and lawyers were likely to say the quality was variable and sometimes very poor. It is worth noting that they would also criticise the quality of solicitors' paperwork. Court staff pointed out it may be clerks or secretaries doing the paperwork in solicitors'

offices and one judge suggested solicitors' debt claims were worse than litigants in persons' because they were standardised and contained minimal information:

> *Oddly enough I think it is worse when a solicitor does it sometimes, because they just press a button on their WP and you just get an invoice or debt or something, and almost no information at all.*

Another judge criticised solicitors' trial bundles, although several said they would get solicitors to do trial bundles as to get litigants in person to do them was difficult.

> *Some of the trial bundles prepared by solicitors that we get are bizarre. Common sense seems to go out of the window in terms of putting them together in a logical sequence. So I wouldn't say that, you know, it would be wrong to think that solicitors are whiter than white. They're not.*

Generally, however, it was clear that unrepresented litigants' documentation posed greater problems than that of represented parties. General problems discussed were the submission of difficult to read handwritten documents; including too much information; missing the point or failing to prioritise what is relevant; and, failing to provide comprehensive and ordered financial information (in debt/housing matters). This judge felt that unrepresented litigants struggled more with paperwork than with hearings:

> *Litigants in person, very often seem to miss the crucial point and, and get themselves tied up in awful knots over things that are actually not key to the issues which I have to actually decide. So I think that litigants, in summary I would say litigants in person struggle with the paperwork side of things, probably more than they do with the hearings.*

Another judge commented on how the paperwork proliferated with some unrepresented litigants and how difficult this made it for the judges. The implication is that …… voluminous paperwork is ignored.

> *it is not an uncommon feature to find a file with a litigant in person which has grown out of all proportion to the issues because they constantly sending documents, writing to the court, sending documents in, and believing somebody's going to read all of them at that point… there is always this worry with litigants in person that somewhere hidden in the forest is actually a valid complaint, or a valid point of concern or a valid cause of action. … you have to be very careful to make sure that, you know, you don't sort of brush it all on one side and say that I can't be bothered to read all this. … it is unrealistic, judges are as busy as everyone else, it may be unrealistic to expect a judge to read every piece of paper. Particularly if it's not easy to read, which in some cases it is not. Or if it's not clear what relevance it has. And inevitably I think, even if there is a reason to send stuff in, again there is always an appreciable proportion who do not arrange it in a coherent order.*

Although pleadings could be well dealt with, some lacked focus:

> *You sometimes get pleadings quite well prepared by litigants in person. But, well, quite often they are fairly diffuse, chatty, very, very long, sometimes you get 20 to 30 page documents with no paragraph numbering for example, which is difficult to cope with. But sometimes we have to make orders that statements put in are to be treated as the defence.*

Another judge found the difference in litigant in persons' paperwork quite strong:

> *Well it's vast, because obviously the litigants in person don't know about the legal framework, you know they just write down their thoughts on a piece of paper and you have to try and, see whether or not that comprises of cause of action.*

Another judge warned against generalising:

> *There are some litigants who prepare meticulously, it depends on their background and what they're used to, if they are used to preparing reports and working in an office environment, and they are used to preparing papers for their meetings or whatever, and used to writing letter, then they, you'll get paperwork prepared as meticulous as a solicitor. ….[Y]ou can have two extremes, you can have some litigants in which they give you bare minimum and it is very difficult to make out what the case is, and then you have other litigants who throw everything in and give you pages of documents, for example. Then you have to try and sort out what it's all about. So I don't think you can generalise, there's obviously a very broad range and I wouldn't want to say that all litigants do this or all litigants do that, because they don't.*

A further judge felt that solicitors were much more likely to get to the crucial point and present papers in an orderly way:

> *it's far more likely with a solicitor that you will receive a bundle of papers that frankly make sense. They're easy, they've addressed the issues and, that and are properly presented, neatly presented, are easily assembled and don't stray into wholly irrelevant areas. Litigants in person, very often seem to miss the crucial point*

Of course, many of the general points made about the difficulties for unrepresented litigants are obvious. They don't understand the law, they can't fully explain their case in legally relevant terms, and so on. Staff and judges referred to litigants coping poorly with the cumulative effect of procedural aspects of a case. This could have significant consequences as this judge noted:

> *The case may be struck out for example, because they just don't prepare their case properly. They don't put things in on time, they don't prepare the right documents, they don't serve lists of documents in time. In*

> *matters like that, you put them under some sort of condition then, make an unless [order].*

We wanted to explore in some depth more specific examples of difficulty, to begin the process of ascertaining the extent to which such problems could be remedied.

Initial documents

When litigants were asked how they found issuing their claims, several described a protracted process, and one over which some of them, at least, took great care:

> *It took me quite a while just to, the words and to be very, very careful. …I put the claim in and then I altered it. This is, I did it over a couple of weeks and I did it and then I thought no that is not quite right and so I altered it several times.*

This litigant sought help from the court staff and had to deal with issues of fee exemption/remission:

> *You have to wait a while, and going back and forwards and that to the County Court office and just asking questions and getting help filling out forms. And just the whole rigmarole about paying, because I was unemployed at the time, and have no savings to speak of, and trying to work out whether I needed to ask for help in paying my court fee or not, and then I found a job, so I had to pay the court fee, so I lost on that one.*

Several of the litigants we spoke to described this part of their case as fairly straight forward.

Staff, on the other hand, said claims varied from the good to the awful, the very brief to ones that were very long. Partly the differences were between those that were word processed and those that were not. According to court staff, some litigants had a tendency to ramble on in their claims, because they do not know what is relevant and what they can exclude as irrelevant.

Staff also said civil claims might be returned for a number of very basic errors such as failing to include the claimants address or providing incorrect fees. It was also felt that unrepresented litigants often failed to properly specify interest claimed. They also not uncommonly filed evidence with the claim, rather than wait until the appropriate stage in the proceedings.

Several court staff tempered their view by saying solicitors made errors too, and one court staff member felt, backed up by a survey that they had done of divorce petitions, that solicitors made as many or more errors than litigants in person. Private landlords struggled when taking possession proceedings in person, failing to serve

proper notices prior to issuing proceedings and not coping where they chose to proceed by the accelerated procedure.

Postal claims were sometimes of poorer quality than cases issued over the counter because with the latter staff had an opportunity to check with litigants that basic details were specified in claims before they were issued.

> *#1:If it came in over the counter and I said, 'it says Joe Bloggs owes me fifty quid' and nothing else, I'll say, 'well you might want to put the date there and why he owes you £50 to explain to the judge, to give the judge a little more information.'*
>
> *#2: Was it a cheque that bounced or something like that? Was it a loan?*
>
> *#3: So, at the counter I will explain to them that they may need some more information but legally we can't send it back if it comes through the post.*

Staff said, they would not, however, ordinarily read the claim and check it for coherence or any basic legal tests. In terms of the legal coherence of the claim, staff said it was the judges who were the first to read the claim although it was clear that historically staff had involved themselves in more thorough checks;

> *We used to check medical reports, everything was there, if they'd claimed interest, if they'd got the correct wording and if it was out of the jurisdiction if they've got the wording, if they hadn't we used to send it back.*

This staff member explained the logic behind not checking claims, which was partly about placing the onus on litigants, and partly about court resources. This sometimes appeared to cause tension with the judges:

> *Part of the thrust of the Woolf reforms was that the onus is on the person lodging the documents to get it right. And if they don't get it right, we could even apply sanctions…. So, the culture of the court staff is to not check things very carefully, we haven't got the time and the training to check the depth of the form, but … …[when the judge sees it] the judge is saying 'well you haven't exhibited this and this hasn't been exhibited and this is insufficient proof of, why wasn't it checked?' We explain to the judge and then go back to the litigant, and it's a month later and he's saying well, you know 'I asked you to check it, why didn't you check it?' and it's a sort of difficult line.*

Conversely, as we noted when discussing obsessive litigants, staff might fast track claims to judges where the case seemed to be 'gibberish' or come from 'regular' claimants without the claim necessarily being served.

According to staff, divorce petitions often had to be sent back, because of technical mistakes, and the capacity of unrepresented litigants to be misled by the notes for guidance.

Damages claims posed problems because litigants did not know how much to claim for and sought the advice of staff which they were, understandably, unable to give. Staff mentioned that they were promoting the use of money claims on line (this was something we noticed in all four courts whilst we were working in them). Another matter worth commenting on is that court staff reported unrepresented litigants frequently asking about the merits of their claim when they issued, along the lines of 'what do you think? Do I have a chance?' (see further in discussion of advice by staff).

Defences and responses

As with other documents, litigants in person provided defences of variable quality, as this court staff member explained:

> *We've had ones with swear words all over them. We've had basically some quite professional who will go into the whole saga of the case, and say the company has made a mistake, because they've, they don't owe the money, they should have issued them a credit note, in fact they probably owe them money. And some [he estimated about 5%] are just a mess, a total mess and get struck out.*

One court staff member suggested litigants often made part admissions that were in fact full admissions (admitting the claim but not legal costs) which at a technical level was a mistake, although they would, it seems, put these cases to claimants anyway:

> *With part admissions, what we do, we send them off to the claimants and they can say whether they accept it or not. If they don't accept the part admissions we go straight through, straight through to the defence code system.*

Another staff member in a different court indicated some further problems with apparent admissions which may or may not in fact be admissions. This is interesting because it suggests staff members are evaluating documents to see whether they might amount to a defence, i.e. they are applying legal judgments:

> *Litigants in person, also when we get admissions in they tend to, they tend to explain. They always fill in the admission and they're admitting all the amount but they're also send in a defence form and tend to explain, 'well the reason I haven't paid it is because.' Whereas that's not what the defence form is for, it's actually if say like you're admitting £500 and defending the other £500, that's when you send in the admission and the defence. So a lot of litigants in person will obviously go in to big details*

> *about why they haven't paid it, 'this has happened in my life, and this has happened' so you've got to read through all that just to get, to find out that they are just admitting the claim.*

A problem frequently referred to by court staff was litigants only sending a defence to the court, not sending one to their opponent.

Judges were reported as being flexible in what they would accept as a defence. A letter which is signed and sets out sufficient facts for instance would stand as a defence, in the view of some of the court staff we spoke to. Where the judge feels more details are needed, the litigant is typically (according to court staff) told only that they need to provide more details. Striking out of defences might similarly be poorly communicated:

> *We do have quite a few instances where the judge has struck out the claim, and he has given no reason why the claim was struck out, well no reason is actually incorporated into the order. And I deal with a few people like that and they're litigants in person. Because they've no idea why the claim has been struck out, they don't know what their response can be or what the next course of action is because they don't know what's gone wrong in the first place. I think perhaps it could be more detailed, within some of the orders, why the judge has done a particular thing. Obviously we can't approach judges, say well this is inadequate, because that's obviously the judge's order.*

Ironically, in relation to defences a court staff member reported that the apparent tendency of litigants in person to prolixity evidenced in divorce petitions and civil claims relative to solicitors was reversed with defences:

> *They tend to just stick to, this is one good thing about litigants in person and they tend to just stick to the response pack, they do like a defence form they can fill in and they just write in there because they don't think, but solicitors tend to attach like loads of papers to the back and really go into detail about the defence, you know, whereas a litigant in person will stick to the one form that we provide them.*

Judges referred to defences that weren't defences at all, or defences that 'muddied the waters'.

> *[T]hey write in something which clearly isn't a defence or is nothing to do with a defence and you end up striking out the defence and telling them that they've got days to set out a proper defence with their reasons and that's the way we tend to deal with them.*

One staff member referred to litigants in person acknowledging receipt of a claim but not filing a defence in the time, failing to appreciate that they had to do both.

Acknowledgements of service in divorce cases were relatively unproblematic, although some staff members felt the section which dealt with the respondent's willingness to pay costs caused anxiety and confusion and as noted above we saw some evidence of this on the files.

Allocation questionnaire

Court staff frequently referred to the allocation questionnaire in civil cases causing litigants problems. This form was felt to be far too detailed, and contain much too much that was irrelevant for unrepresented litigants. The basic language also caused difficulties, as this exchange between court staff shows.

> *#1: One of the questions in an allocation questionnaire, 'have you made any other applications in this case' and most of them say to me 'what does that mean?' So they don't even know what an application is. …and, but they don't know a direction is, it says 'have you attached any proposed directions to this form' they don't know what they are.*
>
> *#2: 'Have you got any proposed directions' 'no, but should I have?' …*
>
> *#1: …there is a point that says, 'if you've got any pre-action protocols?' Now I don't even understand what that is. I've had to ask …*

According to court staff, dealing with the Allocation Questionnaire could lead to a strong fear of making mistakes inhibiting litigants as well as a fear of committing themselves to positions:

> *They feel they have to complete the whole form is the problem. …they bring it in, they haven't even put their name on it, or a case number because they are frightened of making a mistake. Because they think that if they make a mistake or they say, you know I've only got this witness at the moment, they cannot change it, and that's the impression they get. They think right, I've done this it's written in stone I can't alter it in any way shape or form, and that's what they panic about.*

Disclosure

Several lawyers, staff and judges suggested the concept of disclosure was confusing to unrepresented litigants, 'list of documents, they sort of get confused by that.' As an example one of the judges we interviewed stated:

> *There's no point asking them to give standard disclosure by lists. …I might say to them 'look, list all the documents which you say are of relevance to this case, compare it with their list, if they've put in listed documents which you haven't got, ask them for copies, and they can see what you are seeking to rely on, they can ask you for copies.' But if it's a simple case and there's only a small amount of documents, you may well resort to, 'forget about lists, simply send to the other side copies of any document on which you intend to rely.'*

He abandoned the usual concept of three different types of document in such cases.[65] It is easy to see how the different categories might confuse litigants in person. We asked one staff focus group how they would deal with a litigant who asked whether they had to disclose a particular document and were told, that they would simply tell the litigant to disclose the document if they felt they ought to. This is an example of court staff giving (inaccurate) legal advice, but not realising it.

As we will see, the comments of staff and unrepresented litigants did not suggest that an informal approach to disclosure was universal. Litigants in person were confused by what it was they could request from their opponent; could they request bank statements, for example? This might lead to extra hearings, as court staff indicated if it was not clear on the face of orders whether a litigant could request disclosure they would suggest the litigant could make an application. The following comment from a court staff member, describing an encounter with an unrepresented litigant, suggested that litigants' problems sprang from a number of sources, a failure to see how they ought to prepare prior to a hearing and a difficulty with the technical language.

> *[I]t was set down for a hearing on such and such a date, that there be standard disclosure for such and such a date. He said 'I don't understand all this.' And he said 'failure to do this will result in the matter being struck out, so does that mean that they're going to strike out such and such or.' And he couldn't understand, couldn't get his head round what was going on, why was this order being made. You know, 'surely I'm just going to get a court hearing date?' He didn't understand that you had to do certain things before you got your court hearing date. And non compliance of that resulting in not having a hearing date. And obviously because of the terminology used, I mean it wasn't necessarily jargon, it was just our terminology, he couldn't understand it.*

We can get a very clear sense of the confusion from this description by one of the litigants we interviewed:

> *[W]hen it said 'listings' I assumed it was the list of work and I sent that in wrong. I didn't know that documents had to be exchanged, I thought they were exchanged through the court. I sent stuff into the court instead of to the plaintiff's solicitors. So, that was wrong and of course, that was something of delight to the plaintiff's solicitors, because he was saying 'you haven't sent to me' and I said 'I've sent it, I've sent it' you know, meaning I've sent it the court. So then I was going to the court and they were saying 'yes, we've got the stuff here' then somebody in the court*

[65] Documents which they no longer have control of ; documents which they have control of and which they do not object to disclosing to the other side; and, documents where they have a right or duty to prevent the other side inspecting the document.

> *mentioned 'sorry, usually it's exchanged with the solicitors.' So from that point of view I suppose I hadn't read enough about it, should have done some reading on it, shouldn't I really?*

It is also important to recognise that litigants in some cases may be operating within a context of mistrust of their opponent. Another litigant illustrates why litigants might struggle to explain why they wanted documents, fearing that the opponent might adapt their case to evidence being served in advance. Another of our litigants clearly exhibited mistrust of the opposing lawyer and refused to disclose his case until before the District Judge.

> *I think it was about the accounts… …and I didn't really want to say why I wanted to get them. Because I didn't want them to be able to go in and change [their evidence] …they say they haven't got documents, then they're stolen, then they say they have got them, then they say they haven't, so it changes backwards and forwards.*

A third litigant similarly did not want to show their hand and was concerned that their opponent would not reciprocate in kind, as well as simply being unsure of the basic procedure:

> *I didn't know that the documents that had to be exchanged were exchanged directly with solicitors. And when I did find out, I didn't want to send mine if I wasn't getting them back, do you know what I mean? I didn't want to show my hand at that stage, you know, I wasn't quite sure even then. I mean, do you go along and meet and exchange the documents?*

A fourth pointed to a process which they felt was more vindictive than necessary. Interestingly, they also decided to send documents to the court, not to their opponent, suggesting this somehow ameliorated their sense of mistrust:

> *When I decided to go on my own, he told me that I had to send him a copy of all paperwork, I had a letter from him… 'I direct you to deliver your paperwork, all copies of it to me. I have already made an application for costs.' He hopes, I think to get £400. And, 'my costs will increase if I have to stand up in front of the judge on [date] and ask for an adjournment because you have broken the law.' And then he quoted all sorts of things like Ref 2(1)a, Ref 5(1)a and Ref 6(1)a, why I should comply with his request.*
>
> *WHAT DID YOU MAKE OF ALL THAT?*
>
> *…I addressed a large foolscap envelope to him, A4. And I put a copy of all the paperwork inside. And I had friends up for coffee who have given me a letter of support, … and they said 'don't do it, because he's just being his usual awful self. He will base his statement around your paperwork.' And I'd already thought that one. I said, well I am taking those envelopes into the court.*

Exchange of witness statements

Unrepresented litigants often did not understand that they ought to file their own witness statement as well as those of any other witnesses. We have seen also in relation to disclosure that unrepresented litigants are wary of disclosing their case for fear that it will be used against them, or for fear that opponents will take advantage through sharp practice. Keeping cards close to their chests was a concern for litigants, but one of the judges pointed out this was not a problem confined to unrepresented litigants, even reputable firms of solicitors delayed exchanging witness statements until the last possible minute:

> *But there is still I'm afraid this culture in some parts of the legal profession of, you know, 'keep your cards close to your chest' and 'I'm not going to exchange my witness statements in case you, if I do it unilaterally you'll tailor your witness statement to deal with mine.'*

The same judge suggested they took a varied approach to precise reciprocity:

> *I think you have to rely on your own intuition and experience as there may be cases were that could be a significant problem. Where you really need to have a simultaneous exchange of witness statements. Particularly if there are undercurrents that someone is not telling the truth or whatever. There is always that worry about, will the witness statements be tailored having seen the other side. But in most cases I think particularly with a litigant in person I would say 'come on, don't let's stand on this principle, it's much better for her to see what you are going to say.'*

Another of the judges suggested disclosure was not a big problem, interestingly he illustrates a different approach to non-disclosure by unrepresented litigants suggesting that this judge interpreted it as relevant to credibility:

> *Disclosure is not generally a problem. Most want to show what they have to the other side. Some don't disclose, they say I didn't know it was relevant. Of course they do. It affects their credibility with you.*

Although then the judge seems to backtrack a little,

> *with litigants in person you can't draw inference from non-disclosure, you have to be very careful. It can be dealt with on the day sometimes.*

Whilst a further judge is clearer in suggesting that problems with disclosure were about the veracity of litigants:

> *those who wish not to make disclosure, are those who have got something to hide.*

Simultaneous exchange of witness statements has obvious benefits though the mechanics of simultaneity will not be familiar to unrepresented litigants. It is also important to recognise that unrepresented litigants are disadvantaged, in the sense that they are unfamiliar with the formal and normal approach to witness statements, prior disclosure of represented parties witness statements may provide some guides as to form and substance (especially what is likely to be relevant) though there are of course risks if unrepresented litigants are unscrupulous.

Ancillary Relief: Form Es (financial statements)

Form E is the twenty page document where the parties initially set out their financial position during ancillary relief proceedings.[66] Many of our respondents said Form E was a problem for unrepresented litigants. It is regarded by court staff as a long but comprehensive document with lots of notes for guidance but unrepresented litigants, 'are just completely mind boggled when they see it.' They were said to struggle to cope with the large amounts of information they need to provide, and the documents that have to be attached. A judge echoed this concern:

> *The big difficulty … is dealing with financial disputes and completing these Forms E. Because, the first time you see a form E it's a nightmare… …a lot of people find them very difficult to cope with, particularly as so much of the information sought on the form is totally irrelevant to their particular case.*

A couple of judges pointed out that it was not uncommon for non-compliance with disclosure obligations requiring detailed orders, unless orders and threats of committal to get information. Another lawyer made a similar point in more muted tones, pointing to the absence of any professional duty to the court restraining or shaping the litigants' behaviour:

> *[B]ecause they are in person and not legally qualified. Their duties to the court, in particular in relation to disclosure. If they don't want to show you something they won't.*

Other problems (mentioned by several of our respondents) included failing to send in supporting documents and sending in documentation in support 'willy-nilly'. Another judge indicated that differences between unrepresented litigants and represented litigants might not be so great:

> *Not always no…. Some people are more organised by their very nature … that may be equally be a problem if they're represented, you can only*

[66] It can be found at: http://www.courtservice.gov.uk/cms/media/forme.pdf

> *provide what your client gives you. And some just are very unwilling to provide you with everything.*

It is worth commenting on the support that they could expect from counter staff:

> *I'm not trained to fill it in, to know what to actually put in there, you know. I just tell them to go through it step by step and obviously look at the notes for guidance, and just fill it in as full as possible, that's all, you know.*

In the same court another staff member suggested it was more to do with time than lack of knowledge:

> *[I]n the old days I used to occasionally help them fill in the statement of means, which was an affidavit form, particularly for putting information, it was very time consuming. We just do not have that time in the end.*

As judges and staff commented, lack of information on the Form E could slow matters up considerably. A lawyer we interviewed emphasised the difficulties in litigants not submitting documentation and responding to follow up questions. This would lead to a questionnaire under the Family Proceedings Rules requesting further information, and unrepresented litigants then made their own requests for information in person, at court, and not in writing, which made it difficult for the lawyer to understand what was wanted.

> *They can't deal with a [Rule] 2.63 questionnaire. They never produce those, just sit at court and sling out a list of 'well, I want to know about this and I want to know about that' and it never comes in writing, we have to jot it down there at court. It makes our life, they make our life a lot more difficult, and I am positive that they increase the cost to the represented party.*

This lawyer had a generally jaundiced view of the motivations of litigants in person, and this may be related to the issue of disclosure, where the simple presence of someone who does not know, or play by, the rules creates mistrust:

> *My view is, that if they are a litigant in person they've got something to hide. And not one of them, even in contact cases has ever proved me wrong. So, discovery in financial cases is the last thing they want to do because it's getting to where… …the truth is.*

Other documentation

Other documentation unrepresented litigants were reported as struggling with included applying to have money paid out of court ('the form, the number of times they get them wrong is terrible.') The court had developed a sample form to show them how it was done which had helped.

There were other problems, such as failing to put consent orders in a form which the judges felt able to approve (staff suggested this was a common problem).

Summary

This chapter has discussed in detail the extent to which cases involving unrepresented litigants had involved obvious errors either by the unrepresented litigants or the solicitors. The evidence suggests that unrepresented litigants were more likely to make errors, and also that they were more likely to make more serious errors. Furthermore, individual litigants in person appeared to file more flawed documents than business litigants in person. More than half of cases involving individual litigants in person involved that litigant in person filing at least one flawed document. This probably underestimates the level of problem with documents filed by unrepresented litigants as we were only able to record obvious and apparent flaws. This is illustrative of the high level of technical difficulty faced by unrepresented litigants.

Paperwork was an area where interviewees also identified considerable problems. The litigants we spoke to generally reported that paperwork was straightforward but time consuming. It was not uncommon for it to be perceived as unnecessary. Staff members, judges and lawyers were likely to say the quality was variable and sometimes very poor (although it is worth remembering that they would also criticise the quality of solicitors' paperwork). General problems discussed were: handwritten documents; too much information; missing the point or failing to prioritise what is relevant; and, failing to provide comprehensive and ordered financial information (e.g. in debt/housing matters); and, making admissions which were inappropriate; failing to serve documents on their opponent. Two documents seemed to stand out as causing particular problems because of their complexity and lack of obvious relevance to unrepresented litigants: the allocation questionnaire in civil cases and Form E (the financial statements) in ancillary relief cases.

8. Problems for unrepresented litigants

In this chapter we discuss the more general difficulties faced by unrepresented litigants and those involved in cases with or against them. We ought to emphasise, given the importance attached to this topic by interviewees, that unrepresented litigants varied enormously in their characteristics and abilities. In particular, some were felt to handle their cases very well.

There were some suggestions that family litigants were 'worse' (i.e. more emotional and less competent) than civil litigants: 'I suppose, again, if I had to generalise, people find it more difficult to deal with family disputes than civil disputes.' (a judge). This could be for a range of reasons, unrepresented family litigants were more prevalent than they were in civil cases outside the small claims arena, relative to civil litigants they may be more likely to come from lower socio-economic/educational groups (although we noticed when dealing with divorce cases that plenty of the unrepresented litigants had middle class occupations) and, in general, the disputes may be more emotive and personal to the litigants. Another judge said:

> *Well disputes between commercial organisations, where there are two businessmen, the position is generally much improved. But that's probably because they are used to correspondence, and ordering their thoughts, doing deals and so forth. ….And one hesitates to say it almost, but the better educated the litigant, the more chance you will have of getting a clear presentation of the case.'*

It was also acknowledged by some that Children Act cases could be easier for unrepresented litigants, in some respects, because there was less reliance on paperwork. But that aside, the general impression was that unrepresented litigants were at a significant disadvantage. Some managed, but many struggled with paperwork, evidence, procedural steps and handling hearings in court. One of the judges put the dislocation between litigants' everyday experience and the detailed, habitual workings of the court in this way:

> *A person is at a disadvantage to somebody who's represented, because the judge is on the same wavelength as the solicitor or counsel who represents the represented person, and doesn't have the same difficulty as he does in understanding the litigant in person. Certainly, counsel and solicitors make the judge's life very much easier.*

We explore in some depth the nature of these problems.

Conceptualising cases and handling evidence

Having misconceived cases

With unrepresented litigants, judges and court staff pointed out there was a much stronger possibility of cases being entirely misconceived, or being expressed solely in social, non-legal terms. It might be that judges could perceive, within the social description of a problem provided by a litigant, what the claim's legal foundation was, and what the facts were in support, but sometimes in their view this was simply not possible. Thus one judge described a litigant in a building claim who failed to specify what they were alleging the terms of the contract should be, and how they had been breached, '[x] simply says 'they haven't been done correctly and this is how I want them done.' So everyone's scratching their heads trying to understand what [x] is saying should have been done or how it should have been done.'

One of the lawyers we interviewed supported this viewpoint, saying that they and the courts sometimes struggled to understand the basic points litigants in person were trying to make, and that litigants in person sometimes also failed to support the points that they were making with sensible evidence or argument:

> *It causes me and the court enormous difficulties … is trying to find out what point they're making. And then when you try and analyse from this what point they have, it's then very difficult to assess whether there's any merit in it or not, because they're normally given to making broad allegations. They dip in to irrelevancies and very often they don't support the more sensible contentions that they want to make to the court.*

The fact that their case might be misconceived also appeared to be dawning on one of the litigants that we interviewed. The revelation that (what they perceived as) the essential justice in their case was not going to lead to victory came as a revelation, which destroyed the litigant's confidence:

> *I always felt relatively confident actually….it was so apparent that my case was true and the other side was false, that I always sort of went in very confident that it would turn out alright in the end. And suddenly I began to think 'this might not happen', you know. And that's when I changed, and I became much, much less confident in court. Even this time I was absolutely shocked. I have to tell you that I wrote my own [documents] and I thought 'oh wow, this is so good, this is really so good, you know, I've done it as it should be done.' I was absolutely horrified when [the Judge] said 'you're going to lose with this….'*

Misconceiving remedies

Sometimes litigants, especially defendants, did not understand the nature of remedies being sought against them. This was most frequently mentioned in the context of charging orders applied for by creditors to enforce payment of money judgments, which defendants (according to judges and court staff) often thought meant they were going to lose their house. A judge gave this example:

> *[I]t was obvious from the content of the letter that the litigant had the impression that by making a charging order I was condemning her to being evicted from the property, which of course was not case. So she hadn't really grasped the point.*

These court staff made a very similar point, sympathising with their own lack of knowledge on this matter:

> *#1: I am very in the dark as to what a charging order means and what the consequences are of having that against your house.*
>
> *#2: Most of them think you've got to sell the house, you know.*
>
> *#1: Yeah, they think they're going to be kicked out of their house that seems to be the general idea.*

In one court it was pointed out that notices of eviction were misunderstood, with unrepresented litigants coming to court at the time appointed for eviction. Some accused the court of deliberately getting them out of the home so the bailiffs could go in while they were at the court. Both these examples show how litigants can fundamentally misunderstand the nature of any action being taken against them.

Who to sue?

We also saw evidence of litigants struggling to correctly identify those that they should be suing. Litigants struggled with the concept of corporate identity and the way it may protect the interests of the owner-managers of businesses. They may seek to sue the individual not the company, for instance, as the morally culpable (and financially solvent) defendant, when the position in law is that this is impossible or difficult.

Generally out of their depth coping with law

We saw several examples of litigants describing extensive research which appeared only of general relevance at best. As one of the lawyers put it, litigants might research the law (as we indeed found) but their ability to extract and apply the salient points was deficient:

> *The more intelligent ones research their law on the internet, or they go and read law books, but of course, it's very difficult to get the experience, or the qualifications of a lawyer in a few weeks in the public library. And so they seize on say, facts of a particular case, which they seem to think are roughly similar to theirs, but they ignore the principles, and they ignore all the law that doesn't suit them. I find that having to deal with them.*

Coping with evidence

There were a number of ways in which it was clear that unrepresented litigants struggled with evidential issues. There was some discussion amongst staff of litigants in person being uncertain of which witnesses they could bring and they also reported litigants asking them what they should put in their witness statements. A practitioner described evidence as 'chaotic':

> *They very often can't see the wood for the trees, and their normal approach is to produce enormous amounts of paper and long, long, long rambling sort of statements… … with voluminous 114 exhibits, all of which seem to have missed the point….*
>
> *……they keep having after thoughts. … then they beg the indulgence of the court on the basis that 'but I'm not a lawyer, you've got to help me.' You know, as if they were somehow disabled in some sort of way, but they're not really. Some of them know full well the advantages of being a litigant in person. They know if they lose they're liable for the cost of the other side although they never want to pay them. But they take advantage of the system, which is a pity.*

A judge had concerns, especially in Children Act cases, where lack of knowledge about relevance was compounded by the litigants' emotional involvement and:

> *I think that looking at children's cases and disputes on contact and residence, getting the evidence together is a big problem for them. Because it is very, very difficult, especially when emotions are running high, to know what is relevant and what is irrelevant. And they can provide reams and reams and reams of information that isn't strictly relevant. Clearly, digging up the past and so forth can cause a whole load of, some solicitors do that as well unfortunately.*

Another judge expressed concern about the variability of witness statements:

> *varies a lot. You can get very brief ones which really don't go into detail. Others which go into quite extraordinary detail, a lot of which is off the point. Because that's again a difficulty which some litigants in person will have, that they get so wrapped up in it that they can't necessarily sort out what is important to the case and what is peripheral. Particularly if they have become obsessive about it.*

There were practical problems: if documents were voluminous providing copies would present a problem to unrepresented litigants. Similarly solicitors may be better placed to get documents from institutions, which would not pay as much attention to a litigant's letter. Service was also a problem:

> *I don't think litigants in person always understand that after they've got to serve the Children and Family Reporter. [Court staff]*

Some litigants claimed not to understand that they needed evidence as this judge put it*:*

> *some of them do understand, some of them do it quite well. Others I think choose not to understand. I mean for example, witness statements, and they'll say, 'I haven't any witnesses' and they don't understand that it's their evidence that is important and should have been disclosed in the form of a witness statement.*

Several judges and lawyers commented on the general failure of unrepresented litigants to include their own statement in any exchange of witness statements.

Our respondents' comments suggested that often, no one actually explained to the litigants what they were supposed to do as regards evidence. Some judges commented that they ought to try to 'remind' litigants to serve statements of their own evidence. Indeed, the general picture that emerged from our interviews and observations was that unrepresented litigants were not advised on what evidence to submit and how to prepare it for hearings, they just bring what they think might be relevant. Unrepresented litigants appeared to have a much more relaxed folk concept of how to deal with evidence. For example offering their mobile phone to the judge for a potential witness to be contacted during a hearing during a hearing.

A 'relaxed' attitude to evidence on the part of unrepresented litigants was based round an understandable failure to know what was expected of them, but it was also based on an inability to stand aside from the dispute and see it in a neutral way. We can see something of this attitude, in what according to our lawyer/judge interviewees is a commonly held belief, that oral evidence alone would be enough to prove a case; or rather, litigants felt they could rely on their own plausibility:

> *I was certain that you know, whatever is going on is … whatever points we are fighting over, I was right. Because I wasn't doing anything which wasn't clear they were just being silly, kept asking me to prove that I paid… …Then they decided not to accept that. …I think that the solicitor wanted to make money, so they said they want to see the proof so we can have a next hearing too, so I can produce the proofs. You know, things like that.*

There was evidence also of litigants struggling with the concept that they could not as of right introduce new evidence late in proceedings, as this litigant had found:

> *…you get new evidence and you can't show it. I mean, I've got evidence now… …you know, that I could show that it was a wrong decision but I can't show them. That seems so unfair, doesn't it? Do you think that's unfair?*

Interestingly one of the areas where staff did report advising litigants was in relation to bringing witnesses to court. This suggested that, on occasion, staff discouraged this: Here is one example:

> *No. Sometimes they say 'do they all have to attend?' And I say 'no if you want to just have a written statement… …they don't have attend, I mean if they're willing to.' Obviously then the judge needs to know as well because its going to take longer to question half a dozen, than just read six statements or something isn't it?*

As in some other areas, this advice appeared somewhat incomplete, in that it did not deal with the point that a desire to avoid the need for attendance by a witness ought to be weighed up against any problems which might be caused due to an inability for their evidence to be clarified or challenged on the day.

Experts

Agreeing the identity of an expert, agreeing on instructions and dealing with payment of expert fees were all suggested as problematic for unrepresented litigants. Our respondents suggested litigants don't know when they need one, they don't know where to get one, and they find the concept of joint experts very difficult. They are distrustful of experts instructed by solicitors for the other side and don't want to give joint instructions (and don't know how to).

From time to time it will be necessary for unrepresented litigants to instruct experts. This leads to the question of how they choose. Post-Woolf, a balance has been struck between the possibility of the court exerting some control and parties being allowed to agree experts. For unrepresented litigants, however, the problems are accentuated: how do they choose experts? Are courts likely to be satisfied that they are neutral and competent? This came up in interviews with some of the judges. One judge felt understandably constrained from telling litigants who they could go to for expert evidence.

> *No, I couldn't give him names. I said 'those are the disciplines, you must find doctors. Those are the disciplines for which I am giving you permission, I'm afraid it's not for me to advise you, there isn't a court list*

> *of possible experts because of course the court has to remain neutral.' I said, 'the Law Society for example has a register of expert witnesses, the Citizens Advice Bureau may have details of expert witnesses….'*

Another judge took a more pragmatic approach:

> *I might recommend an expert, for a person who can't find an expert, I say why not try, and [Mr X] …. that's the sort of work that he does, and he's very sensible, and he'll be able to sort [the litigant's] case out as quick as a flash if he had the opportunity to do it.*

Lack of legal knowledge puts judges in a difficult situation

Many of the judges commented on the problems caused by unrepresented litigants being without the requisite legal knowledge to conduct their case. Judges felt that the lack of legal knowledge put themselves in a difficult situation as they too would not know all the relevant law all of the time, and researching points themselves was not always an option because of a lack of resources within the courts:

> *If a tricky issue does arise it obviously causes a problem, because there is going to be nobody there to give you any assistance… of… you're probably going to be in a position whereby you didn't know in advance, or certainly in advance of the day, that this was going to arise. You might well be sitting [in a court] where there are no books. [Where there are books] you do sometimes get an issue whereby you have to adjourn in order to check up on the legal position yourself.*

Another judge appeared to suggest that lack of legal knowledge equated with confusion and lack of proper preparation, and this simply confused the judge. If this interpretation is correct, it was not a question of points being missed, but more like points not being raised at all or being raised in an opaque, unhelpful way.

> *You are considerably at a disadvantage when dealing with a litigant in person, on a legal argument than you are when you have got solicitors or counsel on both sides, because they will at least have thought about it.*

Another felt that where one party was represented then Counsel would put forward a balanced view of the law sufficient for their purposes. However, where there was no representation on either side the judge felt that he necessarily struggled:

> *So, the worst sort of cases are, when you have to do the research for both sides, because the time available and the facilities afforded, are not such as brilliant for doing fundamental research of that kind. We don't have the books here for example.*

Another pointed to the time pressure that inhibited them doing research, sometimes they would deal with points of law from experience, whilst suggesting that in other cases they would adjourn matters could be researched

[I]n a normal course you don't have time to do that, you don't have time to research it, you are here to adjudicate here on the facts, and advocates will tell you what the law is and you've got some idea.

SO YOU DO IT FROM YOUR GENERAL EXPERIENCE RATHER THAN BEING ABLE TO DO ANY ACTUAL RESEARCH?

Yes yes yes yes yes, and you know sometimes you're thinking gosh we haven't done or thought about that for years.

RIGHT.

[Describes a particular cases] …I got to think well there is something on it, I don't know where it is but I've got to go and try and find it, so it makes it much much harder.

SO YOU DO FIND YOURSELF DOING SOME EXTRA RESEARCH?

Well you have to in those circumstances.

Whether judicial research corrects the problem seemed debateable. It is possible that legal points are missed (a judge who, understandably, does not know the law in an area, may not know when a point has been missed) or that pressure of time, and getting through lists, means that judges were reluctant to research cases for unrepresented litigants as much as would be necessary to be sure that unrepresented litigants cases were dealt with fully on their substantive merits. Some see limits as to how far they can properly go in doing research when the parties don't know about the point themselves. This is not to criticise the judges, they have a difficult role, made more perilous by the need to keep their lists moving; but it illustrates the difficulty posed by having unskilled lay people presenting disputes which are not properly framed in their legal terms.

Hearings

Listing Hearings

Court staff suggested unrepresented litigants were unusually impatient for their hearings to be listed, but they also failed to deal effectively with listing issues, for example failing to advise of dates to avoid ('they don't know that it's best to tell us like if they're going on holidays'). They also had a much more flexible attitude to relisting hearings which were inconvenient, which jarred with the courts' usual approaches, and failed to appreciate the tri-partite nature of court arrangements with the court, the litigant and their opponent all affected by changing dates.

They'll just want to change the appointment like that, like, you know you change your doctor's appointment and they don't understand that you

can't just change it because of the people involved and the date's been set, you know, you get some of them that are just like, you know 'can't you just change it?'

Block listing and speed of turnover

Some litigants suggested the judges did not have enough time to read papers prior to hearings and that the whole process of hearings was very rushed. This led to a direct perception of injustice:

> *The solicitors, don't give you enough time, the judges don't give you enough time, to discuss your case properly and things like that. Probably, you know, half an hour before calling us in, he was dealing with probably a different case. And then he just picked the file up and… …called us in, and then listened to our arguments, and then decided there and then. Which I thought, you know, I think the judges should be given more time to study the case before….*

Another discussed the way that cases are listed, and effectively provided a critique of block listing, portraying how such listing processes can have a heavy effect at times of severe stress:

> *It would be nice if they adhered to time. For a lot of people they find it I should imagine very traumatic. The, just before you came and spoke to me I went to the toilet… …And there was a lady in there… ….she didn't go to the loo, she cried. …. She said, 'well it's just that they told me 2.00 and I'm still here. And that was about 3.15. And I said to her 'I know, I was told to be here at 2.30 and I said 'heavens knows when I will go in.' But I think it was gone 3.30 in the long run. So, I think that it would be rather nice. I have this feeling that they lump us all together at one specific time. The first time, I was told to be there at 10.00, I didn't go in until 11.30. You must make allowances because of course it is a bit like seeing your doctor. If it's quick he can see you out, if it's not you wouldn't want him to cut down on your time because he's got another appointment in five minutes. But I do think that there ought to be not quite such long waiting periods.*

In at least one court this problem had been partially recognised with hearing notices going out 'saying that your appointment may not be heard at the scheduled time.' Court staff observed that childcare and work commitments could mean that late court appointments could mean people left the court without waiting for their hearing.

Having considered the precursors to hearings we were interested in perceptions of the way unrepresented litigants dealt with hearings. We cover a range of topics. How well litigants presented the factual basis of their disputes; how well they coped with advocating a position supportive of their claim; and the strategies that judges used to manage this process. We then turn to a consideration of unrepresented litigants' dealings with law in hearings.

Dealing with facts at hearings

As we have seen, one of the reasons litigants sometimes wish to appear in person is their perceived ability to better present their own story. Respondents in interview tended to suggest that litigants' abilities to deal with facts at hearings 'varied enormously'. One judge observed:

> *Well some are very, very well prepared. With others, you have to draw it out of them. It is not an insuperable problem, it's a question of time really. If it's clear that they're not presenting it… …it's just taking them through their evidence question by question. Certainly some are at a disadvantage…..*

Though most recognised that unrepresented litigants could be good at dealing with the presentation of facts, the tenor of most responses was that they were generally poor at this, as this judge suggests:

> *I would say, that in the majority of cases litigants are pretty poor at presenting the facts in a courtroom situation, pretty poor. It's not universal because some litigants are very good at it. That's just a cross section, they're just a cross section of the population after all, so some people do better than others, but the majority in my experience are pretty poor.*

Part of the problem was the interaction between knowledge of the facts and their procedural creation of facts as evidence: it is not enough to know the facts of a case, they have to be formalised through written statements and tested through evidence in chief, cross examination and so on. Another judge emphasised the role of procedure by criticising the approach of litigants to examination of evidence:

> *The procedure in the court, is not readily understandable to them. They tend not to ask questions but to make statements. And, as the judge, you then have to translate those into questions, which the witness who's giving evidence understands. So, there is a tendency for the litigant in person's case to be repeated three times, first of all he puts in, in the form of a statement, in arguing with the witness, secondly he puts it himself in the witness box, and then certainly when, at the end of the case when he's got the opportunity to argue the case, he puts it once again. And so, he's under the disadvantage… …most litigants in person don't seem to understand what is required of them in the courts.*

Unsurprisingly, the more technical the case or complex the facts, the more unrepresented litigants were perceived as struggling. A number of the judges suggested that this lack of competence led them to intervene and to rephrase statements as questions. As one judge said, 'Well they are hopeless. But that means that, you generally end up acting not only as judge but advocate on their behalf.'

Advocacy and handling hearings

As with fact management, although again there was perceived to be great variability between litigants, they were generally felt to be 'pretty hopeless' at advocacy. Some had a very social interpretation of the most appropriate form of argument, what one lawyer we interviewed called 'arguing over the back fence with the neighbour'. This approach was related in some of our respondents' minds to the conviction that justice was on their side (and so implicitly to the non-neutral position of an unrepresented litigant).

> *They don't understand about advocacy, they have little idea of how to marshal their points. It's more like arguing with the neighbour over the back fence rather than making submissions to the court. And that makes life very difficult, because the Judge wants to know what their point is, but because their approach is not structured they tend to ramble on, not answer questions, they don't obey the rules, they're probably in ignorance of the rules, so that they don't think the CPR applies to them. And of course, they continue a refrain of they want, justice. But justice in their eyes is simply that 'you must agree with me wholeheartedly'.*

Litigant perspectives

These views contrasted somewhat with the views of the litigants we interviewed. Generally those we spoke to were confident that they understood what was going on in hearings (although of course they may not know what they do not know). They also felt they understood the process. However, only about half felt able to say what they needed to say. Some expressed doubts about grammar and etiquette and were concerned that they needed to control their temper:

> *I was a bit worried about my grammar, my English and things like that, but I wasn't worried about what I should be saying or what I shouldn't be saying. I think apart, you know, not to lose my, I keep saying to myself I not to use foul language, and not to lose temper, you know.*

In fact, several litigants expressed concerns about etiquette (something which court staff reported they often advised them on):

> *I wasn't quite sure what I should call the judge, whether it was sir, or your honour or anything, and I didn't know whether to stand up, sit down*

The confidence of litigants was sometimes fragile. This litigant felt surprised that they would be asked to say *anything*:

> *I honestly didn't think I would have to say anything when I went in really. I really thought it would be a case of, the judge sort of saying 'yes we've received a letter from [their opponent] as well and … …we agree with the money should be paid to you immediately.' And I thought that would be it really, I didn't, didn't think that I'd have to say anything back.*

Another litigant felt prepared initially but then found the case going away from him:

> *Yes I knew what I was going to say. I had planned everything. But as the hearing progressed it started changing because they were bringing in issues, which were not connected at all to what we had discussed… … I was becoming a bit agitated that you know, false allegations were going on and on and on. And it wasn't germane to the issue at hand at all. I wasn't getting any time at all to put the records right. So yes, things actually changed. What I had in mind I had to change slightly…*
>
> *YES. AND DID YOU FIND IT DIFFICULT TO DO THAT?*
>
> *Yes course it is. The procedure in law is that you don't interrupt someone…*

Another litigant had been surprised by the process but that was partly because his opponent had not turned up. Interestingly this seemed to deflate the litigant. He was asked whether he felt he knew what to say:

> *I went there thinking that, right this woman has raised these issues and concerns and I'm just going to address every point. I had her letter which I took to the court. So in my head I had my points written down and what I was going to say. Because I thought the judge was going to go through each point… …but it didn't really go that way, it seems that it was an in and out basically, straight in blah blah blah fine, and straight out. I thought well, all that preparation for nothing really. Basically it was a victory on my part so I just thought well fair enough the fact that I've won, just forget it.*

And yet another was thrown by the judge's insistence on confining the litigant to relevant points. The extent of this litigant's preparation is also of interest:

> *I had spent probably six months getting everything together, and I had it all, you know, written down and all the points I wanted to make, but I have to tell you I got so muddled in the court eventually. …I got so thrown when he said he couldn't listen to all the stuff that I had to say, that I just didn't know where I was going, and then I got muddled and I couldn't find it and I panicked …*

One litigant felt more generally at sea from the outset:

> *DID YOU KNOW WHAT YOU SHOULD SAY AT THE HEARING?*
>
> *Oh no no. Absolutely not, it was all sort of, I put my paperwork in, and after that I felt I had to follow the judge's lead basically.'*

It is worth emphasising the emotional turmoil, for some litigants, of going to court. This caused difficulty with even the basics of finding the right courtroom and was likely to have affected their ability to function competently in a courtroom situation:

> *Unbelievably hard. …I could easily do the paperwork on this case. That doesn't bother me at all. But I think it's just that the total emotional thing of going into a court to begin with. …You can get an usher to say to you 'oh it's in this court, in that court' but you don't really take it in because it's just, you feel in a totally different world. It's just the whole ordeal of going into a court and you don't whether, how many courts there are because you're just not thinking straight.*

This litigant gave a graphic account of how unnerving the process was for them:

> *I think it was the most frightening thing I have ever done in my life. …I tried to pour the water and I spilt water everywhere. I just, my hands couldn't stop shaking. And even though I told myself weeks before, 'oh the judge is just like you and I' and you know. etc etc. I just found it totally, totally, overwhelming….*

Partly this was coping with the unknown ('I had no idea about what to expect…..I knew I was just going to be petrified.'), although this same litigant had 'been in a court before, the week before just to get a flavour of it.'

The process of listing and calling on cases may add to litigants' feelings of dislocation. Court waiting room areas can get very busy and there is sometimes something of a competition for the attention of the usher, who has existing relationships with a naturally assertive constituency of local practitioners. As a result, time may not always be available to care for unrepresented litigants. This quotation was amongst the strongest expression of an undercurrent in the comments of several of the litigants we spoke to:

> *I found it very bewildering. When we first went in, we saw one person at the desk. And I said to him, 'what do I do?' And he said, 'Are you representing yourself?' And I said 'yes', and he said 'if you take a seat, as soon as I'm free I will show you where you've got to go. Now he did not, and about 2.30 he disappeared and then another man came along. And I asked him again, I said him 'when I get called, because my hearing is at 2.30,' he said 'don't worry we always tell you which room you're in,' but he didn't either.*

Even the less concerned, who tended to feel well prepared also felt apprehensive. They often discussed their feeling of being in the right alongside nervousness. One litigant expressed an interesting mixture of nervousness and anticipation:

> *Nervous. I couldn't wait to get in there because obviously, this woman was going to raise issues that I, you know, were sort of going to touch on raw nerves. Because as I said she was trying to corner me. So I was, you know excited and I couldn't wait to get in there and deal with it, but at the same time I was nervous about the whole ordeal. I was worried if I would represent myself clearly I just, I just had to wait for some time*

Inability to deal with interim and procedural hearings

Interim hearings could sometimes pose more problems than final hearings in the view of one of the judges we interviewed. During this interview the judge discussed the behaviour of an argumentative litigant in a hearing about disclosure in family cases:

> *It's easier to deal with that sort of situation if you're actually hearing the case. If you're hearing the case you can… interrupt …have your opportunity to speak… …but when you're in the situation of trying to sort out what has and what has not been done with regard to the information that you've been given, it tends to degenerate into a lot of discussion in a sense.*

What the judge appears to be describing is a need, for the court to function at an administrative level, for litigants to engage in a rational way with the courts administrative needs during hearings, and the failure of some litigants to do that. One of the lawyers we spoke to expressed a more general problem in relation to procedural hearings which suggested that unrepresented litigants were unable to separate procedural and substantive matters:

> *They turn up to the hearing expecting to, or trying to argue the substantive issues, rather than dealing with the housekeeping points which are, which need to be addressed. Rather than getting the matter properly prepared and focussing on the preparations, it's always that they want to try the issues at these hearings.*

This suggests either that the litigants are not properly aware of the nature and function of hearings in advance of their attendance (and that courts could do more to focus their expectations) or that litigants are simply desperate to have their day in court whenever an opportunity presents itself.

Understanding Orders

We were interested in the extent to which litigants understood orders and were thus able to engage rationally with court process. The litigants we spoke to generally felt they understood what had happened at the hearings they had attended. On the other hand, judges, but more particularly court staff, felt that unrepresented litigants struggled to understand orders at the end of hearings. Judges implied this was a problem rather than stating it overtly, by describing a laboured process of explaining orders 'in words of one syllable' and admitting that they had no way of knowing if the litigants understood. Staff reported numerous instances of individuals not understanding. 'The thing is, even if we don't use jargon, they don't understand it, do

they?' 'There were several phrases that staff picked up on as intelligible to court staff but not to lay people, such as:

- file and serve
- lodge
- adjourn generally,
- liberty to restore
- charging order
- directions
- statement of issues

Several referred to the judges issuing orders at the conclusion of hearings with great despatch, and this would have contributed to the inability of litigants to understand the terms. Court clerks felt they themselves had to frequently listen to tapes if they were going to understand what had been said.

> *#1: he's gone through all this spiel and then wham the order's there, the litigant's sat there thinking, they perhaps lose interest or they don't understand it and they totally miss it, the next thing they're getting up and going out the door and they're thinking, what happened there…*
>
> *#2: You're so right.*
>
> *…*
>
> *#1: I mean sometimes you get solicitors coming over to you and saying 'oh I missed that' and they know what [they are] listening for…*

Court staff often pointed to litigants failing to understand orders:

> *even general orders. I mean I had a four paragraph order and he didn't understand one paragraph on it. And it was fairly self explanatory to somebody who is dealing with it all the time. But he didn't have a clue… …it was set down for a hearing on such and such a date, that there be standard disclosure for such and such a date.*

Conversely, often court staff said favourable things about judicial approaches to unrepresented litigants. They reported that judges took time to check that unrepresented litigants understood, and carefully explained orders in terms that litigants would understand. They were said to be careful during hearings:

> *Judges are quite good when they're in person. Give them more time, and explain things. Make sure the barrister on the other side doesn't, you know get his way all the time….*

Although understandably there was a certain weariness associated with this, as indicated by another member of court staff:

> *I have to say the judges do moan and groan at litigants in person because they just know they are going to have to work harder to explain everything to them, as they do very well but everything takes that much longer, they would much prefer to deal with professionals.*

Judges were also reported as trying to improve the language in which orders were given:

> *[O]ur particular district judges are trying to bring it down to a more user friendly language.*

Judges felt it was their role to explain procedure to litigants:

> *It is pretty straightforward. If you are actually proceeding to, to a hearing then I would explain to them what is going to happen, and who is going speak to first and, try and make of note … and …not to ask questions and to try and ask them at the end, because otherwise we lose track and so forth. So, they know the order of the proceedings.*

Even though judges indicated that they tried to simplify and explain orders, they also felt doubts about whether the litigant understood in any event:

> *I'm really sort of spelling it out in words of one syllable, mutual exchange of witness statements means that you will both and that means that you just ring up the other side and ask whether or not they are ready to put them in the post and, if you are directly going to direct an expert that means that you and they must liaise, but you know I mean, I don't know that they necessarily understand, one just hopes that they do.*

Conversely, some judges had quite high expectations of litigant understanding (one judge felt most litigants would understand what a suspended possession order was, for instance). It was interesting to see how, on occasion, judges and lawyers sometimes interpreted lack of understanding cynically. So for example, one judge and several lawyers felt that litigants in person took advantage of their apparent incomprehension to not comply with orders.

Following directions

Related to understanding orders, is the extent to which unrepresented litigants follow directions in court proceedings. It was not uncommon for either court staff, judges or the lawyers we interviewed to suggest that unrepresented litigants failed to follow directions in time or fully. Practitioners and judges blamed this on a mixture of lack of awareness and competence but also on deliberate obstruction or as a way of seeking advantage. It was said to lead to further hearings and wasted time and expense.

Judges were perceived by some court staff as being more sympathetic to errors by unrepresented litigants:

> *[J]udges are very very lenient on, if things haven't filed. Things haven't been filed correctly, or on time, they give them the extra time.*

Some of the solicitors complained about this (the following comments were made in relation to ancillary relief proceedings):

> *the courts don't tend to be that keen on making costs orders against litigants in person, when they haven't provided full and frank disclosure in accordance with the court's directions.*

In the solicitor's view this compromised the aim of negotiating early settlements in proceedings:

> *[T]he importance is that both parties provide full and frank disclosure at the outset so that meaningful negotiation can take place at the first hearing. Which was the whole sort of premise of the courts practice directions.*

This solicitor also felt judges should be able to distinguish between litigants who were not cooperating because they did not understand what was required of them and those which were not cooperating as a way of dragging out proceedings and incurring costs for their opponent. We have already noted that judges do not always feel able to tell whether litigants have understood their orders, but also that staff suggested that the judicial time spent on giving and explaining the order could be variable. This suggests that greater thought might be given to how judges should ensure and test understanding when dealing with unrepresented litigants,[67] and that this will aid their later management of disputes.

Non compliance with directions was particularly problematic in family cases of course because in the end costs orders would not usually be made against either party. This solicitor made the point:

> *[T]here's no incentive for a litigant in person actually to resolve it at the earliest opportunity. Because if they hold out to the final hearing they know that the applicant is going to suffer because they've incurred all these costs. You know, I do know of situations where I am fairly sure that that's the reason why they've not been cooperating because they feel that the courts won't make costs orders against them because they are acting in person rather than being represented by a solicitor.*

---

[67] The literature on lawyer client interviewing deals with this, see for example Sherr (1999).

Interestingly, one of the judges recognised that where unrepresented litigants were given more slack this could increase costs for their opponent but tended not to see this as a problem because this simply increased the solicitors' bill, which would eventually be paid, overlooking the fact that if the unrepresented litigant could not or did not comply with an order for costs, or if no order for costs was made (as happens in many ancillary relief case), this might be paid by the represented opponent:

> *Now if that means that the solicitors incur further costs and they can show that they've incurred further costs well, fair enough, then [the unrepresented litigant will.]*

And another judge recognised that they gave unrepresented litigants more leeway and that this caused resentment in the legal profession but felt that this was for good reason:

> *When I started out in the legal profession, I always felt that judges, district judges, gave far too much rope to litigants in person, which they didn't extend to solicitors. But seeing it from the other side of the desk for the last four or five years I quite see why that was.*

Some court staff said certain judges were more sympathetic to unrepresented litigants than others and, somewhat surprisingly, that they sometimes avoided listing litigant in person cases before such judges because that caused problems with lists overrunning.

Conversely, some judges and court staff suggested lawyers were in fact *worse* at keeping to timetables, being more aware of their ability to stretch a timetable, or simply incompetent. Some of our litigants pointed to the failures of opponents to keep to timetables (a complaint alluded to by Lord Woolf in his Access to Justice Inquiry). One had sacked their lawyer for constantly failing to keep to timetables which had led to them being penalised in costs. This judge suggested that claimants in particular were more motivated to comply with court timetables.

> *[I] often find that unrepresented parties they are far more fastidious in complying with requirements to file their evidence on time and so forth than represented parties. So very often you find a situation that somebody who is unrepresented has complied, and the solicitor is in a last minute rush to get it all in. … most people that are dealing with litigation themselves are, they've got a commitment to it haven't they?*

This judge acknowledged that these comments were more apposite to claimants than defendants. Another similarly said:

> *There is, it is a not unusual complaint of litigants in person to say 'if we don't do something or we do something, we get clobbered, if they do things out of time they don't.' I think there is some validity in that.*

But the same judge responded to the complaint made by lawyers that litigants in person got extra leeway by saying it was inevitable:

> *…Oh, I think, one does give litigants in, you know, there are situations where you give litigants in person more leeway than you would a solicitor. I think you've got to.*

Several of the lawyers suggested judges could do more to be firm with litigants in person who did not comply with directions by explaining their obligations clearly from the outset and being firmer with non-compliance. One of the judge's comments suggested they tried to do this but it was a somewhat forlorn hope:

> *So the judge who is eventually going to try the case, manages it as well. So he tells the parties what he wants. If they're litigants in person, quite often they don't understand what the judge means, and go away and don't do it. And it comes back the second time, and the judge tries to get them right the second time. And every time costs are clocked.*

In summary then, the interview evidence on this point was mixed. Some litigants failed to comply with directions, others complied with greater diligence than their lawyer opponents. Where they did not comply, lawyers perceived a bias in the court's tolerance of errors and inaction; whereas litigants who saw lawyers failing to comply with the rules felt similarly dubious about the justice of the situation.

Problems with enforcement

As well as problems with hearings we also received evidence in the interviews about enforcement. Some court staff indicated that litigants expected the court to enforce orders and judgments for them. This staff member pointed to a sense of disillusionment amongst family litigants which was matched by staff perceptions about the futility of enforcing contact orders:

> *It's a real sense of disillusion that I find with the people that need the orders enforcing, because they don't feel they're getting anywhere, what's the point in bringing it back to court, if she's not going to comply with orders. Doing things like committal proceedings, you briefly touch on it, because really the chances of a judge sending, you know, we wouldn't say this, a mum back to prison, you know for not complying with a contact order, you know it's so far down the line it's untrue, so it's difficult really.*

This litigant was surprised that enforcement was her responsibility, not the courts:

> *I assumed that when you went to the County Court they tried, I didn't realise that you had to pay for all these different options, like the bailiff or the third party order and all these. I assumed that they did that all of that anyway, whatever way they could to get the money, I didn't realise that it was down to me to say 'well I want you to do this and that and I'll have to pay you for it.*

Several staff mentioned problems with litigants in person not knowing how to trying to enforce judgments over £5,000. Some court staff would clearly discuss enforcement options with litigants, ruling out those which were not possible (e.g. charging orders against litigants who were not homeowners), although some felt this bordered on advice (the issue of advice by court staff is discussed in Chapter 10).

Negotiation, settlement and mediation

Judges, court staff, opponents and the litigants themselves all made comments relevant to understanding the willingness of unrepresented litigants to settle cases when they attended court. Court staff indicated a general reluctance on the part of unrepresented litigants to communicate with their opponent or their opponent's lawyer: We were interested in exploring why.

> *I think their interpretation of coming to court is it's dealt with through the court. They won't contact the other side because they think that they are in some breach of some regulation or rule. That is the kind of the impression I've got over the years, it's like. In some instances they want the information from the other side, they want certain disclosure and I say 'well contact the other side.' 'Oh no I haven't done that, wouldn't do that, I didn't think I could.' And that's the impression I've got over the years, is that they don't think that they can contact the other side once it's gone to court.*

One of the litigants we interviewed had indicated he did not want to discuss the case with his represented opponent prior to the hearing. He explained why by explaining his attitude to lawyers:

> *…there are people who will actually twist whatever you say, and make it very monstrous to the original… …and turn it to their advantage, and I know from experience, what, when you say something, they make a mountain out of a molehill. So I wasn't prepared to divulge anything at all to him, until it's in the courtroom.*

This point of view was not uncommon amongst the litigants we spoke to, and suggests that where litigants are reluctant to speak to lawyers it is more because of worries about advantage being taken, rather than a desire to have their day in court. Equally, many were not resistant to talking to opposing lawyers. The desire to only speak to the judge bred suspicion amongst lawyer opponents:

> *He wants to tell the District Judge things which aren't to be told to us, which indicates that things are being hidden. He never focuses on the issues.*

This reluctance to engage was not always on the litigant's part. One judge reported a case where the expert witness had declined to speak to an opposing litigant in person.

There were other comments on negotiation which suggested it was sometimes difficult for litigants to focus on the 'real issues' which suggests that their inability to comprehend what is legally relevant in their dispute infects negotiation as well as advocacy. There were also a series of comments which suggested that unrepresented litigants were more likely to take too partisan an approach to litigation. Sometimes, this was perceived as outside groups stoking up disputes, even where litigants were represented. A solicitor spoke of Families Need Fathers 'fuelling up' her clients. This solicitor perceived solicitors in family disputes as having a moderating effect on disputes, and sociologists have often referred to the way in which lawyers prepare their clients for settlement (see, for example, Sarat and Felstiner, 1986):

> *In family you must take a middle view, you hear what you're client's got to say, but you've got to take more of a middle view, because otherwise they're going to end up with a massive bill of costs that could have been avoided.*

ADR and mediation

Several of the family litigants in particular had experience of what they described as mediation or views on its utility. We suspect often what they are talking about is the new ancillary relief procedure, rather than full-blooded mediation. In relation to civil work there was much less experience and comment (even amongst court staff and judges).

Judges suggested that ADR was sometime carried out in civil cases, because they were aware of parties asking for proceedings to be stayed while ADR tried, but they were not generally able to say how successful it was and the tenor of their comments suggested that the experience was rare. One civil litigant we interviewed had raised the prospect of mediation 'many times' in the context of their case, but had been told, 'you can't mediate on something like this.' (It was a specified claim.)

Why might mediation be rare?

Many views were expressed on why unrepresented litigants would not participate in mediation. Some court staff pointed out that they had booklets describing ADR and

there were divorce mediation services available but also expressed the view that, *'if they're in person it's harder to get that kind of mediation going on. And there might be so much animosity there.'* Another view from one of the lawyers we interviewed was that unrepresented litigants wanted, 'their point of view expressed in the context of legal surroundings.' This was even though the nature of such disputes (i.e. more social than legal overtones) might be better dealt with by mediation. Thus a lawyer suggested:

> *It allows things to be aired and resolved which couldn't be resolved in the court room. You know, who gets the cat? Where the ashes are buried. Whether somebody can access a gate or not. You know, lots of little things that really don't belong in the court of law.*

Court staff suggested that litigants in person were reluctant to engage in mediation, partly through a lack of understanding about what the process was, through fear of engaging in the process where a solicitor was involved, and also through a want of anyone actively 'selling' the process to them. Some did not see it as their role to suggest mediation, whereas others suggested that if they saw clients who might benefit they would suggest it (in relation to family cases). Others said they did not specifically suggest mediation but they did encourage settlement by encouraging litigants to attend early at court for an opportunity to talk to their opponents and see if agreement could be reached. It is difficult to generalise from these differing perspectives but our strongest impression is that staff did not have a strong culture of encouraging or suggesting mediation: it was something which was left to lawyers (where parties were represented) and judges to deal with.

One of the lawyers we interviewed was also a mediator. She suggested that it was rare for litigants in person to mediate. She suggested a range of motives, inflexibility: dishonesty, personality, fear and hostility to their opponent.

> *They've got something to hide and [are] afraid of it. Although… …there are a few people who will come to mediation with something to hide hoping that they'll get away with it there. But, no, they're not the personality. Litigants in person, to a man and a woman, really do not have the personality to go to mediation because they're just not willing to discuss. They really do believe that their view is right and that there's no view, they've got no respect for the other party.*

Unrepresented litigants gave a number of reasons as to why mediation was not tried. On one occasion an appointment had come through to deal with contact and residence of a child (which also involved allegations of violence against the child from a new partner) after five or six weeks and the parties felt the issues had 'calmed

down' and so mediation was not needed. In other mediations, the opponent had simply failed to turn up. One felt it was worth trying with children related issues but with financial matters there was 'no point'. Several litigants and representatives opposing litigants in person felt that an opposing party was too inflexible for it to be worth participating in mediation, or that they would simply use the mediation as an opportunity to be argumentative or to stall for time.

The experiences of mediation in the context of family disputes that litigants in person shared with us were of this failing, and mediation only being tried because it had been a requirement prior to getting legal aid. On one occasion a financial mediation had broken down because of the alleged dishonesty of the opponent.

Positive attitudes to mediation

In spite of this broadly negative view of mediation, several of the lawyers and judges expressed positive attitudes about mediation with unrepresented litigants. Litigants too could see the benefits but with a more cooperative opponent. One judge saw informality as a particular benefit where the process was seeking to engage unrepresented litigants:

> *Not only is it cheaper but it's an easier way of dealing with things and much easier to deal with people on a personal level, rather than within the formal surroundings of a court.*

The same lawyer who had seen clients using non-representation as an opportunity to air non-legal issues in a court of law, pointed to the way in which early mediation could diffuse disputes, promote communication and, if allied to the court process, provide the litigants with some of the sense of 'voice' and participation that is provided by a 'day in court':

> *One of the benefits of mediation and being properly treated up until trial, is that people feel that they've got a fair crack at the whip from the judicial process.*

Similarly, several of the court staff, lawyers and judges we spoke to saw that mediation would be likely to have a bigger role in the future, with local schemes being established in some of the courts and the DCA having promoted the use of mediation with judges and others.

Appeals

Staff said they did not get many appeals, although (as judges agreed) difficult, headstrong or vexatious litigants were more common in this category of cases. They

were described as ‘the world’s worst’ litigants. Judges were worried about the diversion of staff resources to deal with these litigants. Conversely, court staff felt the appeal process was not clear. Litigants were not clear they had to ask permission at hearings and when they came to discuss appeals it was not clear whether they wanted to appeal or make a complaint. They were also not usually aware of the time limits. As might be expected, judges spoke of litigants in person dealing with issues of law badly and appealing where they don’t like the decision rather than cases where they have a valid appeal:

> *A lot of applications by litigants in person for permission to appeal basically boils to, ‘the judge didn’t believe me, he believes the other side.’ And it’s difficult for a litigant in person to understand that you can’t interfere with a finding of fact if the Judge chose to believe that witness’s evidence rather than your evidence, and there was an evidential basis to do so. But they do find it very difficult to understand that an appeal court can’t interfere. And they may be unfamiliar with the law.*

This suggested that unrepresented litigants misconstrued the appeal process, seeing it as an opportunity of a rehearing, rather than the more limited review of the decision that it usually was. Conversely, one judge felt, ‘there are some, there are bound to be, some decisions made by district judges that, probably ought to have been reconsidered on appeal and are not, because [the appeal process is so difficult for unrepresented litigants].’

Summary

Because this chapter discusses the difficulties faced by unrepresented litigants and those involved in cases with or against them it dwells on the problematic. Interviewees in fact suggested that unrepresented litigants varied enormously in their characteristics and abilities. Some coped well with court process and the presentation of their cases. However, as we have seen in earlier chapters, there is evidence of general levels of non- or low engagement with the process, and where there is engagement, we have seen higher error rates than for represented parties. We were able to discuss with court staff and judges the nature of the problems faced by unrepresented litigants to get a fuller idea of the problems that they had.

The first problem was successfully translating disputes into legal cases with prospects of success. This could mean that unrepresented litigants were more likely to put forward cases that were entirely misconceived, or being expressed solely in social non-legal terms. It might be that judges could perceive, within the social description of a problem provided by a litigant, what the claim’s legal foundation was,

and what the facts were in support, but sometimes in their view this was simply not possible. There was also evidence of litigants misconceiving remedies (for instance not understanding what it meant when a charging order was being sought against them, or claimants failing to specify remedies which the law could provide) or failing to understand, especially when dealing with small limited companies, who they should sue. These problems were compounded by the general sense that litigants, although not always disinclined to do legal research, were out of their depth when coping with law.

Problems with substantive conceptualisation of disputes were only the beginning, however. Coping with evidence was a major problem: knowing who to get witness statements from, failing to put their own evidence in the form of a statement, knowing what documents to produce, knowing whether and how they could introduce evidence late. Indeed, the general picture that emerged from our interviews and observations was that they are not advised on what evidence to submit and how to prepare it for hearings, they just bring what they think might be relevant.

A 'relaxed' attitude to evidence was based round an understandable failure to know what was expected of them, but it also based on an inability to stand aside from the dispute and see it in a neutral way. We can see something of this attitude, in what according to our lawyer/judge interviewees is a commonly held belief, that oral evidence alone would be enough to prove a case; or rather, litigants felt they could rely on their own plausibility.

Our interviewees suggested expert evidence presented its own special problems. Unrepresented litigants don't know who to go to, and they find the concept of joint experts very difficult. They are distrustful of experts instructed by solicitors for the other side and don't want to give joint instructions (and don't know how to).

There was also evidence that the unrepresented litigants' lack of legal knowledge puts judges in a difficult situation. They would not know all the relevant law all of the time, researching the point themselves was not always an option sometimes because of a lack of resources within the courts themselves, pressure of time; or the general confusion created by cases being presented in an opaque way.

Hearings too presented special problems. Unrepresented litigants failed to deal effectively with listing issues (failing to advise of dates that they could not do, or expecting re-listing to be treated like making medical appointments). Block listing of

cases at the same time in courts caused litigants stress, and was particularly difficult for those with childcare or work commitments which had to be juggled. Some litigants expressed views that suggested the judges did not have enough time to read papers prior to hearings and that the whole process of hearings was very rushed.

One of the reasons litigants sometimes wish to appear in person is their ability to better present their own story, but respondents in our interviews tended to suggest that whilst unrepresented litigants could be good at dealing with the presentation of facts, they were generally poor at this. Part of the problem was the interaction between facts and the procedural creation of facts: it is not enough to know the facts of a case, they have to be formalised through written statements and tested through evidence in chief, cross examination and so on. Examination in chief, and cross examination in particular caused significant problems. It was clear that many judges had to intervene in this part of hearings. Even litigants, who sometimes expressed confidence about being able to deal with hearing, clearly found hearings very difficult where they took an unusual turn (e.g. because a new issue was raised).

Interim hearings could sometimes pose more problems than final hearings as litigants were generally ready to argue the facts but not ready or able to discuss how cases should be handled. This suggests an inability of some unrepresented litigants to deal with the courts administrative needs during hearings. This further suggests either that the litigants are not properly aware of the nature and function of hearings in advance of their attendance (and that courts could do more to focus their expectations) or that litigants are simply desperate to have their day in court whenever an opportunity presents itself.

A further problem is unrepresented litigants ability to understand court orders. The litigants we spoke to generally felt they understood what had happened at the hearings they had attended. On the other hand, judges, but more particularly court staff, felt that unrepresented litigants struggled to understand orders at the end of hearings. Judges implied this was a problem rather than stating it overtly, by describing a laboured process of explaining orders ‘in words one syllable’ and admitting that they had no way of knowing if the litigants understood them. Staff reported numerous instances of individuals not understanding phrases intelligible to court staff but not to lay people, such as: file and serve; lodge; adjourn generally; liberty to restore; charging order; directions; and, statement of issues. Several referred to the judges issuing orders with great despatch and this would have contributed to the inability of litigants to understand (although some also suggested

that judges took great care with litigants) Even so, court clerks felt they themselves had to frequently listen to tapes to re-hear orders if they were going to understand what had been said.

Related to understanding orders, is the extent to which unrepresented litigants follow directions in court proceedings. It was not uncommon for court staff, judges or the lawyers we interviewed to suggest that unrepresented litigants failed to follow directions in time or fully. Practitioners and judges blamed this on a mixture of awareness and competence but also on deliberate obstruction or as a way of seeking advantage. Some solicitors also felt judges should be able to distinguish between litigants who were not cooperating because they did not understand what was required of them and those which were not cooperating as a way of dragging out proceedings and incurring costs for their opponent. We have already noted that judges do not always feel able to tell whether litigants have understood their orders, but also that staff suggested that the judicial time spent on giving and explaining the order could be variable. This suggests that greater thought might be given to how judges should ensure and test understanding when dealing with unrepresented litigants, and that this will aid their later management of disputes.

As well as problems with hearings we also received evidence in the interviews about enforcement. Some court staff indicated that litigants expected the court to enforce for them. Several staff mentioned problems with litigants in person not knowing how to try to enforce judgments.

Finally, judges, court staff, opponents and the litigants themselves all made comments relevant to understanding the willingness of unrepresented litigants to settle cases when they attended court. Court staff indicated a general reluctance on the part of unrepresented litigants to communicate with their opponent or their opponent's lawyer. This appeared to be because of a mixture of fear of having their words twisted and a general feeling that they ought not speak to their opponents prior to hearings (because it was frowned on in some way). There were other comments on negotiation which suggested it was sometimes difficult for litigants to focus on the 'real issues' which suggests that their inability to comprehend what is legally relevant in their dispute infects negotiation as well as advocacy.

Similar problems beset ADR/mediation.

Appeals were perceived as rare but headstrong or vexatious litigants were more common in this category of case. Our interviewees suggested that unrepresented litigants misconstrued the appeal process, seeing it as an opportunity of a rehearing, rather than the more limited review of the decision that it usually was.

9. The judicial role when handling unrepresented litigants

Handling hearings – taking people out of turn, placing more reliance on represented parties

Judges adopt a number of strategies for dealing with unrepresented litigants. It is clear that judges are at something of a further disadvantage with unrepresented litigants, not only may the paperwork be poor and their presentation of evidence in court be poor, but the judge has to try and surmise what the litigant's case is so that it is articulated properly. The judge acts like a neutral advocate, seeking to display the litigant's case without having the adversarial advocate's advantage of being able to take full instructions. Something of this emerges in the following passage from a judge:

> *What you have do with the person is be obviously more proactive. It's essential you read the papers in advance, so you know the case they are trying, the points they might make, and you have to, well, decide which of these are relevant … … and try and focus their attention on those. Give them the opportunity you know 'is there anything else that you want to add' but what you're essentially doing is trying to focus their attention on the relevant points, they seem to be able to do that, without any difficulties. If they stray then you have, have to be more interventionist.*

One common approach which judges said in interview they tended to adopt was that they relied on opponent lawyers to make the running in cases:

> *If the person who is represented happened to be the respondent to the application, I often find that it is easier, and better just to ask the lawyer to summarise the situation.*

This approach is in accord with the JSB guidelines but it might also give the impression to an unrepresented litigant that the hearing is an agenda set largely by the judge and the lawyer, even where the litigant is the person making the application. The judge quoted above however rejected any suggestion that this caused problems:

> *I rarely encounter any difficulty there, you know. But having said that, normally they'd be up against counsel, who, you know, outline the case fairly.*

Another judge saw the role of opponent representatives as useful. He too saw the great benefit in allowing the represented litigant to go first:

> *For example, in applications to suspend a warrant of possession, it's the applicant, it's the defendant's application always. But if there's a representative on the other side I will usually ask them to outline what the, you know, the factual background to the matter is before I hear anything from the applicant, because it is far quicker to get the solicitor to summarise the facts, than to ask the applicant to struggle.*

Yet another judge saw this providing of summaries as useful, although they portrayed it as the advocate *offering* to provide a summary 'out of turn' rather than the judge *inviting* it. Whilst they described this as partly the neutral role of advocates as officers of the court, they also saw limits to representatives putting every matter unhelpful to their case before the court:

> *They are officers of the court, they have a duty to put all the evidence and law before the court both, that which favours their client and that, which doesn't. That doesn't necessarily mean to say that they have got to do all the research and produce all the cases that militate against their case.*

Another judge often reversed the order of closing speeches feeling it was more helpful for the unrepresented party to go last:

> *'I think it will help if you hear what Mr so and so or Mrs so and so has got to say, and then, you know, the points they're making and then you can respond to those'. And I think they appreciate that. It helps them. helps some of them certainly, to focus on what they need to say. It's a response to what they've just heard rather than rehashing all the evidence again.*

There were other changes that this judge employed for instance changing the process of examination in chief.

> *It may be necessary to depart from the norm, which is that witness statements stand as evidence in chief, subject to any supplementary questions by way of clarification. The problem with that is that with most litigants in person, that means that within a minute, two minutes of the witness going into the witness box you're at cross-examination stage. Cross-examination is one of the hardest things for litigants in person to cope with, because it is difficult for them to appreciate the difference between putting your own side of the story and asking the witness questions which seek to challenge the witness's version of events. And I think it will be helpful in that situation if the litigant in person hears from the witness, doesn't have to be the whole lot, you know, just very briefly, tell me what happened or whatever. So they get into the flow of it.*

The judge gave an example of a particular case and then said:

> *If we had just simply said in that case 'there's the witness statement, evidence in chief, over to you' she would have been absolutely at sea, she wouldn't have known where to have started.*

As for cross examination by unrepresented litigants:

> *I'll tend to let them ask the questions. But if necessary, if it becomes [un]clear ….I will then say to the witness 'now, what is being put to you is…' and summarise or whatever. …[A]nd if necessary you can say 'is that what you're trying to say?' And they will say 'yes' or 'no, what I'm trying to say is this…' ….[T]he key thing that you've got to bear in mind is that you want the litigant in person to go away thinking, even if they've lost, which in a large number of cases they will do, but even if they've lost that they have actually had a fair hearing. And that you are seen, you know, that you are seen to be even handed and if the solicitors or barristers go out of line, that you pull them up.*

Another judge described the way litigants in person conducted hearings as hopeless and suggested some comfort with a blurring of the roles of advocate and judge. Their approach appeared to be less likely to allow the litigant to question and then sweep up or reformulate but to act as an intermediary and ask the unrepresented litigants to put suggestions through the judge:

> *…[P]articularly if you have a trial they just don't understand the concept of cross examination, so you end up saying to them 'it's not for you to tell me what your case is about but there may be some questions that you may want to ask the defendant and if you tell me what those are then I'll help you formulate those questions'.*

This intermediary approach was clearly adopted by another judge:

> *I have to say I find it easier if it's a fast track trial with a litigant in person, to conduct it, as if it was a small claim. It's a lot more informal approach to, and to get the litigant to give me or tell me their own case, and then I can put the questions*

As a further judge showed, there is a difference between assisting with a line of questioning advanced by a litigant and conducting a cross-examination for them:

> *Well. You've got a duty to both sides and to conduct a cross examination on behalf of a litigant in person, means first of all that you have to know what their case is in some detail. And it's not the judge's function, the judge's function is to decide, not to cross examine the other party's witnesses. So what I do, is to remind them about areas which they haven't explored in cross examination, translate their assertions into questions which, quite often the assertions that they make are long rambling statements, which then have to split up into, distinct questions. And that's one way the judge can help. But to enter into the dispute and to cross examine the other side's witnesses on behalf of the litigant in person, seems to me to be going beyond the boundaries of what is proper, for the judge to do.*

But even so this judge felt it was necessary to encourage the unrepresented litigant to develop lines of questioning:

Yeah. And normally I find that the cross examination by litigants in person is much shorter than it would be if they were represented. So it's in much less detail. So you need to remind them sometimes, 'look you need to put you case to this witness, so that he's got a chance to address it. I know what your case is, because I've read the statements. I know your case is so and so, you need to put that to him, in order that he can comment on it, and you haven't done that yet.' They'll do it straight away then.

Where the witness has made some assertion, and the litigant in person has not challenged it or, asked any questions at all about it, I ask her 'Are you accepting what the witness has said about so and so? And if not you should ask him about it' and that reminds them to. So it's that sort of assistance, rather than saying 'right' to the witness 'right, you've said so and so, I put it to you that isn't correct, or that's a lie or whatever.' The judge ought never do that in my view.

I WAS GETTING A SENSE THERE, THAT WHAT YOU'RE SAYING, IF THE LITIGANT IN PERSON THEN TAKES THE RESPONSE AT FACE VALUE, WITHOUT GOING INTO IT IN CROSS EXAMINATION, THEN YOU'RE NOT GOING TO TAKE OVER AND SAY 'ACTUALLY HANG ON A MINUTE THAT CONTRADICTS WHAT YOU SAID THREE WEEKS AGO' OR SOMETHING LIKE THAT, YOU'RE NOT GOING TO GO THAT FAR?

Well, sometimes I would say that. I must say that if the witness says 'x' and I know that in his statement he has said 'y' and the litigant in person in cross examination doesn't pick up the point, that is an ambiguity in the case which needs to be cleared up. So I will say 'look, turn to page so and so, have a look at what you said then, now what you've said today seems on the face of it to contradict that, do you want add anything to your evidence about that?' That's merely clearing up an ambiguity, and I think that would be on the right side of the line.

The fact that this judge, and others, are aware of a 'line' which should not be crossed suggests a somewhat conflicted situation. It is also an area where we sensed there was not a uniformity of approach. Interestingly, in this light, some judges suggested they would make changes to their approach for unrepresented parties in small claims hearings that they would not do in full trials. For example:

Yes but then I might ask questions rather than they ask questions. So in small claims yes but at trial you need to stick to some formalities.

Whereas another judge described how a final hearing in an ancillary relief case was handled in a most informal way, almost like a mediation saying at one stage: 'You've got to manufacture a solution':

So the easier way to do it was actually to put it in as a final hearing and, actually I just sort of talked them through it. You know, got the points of view, got of the points of view 'well don't you think that this, and don't you think that that.' And I'm almost brokering the agreement, but not quite, because at the end of the day it's got to be my decision.

Reliance on opposing lawyers

In relation to ancillary relief matters, another judge indicated a further way in which judges rely on solicitors:

> *We are concerned to ensure the unrepresented party has had advice regards [the] statement of information.*
>
> *YOU ASK THE SOLICITORS TO CONFIRM THE LITIGANT IN PERSON HAS HAD ADVICE, RATHER THAN ASK THE LITIGANT IN PERSON?*
>
> *Yes. I can trust the solicitors' integrity on this.*

Another judge confirmed what the lawyers we spoke to had said, that the represented party's solicitor may be asked to do extra preparation, such as preparing a trial bundle:

> *If there's a trial looming with a litigant in person that we'll probably ask the represented side to prepare the trial bundle …even if it's the litigant's responsibility because most of them haven't a clue where to start, and its much easier to say to the other side, who are legally represented, 'will you please prepare the bundle.' Its not a complete panacea because then you do get the occasional case where the litigant in person then starts complaining like mad, and sort of saying, 'well you've not included this, or why have you included that.' And they then end up preparing their own bundle as well, which is a recipe for disaster at the trial, you've got people working on two bundles.*

The situation is of course more complicated than that. The tendency of judges to request the represented party to take other steps, e.g. prepare bundles, is a way of shifting the expense of preparation from one party (often the unrepresented party in ancillary relief proceedings) to the other, even though that party may have sufficient wealth to pay for their own representation but choose not to. Some lawyers we spoke to even went as far as suggesting that litigants in person perceive the costs advantages in shifting work onto their opponent. Even so, there may be other benefits to the represented party taking on these tasks both economic and tactical:

> *AND PRESUMABLY IS THERE SOME SORT OF COSTS SAVING IN THE LONG RUN TO BE HAD FROM THE DOCUMENTS ACTUALLY BEING IN ORDER?*
>
> *Absolutely yes, and I mean apart from anything else I think, you are more likely to get the judge on your side… ..so they don't lose their temper over trying to find out what document you're referring to.*

Judges dealing with points of law

Another issue which was considered in the interviews was the extent to which judges intervened in hearings to raise points of law which favoured unrepresented litigants.

Judges generally stated that they did this where they could, although with a certain wariness of their position as adjudicators, but also aware of their own limits in terms of detailed legal knowledge. One judge had this to say about what happens when he feels an unrepresented litigant should be raising a point of law that they are not:

> *They say that you're not supposed to descend into the arena. But, if I became aware of the fact that some situation did give rise to a question of law, I would mention it to the parties, in fairness to both.*

Another pointed to the inevitable tensions that this gives rise to for judges, balancing a role as neutral adjudicator against the need to deal with cases justly. Judges tended to interpret this duty in terms of process, maximising the *opportunities* for unrepresented litigants to get help, rather than in terms of substance: ensuring the litigants understood the law that was applicable to their situation:

> *[Y]ou have to balance the, you have to try and do your best. The overriding objective is to deal with cases justly and you have to [do] what you can to do that. But the fact of the matter, is I haven't researched it, and the first I know about this case is when I come to court this morning. It's not something that is at the forefront of my mind, I don't deal with it in daily practice as a solicitor. So what am I, how am I supposed to deal with that? There's, one party may or may not have some authority, …there may be authority the other way. May be a good legal argument, but haven't got the ammunition to deal with it, it's not really my role to argue with the claimants case for him, or the unrepresented party's case for him. But I do have to try to, you know, not let him be overwhelmed by sort of the other side's power. But I haven't prepared it, and I don't think I could.*
>
> *You know, I struggle to see how any district judge is going to really, deal with that wholly adequately. I don't think that you can balance that wholly and adequately. Unless parties are properly represented then you can never be sure that all the relevant arguments have been heard.*

The preference for procedural over substantive fairness can also be seen in the judges' strong preference to say, in situations where there were legal questions that needed to be addressed in an unrepresented litigant's case, that the matter would be adjourned with a strong suggestion that unrepresented litigant should go and seek advice either from solicitors or the CABx. That is, where legal issues arose they often saw their role as making time for advice seeking, rather than for providing assistance with the law necessary to adjudicate the dispute. As one of the judge's recognised, sending the client away to get advice was not always satisfactory:

> *But what can you do if they don't? They come back and we're still in the same position. So you've given them a chance, but. It's not my job to, to*

fight their corner for them, but it is my job to try to make sure that they get a fair hearing. And yes, it's difficult.

Another situation in which judges tended to suggest unrepresented litigants took advice is where they seemed to be pursuing unfounded claims. Our interpretation of this is that, rather than tell the litigant that their claim looked doomed to failure (perhaps for fear of giving the impression of forming a premature judgment), they would tell them to seek advice:

[I]f I thought that they'd got hold of the wrong end of the stick maybe, and were marching off down a path which was doomed to fail. Although the court's got its own powers to dismiss hopeless cases…..

There were however occasions when a judge did feel it was necessary to intervene and make legal points on behalf of unrepresented litigants. This exchange between judge and interviewer gives a flavour of the path that some judges felt they have to tread:

HAVE THERE BEEN ANY SORT OF SITUATIONS WHEN YOU'VE COME ACROSS, SAY IN A POSSESSION CASE, WHERE YOU HAVE THOUGHT IF THERE WAS A LAWYER THERE THEY WOULD TAKE THIS POINT?

Well I think, if there's a lawyer, if you're thinking that, I think you're duty bound to take the point. You know, this is where they will need help. And you might have to say to the other side, legally represented, well 'isn't there a problem here' or whatever. Judges do bear a heavy burden to be on the lookout for points which the litigant may be entitled to raise.

….

IT SOUNDS AS THOUGH YOU'RE BORDERING ON ADVOCATING LEGAL POINTS FOR LITIGANTS IN PERSON, I DON'T KNOW IF THAT'S FAIR OR NOT?

Well I think only if the, well, only if the litigant has either made a point, or it's manifest from the papers, it may in some instances be manifest from the papers, but if the litigant raises a point which appears, and it sets the mind thinking, I think you've got obviously, you know, you can't descend into the arena, but if they have a valid point, I think you're duty bound to raise it. In the same way, as, you know, there's an analogy with counsel has a positive duty if he's citing an authority for a proposition, if counsel is aware of an authority which may be the other way, they've got a duty to bring that to your attention as well.

Equally, there were times when judges felt they should not advise, even though they recognised the law was very complex and beyond unrepresented litigants. Costs is one area; they tended to ask litigants in person whether they wanted to apply for costs at hearings and would not, for instance, specifically encourage them to make

the normal applications. This is in spite of the fact that there may be significant costs to unrepresented litigants in terms of their own time and other expenses. One of the judges took this attitude to costs in cases when unrepresented litigants were successful:

> *I have to confess I never advise them about it. Or if I did, I might say, you know, there are, there are rules about litigants in person and costs but they are very complicated. And you can usually devise, as I say, they are not really interested…*

This seems to be an area where judges could and (where the opponent is represented) should, simply advise the losing party of the order that they are minded to make and see if they have any counter applications. One can see too though problems with this suggestion, the successful unrepresented litigant may not have come prepared to quantify his or her time and expenditure.

With some exceptions, we can see in most of these comments a certain understandable reticence in judges' approaches to raising legal issues on behalf of unrepresented parties. In one of the cases we observed, however, the judge gave the unrepresented litigant fairly extensive advice on substantive law and was asked why:

> *Well only because she's floundering, and the case would never be ready for trial if it's left to [her]. That's the problem and in the end it will end by being struck out which is not an outcome that would be a just outcome.*

When interviewed, the lawyer representing the opposing party was not unduly troubled by the judge's approach:

> *Yes, yes it, well it could work for us, it could work against us ... But, I think that's part of the assistance the court gives to litigants in person to show that if they persist in a line of argument it's going to be adverse to their overall case.*

Another judge reported the situations in which rather than deal with matters on paper he would call parties into court and intervene in more directly: this could include claims which were being brought against the wrong parties or ancillary relief consent orders being put forward which 'may appear to be over generous to the other side'. Consent orders settling ancillary relief matters are extremely difficult to re-open, and this was a factor in the District Judges we interviewed being especially anxious to ensure that unrepresented parties in these cases understood the consequences of any order, and had access to legal advice if there was any doubt about that. The judge had a particular case in mind and predicts what he would do. Again we see the

balancing of intervention through suggesting legal advice. What he is not prepared to do is say the settlement seems to be unfair as this risks unsettling the usual process of negotiated settlements of court disputes:

> *I'll explain to the husband precisely what the order means… …in terms of capital and property, and pension. And that whatever the changes there are in the future, you won't be able to come back. And I'll explain what sort of range of orders would be open to the court to make in that situation, and does he want to take legal advice? Sometimes, and this not only happens to wife/husband, it also happens to husbands/wives, where you have a wife is in effect giving up…..more than she should to the husband. And you explain the position to them, and you outline the options, and ask them if they want to reconsider, would they like to take legal advice on the matter. And more often than not, they will say yes, and will go away, we'll adjourn it for them to come back another day. I had one that came back the other say, said she had had legal advice and she still wanted to go ahead with it. So I explained what it meant, and all the consequences of it, and write it down on the file, that you have, you have explained it to them. But at the end of the day, they're adults, and if they say that is what they want to do, and you've explained everything to them, given them the opportunity to have legal advice, and they've had legal advice, and that's still what they want to do. Well you have to make the order.*

Perceptions of fairness

We were also interested in the perceptions of the fairness of the hearings we had observed. Litigants were asked whether they felt they had been given a reasonable opportunity to say what they wanted to say. Often litigants were positive, judges were said for example to be 'excellent ….very, very fair towards me, very fair indeed.' However a similar number had concerns. One expressed concern because he had been inhibited from introducing evidence which had not been served on the other side, even so he felt that overall he had been treated fairly. Others felt judges had not shown any interest in their matter. This was not uncommonly in relation to procedural hearings where the judge may have felt there was not much to be gained from protracted discussion. Another felt they had been given a reasonable chance to say what they had wanted but that nevertheless they had not been given a fair *hearing* in that (they felt) the decision making had not been fair:

> *Yes, I think I was given the opportunity to say what I wanted to say. But on the other hand I mean, I don't know whether this is relevant for your case or not, but I found that every point I raised, I was overruled, and the judge made a decision in my wife's favour.*

Several litigants felt the courts were not interested in the truth. What our observations suggest happens is that the represented litigant includes in submissions (or omissions) matters of fact which are not strictly relevant but that the other party

seeks to contest as untrue. Because the court views them as irrelevant there is no point in pursuing their factual accuracy, but this leaves unrepresented litigants with a bad feeling about the justice of the process, particularly where the issue of relevance is not spelt out for the contentious facts. They may feel that they (unlike their opponent) have been denied their chance to speak to the truth, or they may feel the court has been influenced by a perceived falsehood. This litigant felt he had not been given enough opportunity to say what he wanted to say, meaning:

> *Yes, basically. I'm telling the truth and she's not, which is the truth. Which I can prove but no-one wants to listen. …She even neglected to put her own personal business down on there [it was an ancillary relief case]. But the court, were like, well, you know, so what? type of thing. That to me was a serious, deliberate attempt to hide things. But as far as I can tell the courts are just weighed on her side.*

Another litigant felt that they had more to say but respected the court's attempts to keep her to the facts up to a point:

> *To some extent, yes, I mean I had more things to say. As the Judge pointed out, stick with the facts of the case, which is obviously what I've done.*

He also felt that a procedural matter (a judgment in his favour was set aside on the papers without him being forewarned) had been poorly dealt with. One litigant simply felt that she had not had the opportunity to say what she wanted to say but that was because she was unrepresented and the judge could do nothing to help her with that:

> *No, but then I am not criticising that, because obviously he can't help, it's not his place to, to provide assistance, it's just his place to judge, so. And he has to be impartial, so I understand that. It just means I have to go back and speak to someone else.*

Another had more trenchant criticisms. This is another example of how unrepresented litigants may feel that (unlike their opponent) they have been denied their chance to speak to the truth, or that the court has been influenced by a perceived falsehood. This response illustrates how confusion over procedure and lay notions of fairness can combine to create a strong perception of unfairness, particularly where one party is unrepresented and the other represented:

> *I wasn't pleased about how the judge handled the case. … [The judge] did explain at the beginning that he would allow them to make their statement. And then after that he will allow me to make my statement. And that's what I thought was going to happen. But when, her solicitor spoke at length, for a very long time. I thought well, ok I will now have my time to make my statement and then rebut what allegations they have made. But then, to my surprise he said no, he will now ask the solicitor to*

cross-examine his client. And this went on, this went on, and so they took more than an hour and a half. And he realised I was itching because I hadn't had my word in yet. So at one stage, I don't know if you heard, but he said I shouldn't worry, I will have my time to speak. When they finished, then he asked me if I was going to ask them any questions. And if, again, if you can recall, I told her that, he said, I reminded her that he said he would give me time to make my statement, so I am expecting to be allowed to make my statement first, before the questioning or cross-examination or questioning starts. And then he said, yes he's got some points down, he started asking me what the points were and if I agreed with the points or not. I insisted on making my statement and then again he tried to cut me short, that they have rules that they follow. So if, what I hoped and intended to say would not help her in arriving at a decision he would tell me so. So I started, every time I pick up a subject, which he had already been allowed to make a statement on, he said that this is not going to help me. And then I would change the subject, no this is not going to help me. So in the end I had less then five minutes to speak in summary. So I wasn't pleased about the procedure. But as I said I am law abiding. I didn't agree with the decision but I respect it.

…The procedure in law is that you don't interrupt someone when somebody is talking. And I thought, you know, in fairness, ok I wasn't represented, but if they'd been allowed 50 minutes to speak, I should have be allowed 50 minutes to speak as well. But you could see from yourself, that it looked as if, and I don't want to tar all judges with the same brush, it looks as if because I am not a solicitor, I was unrepresented, I was seen like a non-entity. She gave all her attention to the opposing party, and preferably the solicitor representing my ex-wife. So in effect he actually hijacked the whole hearing, and dictated what he wanted to say. And I don't think I was given a fair turn you know, to put my case across.

Another litigant had tried to raise what was clearly, in the judge's eyes, a minor breach of a court order but the judge dismissed it, with a pragmatic view that the order could not be enforced, this was understandably difficult for the litigant to understand:

…I was trying to talk about the actual order… [which] said that we had to exchange contact numbers just in case of emergency. Well, I complied with everything in the order, whereas the children's mother hadn't. And I just wanted to bring this to the attention of the judge, so that she can then write to this woman and say to her in your order I said that you needed to give a phone number for contact and you haven't done, and please do so. But that was by the by. Basically the judge said 'well, if she doesn't want to give her number, then that's up to her and I can't really force her'

Summary

Inexpert, sometimes emotional, and procedurally naive litigants pose a number of ethical and managerial problems for judges. They are conscious of their role as neutral arbiter of an adversarial process[68] but also of the need to focus on substantive justice. The responses given in interview suggest that the two roles are difficult to balance; and also that different judges take different approaches to what needs to be done to protect one or other aim. The level and nature of intervention believed to be required to ensure that an unrepresented litigant's case is understood by the court, presented to the parties, and dealt with in evidence varies from judge to judge and case to case. No doubt some of this variation involves a sensible response to different cases and the capacities of different litigants, but we observed also that judges had different approaches and views on where they were naturally inclined to let the balance fall. No judges indicated they would never intervene on behalf of litigants, but some suggested that their interventions would be quite modest, telling litigants they should get legal advice, rather than saying what precisely was wrong with their case or what needed to be done to put it right. Others involved a much more direct engagement with the substantive issues before them, making explicit references to legal positions (a position similar to advising litigants) or taking up lines of questioning on their behalf (cross-examining). For these judges, the role of neutral arbiter was abandoned in favour of the neutral advocate, or to give a more palatable description, that of inquisitorial judge. We do not criticise the judges who took this approach. To us, who do not have the benefit of the judges considerable experience, the more interventionist approach seems more sensible: but the very diversity of approaches and views suggest that the judicial role in relation to unrepresented litigants would benefit from closer scrutiny, by research and within the judiciary itself.

Although the judges did not avert to this specifically, the overriding objective of the Civil Procedure Rules is relevant:[69]

> *These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing with a case justly includes, so far as is practicable –*
>
> *(a) ensuring that the parties are on an equal footing;*

[68] The judge, 'holds the balance between the contending parties without himself taking part in their disputations.' (Lord Denning, Jones v. National Coal Board [1957] 2 QB 55 (CA))
[69] Civil Procedure Rules, Part 1.1.

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

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

As with other aspects of their handling of cases, staff members, judges and lawyers were likely to say the quality of paperwork by unrepresented litigants was variable and sometimes very poor (although it is worth remembering that there were also criticisms of the quality of solicitors' paperwork). Of course, many of the general points made about the difficulties for unrepresented litigants are obvious. They don't understand the law, they can't fully explain their case in legally relevant terms, and so on. We wanted to explore in some depth more specific examples of difficulty, to begin the process of ascertaining the extent to which such problems could be remedied. It is difficult to see, for instance, how problems of prolixity, the omission of relevant or suffusion of irrelevant details could be remedied without legally skilled advice. Court staff probably possess sufficient knowledge to deal with many bureaucratic and administrative type problems (e.g. helping unrepresented litigants work out interest on claims) but staff are wary of doing this for fear of providing legal advice (see below, Chapter 10) and because it takes them away from what is perceived as their core work.

Basic procedural steps such as disclosure and exchange of witness statements seemed to pose problems (although as our quantitative data shows these steps were not common in the cases we looked at), especially in relation to ancillary relief cases. At this point interviewees broke into two camps: those who sympathised with the

difficulties faced by litigants and those who suspected that a proportion of litigants exploited their apparent naivety to withhold evidence.

The way in which cases are block listed and the management of court waiting rooms was not well received by unrepresented litigants. An already stressful experience was rendered more forbidding. We saw a range of responses to the hearings themselves. Sometimes litigants dealt with matters well, sometimes they were totally without confidence, sometimes they began confidently but ended poorly. Litigants seemed to cope particularly poorly with procedural, as opposed to substantive, hearings; and also with hearings where new or unpredicted issues arose.

Judges had a range of ways of dealing with hearings, which tended to include putting much more emphasis on the opposing lawyer giving summaries and making submissions about the case. They also altered their approach to the giving of evidence. There seemed to be evidence of litigants failing to understand orders given by judges. This was for a mixture of reasons only some of which were the approach of particular judges. Judges seemed unable, or unwilling, to establish whether parties had truly understood the orders they had given. Comments from court staff suggested that, on occasion, orders were given out with such haste, that checking for comprehension was not even tried. Legalease remains a problem. This may well effect the ability of courts to manage their cases effectively, and to properly avoid or (where appropriate) sanction procedural failings by unrepresented litigants.

We were also interested in perceptions of fairness of the hearings we had observed. Litigants were asked whether they felt they had been given a reasonable opportunity to say what they wanted to say. Often litigants were positive but several litigants felt the courts were not interested in the truth. What our observations suggest happens is that the represented litigant includes in submissions (or omissions) matters of fact which are not strictly relevant but that the other party seeks to contest as untrue (perhaps because they fear they are relevant and need to be attacked, or perhaps because they have seen their reputation sullied by false allegations). Because the court views them as irrelevant there is no point in pursuing their factual accuracy, but this leaves unrepresented litigants with a bad feeling about the justice of the process, particularly where the issue of relevance is not spelt out for the contentious facts. They may feel that they (unlike their opponent) have been denied their chance to speak to the truth, or they may feel the court has been influenced by a perceived falsehood.

Finally, Judges, court staff, opponents and the litigants themselves all made comments relevant to understanding the willingness of unrepresented litigants to settle cases when they attended court. Court staff indicated a general reluctance on the part of unrepresented litigants to communicate with their opponent or their opponent's lawyer. They suggested that this was because of a perception that they could or should not deal with opponents once cases had gone to court. Some of the litigants we spoke to were more fearful of lawyers manipulating negotiations or exploiting what is said by referring to it in court. Interestingly, their opponents interpreted this as 'having something to hide'.

Experience of mediation appeared to be very limited amongst those we spoke to except in the field of family. There were a number of reasons offered suggesting litigants in person might be more averse to mediation. Intractable and inflexible attitudes to disputes, an inability to 'see both sides', interpersonal hostility and the power-fear dynamics which may persist between litigants make it less likely that litigants in person would want to participate in mediation. There may be other reasons too: a lack of concerted attempts to persuade litigants of the benefits of mediation, the extent to which mediation may be perceived as an alternative to, rather than a part of the judicial process, and a lack of opportunities or services to which the potential mediating litigant can be referred. Court staff too had varying views on their role regarding mediation and we suspect largely saw it as beyond their remit (they might seek to argue, but did not with us, that it is a form of legal advice to tell a litigant that their case might be suitable for mediation). In spite of this lawyers and judges remained positive about the benefits of dealing with unrepresented parties in a more informal forum where legal and non-legal issues could be aired and the procedural hurdles of civil procedure would not inhibit discussion and resolution of disputes.

10. The role of court staff

The advice information dilemma

A particularly important issue in the context of assistance for unrepresented litigants is the limitations on what court staff, who ordinarily are not legally trained, can do for them. The role of staff clearly includes the provision of information on procedure and help with completing court forms, but it is generally accepted that the need for the courts to be impartial, and the resources available, mean that they cannot advise parties on the legal merits of their cases.[70] There are various measures in place designed to bring this limitation to the attention of unrepresented litigants. The Courts' Charter, for example, states that:

> *We can give you forms and help you fill them in but we can't give you legal advice or tell you what to say. We won't be able to say if your case is likely to succeed, or tell you what the judge will decide.*[71]

This message is reinforced at various points in the information leaflets produced by the Court Service, several of which indicate that there is a distinction not only between procedural and substantive legal issues, but also between information and advice. For example, the general leaflet on enforcement of money judgments in civil cases states that further information about the various procedures is available from any County Court, but:

> *the court staff will not be able to tell you which method of enforcement to choose. It is up to you to decide which one is the most likely to get you your money.'*[72]

In addition, in each of the courts where we conducted the research, the information displayed in public areas included A4 notices headed 'What assistance is available to you?' These notices, which we understand to have been produced by the Court Service centrally, set out in some detail what court staff could and could not do, and emphasised that staff could not recommend a course of action, and that the decision whether to take a particular step in proceedings rested with litigants themselves.

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[70] See for example Lord Woolf's Interim Report (1995), Chapter 17

[71] This wording is from the latest Charter leaflet, published in November 2003. The previous version was in similar terms: "Court staff can advise you on court procedures, give you the forms you need and help you fill them in. **But they cannot give you legal advice.** For example, they cannot tell you if you have a good claim or who you should be claiming from."

[72] 'I have a judgment but the defendant hasn't paid what can I do?' Leaflet ex321, dated 2003

We spent some time in the focus groups exploring these distinctions with court staff. Although it was a topic on our interview schedule, it transpired that this too was an issue high up the court staff's own agendas. All those we spoke to were very conscious both of the broad principle that they could not give legal advice and the difficulty that it caused them. They felt that, in practice, keeping within the proper limits of their non-advisory role was frequently problematic. A common complaint was that many unrepresented litigants did not understand (and in some instances seemed unwilling to accept) the limits to what staff could do, but it was also clear that the line between advice and information was a hazy one, difficult for them to operate in practice.

Staff had some sympathy for the position of unrepresented litigants who often found it difficult to understand the distinction between information and advice. One member of staff noted for example that, 'on the bottom of one of the forms, I think it does say, that if you're stuck please ring the court staff for help.' This suggests there was a tension between the customer service element of the court staff role and the prohibition on advice. Also, litigants were encouraged by others to see the court staff as a useful source of help: 'Oh, it's, 'I've been told by the CAB that you can help me fill it in.' And I think they take that as literally us getting a pen and writing it for them.' In such circumstances, it is perhaps not surprising that despite messages to the contrary, litigants unfamiliar with the legal system would often perceive of staff as the right people to turn to for advice. As one put it: *'they come to court, they don't know what they're doing, they look to us for that information and guidance.'* However, this did lead to staff being asked for assistance which they felt unable to provide, or uncomfortable about providing.

There were some areas where staff differed in their interpretations of where to draw the line between information and advice, and there were various pressures on them to cross it. Some of the more common difficulties arose from being asked:

- to advise on matters such as what the basis for a claim or application should be, how much to claim, what information would be required to succeed, and the chances of success;

- for explanations of the reasoning behind judicial decisions (particular examples included where claims had been struck out in civil cases, and where certificate of entitlement to decree nisi had been refused in divorce cases);

- questions about how to proceed generally (especially in relation to evidence and disclosure) and the likely consequences of taking a particular step;
- whether attendance at court hearings was required;
- which enforcement method to pursue.

Staff were generally agreed that they should not advise on how to frame claims or defences, the grounds on which parties should make applications generally, whether to take a particular step in proceedings, or likely outcomes. Questions about such matters were rightly perceived as raising legal issues, and most therefore took the view that they should not be answered in anything other than the most general terms, if at all. Instead, unrepresented litigants would either be directed to the information leaflets and notes for guidance issued by the Court Service, sometimes they would be offered access to the Civil Procedure Rules to look up points for themselves, or it would be suggested that they seek independent advice:

> *You've just got to give them the same answer … 'just respond to the claim, basically. Put,' they try to tell you the story, 'well put that on your defence then and that will have to do, or take some advice.'*

> *you can only say, say if [the judge] said, you know that, 'There is insufficient evidence.' Then that's all you can really say, 'There is insufficient evidence.' You can't really be seen to be directing them, you know, what to put in, because then if it goes wrong again, they'll say, 'Well, she told me.'*

As this second quote suggests, several members of staff were aware of the risk that advice would backfire and this appeared to often be a contributing factor in their adopting a cautious approach to assisting unrepresented litigants, even though that led to their being perceived as unhelpful. Sometimes this was based on personal experience. One commented that, 'I've done it once, and you don't do it again because if you get it wrong, it's your fault.' Another remarked that,

> *Yeah, I mean, it's us being unhelpful, but it's more than your job's worth, because if we work it out wrong, then they say, 'Well the court staff did it for me' … They get your name and you get blamed for everything.*

Another factor which militated against staff providing help was the risk that unrepresented litigants would work the system by seeking little pieces of information from each member of staff and then putting them together incrementally, or looking for contradictions. This could lead to embarrassment but also staff were very aware

of the extra work that was involved in allowing litigants to see that they were too helpful.

A handful of those members of staff who were more experienced, were however willing to approach certain of these matters differently. One tactic sometimes employed was to take unrepresented litigants through their options, asking questions designed to help them arrive at answers for themselves. For example, when asked about the grounds on which to base a divorce petition, one felt that,

> *it's quite easy to help them to deduce for themselves isn't it? There's only five. So adultery, straight away: 'Is it adultery?' No, and you don't need to explain it, and you can rule it out straight away. When it's a separation, if it's less than five years ago, you've wiped out five years. 'Does the respondent consent?' Well you've wiped out the two years by consent. You've only got behaviour, desertion left. 'Has he deserted you?' You know what I mean?'*

Unlike some court staff, this member of staff was confident that such an approach did not amount to the giving of legal advice, because the situation was one in which, 'they know the answer really, they're just asking for clarification.*'* It is worth noting here that the information leaflets produced by the Court Service clearly set out the possible grounds for divorce. There would seem to be no good reason why staff should not take unrepresented litigants through criteria already available from the courts in another format, and it would therefore seem that a more robust approach such as this could properly be adopted in these circumstances, without overstepping the boundary between information and advice.

One area which caused particular difficulties was enforcement procedures. Unrepresented litigants would often want to know which method would be most effective, and as noted above, that would be something which staff should not advise on. In outlining the options, several said that they would adopt a similar approach to that above in respect of grounds for divorce:

> *they say, 'What can I do?' And then you'll say, 'Do they own a property?' 'Yes' 'Well, you can issue a charging order. Are they working?' 'Yes.' 'Well, you can issue an attachment of earnings.''*

Unlike the divorce example, however, the underlying concern here sometimes appeared to be that staff were unsure of what they could and could not say. Although in one court, it was felt that a direct explanation that an attachment of earnings order could not be obtained against a self employed debtor did not amount to legal advice, in another, staff perceived something of a dilemma:

> *If I was to say 'You can't do an attachment of earnings of order because they're self employed' that's probably bordering on advice really and maybe we shouldn't be saying that, because ultimately it's the party's choice. … really that should be their problem, but we know that it would just waste the court's time, the judge's time and tax payers' money, whatever, so we probably feel we should step in and mention that to them.*

Again, the information leaflets produced by the Court Service clearly state the position regarding attachment of earnings orders and self employment, and this would therefore seem to be another situation in which a more robust approach to assisting unrepresented litigants could properly be adopted.

Stretching the envelope of information

There were some situations in which a handful of the more experienced members of staff said they would, if dealing with unrepresented litigants at the counter, go further than others. One was if it was felt that the particulars of behaviour on a divorce petition were inadequate: 'We know from experience really that you have to be specific. You know, I would have no qualms saying, 'You're not being specific enough.'' Similarly, on the civil side:

> *If it came in over the counter and it says, 'Joe Bloggs owes me 50 quid' and nothing else, I'll say, 'Well you might want to put the date there and why he owes you £50 to explain to the judge, to give the judge a little more information.'*

Another way in which the information-advice dilemma was manifested was when staff were requested to explain judicial decisions. Whilst most said they would not attempt to explain judicial decisions in anything other than the most general terms, the same member of staff said that they would attempt to provide some explanation if they thought it could be gleaned from the court file, even though that might entail making assumptions:

> *if I see for example that they haven't explained how they arrived at a figure of £2,500 or £10,000 or whatever, then I'll say to them, 'Well perhaps you didn't explain why this person owed you money, when was this debt incurred, perhaps you ought to go into more details.'*

In these examples, staff were clearly trying to be as helpful as possible (and no doubt their belief in the inadequacy of documents was often right), but their approach seemed to stray into the provision of advice. Unrepresented litigants would be likely to construe it as advice which should be relied upon, and it is not difficult to imagine that leading to problems where the advice is inaccurate. Another member of staff, although mindful of this, was nevertheless prepared to run that risk:

> *It's an incredibly difficult balance, yeah. Because we end up dispensing legal advice with the kind of 'I'm actually wedged on the fence here, and I'm not allowed to say what I'm about say, because I've got no qualifications to say it. Even if I did have, I'm not allowed to say it, so this is just the benefit of some experience, but you understand I'm not giving you advice.' And that's usually the mantra.*

Part of the difficulty for staff in dealing with unrepresented litigants was that they could sometimes be quite persistent in asking for help, or otherwise come across as needy, leading some to feel pressurised into saying something helpful:

> *People will cry for ages on the phone, and you're worried about that, but you're also thinking, what can I and what can't I say, or how can I say it to make them feel better, to give them that little bit of assurance that, 'this is the way that you should do things' without actually telling them.*

Another member of staff described a situation in which the presence of unrepresented litigants on both sides had led them to go further than they normally would. One party had complained that the other had not served a document in accordance with directions, and rather than leave it to the first party to pursue the matter themselves, the member of staff had written to the other to remind them of what the directions required. The motivation for this had been that, 'it's difficult when they're in person, you feel, you're thinking that this hearing they're coming to could be a waste of time.' This desire to be helpful however led to the second party then asking for a similar level of assistance, and the member of staff recognised that they had become more involved than they felt they ought to have: 'I seemed to become a go between then between the two parties. But I nipped it in the bud really by, I can't remember exactly what I said, but I didn't go to the length I did the first time.' This was one of the more experienced members of staff speaking, and ironically perhaps, it was sometimes the fact that they were more experienced which led to some staff finding it more difficult than others to say 'no' to unrepresented litigants:

> *I think that's the trouble though. If you've been in the department for a long time and you know about the procedures, or you've got ideas about A, B, C and D, they'll ask you the next question … because I knew the basis of the procedure throughout, he was like following it through with another question, then another question. If I didn't know, and I said, 'Look, I don't know', the questioning would have just stopped there. Which obviously would have made it easier for me in some respects.*

One other example of how another experienced member of staff may have been too helpful stood out. They had attempted to dissuade a prospective litigant from issuing a claim, because they worried about the potential liability for costs if it failed, which they felt the litigant could ill afford to risk. The claim was however a routine consumer

claim for only £800, and thus would in the normal course of events have been allocated to the small claims track if defended, meaning that if the claimant lost, their liability for costs would have been very limited (unless there were exceptional circumstances). In this instance the claim had still been issued, therefore there appeared to have been no adverse consequences, but it nevertheless appeared that concern for the unrepresented litigant's position had led to the giving of incorrect advice.

One of the litigants we spoke to appeared to have had advice from court staff on the interpretation of a response to an application for a third party debt order (formerly a garnishee order) which turned out to be wrong:

> *I had a few options at my disposal, go through a bailiff…. …I could do, I am not sure what the term is, I could do a thing where you can sort of, put a kind of a thing on his car or his house, if he tries to sell it, you can get the proceeds of that. But you are waiting on whether he's going to sell it or not, or you could do this third party, you know he has an account somewhere, you can ask, the bank to sort of freeze his money, get it from there. So I decided the best cause of action was to go through the bank… ..So I filled out all the necessary forms and then I just in before this hearing I got a letter from the bank. But I didn't completely understand it, it looks positive but the last paragraph made it look in the negative and I thought. So I rang up and I spoke to the County Court office and read it out to them and explained it to them, and they had a look at that, and they said no, that's positive, they're saying that [the opponent] hasn't got any debts with the bank. So, if they're ordered to give you this money they should be able to. So of course today when I'm told today that actually he doesn't have an account with them I'm a bit shocked. So I guess I've got to go back to, try to do a different route I suppose, and take it from there…*

Advice on attending hearings

Interestingly one area where the approach of staff was almost always circumspect, was in answering what was said to be a very common question: 'Do I have to attend the hearing?' The standard response in each of the courts was said to be along the lines of,

> *It's in your interests to attend, but ultimately it's your decision. If you don't, the judge will make an order, or he may want further information, which if you're not there you can't give him, which could result in the case going against you.'*

Even here, however, one or two of the more experienced staff drew distinctions. One said that if a query related to the hearing of a party's own application, the advice would be to attend. Another would advise debtors faced with charging order applications that

> *'You not turning up to the hearing won't make any difference, it's a forgone conclusion. You do owe the money that has been judged, and unless you have, unless you can find some way of applying for the judgment to be set aside, then this charging order absolute will be made. It's going to happen, it's pointless you coming along anyway, there's nothing you can do to stop it.'*

Arguably the staff's general approach was a rather cautious way of encouraging litigants to attend a hearing and one which could be interpreted as not discouraging non-attendance sufficiently robustly. Ironically, this is also an area where some staff appeared to be into predicting and advising on outcomes.

One other area demonstrated a problem caused by staff management of the information advice divide. This was answering questions from private landlords about use of possession procedures. Whilst working in one court, we had been aware of a telephone call during which a landlord had asked whether, instead of taking action through the court, he could simply 'go round there.' The response had been, 'It's up to you, I can't advise you.' Here we see the potential significance of a failure to provide advice. It does not amount to condoning harassment by the landlord, but it might be interpreted as such; and it fails to warn the landlord of potential illegality.

We asked staff whether they were often asked by landlords if they could simply 'change the locks' instead of obtaining possession via the courts. We were told that they were, but how they said they responded varied. Some took the view that, as in the instance we had observed, 'We can't be seen to make a comment.' Others agreed, but would say, 'I wouldn't advise it until you go and seek some legal advice, but I can't say 'yes' and I can't say 'no' because I don't know.' Some would add something along the lines of, 'Be careful, and don't do anything that breaks the law.'

Each of these approaches is entirely understandable. As already noted, most staff are not legally trained, and they have to remain impartial. This did however seem to be a commonly encountered situation in which several half-knew the answer, and were aware that callers might be considering action which could have potentially serious consequences, yet felt constrained in what they could say. We think that staff might reasonably be encouraged to give a stronger response here, without themselves advising landlords what to do. We do not think it would be going too far if staff were trained to say to landlords something along the lines of, 'I can't advise you on your rights or what action you should take, but it is usually illegal to evict someone from residential premises without a court order, so you would be well advised to seek legal advice before doing anything.'

Dealing with correspondence and documents

The situations discussed so far all involved dealing with unrepresented litigants directly, whether at the court counter or on the telephone. Staff also had to deal with proceedings issued via the post, and correspondence from unrepresented litigants generally. It was noticeable that when discussing this area, staff appeared more confident about how to deal with such matters, also, that their approach was more uniform; claims and applications received in the post would be issued without further ado (it was pointed out that staff had no authority to reject them, but would sometimes refer bizarre claims to judges before they were issued and served), and if correspondence regarding procedural matters lacked clarity, it would be referred to the judiciary for a decision on whether a formal application was required. Staff would also often turn to the judiciary when in doubt as to how to respond to correspondence involving requests for assistance, but views on the value of this differed. In one court, it was said that,

> *The district judges here are very good because if there is a letter we think is bordering on legal advice, we can always put it up to them and they'll make a comment.*

In another, however, it was noted that,

> *a lot of the time the judge will just say 'no comment' for those, which isn't particularly helpful to them [the unrepresented litigant]. But that's all we can do.*

We saw further evidence of this on the desk of one judge we interviewed, which contained a pile of files on which there were queries from staff. This judge confirmed that,

> *If the query seeks advice, the normal reply that I would draft for them is to say, Sorry it's not my function to give advice and you should see a solicitor, or go to the Citizens Advice Bureau.*

Staff often described how unrepresented litigants were disappointed at the level of assistance that they could give, and sometimes also felt frustrated themselves by this. We discussed whether they would welcome being allowed to give a greater level of assistance. One would have welcomed being able to give, 'just that little bit more of legal advice.' The majority view however, was that such a development would not be welcomed. There appeared to be two main reasons for this: firstly, fear of the consequences of giving wrong advice, and secondly, the perception that if their role were enhanced, that would involve taking on the functions of a lawyer or other adviser:

No, because I have seen … I have seen disasters, through extremely helpful officers getting in deeper and deeper.

I think that would eradicate the role of a solicitor as well, I think. You know, if we were giving out advice. And I think that more people wouldn't instruct solicitors would they? They would rely on us more, and that's the role of the solicitor isn't it?

The members of the judiciary and the lawyers we spoke to, were sympathetic to the difficulties which court staff faced in assisting unrepresented litigants, but also felt that the Court Service position on what staff could and could not do was correct. Their views on this issue were perhaps best summed up by the following quotes:

I think they fall over themselves to be as helpful as possible, and they probably do give on advice on occasion, but they are not meant to do it, because it's a minefield once they start suggesting things to people.

I don't think the court staff should get themselves involved in that, giving anything more than the most basic level of advice on how to fill in the forms. Once you get beyond that, most of it is just an imposition on them.

Where staff have made efforts to improve information for unrepresented litigants locally

Several courts had developed specimen documents as precedents, and felt these had helped improve the quality of documentation filed by litigants in person because rather than being told that something was wrong, they had a worked example of what it might look like if it was right. These specimen documents included divorce petitions and claim forms in civil cases (where actual figures were given to show how to calculate interest).

There is some central coordination of initiatives in the courts via a Best Practice section and a 'good idea' recognition scheme whereby staff are invited to submit ideas for improving practice and forms within the courts. Some staff were disenchanted with these schemes, because they had submitted ideas that were rejected without (it was perceived by them) a cogent explanation, or because they had not received any response, even though the ideas had been submitted in some cases more than a year ago. One member of staff had begun trying to liaise centrally to ensure the allocation questionnaire was simplified, though pressure of work had meant they had been unable to progress this:

Yeah, I have actually tried to do something about it and tried, to I've written off to the [unclear] see if we can get the notes more simplified. Just put into plain English so they understand what to put, or put like a

glossary at the back so they understand what terms mean, which would be helpful, I've written off, …they want a full working example of what I want, and I haven't got round to doing that yet, but it would definitely save us a lot of time. It's a huge problem.

Culture and targets

There was broader evidence that aspects of the management culture within the Court Service sometimes inhibited customer service. This related to two issues: manning levels and targets. Several staff referred to the pressure of work as inhibiting what they could do:

[W]e are so conscious of, you know, running to open the post and deal with all the correspondence, check over all the documents. It can get to the point where you see customers as an interruption. You don't mean to, and you don't give them that impression, but when the phones won't stop. A lot of us get in pretty early in the morning to give us a couple of hours to do our work before the phone starts.

Some referred to specific monitoring of their work which did not properly reflect the customer service element of the job; saying the emphasis was on shifting paperwork, and monitoring for efficiency in processing 'events' through the computer system. This court staff member thought this had a deleterious effect on work that was not monitored and also forced staff to spend as little time as possible on each 'event':

But it's a killer, we're governed by stats. We're staffed if you like on stats. You know that telephone calls, there's no code that we can stick on the computer that will give us time that goes towards our stats. There's a percentage uplift that phone calls are taken into consideration….. [Court staff member] for example has got a lot of work to get through in a day, so she just wants to get off the phone to get on with her work. She also knows perfectly well that every, that clock is ticking, and every extra minute she is on the phone she is not getting any BMS [Business Management Systems] time for that call.

One court staff member claimed that a more business-like court culture, and the Woolf reforms in particular, had reduced the tendency of court staff to check forms:

Part of the thrust of the Woolf reforms was that the onus is on the person lodging the documents to get it right. And if they don't get it right, we could even apply sanctions…. So, the culture of the court staff is to not check things very carefully, we haven't got the time and the training to check the depth of the form.

Another member of staff with considerable experience pointed to a change in the culture of courts: things, 'didn't used to be so fast paced in the courts as they are

these days.' And a further member of staff pointed more directly to a greater willingness to help unrepresented litigants in the past:

> *In the old days I used to occasionally help them fill in the statement of means, which was an affidavit form, particularly for putting information, it was very time consuming. We just do not have that time in the end.*

There was no doubt from the responses of court staff in this group that everyone felt under pressure to keep these 'productivity statistics' high: 'Everyone in every court is, there is no question about it.*'* Nevertheless they liked to think that they also prioritised customer service:

> *I mean don't get me wrong here, we I think are excellent at customer service, we are constantly putting in new initiatives, you know plans to improve customer service. Everyone here has done something to improve customer service, either directly or indirectly, in some cases in a very big way. It is a question of trying to balance our time between improving customer service, knowing full well that you take that step back to take the five steps forward or whatever. But it is a very difficult squeeze to manage.*

But:

> *We could, we could, given the time yeah, we could do an enormous amount more.*

One of the judges supported the view that the way that courts were resourced made no allowance for the time that had to be spent with unrepresented litigants, particularly those difficult ones that took up a lot of court counter time:

> *There's no adequate, as far as I can see, there is no adequate allowance made in their assessment in the number of staff for the fact that, particularly in [location of court], you get litigants in person who come and may be at the counter for a long time.*

Inhibitors of customer service other than resources

There were other inhibitors of customer service such as lack of sufficient staff experienced in the work of the courts generally, which one staff member pointed out could mean litigants were passed from pillar to post:

> *I just think it's not, there's not enough experienced people in the office. I mean all I know is issues. Yeah, I know a little bit of enforcements, but not, not enough to give [help]…. …So you pick up bits, but you're not actually trained on any other section, so when you get phone calls, the only thing you can do is put them through to another section, because you don't know enough about it to explain queries at the counter.*

Even where staff did know the answer to queries relating to another section they preferred to pass them on so that they could get on with their own work. Otherwise, 'The thing is you'd end up being on the phone all day wouldn't you?' We also saw examples of court staff with higher levels of customer experience regretting that knowledge because they inevitably became burdened with higher levels of customer queries:

> *But I've got 10 years customer service, so that's my downfall isn't, it is my downfall in some respects?*

One of the judges, who had experience of other courts, spoke of levels of help varying from court to court, with smaller courts have less of a division of labour within sections and therefore having staff with a greater breadth of experience and so able to provide more help.

Possible improvements to the way courts work with unrepresented litigants

Court staff made a range of suggestions for improvements to the way that courts worked with unrepresented litigants. These suggestions included:

- Standard litigant-friendly wording for common orders (said to have been developed in at least one court);
- Earlier hearings for unrepresented claimants (because cases were perceived as very pressing by first-timers) though it was clear solicitors would resent this if it were implemented;
- Better information on appealing prior to hearings: 'I don't think the appeal process is very clear. I don't think people are aware that they need to ask permission to appeal from the judge at the initial hearing;
- Stronger case management, rather than District Judges tending to, 'leave too many things in the air without taking a firm hand;
- More training for advice agencies and similar organisations. Court staff talked about this, and some had been involved in training advice organisations;
- Forms could be clearer even where they were Crystal marked for Plain English. Staff mentioned in particular, third party debt order forms, and applications by litigant in person for a transcript of tapes of hearings;

- More information leaflets for people;
- Asking unrepresented litigants for their phone numbers on court forms so that they could be contacted in an emergency (such as a problem with listing a hearing).

Suggestion made by legal representatives included:

- More mediation;
- More robustness in making cost orders against unrepresented litigants who deliberately string out proceedings or cause unnecessary work, and stronger warnings on standard guidance material about the dangers of not complying with an order.

Judges' suggestions included:

- better physical facilities for unrepresented litigants;
- abandonment of formal court dress for hearings (outside of chambers where they do not robe anyway).

Specific points made by unrepresented litigants included:

- Two mentioned the need for more speed (one in a civil case and one in a contact case). Both felt that the lack of timely progression and prevarication by their opponent created a sense of injustice. Errors of omission (failing to force another party to get on with matters) and commission (making clerical errors) by the court compounded this.

Two unrepresented fathers in contact disputes had a broader perception that the system was stacked against fathers and stated this provided a clear signal to mothers that they could 'play the system'. Both court staff and judges referred to the problems of enforcement in this context.

There are some more general themes which we develop below.

Written information

Most unrepresented litigants we interviewed received leaflets or guidance information from the courts. Some had to request it and some were sent it unasked, especially in family cases. Most found the information useful in terms of filing in the forms they

were presented with but one described the information received as of, 'no relevance to my case'. One defendant in a civil case and one respondent in a Children Act case had received no information from the courts that might have helped with the handling of their case. An unrepresented respondent in ancillary relief proceedings had received no information, probably because he had initially been represented. A civil litigant enforcing a tribunal award had received information leaflets but felt the need to speak to court staff as well:

> *They were useful. But I mean, I still went back to the court office quite a few times just to get a better explanation, because I just wanted to be doubly sure on things. Like with the order, the third party order that I decided to go for. I just, you know, I sat and chatted*

Court staff came up with a wide range of areas where they felt that court information ought to be provided, but was not, and several of them were taking steps within their own courts to make local improvements. The types of area suggested included:

- Better guidance on how to fill in a divorce petition (as mentioned above, some courts had developed specimens);
- How file an answer in a divorce;
- How to deal with drafting and applying for a consent order in ancillary relief cases;
- How to enforce a breached Children Act order;
- How to prepare for and conduct yourself at hearings (something the litigants appeared to want as well, as one litigant put it: 'A little leaflet to say, please bow to the judge or call him sir would have been quite useful.')[73]
- Guidance on the allocation questionnaire;
- Guidance on pre-action protocols, which staff felt could be reworded as, 'what have you done before issuing?';
- Literature on assessment of costs;

[73] The Court Service does in fact produce a leaflet, titled 'Coming to a court hearing? Some things you should know' which covers this point and other practical matters. However, the focus groups and interviews did not suggest a great deal of awareness of this.

In relation to better information about how to conduct court hearings, interactive or video based demonstrations about court hearings were sometimes suggested, as were simple notices:

> *Just I suppose it would be helpful if they were going into the court, if there was just something on the door, that says how you, where you sit if you're on own, and how you address the judge and just a little a brief explanation I suppose, that you don't talk when the judge is talking, and you stand up when you want to say something, I suppose. They don't really know what they're doing a lot of the time.*

Although staff tended to suggest better written information they also saw limits to that strategy as many litigants, they felt, were reluctant to read literature. This might be tackled by better formatting and thinking more carefully about how to make the material more useful and/or digestible to unrepresented litigants.

> *Yeah, may be a simple question and answer leaflet like an A4 page, that says what happens if they defend it, just little, may be leaflets are a bit too much for litigants in person to read.*

Another staff member put the point more critically:

> *[W]ith the best will in the world, you can give the litigant in person all the advice, all the information. They don't read it. Which is what happens. We send out a claim pack, so we send out the claim forms, the notes for guidance, we send out the fees leaflet. And probably 50% of the time they'll bring it back in, in the same envelope, and they haven't even put pen to paper. And you think, well they might have had two weeks. And that's a litigant in person. I mean, they say 'we weren't sure what to put on, we've come down to see you' And this is partly why they're not doing it on line. Simply because they're not sure, they're nervous. In some cases it is a lot of money, you know it's £120, £250, £400, it's not money to be sneezed at for most people. And, I mean, we've got leaflets out there, we've got free advice agencies, we've got the CLS leaflet, we've got every leaflet that is available, we've got a public counter and I've been there for 12 years, so I know what the public want. But, if they're not reading the leaflets, and a lot of people don't or don't understand the leaflets, then really there is very little you can do in some respects.*

Although staff tended to resent the way in which litigants relied on them, and suspected that litigants often did not 'bother' to read material sent to them, they also recognised that it was very difficult for lay people to understand how to put their own case into the alien documentation. It is worth quoting a range of comments from staff as they show a whole host of attitudes to unrepresented litigants: a mixture of understanding, hostility, irritation and sympathy:

> *They are clearly not attempting to read them or at least digest them because they'll ring up and ask the exact same questions that you'll have to answer … …in three different ways before they've actually understood.*
>
> *And if they can't serve them and stuff like that, and they don't quite understand. I don't think any of them read the literature really, they don't read much of it, they just depend on the staff to. And somewhere in the small print it says 'the court will help you anyway.'*
>
> *[T]he large majority do [divorce] on their own nowadays, so they are asking questions. Is it alright to file for my DA [Decree Absolute] now and all this sort of thing on the telephone and they don't, and they haven't read anything. You know, I don't know, well, perhaps they can't, if their education isn't that good, they ring the court and say 'is it time yet' sort of thing.*
>
> *There's almost this, you know I'm in a new building with my glasses on and I can't see thing. It's too, you can just see that they just can't take it in.*

And whilst some staff felt that although leaflets had improved dramatically in recent years, more could be done to simplify language, some were sceptical. So this staff member was asked if the court leaflets could be further improved was dismissive, 'Not unless you did it in three inch high letters or narrated it to them no.' Others were more accepting of the problems:

> *even with the guidance material you have to go through it with them because it is not, because to the everyday person on the street it's not really user friendly, it is more, there is quite a bit of jargon in there and they don't understand.*

Conversely, one staff member pointed out it was 'difficult to know' what unrepresented litigants needed. This might suggest a case for litigant based work to improve leaflets.

A judge felt:

> *The court service I think has got it about right in terms of the information that it produces. And I can't think of any examples where the court services either do too much or too little for litigants in person, talking in terms of the administration.*

Although this judge then went on to make suggestions about specific documents, particularly suggesting that more could be done to develop standard application forms, such as applications to set aside a judgement:

> *to give them at least a few boxes to tick and also for them [to] produce some evidence, but giving them just a few boxes to tick so that, at least give them the basics. 'I never received the, I moved address, it was*

served at the wrong address' or whatever it might be. I mean those are critical pieces of information which very often are left off because they don't know what they're supposed to say.

Terminology of court orders and better use of plain English

As we have already noted, several court staff felt there could still be considerable improvement to court orders and documentation. For example, 'file and serve' could be explained in plainer English, e.g. 'send [description of document] to the court and send a copy to all the other parties in the case.' Comments also suggested that there was a communication problem within some (but not all) courts created by the judges' status, preventing court staff from raising such issues directly with them:

We wouldn't comment on how a judge has made an order. I mean at the end of day we're only interpreting what the judge has said. So, if there's going to be any changes it's got to be with the judges. So somebody at court manager level or a HEO level have got to go see a judge and say 'Is there any possibility of actually simplifying it for the litigant in person generally?' I mean that is where it would have to come from, it certainly couldn't come from us.

A judge acknowledged that case management directions were often given out in a routinised way. More could be done to specify precisely what they meant to the litigant in person: one suggested, for example, 'I think judges probably need to get into the habit, that if they've got a litigant in person of saying 'witness statements include your witness statement.'

An unrepresented litigant gave this description of use of legal jargon, showing the way in which its effects prevent effective communication and help foster a deeper mistrust of the system:

In terms of legal jargon, they make it difficult for the everyday man in the street to actually deal with it, that's why you then have to get a solicitor. To me it just seems like a legal game, and the solicitors, barristers and magistrates, judges and the, what have you are all privy to the rules and regulations. And you as a client or you know, [unclear] there at their mercy. You've just got to sit there and this person is dealing with your life. And to them [it] is a meal ticket.

Court staff described a process whereby orders in cases involving unrepresented litigants referred to the CPR, and so staff had to photocopy the relevant rules and hand them to parties:

You've got to photocopy the book. [A litigant says], the judge has quoted CPR 3.1(2)(b)…. …he's a Part 20 defendant, he said 'I've got no idea

> *what that is.' I do, 'that's no problem I said, I'll photocopy the CPR' and highlighted all the relevant sections. But actually a lot of people will get orders landing on their door mat and nobody has bothered to photocopy the CPR, so you've got no idea what Part 17(a) may be.*

And this staff member even had to go as far as asking the judge before getting the right section of the rules:

> *And that took me about 20 minutes to go up to the judge and say, 'what part were you actually talking about?' Come back down and then photocopy it for them.*

Training and other improvements to court services to unrepresented litigants

Staff had varied views on whether there was training for dealing with litigants in person. Some referred to a course called 'dealing with people' others were unaware of any training, and some of those that were aware suggested they had not been provided with adequate, practical help in dealing with difficult litigants (and lawyers). Several suggested customer relations was just something currently to be picked up on the job, but several also felt that training was needed and would be beneficial.

Another issue was whether to have a dedicated customer service section, to specialise in providing litigant support and remove the burden from colleagues. Staff saw this not only as a rewarding job that would help litigants, it would also enable staff to get on top of the help that *was already* available to unrepresented litigants and 'joining up' the Court Service with other relevant institutions:

> *…if you're dedicated to [customer service] there's a lot of schemes being pushed that are introduced and just, finding out what kind information is available. Like in adoptions there is loads of different leaflets, like this incident that I mentioned… …we found out that …organisations that offer a special service.*

Another staff member said:

> *…if we had the time if [staff member] were just released, then she could be on the phone setting up visits, she could go to the CAB and train them on at least the procedure of the claim, and train all the staff there. We'd love to do things like, this and we'd have them in and we can give them training courses and it's an initiative that we'd love to do.'*

Some courts had Customer Service Officers already. Other courts had debated the pros and cons but there were a number of difficulties. One was resources: 'We often talk about having a customer service section, but it's then needing to put your experienced staff there and draining department staff.' Another was the problem of

defining such a role, if it was a court based service, and whether it would be capable of meeting demand for advice as well as information. 'It's a hotly disputed thing, how some people are all in favour of it and others are not in favour of it, because it can't do enough.' This may point to the limitations of the information giving role of court staff. Other staff suggested a court-based CABx (as they have in the Royal Courts of Justice). Some discussed this in the context of a counter-based service, others in terms of a duty adviser in the court waiting areas. Part of the undercurrent behind this was the desire to offload work from the court staff to CABx.

One of the litigants we spoke to was in favour of having someone based within the court who they could go to when filing documents:

> *it might be quite nice actually, wouldn't it to have somebody in, in the court I suppose, a sort of a lawyer, or a couple of lawyers that you can go along and ask questions about it.*
>
> *YOU WOULD HAVE MADE USE OF THEM IF THERE HAD BEEN SOMEBODY THERE?*
>
> *Yes, absolutely, yes. Because when I was sending in documents that were wrong, they just handed them over, they didn't sort of think 'well hang on, this isn't what was wanted.'*

One of the representatives agreed:

> *I think that it would be sensible if the court had some sort of duty person, lawyer to help litigants in person. …I know this causes expense on the Lord Chancellor's budget, and I know he won't care for that. At the same time, if somebody can help reduce documents into good order, or cases roughly into decent order or just an explanation of how the process works and things like that… …it's cost benefit in saving judicial time.*

In terms of family law a representative suggested a salaried service of family lawyers able to assist unrepresented litigants:

> *I think that would need to be some sort of, special formulated body of solicitors, a bit like a public defender service but, in family perhaps.*

Encouraging collaborative improvements within the court

We saw evidence of the focus groups themselves prompting ideas amongst staff as to how to improve their approach. The staff member who had suggested changing the words 'file and serve' to instructions intelligible to lay litigants said,

> *They should really change it. Perhaps I'll start doing it anyway… …I don't think, I don't think there would be any big problem. I would probably just*

> *run it past the district judges because we have good relationship with them.*

Another staff member in the same court suggested judges were trying to make improvements themselves:

> *The district judges, on ancillary relief they're trying to do their own sort of, they are changing the wording themselves now. But the only thing is, there is things in the system that are, that have been programmed in for speed and now they're changing them to be user friendly sort of thing.*

Summary

This discussion of the role of court staff has highlighted the difficulties they face in providing information when they are prevented from giving advice, partly through their own natural reticence and partly because it is forbidden. We saw a range of approaches to this issue, ranging from giving advice to providing very little information for fear that it offend the 'no advice' rule.

The boundary between information and advice presents a number of problems. There is a strong tension between the customer service element of the court's work and the capacity of the court to deliver on that customer service role. Litigants see, and are encouraged to see, courts as sources of help but that help is limited to information rather than advice. It is unsurprising that litigants were frustrated by the coming down of 'no advice' shutters in their dealings with the courts.

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

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

- caution in applying the information-advice test acts to inhibit the flow of information as well as advice.

The institutional response to the information advice dilemma has been to warn against the dangers of giving advice. We think this approach should be questioned, not because we think that court staff should be giving substantive advice, but because they should be trained and assisted their role as providers of information. It was telling that court staff did not feel that they had been so trained but picked up their approach to giving help from colleagues. The institutional response is thus one of uncertainty coupled with hostility: it is likely to inhibit the giving of sensible and constructive information. Nor is the failure to give 'advice' value neutral: it can lead to wasted applications from litigants making mistakes which are obvious to court staff, or missed opportunities to warn landlords of the dangers in evicting without a court order. An alternative approach to the information advice problem would involve providing clearer and more constructive guidance on what is information and what is advice, and when help can and ought to be given. A good deal of work is being carried out in the United States working through in more detail the difference between information and advice and teasing out what a court can and should do, as part of a sensible facilitative role as information provider and what it should not do (See, for example, Zorza, 2002 and 2004).

We have also noted that staff have made efforts to improve information for unrepresented litigants locally, for example developing information packs and specimen documents as precedents.

There was broader evidence that aspects of the management culture within the Court Service sometimes inhibited customer service. This related to two issues: staffing levels and targets. Pressure of work and a consciousness that management targets meant that the processing of paperwork was incentivised whereas the handling of customer queries was not. There were other inhibitors of customer service such as lack of sufficient experienced staff.

Court staff, litigants and judges made a range of suggestions for improvements to the way that courts worked with unrepresented litigants. There was a certain ambivalence to written information. They perceived the need for more, and improved information (recognising that great strides had been made in this respect in recent years, but that more could be done). They also perceived great difficulty on the part of some litigants faced with detailed guidance and leaflets which they either could not

want to, or were too lazy to, comprehend. They also suggested that significant improvements could be made in the extent to which orders were in genuinely plain English, and that the reasons for judges decisions were conveyed to litigants. We also discussed attitudes to training and other improvements to court services to unrepresented litigants, including court based services targeted at providing greater assistance.

11. What can we say about how cases ended?

Our qualitative data suggested that unrepresented litigants achieved poorer outcomes on their cases, and that this was essentially for two reasons. Firstly, lack of representation frequently meant they were unable to present their cases in the best light (if they were able to present them at all). Secondly, a proportion of them brought cases that were inherently weak, either because they had not had the benefit of lawyers discouraging them from bringing cases in the first place, or because they were motivated to bring poor cases because of other grievances against their opponents or a broader disregard for the relevance of law to their disputes.

Our quantitative evidence sheds some light on the extent to which cases of unrepresented litigants ended at different stages or appeared to have different outcomes. A study of this sort cannot, however, disaggregate the reasons for such differences. A much more involved methodology would be needed for that (see for example, Seron *et al*, 2001, who tackles the issue of case selection.

We begin by looking at family cases.

What can we say about how family cases ended?

In this section we consider Phase I data indicating the stage that family cases ended at, how long cases took, and, where the information was available, the outcomes on those cases.

What stage did family cases reach?

Table 61 shows the stage reached on all files where there was a divorce petition issued. These include both divorce only cases and progress in respect of the petition in ancillary relief cases (which of course necessarily take place in the context of divorce proceedings). It can be seen that it was rare for cases where there was a divorce petition not to reach decree absolute. It was more common where only the applicant was unrepresented, although the sample size for this group was small and the difference in distributions was not significant.[74]

[74] Chi-square, p => .1, when the cross tabulation only considered whether or not there had been a decree absolute/judicial separation or not.

Table 61: Stage reached in the divorce by party status

	Who was unrepresented?			
	Neither Party	Petitioner Only	Respondents Only	Both
	%	%	%	%
Issue	5.1	18.8	6.5	1.7
Acknowledgement of Service	1.7	6.3	3.5	1.7
Answer	0.6			
Decree Nisi	5.1		5.0	5.0
Decree Absolute	86.7	62.5	85.1	90.0
Decree Judicial Separation	0.3	6.3		
Unclear	0.6	6.3		1.7
Total	354	16	201	60

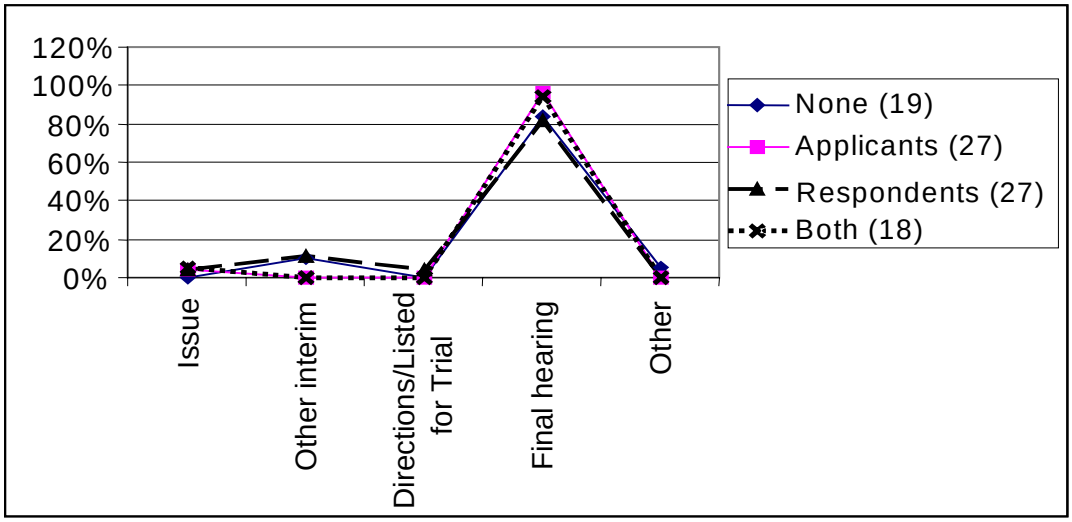
Only 9 petitions were dismissed, 4 of these were where both parties were represented (about 1% of all divorce cases where both parties were represented); 3 were where the respondent was unrepresented (about 1.5% of such cases); and 2 (about 4%) were where both parties were unrepresented. Even if these figures were correctly indicating that cases involving unrepresented parties were more likely to involve dismissed petitions, the numbers that do not succeed in reaching the decree absolute stage are extremely low and the differences by litigant status type in those making decree absolute/judicial separation compared with any other outcome are not significant.[75]

Although there are differences between them, other types of family proceedings can be broken down into broadly similar stages. We recorded the stage reached by the time work on the case appeared to have ended. The following graphs summarise the position for each case type.

In adoption cases it can be seen that cases involving an unrepresented applicant litigant in person, and those where both sides are unrepresented, were marginally more likely to end in a final hearing (about 95% ended in a final hearing where the applicant or both parties were unrepresented, whereas about 85% ended in a final hearing where the applicant or both parties were represented). The differences in distribution by litigant status were not significant.[76]

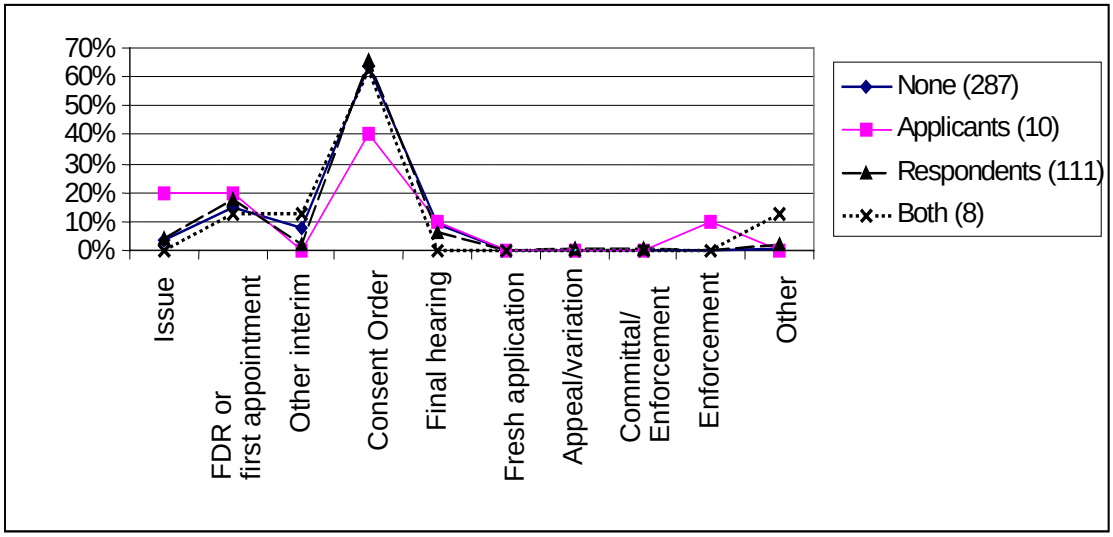
[75] Chi-square, p = .155.
[76] Chi-square, p = .412

Last Stage Reached (adoption)



For ancillary relief cases, the profile of cases was very similar save for cases where only the applicant was unrepresented, which were less likely to end by way of a consent order (40% of unrepresented applicant cases ended by a consent order, whereas for other types of litigant combination the figure was around 65%). The difference in distributions was statistically significant.[77] Unrepresented applicant cases were more likely to involve final hearings, enforcement or to not proceed beyond issue. It should be borne in mind that there were only 12 such cases in any event and so such variation may well be due to chance.

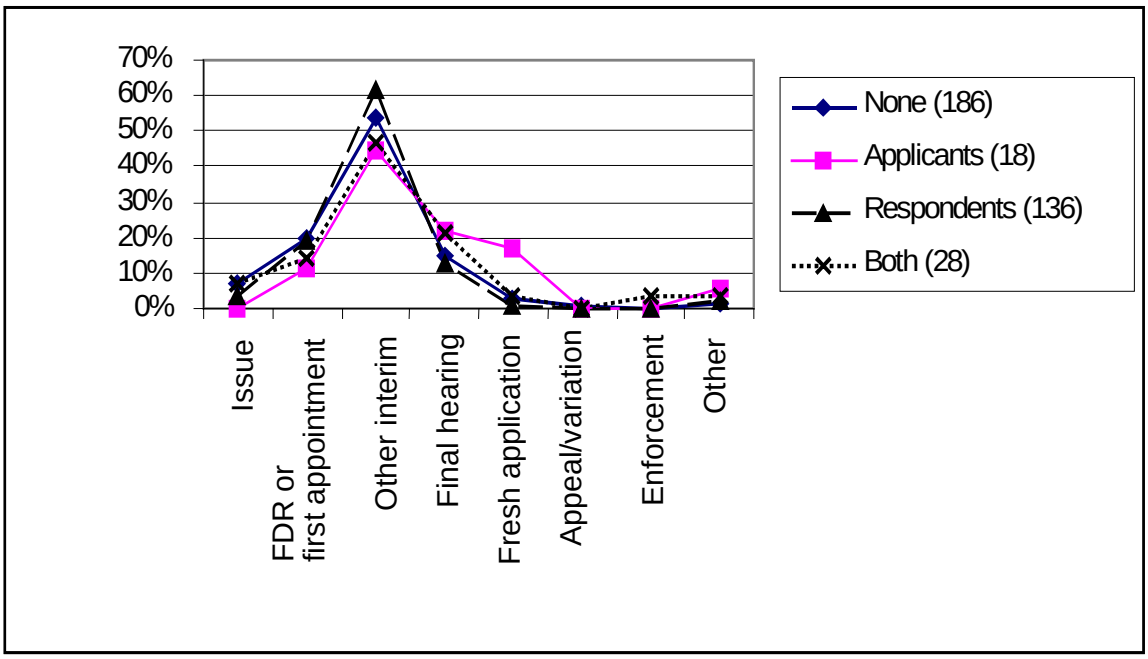
Last Stage Reached (Ancillary Relief)



[77] Chi-square, $p = 7.1 \times 10^{-6}$.

In Children Act cases, those involving unrepresented applicants against represented respondents involved more final hearings and fresh applications. Where both parties were unrepresented they involved more final hearings than where the respondent was represented or both sides were. The difference in the distributions was statistically significant.[78]

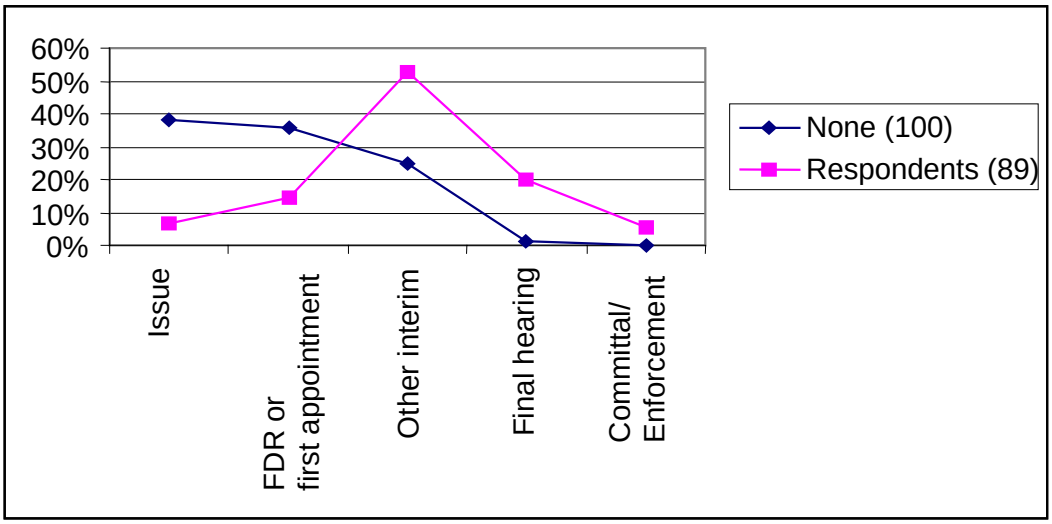
Last Stage Reached (Children Act)



For injunctions the differences were starker.[79] The numbers involved mean it was only worthwhile comparing those cases where neither party was unrepresented and those where the respondent was unrepresented. Where all parties were represented cases were likely to end in the early stages, whereas when the respondent was unrepresented there were much more likely to be steps beyond the first appointment and there was more likely to be a final hearing. Enforcement activity was also more likely (6% of cases involving unrepresented respondents involved enforcement, none of the cases where both parties were represented involved enforcement). Three quarters of 'represented' injunction cases ended either at or before the first appointment, whereas only 21% of cases involving unrepresented respondents so ended.

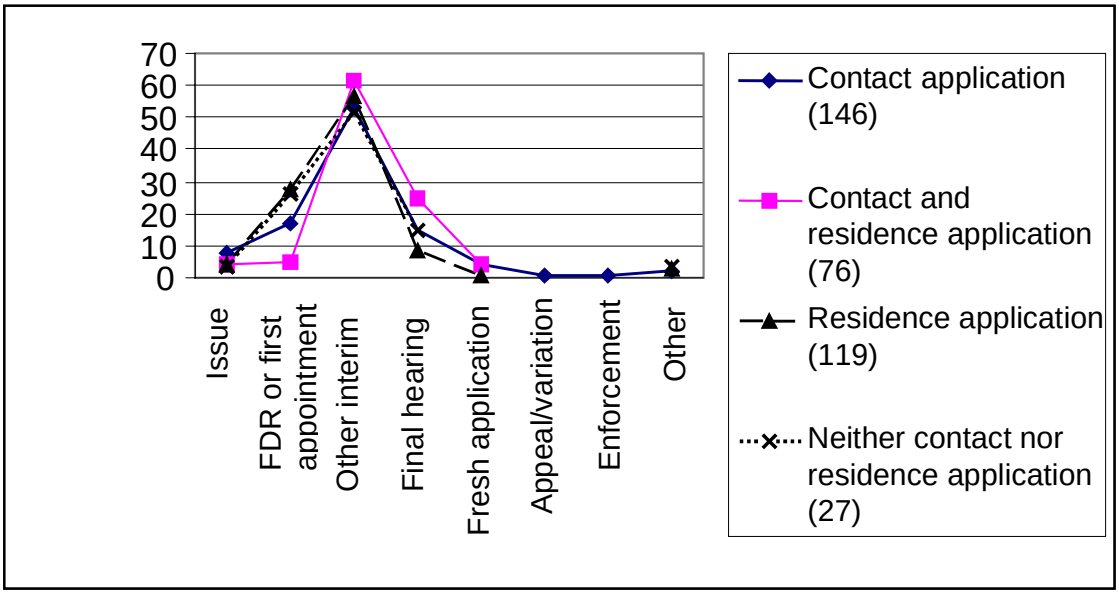
[78] Chi-square, p = .013.
[79] The difference in the distributions is statistically significant, Chi-square, p = 2.5×10^{-11}.

Last Stage Reached (Injunctions)



It is worth bearing in mind that within Children Act cases there were different types of application, and these had different types of profile. The next graph shows this, illustrating that cases involving contact applications or contact and residence applications were more likely to proceed further down the procedural route. It should be borne in mind that the categories simplify the applications made but in fact 'contact applications', 'contact and residence' and 'residence' applications often included other applications (such as parental responsibility or specific issue applications).

Last Stage Reached: Children Act cases by application types



Taken together this analysis suggests that cases involving unrepresented applicants or where both sides were unrepresented were more likely to proceed to final hearings. Generally this greater likelihood only affects between 1 in 5 and 1 in 10 hearings, but it does suggest that cases involving unrepresented applicants were less likely to involve early settlement of their case.

How long did family cases take?

Table 62 shows summary data on the length of divorce proceedings for two types of case: divorce only cases and those where there were ancillary relief proceedings. The length of time taken was calculated from the date of issue of the petition to the date of decree absolute. Cases which transferred in from another court and cases which did not reach decree absolute were excluded from the analysis.

What this data suggests is that divorce cases where both parties were unrepresented were *quicker* than cases where one or both parties were represented. There is also some suggestion that cases involving a represented petitioner against an unrepresented respondent were also quicker. This may be accounted for, in part at least, by the difference in the grounds of divorce (unrepresented petitioners being more likely to petition on less contentious grounds). Alternatively, unrepresented litigants may perceive the processing of their divorce as more of a priority than solicitors handling what, for them, is the less significant part of a family case. If this is so, they may take more care to ensure it is done quickly.

Table 62: Average time (in days) from issue to decree absolute (excluding transfers in)

	Divorce		Divorce (where there are also Ancillary Relief proceedings)	
Who is unrepresented	Mean	N	Mean	N
Neither party	273.6	39	303.1	268
Petitioner	245.5	2	353.9	8
Respondent	216.9	66	261.3	105
Both	162.0	47	123.3	7

Regression was conducted which took into account the status of the litigants, whether it was a divorce only or a divorce and ancillary relief case, and whether the grounds of divorce were separation or not. This indicated that where both parties

were unrepresented the divorce took significantly less long than for other litigant-status combinations. (See Appendix C, Table 82). This may indicate that lack of lawyers speeds up the normal processes of divorce, or it may indicate that both parties are more likely to choose to handle a divorce unrepresented where their cases are less complex or the divorce is reasonably amicable or totally uncontested.

The same approach was adopted for proceedings other than divorce.

Table 63: Mean times for proceedings other than divorce (issue to completion)

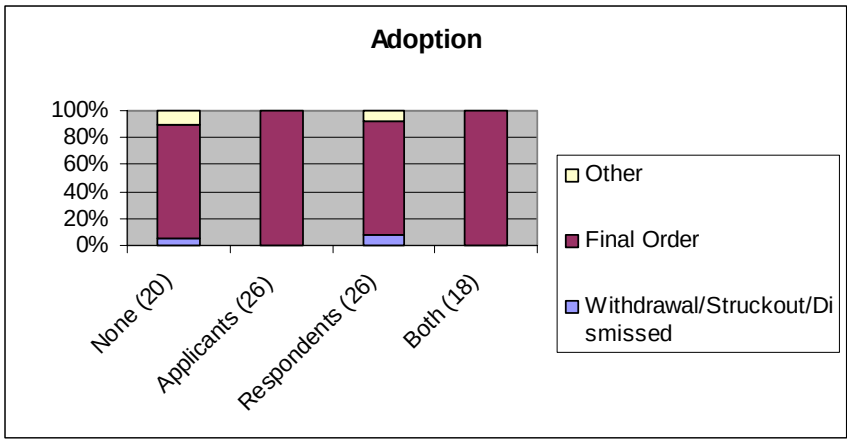
Unrepresented parties		Adoption	Ancillary Relief	Children Act	Injunction
Neither	Mean	100.1	119.9	184.5	20.1
	N	22	185	188	105
Applicant	Mean	121.1	145.7	406.3	64.0
	N	27	6	18	2
Respondent	Mean	295.7	125.2	182.3	54.6
	N	27	85	139	92
Both	Mean	291.8	113.0	297.2	9.0
	N	18	7	28	1

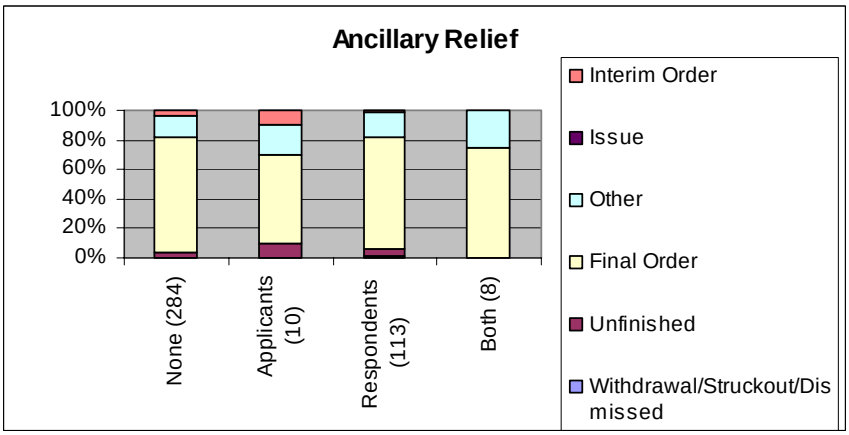
The picture in Table 63 is less clear. Regression which took into account the status of the litigants and the case type indicated that, where the applicant was unrepresented, or where both parties were unrepresented, the case took significantly longer, where the respondent only was unrepresented, the cases appeared to take longer but the difference was only near significance. (See Appendix C, Table 83). This suggests that non-representation in family cases, other than divorce, is generally associated with cases taking longer, though as Table 63 shows the position is not a simple one.

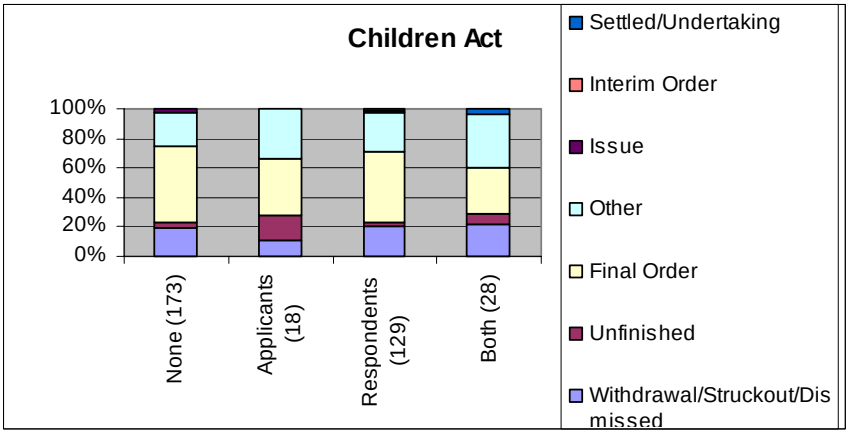
Outcomes in family cases

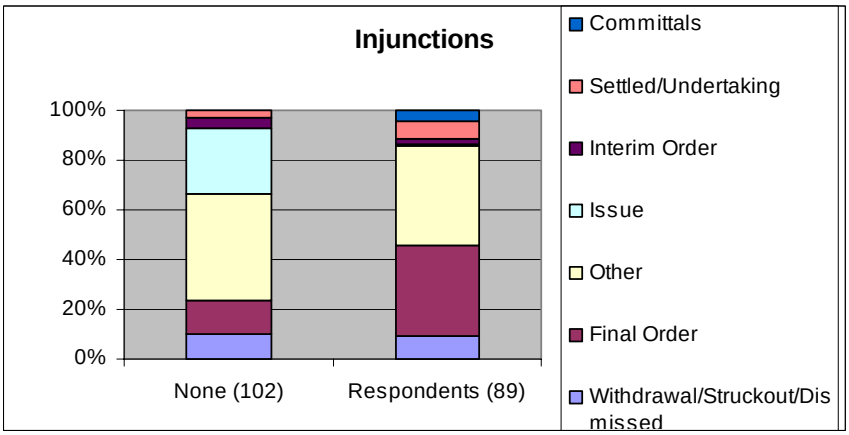
The following graphs illustrate the different outcome profiles for family cases, although only the difference in distributions for injunctions differs significantly by litigant status.

This suggests that, save in injunction cases, the profile of outcomes (in particular whether a final order was made, did not differ drastically depending on whether someone was unrepresented or not). The actual content of the outcome, i.e. whether the decision was favourable to one party or another is not ascertained by such data.


Adoption
100%
80%
60%
40%
20%
0%
None (20)
Applicants (26)
Respondents (26)
Both (18)
Other
Final Order
Withdrawal/Struckout/Dismissed


Ancillary Relief
100%
80%
60%
40%
20%
0%
None (284)
Applicants (10)
Respondents (113)
Both (8)
Interim Order
Issue
Other
Final Order
Unfinished
Withdrawal/Struckout/Dismissed


Children Act
100%
80%
60%
40%
20%
0%
None (173)
Applicants (18)
Respondents (129)
Both (28)
Settled/Undertaking
Interim Order
Issue
Other
Final Order
Unfinished
Withdrawal/Struckout/Dismissed


Injunctions
100%
80%
60%
40%
20%
0%
None (102)
Respondents (89)
Committals
Settled/Undertaking
Interim Order
Issue
Other
Final Order
Withdrawal/Struckout/Dismissed

We have some further data on outcomes from Phase II, which only involves data on cases where at least one party was unrepresented at some stage.

Adoption cases (outcomes)

All but three (out of 51) adoption cases involving unrepresented litigants ended in either an adoption order or an order freeing the child for adoption.

Ancillary relief (outcomes)

There were four cases involving **unrepresented applicants**, three led to lump sum payments (of between £13,500-£40,000) to the applicant and one of these included an order permitting retention of ownership of shares valued at £10,000 and a pension valued at £93,000. One of these also led to the sale of the former matrimonial home and the other three led to transfers in the ownership of the home. All these cases, thus appeared to be based on not inconsiderable assets. One also involved a periodic payment of £50 per week.

There were data on eight cases where **both parties were unrepresented** at some stage of the proceedings. The outcomes suggested that considerable assets were being dealt with. Four out of eight had orders covering lump sum payments (which ranged between £8,000 and £38,000). All of these four cases plus one further case also involved either transfer or sale of the matrimonial home. Three cases also involved periodic payments. One case was dismissed and another was a case brought for the purposes of enforcement only.

Interestingly of the cases involving **unrepresented respondents,** 8 out of 34 did not appear to involve any transfer *as a result of the proceedings*. In most of these cases a consent order was put forward for the sole purpose of dismissing all claims to entitlement between the parties on the basis that all assets had already been divided. 19 cases involved either the sale or the transfer of interest in the former matrimonial home. 11 cases involved lump sum payments. One of these was for a relatively small sum (£900). The others ranged between £4,000 and £70,000. 9 cases involved periodic payments (usually but not always for the children) of between £75 and £1,650 a month.

Interim orders for costs in family cases

In Phase II we were able to collect detailed information on interim and final costs orders. In only one case was an interim order for costs made against an

unrepresented applicant. In 2 cases an interim order for costs was made against a represented respondent and in 4 cases where the respondent was unrepresented was an interim order for costs made against them. 4 orders were made in Ancillary relief, 2 in injunctions and 1 in a Children Act case. The paucity of orders against the represented parties in Phase II cases compared to orders against unrepresented parties suggests, albeit on small numbers, that unrepresented litigants in family proceedings may be more likely to be subject to adverse interim costs orders. The making of such orders does not, however, appear to be common.

Divorce costs

Unrepresented respondents, within cases involving unrepresented litigants, are more likely to end up paying some or all of the costs of the divorce than were represented respondents, as we can see in the following table.[80]

Table 64: Divorce petition costs by litigant status

	Who is unrepresented?		
Costs order	Applicant	Respondent	Both sides
50/50	0%	8%	3%
No order for costs	86%	65%	79%
Respondent pays all/most	0%	27%	13%
Unclear/not dealt with	14%	0%	5%
	7	62	39

What can we say about how civil cases ended?

We consider similar issues in relation to civil cases.

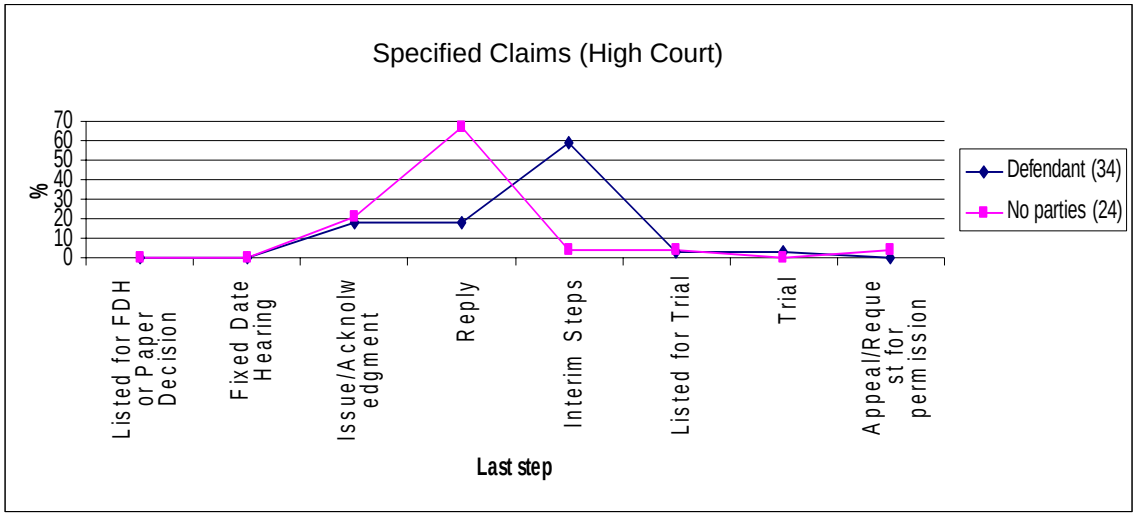
The stages cases reached

The following graphs give an indication of the stages that cases ended at. The graphs indicate the last stage *completed* for each case type. As there were so many different possibilities, the stages were simplified and arranged in an approximately chronological order.[81]

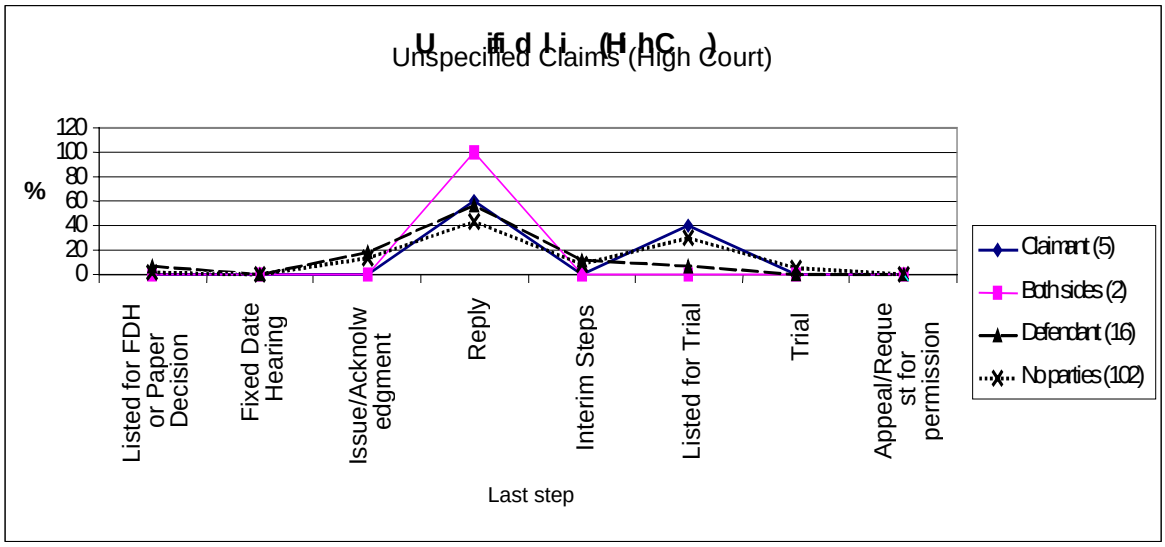
[80] Chi-square, p = .003.

[81] In terms of time elapsed to the completion of a particular stage the order shown in these figures is generally correct. The one exception is appeals/requests for permission to appeal which generally occurred relatively quickly after issue, suggesting that these were appeals on early decisions on cases, such as summary judgments/striking outs.

Stage a case reached by case type and representation (High Court)

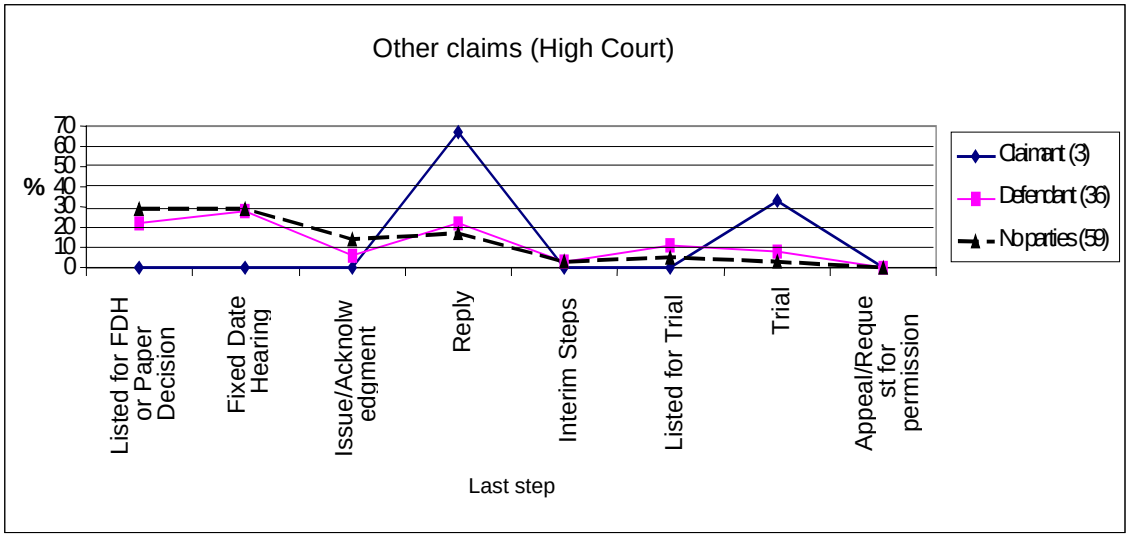


The distribution for cases involving unrepresented defendants was significantly different from that for cases where no parties were unrepresented.[82] The last step on cases involving unrepresented defendants tended to be an interim step whereas cases where no parties were unrepresented usually did not proceed beyond the reply stage.

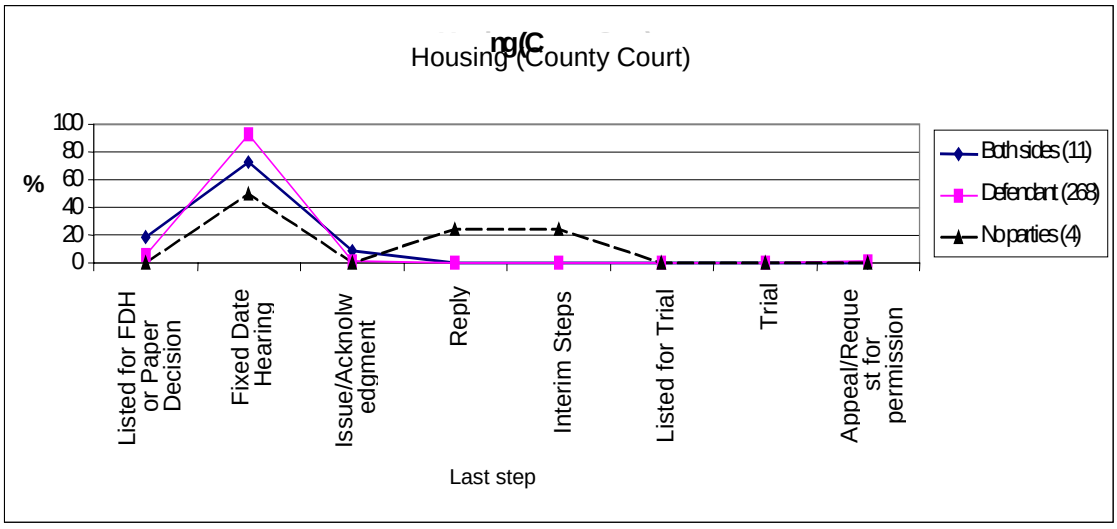


[82] Chi-square, $p=3.7x10^{-4}$.

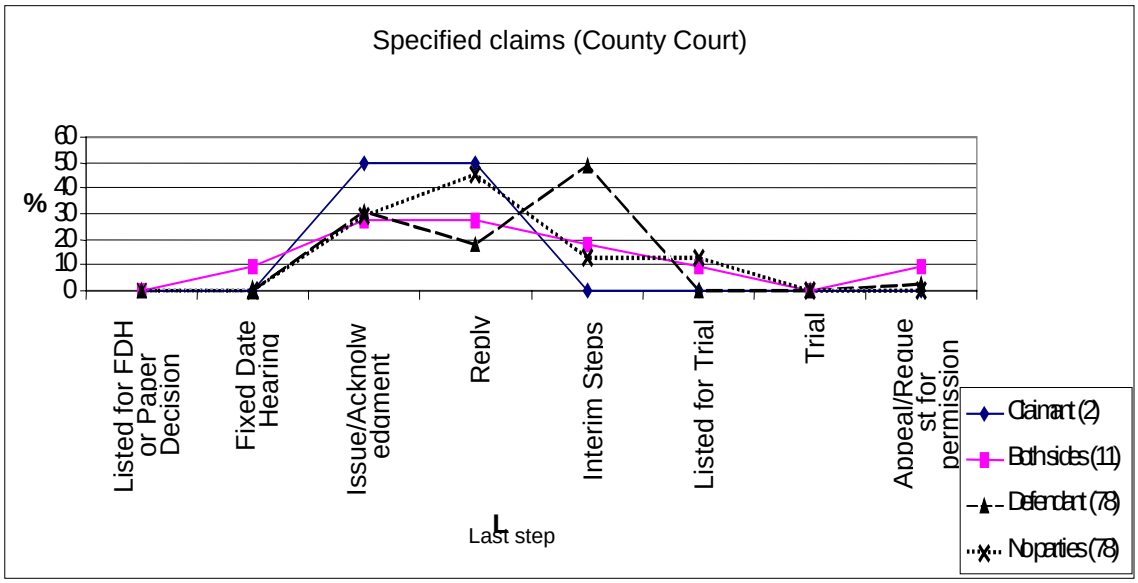
The differences for unspecified High Court claims were not significantly different.[83] The difference between the distributions for 'other' High Court claims was also not significant.[84]



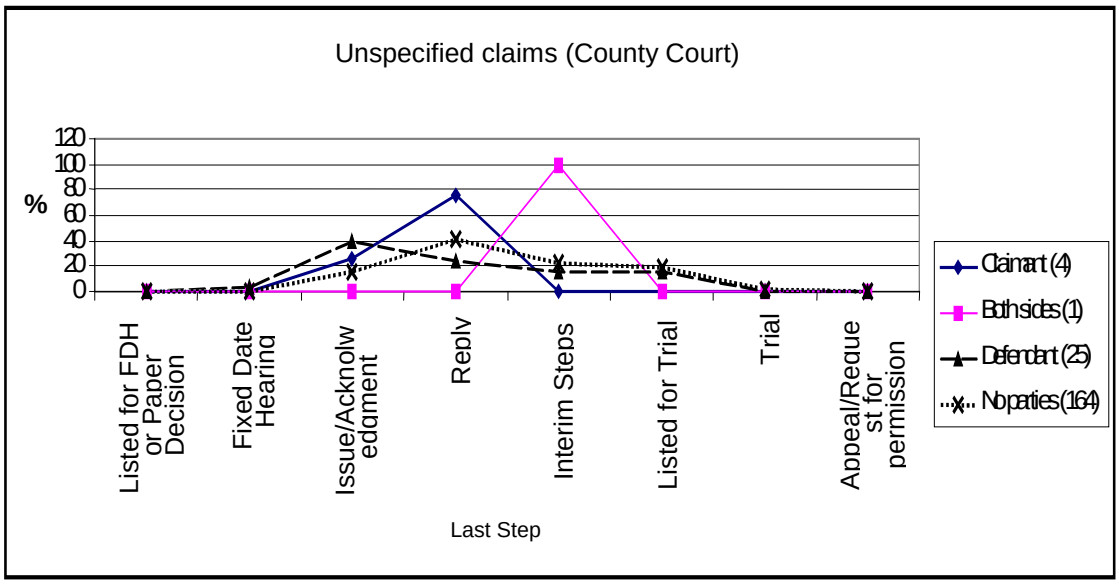
The distributions for County Court housing possession cases for different litigant types are significantly different.[85] Cases were both sides are unrepresented (probably private landlord cases) are more likely to be listed for a fixed date hearing but not reach that hearing. The very small number of housing cases where no parties were unrepresented were more likely to proceed to reply or interim steps.



[83] Chi-square, p=0.07.
[84] Chi-square, p=0.34.
[85] Chi-square, $p=7.0 \times 10^{-27}$.

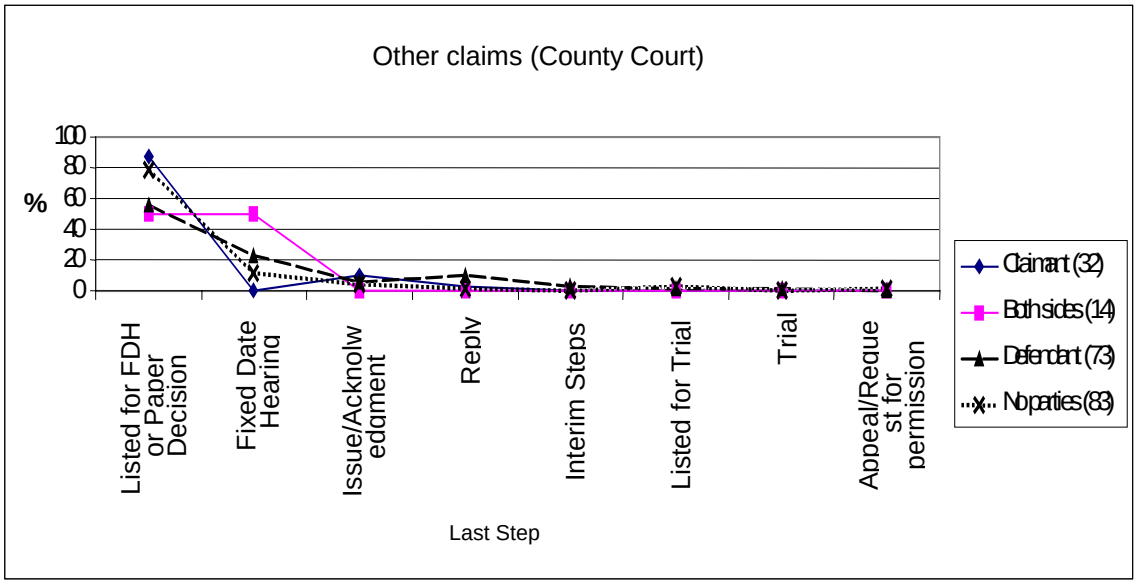


The distributions for specified County Court claims by different litigant types are significantly different.[86] Cases where only the defendant is unrepresented were most likely to end at an interim step and less likely to be listed for trial. Where both sides were unrepresented the case was more likely to end at an appeal stage (either the appeal itself or a request for leave) than where no parties or only the defendants were unrepresented.



[86] Chi-square, p= .002.

The distributions are not significantly different for unspecified claims.[87]



The distributions are significantly different for other claims. Where the defendant was represented, cases were more likely to end at the listed for first directions or paper decision phase. Where both sides were unrepresented, cases were more likely to proceed to a fixed date hearing, suggesting a greater need for judicial management of these cases.[88]

Outcomes in civil cases

For Phase I, outcomes were classified in three ways. Either the case ended in settlement or it ended in judgment, dismissal or withdrawal; or, the outcome was uncertain (e.g. the case either fizzled out, or settlement occurred beyond the purview of the court records). The next two tables show the results for the County Court and High court respectively.

There are limitations on the reliability of this data. A significant minority (26%) of our County Court cases and nearly half (48%) of our High Court cases were of uncertain outcome. That said, the most noticeable trend is that there was generally a higher level of settlement for cases where both parties were represented. Settlement levels were higher also for cases where only the claimant was unrepresented. This may mean settlement was more likely because the defendant was represented.

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[87] Chi-square, p= .15.
[88] Chi-square, p= .009.

Table 65: County Court Outcomes

	Who is unrepresented?	Uncertain outcome	Outcome settlement	Final judgment, dismissal or withdrawal	N
Housing	Both sides	18.2	27.3	54.5	11
	Defendant	11.9	10.0	78.1	269
	No parties	25.0		75.0	4
Specified	Claimant	50.0	50.0		2
	Both sides	72.7	9.1	18.2	11
	Defendant	38.5	9.0	52.6	78
	No parties	50.0	29.2	20.8	24
Unspecified	Claimant	75.0		25.0	4
	Both sides			100.0	1
	Defendant	56.0	32.0	12.0	25
	No parties	32.1	61.9	6.0	168
Other	Claimant	18.8	81.3		32
	Both sides	14.3		85.7	14
	Defendant	30.1	11.0	58.9	73
	No parties	22.9	69.9	7.2	83

Table 66: High Court Outcomes

	Who is unrepresented?	Uncertain outcome	Outcome settlement	Final judgment, dismissal or withdrawal	N
Specified	Defendant	37.1	2.9	60.0	35
	No parties	61.5	23.1	15.4	26
Unspecified	Claimant	80.0		20.0	5
	Both sides			100.0	2
	Defendant	50.0	37.5	12.5	16
	No parties	40.2	51.4	8.4	107
Other	Claimant	25.0		75.0	4
	Both sides	100.0			1
	Defendant	69.2	10.3	20.5	39
	No parties	45.3	25.0	29.7	64

Outcomes (Phase II data)

We collected more detailed data during Phase II on civil outcomes.

Table 67: Housing cases outcomes

	Both sides represented %	Defendant LiP %
Claim struck out	12.5	
Judgement for claim at trial		1.2
Judgement for def at trial		1.2
Other		1.2
Outright possession order	12.5	10.7
Possession suspended on terms	12.5	73.8
Settled	37.5	6.0
Withdrawn	12.5	2.4
Unknown	12.5	3.6
N	8	84

Table 67 shows that cases involving unrepresented defendants were much more likely to involve suspended possession orders, whereas cases involving representation of defendants were more often settled without a possession order or they were withdrawn. Although only based on a small number of cases this suggests that unrepresented defendants got poorer outcomes than represented defendants (this may be explained by poorer quality cases and/or poorer handling of the cases).

Table 68: Specified claims outcomes

	Who is unrepresented?		
	Both sides	Claimant LiP	Defendant LiP
Claim struck out	16.7		
Judgment for both			4.4
Judgment for claim at trial			6.7
Judgment for claim default	50.0		37.8
Judgment on admission			2.2
Other		50.0	4.4
Settled	33.3	50.0	24.4
Summary judgment for claim			4.4
Withdrawn			4.4
Unknown	0.0	0.0	11.1
N	6	2	45

Where the defendant was unrepresented in specified claims there were a high proportion of default judgments, consistent with the defendant participating but not defending their cases.

Table 69: Unspecified claims outcomes

	Who is unrepresented?		
	Both sides	Claimant	Defendant
Claim struck out	50.0	60.0	
Judgment for claim at trial			11.1
Judgment for claim default			11.1
Settled			55.6
Withdrawn	50.0	20.0	
Unknown	0.0	20.0	22.2
Total	2	5	9

The number of unspecified claims where a party was unrepresented and participated was small. It is therefore difficult to deduce much from the results. The outcomes for the small group of unrepresented claimants appear to be poor.

Table 70: Other cases outcomes

	Who is unrepresented?		
	Both sides	Claimant	`Defendant
Claim struck out		4.3	
Judgment for both			5.6
Judgment for claim at trial	46.2		27.8
Judgment for def at trial		8.7	
Lease approved		78.3	
Other	46.2		11.1
Outright possession order			5.6
Settled	7.7	4.3	44.4
Sum judgment for claim			5.6
Unknown	0.0	4.3	0.0
Total	13	23	36

Here we see, as we did in the Phase I data, how relatively rare settlement is where the claimant is unrepresented. This is partly due to the high number of commercial lease approval cases in the 'other' sample.

Payments ordered or agreed to be made

We also collected information on payments ordered or agreed to be made by defendants when cases involved an unrepresented party. This provides some indication of the magnitude in financial terms of the disputes. Table 71 contains the information for lump sum payments made by first defendants.[89]

[89] No claimants were required to make payments. The number of payments made by second defendants was too small to be worth analysing in detail.

Table 71: First defendant total payments

	Who is unrepresented	Mean	Maximum	N	N
Housing	Both sides	511	806	3	8
	Defendant	3,333	93,986	66	84
Specified	Claimant	3,400	3,400	1	2
	Both sides	6,596	8,025	4	6
	Defendant	48,278	657,302	33	45
Unspecified	Claimant	.	.	0	5
	Both sides	.	.	0	2
	Defendant	20,206	83,777	6	9
Other	Claimant	.	.	0	23
	Both sides	2,663	10,436	9	13
	Defendant	15,018	88,043	16	
	No parties	.	.	0	

What is noticeable from this is that claimants appear to be represented in cases where payments made to them are larger, whereas (the small number of) cases involving unrepresented claimants involve smaller payments to claimants. It is not possible to tell whether this is an indication of unrepresented claimants doing more poorly than represented claimants or that claimants are more likely to choose to represent themselves when less is at stake. The size of the difference might lead one to surmise it is the latter explanation. The proportion of cases where defendants are ordered to, or agree to, make payments and are unrepresented is higher than where they are represented. This suggests unrepresented defendants do get poorer outcomes (though they may choose not to defend, or be represented in, cases they are likely to lose) and some of the differences may be due to other differences in case types (building societies suing unrepresented defendants for mortgage shortfall debts are likely to be for sizeable amounts and are also likely to involve unrepresented defendants).

We also collected data on periodic payments made by defendants as a result of proceedings but the small number of these meant it was impossible to draw any conclusions from the results.

Interim costs

As with the family cases, we considered the frequency of interim costs awards. Generally, as can be seen in Table 72, such orders were not frequent.

Table 72: How often were interim costs awarded against parties in Phase II cases?

	Who is unrepresented	Interim Costs awarded against	%	N
Unspecified	Claimant	Unrepresented claimant	40.0	5
Unspecified	Defendant	Unrepresented defendant	22.2	9
Unspecified	Claimant	Represented claimant	20.0	5
Other	Claimant	Represented claimant	4.3	23
Other	Defendant	Represented defendant	2.8	36
Other	Defendant	Represented claimant	2.8	36
Other	Defendant	Unrepresented defendant	11.1	36
Housing	Defendant	Unrepresented defendant	1.2	82

Although one must be cautious given the small number of orders, these figures suggest that interim costs orders were more likely to be made against unrepresented parties.

Enforcement

It can be seen from Table 73 that enforcement was much more likely to occur where there was an unrepresented litigant (and it seems likely that by this we mean in particular where it is the defendant who was unrepresented). This seems to be confirmed by regression analysis (Appendix C, Table 81) although interestingly whether or not the defendant litigant in person was *active* did not have a significant effect, although whether the *claimant* was an active litigant in person did seem to have a significant effect (making enforcement action more likely). This may indicate unrepresented claimants were more likely to pursue bad risks beyond judgment. The figures for defendants were consistent with a view that unrepresented defendants simply ignored proceedings in the hope that they would go away (though if this were true one would find higher rates of enforcement against non-participating defendants). were also consistent with an explanation that such defendants were unable (or unwilling) to pay for representation and were similarly unable (or unwilling) to meet court judgments.

Table 73: Enforcement (Civil Cases)

		Who is unrepresented?	% age of cases involving enforcement	N
High Court	Specified	Defendant	37.1	35
		No parties	3.8	26
	Unspecified	Claimant	0	5
		Both sides	0	2
		Defendant	12.5	16
		No parties	0	107
	Other	Claimant	0	4
		Both sides	0	1
		Defendant	10.3	39
		No parties	6.3	64
County Court	Housing	Both sides	27.3	11
		Defendant	30.1	269
		No parties	75.0	4
	Specified	Claimant	0	2
		Both sides	0	11
		Defendant	24.4	78
		No parties	4.2	24
	Unspecified	Claimant	0	4
		Both sides	0	1
		Defendant	4.0	25
		No parties	0.6	168
	Other	Claimant	0	32
		Both sides	57.1	14
		Defendant	35.6	73
		No parties	0	83

The next table shows the types of enforcement used in these cases.

Table 74: Type of enforcement

	Housing	Specified	Unspecified	Other
	%	%	%	%
Attachment earnings	1.1	5.9	0.0	38.1
Charging order	0.0	47.1	25.0	4.8
Garnishee order	0.0	2.9	50.0	2.4
Oral examination	0.0	11.8	25.0	4.8
Warrant committal	0.0	2.9	0.0	7.1
Warrant delivery	0.0	0.0	0.0	11.9
Warrant execution	1.1	8.8	25.0	23.8
Warrant possession	98.9	0.0	0.0	2.4
Writ fi fa	0.0	29.4	0.0	0.0
Writ possession	0.0	0.0	0.0	11.9
	87	34	4	42

Given the small numbers of cases involved we have not distinguished here between High and County Courts or by litigant type. What is notable is the relatively high proportion of charging orders in specified proceedings and the relatively low proportion of warrants of execution. This may be because we are dealing with higher value claims where alternatives to warrants of execution may have to be used or may be more appropriate.

Table 75 shows the level of activity on enforcement in cases involving unrepresented litigants.

Table 75: Mean levels of activity on enforcement aspects of the case

		Number of orders re enforcement	Number of hearings listed re enforcement	Number of hearings effective re enforcement	Number of DJ/Judge interventions re enforcement
Housing	Mean	1.1	0.9	0.8	0.0
	N	80	87	85	87
Specified	Mean	1.4	0.8	0.5	0.1
	N	33	34	32	34
Unspecified	Mean	2.3	0.8	0.3	0.3
	N	4	4	4	4
Other	Mean	1.3	0.4	0.2	0.0
	N	38	42	40	42

This data suggests a reasonably significant level of activity in enforcement proceedings. A significant minority of cases (between about 1 in 4 and 1 in 6) had more orders and/or hearings post-enforcement than pre-enforcement.

Summary

Our qualitative data suggested that unrepresented litigants achieved poorer outcomes on their cases, and that this was essentially for two reasons. Firstly, non-representation frequently meant they were unable to present their cases in the best light (if they were able to represent them at all). Secondly, a proportion of them brought cases that were inherently weak, either because they had not had the benefit of lawyers discouraging them from bringing cases in the first place, or because they were motivated to bring poor cases because of other grievances against their opponents or a broader disregard for the relevance of law to their disputes. Our quantitative evidence sheds some light on the extent to which cases of unrepresented litigants ended at different stages or appeared to have different

outcomes. A study of this sort cannot, however, disaggregate the reasons for such differences.

Family cases

In relation to family cases that even though divorce cases often involved unrepresented parties, a decree absolute was still typically achieved. This appears to confirm the view that the divorce procedure itself is capable of being navigated by most unrepresented parties, although achieving an outcome is not necessarily sufficient evidence that the process itself was straightforward. There is some evidence that (a very small number of) unrepresented parties were more likely to be involved in dismissed petitions. Conversely, divorces were generally quicker where their were unrepresented parties and slower where lawyers were involved. We suspect this may be due to non-representation being more likely where divorce is amicable or not resisted.

In relation to other cases we saw some indications that non-representation was more likely to lead to cases proceeding further down the route towards trials. There was similarly some evidence that settlement was less likely. Neither of these patterns was particularly strong but it was reasonably consistent with the view that a proportion of cases involving litigants in person are more difficult to settle. As we have discussed elsewhere in this report, there are a number of possible reasons for this. We also saw evidence that (except for the divorce procedure itself) suggested that non-representation tended to slow down the progress of cases.

In injunctions cases there were starker differences. Cases where all parties were represented cases were likely to end in the early stages (usually by the giving of undertakings) whereas when the respondent was unrepresented there were much more likely to be steps beyond the first appointment and more likely to be a final hearing. Enforcement activity was also more likely (though the number of cases was small).

We had very little reliable substantive information on outcomes in family cases. What we had indicated that ancillary relief cases involving unrepresented litigants could be, and often did, involve substantial assets (the former home and substantial lump sum payments). This suggests that non-representation is not indicative of trivial claims. It also suggests that one or other litigant may have chosen to preserve matrimonial assets for division in the divorce rather than spend some of those assets on legal fees (or that those assets could not be realised for the payment of legal expenses in

the way, for example, permitted by the statutory charge). Moorhead *et al* (2004) found evidence that lone mothers were resistant to spending money on legal disputes once they appreciated more fully the implications of, for example, the statutory charge, supporting the view that once legal costs become tangible, litigants may be tempted to go unrepresented in ancillary relief disputes.

There was also some evidence that unrepresented litigants might, on occasion, be struggling with proceedings or acting inappropriately. Interim orders for costs were not common, but did seem to be made more commonly against unrepresented parties. There was also some sign of disadvantage: unrepresented respondents, within cases involving unrepresented litigants, were more likely to end up paying some or all of the costs of the divorce than are represented respondents

Civil cases

As with family cases there were subtle differences in the different stages that civil cases ended at, depending on whether the case involved an unrepresented party or not. In broad terms cases involving unrepresented claimants tended to proceed to later stages in the High Court. More County Court cases involving unrepresented litigants tended to proceed to later stages than cases where both parties were represented, especially where the claimant was unrepresented. Very few cases proceeded to trial.

In spite of this cases involving unrepresented litigants, even where active, did not seem to take much longer on average than cases where both parties were represented. Cases involving inactive litigants in person were usually much quicker (given the absence of a defence).

Consistent with family cases, settlement appeared to be less likely where any parties were unrepresented, particularly where defendants are unrepresented. There were also indications that the outcomes for defendants were poorer if they were unrepresented. There was more likely to be a suspended possession order in housing cases, or a default judgment in a specified claim, for example. Defendants also appeared more likely to pay damages if unrepresented. Payments of damages in cases involving unrepresented defendants were much higher than in cases involving unrepresented claimants (though this may say more about their decision to self-represent than their failure to secure a possible outcome). There is some suggestion that unrepresented litigants were more likely to have to pay interim costs.

Enforcement was much more likely to occur where a party was unrepresented. There was some evidence to suggest that active claimants may be pursuing poor risks beyond judgment, though the largest part of the explanation was probably the prevalence of non-participating defendants who claimants then needed to take enforcement action against.

12. Summary and Discussion

Although interest in litigants in person is strong, and their presence within the court system is increasingly remarked upon, there is a relative dearth of information on the numbers and nature of cases involving litigants in person. This report explores detailed quantitative and qualitative data on unrepresented litigants from four courts in first instance civil and family cases, excluding small claims cases. It provides a detailed picture of the prevalence and nature of unrepresented litigants and the impact of non-representation on themselves, the courts and their opponents. The research is based on information from 2,432 case records, 748 case files, 24 interviews with litigants, lawyers, and judges and 8 focus groups with court staff.

This chapter seeks to summarise what has been learnt before considering some broader theoretical questions posed by the existence of litigants who do not, for whatever reason, have representation by a lawyer.

Unrepresented parties in cases were common

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

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

The characteristics of obsessive or difficult litigants are often taken to be the archetype for unrepresented litigants generally. In the courts we researched, there were some litigants who made far-fetched or meritless claims, fruitless applications, and indulged in abusive or uncooperative behaviour but these were not the dominant behaviours of unrepresented litigants generally. Obsessive or difficult litigants were

far from common. Nevertheless such litigants did pose resource issues disproportionate to their number and challenge the skills of judges and staff.

Fee exemption and remission has been suggested as a catalyst for such litigants. Interview evidence supported the view that being free of liability for court fees 'encouraged' obsessive litigants. Our review of files, did not support a view that fee exemption/remission was a major source or cause of encouragement for unrepresented litigants. Given the small numbers of obsessive litigants in first instance courts, a relationship between fee exemption and unreasonable behaviour is only likely to occur in a very small number of cases. Any general reduction in the provision of fee exemption aimed at stamping out obsessive litigation may be disproportionate.

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

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

Unrepresented claimants were rarer, although 17% of business claimants in the County Court were unrepresented (the figure for the High Court was 2%) and for individual claimants the figures were 10% in the County Court and 6% in the High Court. Institutions, particularly local authorities and housing associations, also often took claims without formal legal representation. 56% of cases involving institutional claimants in the County Court involved those institutional claimants being unrepresented at some stage. Institutional claimants are rather different in nature to other unrepresented litigants, being likely to have a degree of specialisation and in-house expertise which probably makes them more akin to represented parties.

Part of the explanation for such high levels of representation amongst claimants is that in circumstances where individuals and business could bring claims unrepresented, they opt for other strategies such as negotiation and giving up on their problems rather than instigating litigation ('lumping', see Genn (1989), Pleasence et al, 2004; and Felstiner, Abel and Sarat, 1980). Genn found that, of individuals who were initiating action to try to solve a justiciable problem (i.e. potential claimants), only 13% became involved in legal proceedings. Of those having action

taken against them, 69% reported involvement in proceedings (Genn, 1999). This suggests there is an important asymmetry in the way individuals choose to solve justiciable problems (negotiate or give up) and the way institutions and businesses choose to solve them (they are more likely to litigate). This is reflected in the patterns of unrepresented litigants in the courts. Defendants in such circumstances have no option other than to submit to litigation.

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

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

In many cases unrepresented parties did not in fact participate in the proceedings in any way apparent from the court records. This means they did not file any documentation, contact the court at any stage or have any negotiation with their opponent (apparent from the court file[90]). This was particularly true in County Court cases (which would include housing possessions) where over a half of all individual defendants did not participate in their cases (and so were automatically unrepresented), even in High Court cases, over 1 in 5 individual defendants did not participate in any way apparent from the court file in their cases. More than 1 in 6 business defendants in the High Court and over 1 in 4 in the County Court did not appear to participate in their cases. Even on family cases, there was a significant minority of unrepresented litigants who did not participate in any way apparent from the court file. In ancillary relief, Children Act and injunction cases about a third of unrepresented litigants did not appear to participate.

In many ways our data suggests that, in terms of access to justice, there is a prior problem to the problem of non-representation which is the decision not to participate. From the defendant's perspective, this may be for rational reasons such as having a weak case or seeking to evade any judgement. From another perspective, if disengagement is for reasons of fear, inability to secure representation, or as a

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

strategy of avoiding enforcement, it weakens the legitimacy of court process. A recent study of housing possession suggested that housing defendants saw the court as irrelevant to their main problem, which they saw as dependent on their level of housing benefit problems and relationship with the local authority landlord (Blandy et al , 2002).

Some unrepresented litigants were in fact partially represented

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

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

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

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

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

It should be remembered that because we were concentrating on court files we were likely to under-record the level of assistance received by litigants in person as much of it would not be discernible from court and party paperwork lying on a court file.[91]

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

Once the numbers of litigants who were unrepresented is subdivided into the inactive, the partially represented and the active, it becomes clearer that the number of active but unrepresented litigants, who remain unrepresented throughout the proceedings is generally a small but significant proportion of the courts' caseloads. This is not true in adoption and divorce cases where the proportion of cases involving at least one active unrepresented litigant is high (64% adoption and 60% divorce), but otherwise the figures are lower (Ancillary Relief 15%; Children Act 21%; Injunctions 20%). In civil cases the figures are generally lower than that, save for defendants in County Court cases, where cases involving active unrepresented defendants were over a quarter. The figures for active litigants who were unrepresented throughout their case was as follows:

High Court

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

County Court

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

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

Cases where both parties were unrepresented were rare

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

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

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

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

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

Relationships between the parties and indications of vulnerability

In family cases, unrepresented litigants were more likely to be male: 48% of cases involved the male litigants in person, 38% female litigants in person and 13% involved both male and female litigants (sometimes couple, sometimes opponents) in person. This may well reflect, at least in part, the legal aid position, several of our interviewees pointed to the means test in legal aid meaning it was more likely that a woman (being more economically vulnerable) would get legal aid.

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

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

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

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

decline was not offset by more unrepresented parties in small claims. The number of small claims hearings has declined whilst the numbers of unrepresented parties within those claims has remained relatively steady.

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

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

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

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

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

assessments of representation or perceive cases as being straightforward enough for them to handle themselves.

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

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

Participation is not the same as active defence

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

Thus, part of what we may be seeing here is a case selection affect where unrepresented litigants do not defend poorer cases. However, other research has

shown convincingly that non representation, even controlling for case selection, leads to considerably poorer outcomes (Seron et al, 2001). Case selection is unlikely to be a total explanation for non defending and, therefore, part of what we see is likely to be unrepresented parties missing the opportunity to defend successfully and/or to better protect their position.

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

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

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

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

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

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

Unrepresented litigants participated at a lower intensity but made more mistakes

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

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

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

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

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

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

Others problems derive not solely or mainly from the factual and legal complexity of their own disputes, 'rather, they stem from the inherent complexity of the courts' own procedures and administrative requirements' (Owen, Staudt and Pedwell, 2004). There was considerable evidence that complexity, and the court's inability to work in a way intelligible to lay litigants, is part of the problem. This opens up an interesting area of debate. Are court procedures necessarily complex, and therefore incapable of comprehension, by many litigants, or can more be done to make the process more intelligible? We cannot answer that question definitively here: experimentation and litigant-based research on understanding would be needed.[92] There is, however, evidence of some familiar problems, that could be tackled to improve the situation: routine orders still involve apparently (to experienced participants) simple phrases which patently are not comprehended by lay litigants and could in fact be dealt with more transparently. For example, explaining what 'file and serve' means or ensuring that a litigant knows that exchanging witness statements ordinarily means they would

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

have to put in a witness statement of their own, are straightforward steps which would make the process clearer to litigants.

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

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

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

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

Cases with unrepresented parties were less likely to be settled

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

There was a good deal of evidence from the files favouring a modestly weaker tendency to settle cases (Baldwin, 2002 and Shapland, 2003, have also pointed to

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

Evidence of prejudice

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

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

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

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

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

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

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

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

almost certainly not enough to simply suggest litigants see ‘a solicitor’ or ‘the local CABx’

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

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

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

This view is probably not one which can hold in the context of cases involving unrepresented litigants, where more intervention may be required. Although the judges did not avert to this specifically, the overriding objective of the Civil Procedure Rules is relevant:[93]

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

The overriding objective is not unequivocally in favour of intervention. Though the equal footing argument may suggest strongly that intervention can be the right course, the resources issue may set limits on what judges, and indeed courts, can

[93] Civil Procedure Rules, Part 1.1.

do, and advocates of passive neutrality would no doubt point to intervention unbalancing in other ways procedural equality.

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

No judges indicated they would never intervene on behalf of litigants, but some suggested that their interventions would be quite modest, telling litigants they should get legal advice, rather than saying what precisely was wrong with their case or what needed to be done to put it right. Others involved a much more direct engagement with the substantive issues before them, making explicit references to legal positions (sometimes *de facto* advising litigants) or taking up lines of questioning on their behalf (cross-examining). For these judges, the role of neutral arbiter was abandoned in favour of the neutral advocate, or to give a perhaps more palatable description, that of inquisitorial judge. We do not criticise the judges who took this approach. To us, the more interventionist approach seems sensible, but the very diversity of approaches and views suggest that the judicial role in relation to unrepresented litigants would benefit from closer scrutiny, including work led by the judiciary itself.

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

A discussion of the role of court staff in assisting litigants has highlighted the importance of the no advice rule, and the difficulty it presented to staff. They are discouraged from giving advice, partly through their own natural reticence and fear of making mistakes and partly because it is forbidden. Staff were very conscious indeed of the need to be careful in providing information to litigants which could not be construed as advice, but in fact, we saw a range of approaches to the information-advice dilemma. Some staff clearly gave advice (e.g. domestic violence applicants

were routinely discouraged from applying for injunctions unrepresented and some experienced court staff would advise in a range of circumstances but try to protect themselves by saying, 'I am not giving you legal advice, and I don't have the expertise, but my view is…'). Some gave information structured in such a way as to probably amount to advice; whereas others indicated they provided very little information for fear that it offend the 'no advice' rule.

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

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

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

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

thus one of uncertainty coupled with hostility: it is likely to inhibit the giving of sensible and constructive information.

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

Court staff and judges perceived that improvements could be made

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

Endnote

There are three main narratives or theories about unrepresented litigants that this research goes some way to informing. The first is the extent to which a better understanding of unrepresented litigants is suggestive of an **access to justice crisis**. There are a number of aspects to this. Firstly, an assumption that the erosion of legal aid has led to a significant increase in the numbers of unrepresented litigants. Secondly, that unrepresented litigants are unable to take cases for themselves,

hence justice is denied them. Thirdly, that they are unrepresented not out of choice but of necessity.

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

'Crisis' is language which we would still reject in this context as hyperbolic on the facts as we see them, but the closest that this research comes to suggesting any kind of access to justice crisis relates not to non-representation but to the exclusion of litigants who do not, apparently, at any stage or in any form, participate in legal proceedings taken against them. Of course, this may not be a problem at all: it may simply represent a rational response on the part of the parties, and one which does not necessarily damage the values of the justice system (though the extent of problems with enforcement suggest that it may be a more serious issue). The advice literature has, however, demonstrated that 'lumpers' of problems give up on solving their problems for a host of reasons, rational and otherwise (Genn, 1999 and Pleasence et al, 2004). We should be concerned and want to know more about this difficult to research group. Should and could defendants be more active? Would it benefit them and the interests of others participating in the system? Similarly, the low level of unrepresented claimants, particularly in civil cases, may also be cause for concern, particularly when we see levels of litigation falling dramatically.

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

> *Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil*

> *justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people."*[94]

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

A third narrative involves seeing the existence of unrepresented litigants themselves as **pathological and antithetical to justice values**. Here, the story is of the unrepresented as vexatious or obsessive litigants, abusing court process, exploiting their naivety, creating chaos and mistrust in an otherwise harmonious system. Here, unrepresented litigants choose to be unrepresented, and do so for reasons contrary to the broader purposes of the justice system. Under this narrative, unrepresented litigants need to be controlled or expunged from the system. As we have seen, this pathological litigant is rare, but poses significant problems to court staff and the judiciary.

It is important, therefore to remember, however, that most unrepresented litigants appear to do so because they cannot afford, or feel they do not need, lawyers, not because they have a psychotic disregard for the interests of justice or the needs of others. The nature and intensity of their participation; the struggles they have comprehending law and procedure; and the importance of ensuring that substantive justice is done in our courts suggests that unrepresented litigants need help far more than they need approbation.

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

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Appendix A: Detailed method notes

Identifying unrepresented litigants in person from Caseman/Familyman

Our definition of unrepresented litigants depended on our being able to identify whether a person had a lawyer acting for them on the record. Our pilot work indicated that this could be identified relatively straightforwardly from Caseman/Familyman. The parties section of the computer systems indicates, at the last stage of the case, which parties are represented and by whom. The events screen also indicates whether there has been a *change* in representation over the life of the case. Such a change would include an unrepresented party becoming represented. Thus, it is possible to see when representatives started acting, and so whether parties have at any stage been unrepresented (even if they were represented at the end of the case record).

We did identify some difficulties with this approach, which were dealt with as follows.

- On occasion some time elapsed between defendants being served with proceedings and a representative coming on the record. The status of defendants during such a period is uncertain. If the defendant took any action (e.g. filed a defence) during this period or the applicant took some action to which the defendant might be expected to respond, we treated the defendant as an unrepresented litigant. If, however, no substantial action was taken by any parties before the defendant appointed a representative, then we treated them as an unrepresented litigant (unless, of course, they subsequently became unrepresented).

- Undefended divorces were often handled under legal help, where solicitors handled all the documentation, but were not acting on the record. In these circumstances, the process was invariably handled to all intents and purposes as if it the client was represented. We therefore treated these cases as not involving unrepresented litigants (unless the other party was an unrepresented litigant).

- The status of business litigants may not be clear. In particular, they may have in-house legal departments or regular claims handlers. Our approach was to treat as represented those who had an outside solicitor or used an in-house legal department (if they did so for the entirety of the case).

We also found instances of the court computer records being inaccurate. Phase II data collection provided a natural opportunity to check that those identified as unrepresented litigants were indeed unrepresented. We also checked a wider sample of cases than those we were looking at in Phase II to ensure our estimates of unrepresented litigants were robust. We nonetheless could have missed files where a party appeared to be represented (from the computer record) but was not. Where this occurred, courts would usually be corresponding with solicitors who would make sure they were taken off the record and so ensure that the records are up to date, but we cannot rule out the possibility that our figures will underestimate the number of unrepresented litigants. Our experience suggests this was unlikely, but it also suggests that if there is any inaccuracy in our estimates it will mean we have slightly underestimated the number of litigants who are unrepresented.

Selection of files

The project aimed to profile the number and type of unrepresented litigants in the court system, with some broad comparisons with cases where both parties are represented throughout the proceedings. This left open the question as to the most appropriate approach to sampling such cases. There were three main options:

- Draw a sample from all cases opened during a defined period;
- Draw a sample of all cases closed during a defined period; or,
- Draw a sample of cases active within a court during a defined period (e.g. all cases listed during a particular timeframe).

The last option either focuses on particular cases (i.e. those which are listed for some sort of hearing (which is likely to be atypical)) or is difficult to implement ('active' would need to be defined in a comprehensive way, e.g. to cover all cases issued, settled, or heard during a time period). As the aim of this study was to profile all cases involving unrepresented litigants this was not an appropriate approach.

The second option has significant benefits. It enables whole cases to be looked at (i.e. avoids the potential problem of cases which remain open at the time of the research). However, discussions with the Court Service indicated that courts did not have any list of cases which were closed (indeed, courts may be unaware whether cases were closed, especially where enforcement of judgments is involved). Generating a random sample of closed cases in the absence of a defined source of

closed cases during a particular period (such as a list or a filing system) would have been very difficult indeed. Any attempt to concentrate only on closed cases would have had to been generated by sampling quotas from cases sampled at random under the first option. This would have added considerably to the time and cost of such work. In any event, our pilot work indicated that it would not always be possible to identify whether a case had finished from case files or Case/Familyman.

As a result, the first option was the most practical and was adopted by this research.

Following consultation with our courts, cases issued in 2000 represented the best balance between cases likely to have been completed, but with papers that remained reasonably accessible so we drew our sample of civil cases from all cases issued in the year 2000. In one of our courts, Children's Act family cases were only entered onto Familyman from February 2000, so for our family cases we used the sampling period March 2000 to February 2001. The civil cases all arose post-implementation of the Woolf reforms.

Appendix B: Detailed regression analysis for court activity

Table 76: Regression for filing of defences

Logistic Regression

Dependent Variable Encoding

Original Value	Internal Value
0	0
1	1

Categorical Variables Codings

			Parameter coding		
		Frequency	(1)	(2)	(3)
Who is unrepresented	Claimant	47	1.000	.000	.000
	Both sides	40	.000	1.000	.000
	Defendant	535	.000	.000	1.000
	No parties	476	.000	.000	.000
Simplified case types	Housing	284	1.000	.000	.000
	Specified	176	.000	1.000	.000
	Unspecified	328	.000	.000	1.000
	Other	310	.000	.000	.000
County or High	High Court	299	1.000		
	County Court	799	.000		

Block 0: Beginning Block

Classification Table[a,b]

			Predicted		
			Was claim defended		Percentage Correct
	Observed		0	1	
Step 0	Was claim defended	0	822	0	100.0
		1	276	0	.0
	Overall Percentage				74.9

a. Constant is included in the model.

b. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 0	Constant	-1.091	.070	246.092	1	.000	.336

Variables not in the Equation

			Score	df	Sig.
Step 0	Variables	SAMP1(1)	27.971	1	.000
		CASTYPE1	352.823	3	.000
		CASTYPE1(1)	111.240	1	.000
		CASTYPE1(2)	.508	1	.476
		CASTYPE1(3)	313.834	1	.000
		LIP_SUM	208.159	3	.000
		LIP_SUM(1)	.078	1	.780
		LIP_SUM(2)	6.862	1	.009
		LIP_SUM(3)	169.282	1	.000
		ACDEFLIP	11.764	1	.001
	Overall Statistics		391.319	8	.000

Block 1: Method = Enter

Omnibus Tests of Model Coefficients

		Chi-square	df	Sig.
Step 1	Step	428.652	8	.000
	Block	428.652	8	.000
	Model	428.652	8	.000

Model Summary

Step	-2 Log likelihood	Cox & Snell R Square	Nagelkerke R Square
1	809.520	.323	.478

Classification Table[a]

			Predicted		
			Was claim defended		Percentage Correct
	Observed		0	1	
Step 1	Was claim defended	0	723	99	88.0
		1	90	186	67.4
	Overall Percentage				82.8

a. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1[a]	SAMP1(1)	.074	.185	.160	1	.689	1.077
	CASTYPE1			143.232	3	.000	
	CASTYPE1(1)	-.516	.540	.914	1	.339	.597
	CASTYPE1(2)	2.027	.301	45.292	1	.000	7.594
	CASTYPE1(3)	2.738	.253	117.017	1	.000	15.464
	LIP_SUM			46.091	3	.000	
	LIP_SUM(1)	.046	.434	.011	1	.915	1.047
	LIP_SUM(2)	-2.109	.685	9.483	1	.002	.121
	LIP_SUM(3)	-1.797	.273	43.472	1	.000	.166
	ACDEFLIP	1.103	.340	10.503	1	.001	3.013
	Constant	-2.129	.245	75.532	1	.000	.119

a. Variable(s) entered on step 1: SAMP1, CASTYPE1, LIP_SUM, ACDEFLIP.

Table 77: Logistic Regression whether Cases are allocated

Case Processing Summary

Unweighted Cases[a]		N	Percent
Selected Cases	Included in Analysis	1098	100.0
	Missing Cases	0	.0
	Total	1098	100.0
Unselected Cases		0	.0
Total		1098	100.0

a. If weight is in effect, see classification table for the total number of cases.

Dependent Variable Encoding

Original Value	Internal Value
0	0
1	1

Categorical Variables Codings

			Parameter coding		
		Frequency	(1)	(2)	(3)
Who is unrepresented	Claimant	47	1.000	.000	.000
	Both sides	40	.000	1.000	.000
	Defendant	535	.000	.000	1.000
	No parties	476	.000	.000	.000
Simplified case types	Housing	284	1.000	.000	.000
	Specified	176	.000	1.000	.000
	Unspecified	328	.000	.000	1.000
	Other	310	.000	.000	.000
County or High	High Court	299	1.000		
	County Court	799	.000		

Block 0: Beginning Block

Classification Table[a,b]

			Predicted		
			Was claim allocated		Percentage
	Observed		0	1	Correct
Step 0	Was claim allocated	0	952	0	100.0
		1	146	0	.0
	Overall Percentage				86.7

a. Constant is included in the model.

b. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 0	Constant	-1.875	.089	445.011	1	.000	.153

Variables not in the Equation

			Score	df	Sig.
Step 0	Variables	SAMP1(1)	17.989	1	.000
		CASTYPE1	214.246	3	.000
		CASTYPE1(1)	55.680	1	.000
		CASTYPE1(2)	5.189	1	.023
		CASTYPE1(3)	208.659	1	.000
		LIP_SUM	123.015	3	.000
		LIP_SUM(1)	2.036	1	.154
		LIP_SUM(2)	2.479	1	.115
		LIP_SUM(3)	96.131	1	.000
		ACDEFLIP	16.063	1	.000
	Overall Statistics		228.498	8	.000

Block 1: Method = Enter

Omnibus Tests of Model Coefficients

		Chi-square	df	Sig.
Step 1	Step	230.933	8	.000
	Block	230.933	8	.000
	Model	230.933	8	.000

Model Summary

Step	-2 Log likelihood	Cox & Snell R Square	Nagelkerke R Square
1	629.882	.190	.349

Classification Table[a]

			Predicted		
			Was claim allocated		Percentage
	Observed		0	1	Correct
Step 1	Was claim allocated	0	952	0	100.0
		1	146	0	.0
	Overall Percentage				86.7

a. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1[a]	SAMP1(1)	.171	.206	.695	1	.404	1.187
	CASTYPE1			70.102	3	.000	
	CASTYPE1(1)	-1.753	1.057	2.751	1	.097	.173
	CASTYPE1(2)	.929	.411	5.115	1	.024	2.532
	CASTYPE1(3)	2.272	.313	52.761	1	.000	9.699
	LIP_SUM			12.345	3	.006	
	LIP_SUM(1)	-.883	.641	1.896	1	.168	.413
	LIP_SUM(2)	-.709	.794	.798	1	.372	.492
	LIP_SUM(3)	-1.118	.338	10.912	1	.001	.327
	ACDEFLIP	-.103	.543	.036	1	.850	.902
	Constant	-2.771	.310	79.770	1	.000	.063

a. Variable(s) entered on step 1: SAMP1, CASTYPE1, LIP_SUM, ACDEFLIP.

Table 78: Regressions for detailed indicators of activity (Civil Cases)

Regression

Variables Entered/Removed[b]

Model	Variables Entered	Variables Removed	Method
1	Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case[a]	.	Enter

a. Tolerance = .000 limits reached.

b. Dependent Variable: Number of orders

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.406[a]	.165	.158	1.805

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	685.658	9	76.184	23.385	.000[a]
	Residual	3479.297	1068	3.258		
	Total	4164.955	1077			

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: Number of orders

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	3.424	.198		17.259	.000
	Housing case	-1.334	.204	-.299	-6.527	.000
	Specified claim	-1.487	.193	-.278	-7.710	.000
	Other claim	-1.284	.155	-.294	-8.287	.000
	County or High	-.855	.137	-.191	-6.264	.000
	Claimant lip represented def	-.295	.325	-.030	-.907	.365
	Both lips	.138	.317	.013	.434	.664
	Both represented	3.988E-02	.161	.010	.247	.805
	Active claimant lip	-.147	.181	-.027	-.815	.415
	Active defendant LiP	.260	.171	.046	1.518	.129

a. Dependent Variable: Number of orders

Excluded Variables[b]

Model		Beta In	t	Sig.	Partial Correlation	Collinearity Statistics
						Tolerance
1	unspecified claim	.[a]	.	.	.	.000
	Unrepresented def represented claimant	.[a]	.	.	.	.000

a. Predictors in the Model: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: Number of orders

Regression

Variables Entered/Removed[b]

Model	Variables Entered	Variables Removed	Method
1	Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case[a]	.	Enter

a. Tolerance = .000 limits reached.

b. Dependent Variable: Number of hearings effective

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.414[a]	.171	.164	.788

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	129.045	9	14.338	23.093	.000[a]
	Residual	625.239	1007	.621		
	Total	754.283	1016			

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: Number of hearings effective

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	1.015	.093		10.937	.000
	Housing case	.419	.092	.217	4.572	.000
	Specified claim	-.550	.087	-.239	-6.346	.000
	Other claim	-.141	.071	-.073	-1.986	.047
	County or High	-.465	.063	-.229	-7.366	.000
	Claimant lip represented def	-.247	.143	-.058	-1.724	.085
	Both lips	4.341E-02	.139	.010	.312	.755
	Both represented	-6.83E-02	.073	-.039	-.931	.352
	Active claimant lip	-1.49E-02	.080	-.006	-.187	.852
	Active defendant LiP	.258	.077	.105	3.361	.001

a. Dependent Variable: Number of hearings effective

Excluded Variables[b]

Model		Beta In	t	Sig.	Partial Correlation	Collinearity Statistics
						Tolerance
1	unspecified claim	.[a]	.	.	.	.000
	Unrepresented def represented claimant	.[a]	.	.	.	.000

a. Predictors in the Model: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: Number of hearings effective

Regression

Variables Entered/Removed[b]

Model	Variables Entered	Variables Removed	Method
1	Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case[a]	.	Enter

a. Tolerance = .000 limits reached.

b. Dependent Variable: Number of DJ/Judge interventions

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.251[a]	.063	.055	.426

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	13.269	9	1.474	8.128	.000[a]
	Residual	196.818	1085	.181		
	Total	210.088	1094			

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: Number of DJ/Judge interventions

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	.288	.046		6.302	.000
	Housing case	-.143	.048	-.143	-2.993	.003
	Specified claim	-.122	.045	-.102	-2.712	.007
	Other claim	-8.02E-02	.036	-.082	-2.227	.026
	County or High	-.146	.032	-.148	-4.616	.000
	Claimant lip represented def	.255	.074	.118	3.425	.001
	Both lips	-1.46E-02	.075	-.006	-.195	.845
	Both represented	6.498E-03	.038	.007	.173	.863
	Active claimant lip	5.335E-03	.042	.004	.126	.900
	Active defendant LiP	2.763E-02	.040	.022	.688	.492

a. Dependent Variable: Number of DJ/Judge interventions

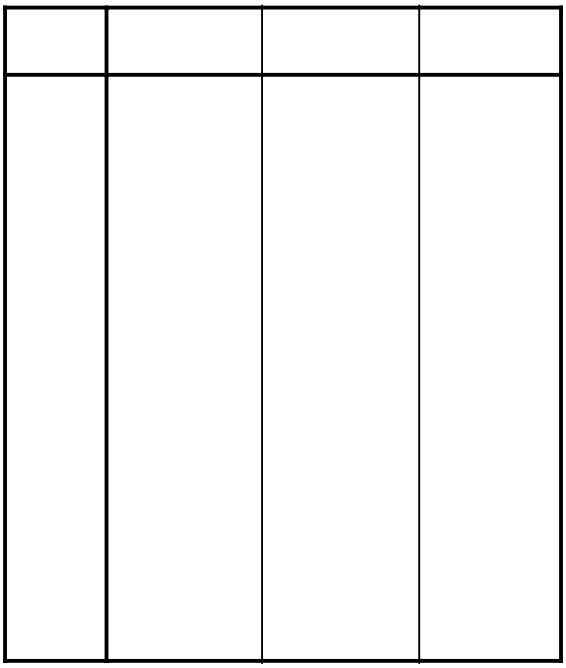
Excluded Variables[b]

Model		Beta In	t	Sig.	Partial Correlation	Collinearity Statistics
						Tolerance
1	unspecified claim	.[a]	.	.	.	.000
	Unrepresented def represented claimant	.[a]	.	.	.	.000

a. Predictors in the Model: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: Number of DJ/Judge interventions

Regression



Dependent Variable: Ineffective hearings

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.339[a]	.115	.107	.63606

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	52.932	9	5.881	14.537	.000[a]
	Residual	407.002	1006	.405		
	Total	459.933	1015			

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: Ineffective hearings

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	.588	.075		7.837	.000
	Housing case	-.289	.074	-.192	-3.902	.000
	Specified claim	-.407	.070	-.226	-5.807	.000
	Other claim	-.337	.057	-.224	-5.881	.000
	County or High	-.167	.051	-.105	-3.275	.001
	Claimant lip represented def	7.040E-02	.116	.021	.609	.542
	Both lips	3.123E-03	.112	.001	.028	.978
	Both represented	.144	.059	.106	2.433	.015
	Active claimant lip	-6.33E-02	.064	-.035	-.985	.325
	Active defendant LiP	9.687E-03	.062	.005	.156	.876

a. Dependent Variable: Ineffective hearings

Excluded Variables[b]

Model		Beta In	t	Sig.	Partial Correlation	Collinearity Statistics
						Tolerance
1	unspecified claim	.[a]	.	.	.	.000
	Unrepresented def represented claimant	.[a]	.	.	.	.000

a. Predictors in the Model: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: Ineffective hearings

Table 79: Regression Summary levels of activity

Variables Entered/Removed[b]

Model	Variables Entered	Variables Removed	Method
1	Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case[a]	.	Enter

a. Tolerance = .000 limits reached.

b. Dependent Variable: ACTIVITY

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.368[a]	.135	.127	2.70940

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	1149.205	9	127.689	17.394	.000[a]
	Residual	7355.523	1002	7.341		
	Total	8504.727	1011			

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: ACTIVITY

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	4.709	.320		14.704	.000
	Housing case	-1.094	.316	-.169	-3.465	.001
	Specified claim	-2.323	.300	-.299	-7.752	.000
	Other claim	-1.705	.245	-.262	-6.973	.000
	County or High	-1.296	.219	-.188	-5.926	.000
	Claimant lip represented def	3.902E-02	.498	.003	.078	.938
	Both lips	.282	.478	.019	.590	.555
	Both represented	.283	.253	.048	1.120	.263
	Active claimant lip	-.237	.274	-.030	-.863	.388
	Active defendant LiP	.573	.264	.069	2.170	.030

a. Dependent Variable: ACTIVITY

Excluded Variables[b]

Model		Beta In	t	Sig.	Partial Correlation	Collinearity Statistics
						Tolerance
1	unspecified claim	.[a]	.	.	.	.000
	Unrepresented def represented claimant	.[a]	.	.	.	.000

a. Predictors in the Model: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: ACTIVITY

Table 80: Regression for length of case

Regression

Variables Entered/Removed[b]

Model	Vari Entered		Method
1	Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case[a]	.	Enter

a. Tolerance = .000 limits reached.

b. Dependent Variable: TIME

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.508[a]	.258	.252	160.52779

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	9577397	9	1064155.181	41.296	.000[a]
	Residual	27495706	1067	25769.172		
	Total	37073103	1076			

a. Predictors: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: TIME

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	324.200	17.352		18.683	.000
	County or High	-103.117	12.019	-.246	-8.579	.000
	Housing case	-147.959	18.180	-.350	-8.139	.000
	Specified claim	-161.072	17.048	-.320	-9.448	.000
	Other claim	-145.621	13.706	-.355	-10.625	.000
	Claimant lip represented def	-6.619	28.062	-.007	-.236	.814
	Both lips	-12.395	28.510	-.012	-.435	.664
	Both represented	18.265	14.231	.049	1.284	.200
	Active claimant lip	-16.311	16.050	-.032	-1.016	.310
	Active defendant LiP	34.503	15.203	.065	2.270	.023

a. Dependent Variable: TIME

Excluded Variables[b]

Model		Beta In	t	Sig.	Partial Correlation	Collinearity Statistics
						Tolerance
1	unspecified claim	.[a]	.	.	.	.000
	Unrepresented def represented claimant	.[a]	.	.	.	.000

a. Predictors in the Model: (Constant), Active defendant LiP, Other claim, County or High, Both lips, Claimant lip represented def, Specified claim, Active claimant lip, Both represented, Housing case

b. Dependent Variable: TIME

Table 81: Enforcement

Logistic Regression

Case Processing Summary

Unweighted Cases[a]		N	Percent
Selected Cases	Included in Analysis	1098	100.0
	Missing Cases	0	.0
	Total	1098	100.0
Unselected Cases		0	.0
Total		1098	100.0

a. If weight is in effect, see classification table for the total number of cases.

Dependent Variable Encoding

Original Value	Internal Value
0	0
1	1

Categorical Variables Codings

		Frequency	Parameter coding (1)	(2)	(3)
Who is unrepresented	Claimant	47	1.000	.000	.000
	Both sides	40	.000	1.000	.000
	Defendant	535	.000	.000	1.000
	No parties	476	.000	.000	.000
Simplified case types	Housing	284	1.000	.000	.000
	Specified	176	.000	1.000	.000
	Unspecified	328	.000	.000	1.000
	Other	310	.000	.000	.000
Active claimant lip	.00	926	1.000		
	1.00	172	.000		
Active defendant LiP	.00	942	1.000		
	1.00	156	.000		
County or High	High Court	299	1.000		
	County Court	799	.000		

Block 0: Beginning Block

Classification Table[a,b]

	Observed		Predicted: Was enforcement action 0	1	Percentage Correct
Step 0	Was enforcement action	0	931	0	100.0
		1	167	0	.0
	Overall Percentage				84.8

a. Constant is included in the model.

b. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 0	Constant	-1.718	.084	418.065	1	.000	.179

Variables not in the Equation

			Score	df	Sig.
Step 0	Variables	SAMP1(1)	16.438	1	.000
		CASTYPE1	105.139	3	.000
		CASTYPE1(1)	70.672	1	.000
		CASTYPE1(2)	2.744	1	.098
		CASTYPE1(3)	70.983	1	.000
		LIP_SUM	137.081	3	.000
		LIP_SUM(1)	8.808	1	.003
		LIP_SUM(2)	4.862	1	.027
		LIP_SUM(3)	118.070	1	.000
		ACDEFLIP(1)	23.813	1	.000
		ACCLLIP(1)	1.823	1	.177
	Overall Statistics		155.667	9	.000

Block 1: Method = Enter

Omnibus Tests of Model Coefficients

		Chi-square	df	Sig.
Step 1	Step	193.421	9	.000
	Block	193.421	9	.000
	Model	193.421	9	.000

Model Summary

Step	-2 Log likelihood	Cox & Snell R Square	Nagelkerke R Square
1	742.790	.162	.282

Classification Table[a]

			Predicted		
			Was enforcement action		Percentage Correct
	Observed		0	1	
Step 1	Was enforcement action	0	931	0	100.0
		1	167	0	.0
	Overall Percentage				84.8

a. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1[a]	SAMP1(1)	-.203	.284	.513	1	.474	.816
	CASTYPE1			15.208	3	.002	
	CASTYPE1(1)	.200	.252	.628	1	.428	1.221
	CASTYPE1(2)	-.053	.271	.038	1	.845	.948
	CASTYPE1(3)	-1.962	.547	12.885	1	.000	.141
	LIP_SUM			35.741	3	.000	
	LIP_SUM(1)	-4.608	8.623	.286	1	.593	.010
	LIP_SUM(2)	2.450	.527	21.625	1	.000	11.585
	LIP_SUM(3)	2.146	.369	33.750	1	.000	8.549
	ACDEFLIP(1)	-.139	.216	.416	1	.519	.870
	ACCLLIP(1)	.516	.253	4.150	1	.042	1.675
	Constant	-3.416	.475	51.707	1	.000	.033

a. Variable(s) entered on step 1: SAMP1, CASTYPE1, LIP_SUM, ACDEFLIP, ACCLLIP.

Table 82: Regression for case length (divorce)

Regression

Variables Entered/Removed[b]

Model	Variables Entered	Variables Removed	Method
1	Divorce ground separation, Applicant unrepresented (Dummy), Respondent unrepresented (Dummy), ANCILL, Both unrepresnted (Dummy)[a]	.	Enter

a. Tolerance = .000 limits reached.

b. Dependent Variable: Divorce length

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.291[a]	.085	.077	170.73650

a. Predictors: (Constant), Divorce ground separation, Applicant unrepresented (Dummy), Respondent unrepresented (Dummy), ANCILL, Both unrepresnted (Dummy)

ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	1555973	5	311194.558	10.675	.000[a]
	Residual	16820100	577	29150.953		
	Total	18376073	582			

a. Predictors: (Constant), Divorce ground separation, Applicant unrepresented (Dummy), Respondent unrepresented (Dummy), ANCILL, Both unrepresnted (Dummy)

b. Dependent Variable: Divorce length

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	226.604	17.546		12.915	.000
	Applicant unrepresented (Dummy)	10.078	43.868	.009	.230	.818
	Respondent unrepresented (Dummy)	-25.623	16.387	-.067	-1.564	.118
	Both unrepresnted (Dummy)	-79.359	28.486	-.131	-2.786	.006
	ANCILL	75.831	17.089	.199	4.437	.000
	Divorce ground separation	-8.058	17.243	-.020	-.467	.640

a. Dependent Variable: Divorce length

Excluded Variables[b]

Model		Beta In	t	Sig.	Partial Correlation	Collinearity Statistics
						Tolerance
1	Divorce (Dummy)	.[a]	.	.	.	.000
	Any adult applicant LiPs?	.[a]	.	.	.	.000
	Any adult respondet LiPs	.[a]	.	.	.	.000

a. Predictors in the Model: (Constant), Divorce ground separation, Applicant unrepresented (Dummy), Respondent unrepresented (Dummy), ANCILL, Both unrepresnted (Dummy)

b. Dependent Variable: Divorce length

Table 83: Regression for case length (family proceedings other than divorce)

Regression

Variables Entered/Removed[b]

Model	Variables Entered	Variables Removed	Method
1	Both unrepresnted (Dummy), Divorce (Dummy), Applicant unrepresented (Dummy), CHILD, Respondent unrepresented (Dummy), INJ, ADOPT[a]	.	Enter

a. Tolerance = .000 limits reached.

b. Dependent Variable: All proceedings length

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.371[a]	.137	.131	178.79890

a. Predictors: (Constant), Both unrepresnted (Dummy), Divorce (Dummy), Applicant unrepresented (Dummy), CHILD, Respondent unrepresented (Dummy), INJ, ADOPT

ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	4797589	7	685369.793	21.439	.000[a]
	Residual	30146812	943	31969.048		
	Total	34944401	950			

a. Predictors: (Constant), Both unrepresnted (Dummy), Divorce (Dummy), Applicant unrepresented (Dummy), CHILD, Respondent unrepresented (Dummy), INJ, ADOPT

b. Dependent Variable: All proceedings length

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	111.323	11.415		9.753	.000
	Divorce (Dummy)	427.769	179.323	.072	2.385	.017
	ADOPT	42.993	23.204	.067	1.853	.064
	CHILD	72.424	14.249	.184	5.083	.000
	INJ	-86.184	16.632	-.183	-5.182	.000
	Applicant unrepresented (Dummy)	64.052	27.773	.077	2.306	.021
	Respondent unrepresented (Dummy)	21.907	12.649	.055	1.732	.084
	Both unrepresnted (Dummy)	104.573	26.594	.126	3.932	.000

a. Dependent Variable: All proceedings length

Excluded Variables[b]

Model		Beta In	t	Sig.	Partial Correlation	Collinearity Statistics
						Tolerance
1	ANCILL	.[a]	.	.	.	.000
	Both parties represented? (Dummy)	.[a]	.	.	.	.000

a. Predictors in the Model: (Constant), Both unrepresnted (Dummy), Divorce (Dummy), Applicant unrepresented (Dummy), CHILD, Respondent unrepresented (Dummy), INJ, ADOPT

b. Dependent Variable: All proceedings length

DCA Research Series No. 2/05

Litigants in person
Unrepresented litigants in first instance proceedings

This study seeks to define the different ways in which unrepresented litigants manifest themselves within proceedings, and explore the difficulties posed to unrepresented litigants, court staff, judges and opponents.

The report explores detailed quantitative and qualitative data on unrepresented litigants in first instance civil and family cases, excluding small claims. It finds that unrepresented parties are common, and more likely to be defendants. In civil cases in particular, there is a strong link between non-representation and non-participation. Parties go unrepresented for a range of reasons, including inability to afford representation.

Problems faced by unrepresented litigants demonstrate struggles with substantive law and procedure. The boundary between the provision of information and advice by court staff also presents problems. Both court staff and judges perceived that improvements can be made in the way that unrepresented litigants are handled, including improvement to court-based services providing greater assistance.

For further copies of this publication or information about the Research Series please contact the following address:

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