



Litigants in person could struggle to secure access to justice

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Heather Mills, former wife of Sir Paul McCartney, claimed the courts do not want litigants in person to succeed Thursday 19 January 2012 by Grania Langdon-Down

The prospect of a huge increase in litigants fighting their cases themselves in the face of legal aid cutbacks has prompted dire warnings from judges, magistrates, practitioners and support groups about the impact this will have on access to justice. They also fear that HM Courts and Tribunals Service's plans to cut counter services will create chaos, particularly in the family courts, with litigants in person (LiPs) left struggling for information. While more online services may help fill the gap, support groups warn that many vulnerable LiPs do not have access to computers or know where to turn for advice.

The Civil Justice Council's (CJC) recent report on the situation pulls no punches: 'It is hard to overstate just how difficult it can be - for the person, for the court and for other parties - when someone self-represents.' And the CJC's message for ministers is unequivocal. Even if its recommendations for both immediate and longer-term action are acted upon, many people will still be denied justice. 'There must be no misunderstanding about this,' it states. 'Put colloquially, the recommendations are about making "the best of a bad job".'

After intensive lobbying, the government postponed the implementation of the legal aid reforms. But the pressures imposed on and by LiPs - or self-represented litigants as the CJC prefers to call them - are already causing huge problems.

So what steps should be taken to provide better support? There is conflicting feedback. Some LiPs say judges are so unhelpful it is difficult to get a fair hearing, while some practitioners say judges are bending over so far backwards to help LiPs that represented clients are being unfairly treated.

Practitioners are also concerned about how far they are expected to go to help LiPs, as judges turn to them to explain orders, what will happen at future hearings and even prepare their trial bundles. The CJC report proposes guidance on what should be expected of a practitioner, while the Law Society is preparing to issue a practice note on their professional duties. The Bar Standards Board has seen such an unprecedented increase in complaints from LiPs that, although most are dismissed, it plans to conduct a thematic review early this year if the trend continues to identify any learning points for the bar or the wider court system.

In the family courts, judges and court staff are already struggling to cope. District Judge Nick Crichton, who sits in the Inner London Family Proceedings Court, sums their predicament up in one word: 'horrendous'. 'Where do I start?' he says. 'We are getting more and more people coming to court in private law cases without the benefit of sensible, structured legal advice, wanting to spill blood on the court carpet.' Angry with each other, they shout across the court, they refuse to listen when you try to calm them down and it is very difficult to find a solution that they will go away and work with.

‘The government wants people to stay out of court but it is very difficult to get people to mediate when they are still very angry and haven’t had the benefit of decent legal advice. These cases take an inordinate amount of time, which is having a knock-on effect on public law cases getting before a judge.’

Firm case management is essential, he says, but adds: ‘It is difficult for judges who work on a rota basis to build up the confidence or experience to be robust. They are worried about not giving LiPs their **article 6 rights and being appealed**. But I think we are getting better at case management and people are feeling more confident that they will be supported.’

The prospect of even more LiPs in the family courts has also raised concerns that violent partners may use the courts to bully their victims.

Resolution has pressed hard on this point. David Emmerson, chair of its legal aid committee, says that, **without the same rules as in criminal cases**, victims could face the menacing experience of being cross-examined by an abusive partner. ‘It is very important in that scenario that both sides are legally represented,’ he says. The Magistrates’ Association family court committee has been calling for the definitions of domestic violence to be widened to protect victims. Chair Steve Matthews condemns the legal aid reforms as ‘short-sighted’, adding: ‘Some people will be put off pursuing their cases at all. In contact cases, this could lead to injustice not only for them but also for their children.’

For those that do bring cases, the result is increased delays in getting to court and reaching final decisions. ‘Magistrates are taught how to help LiPs as part of their case management training,’ he says, ‘but it is important we don’t end up acting effectively as their advocates.’

Judges have a duty to ensure a level playing field, says Newcastle-based matrimonial lawyer Caroline Goorney, but the situation is becoming ‘really unbalanced’, she says. ‘Judges bend over backwards to accommodate LiPs, no matter how difficult they are being. But that is at the expense of the represented client. If there is anything to be done procedurally they tend to look at me. Who is going to pay me for that?’ She describes how distressing it is for her clients when faced by an unrepresented former partner. In one case, her client’s ex-husband twice tried to bring his new wife into the hearing as a **Mackenzie Friend**.

The onus is being put on the private sector to pick up the pieces, she says, and the ‘disgruntlement’ among lawyers is enormous. ‘I would seriously consider advising a client who is confident to attend a straightforward procedural hearing on their own, so the judge deals with them on equal terms.’

Senior judges are aware of the problem. The Judges Council submission on the legal aid reforms said judges are having to tread a ‘careful line’ in ensuring LiPs understand proceedings **and that their human rights are safeguarded**, while making sure the other party does not feel the judge is biased against them.

Asked if there are plans for enhancing training, a Judicial Office spokesman said: ‘The subject of LiPs already arises within the training provided by the Judicial College. It is very much linked with equal treatment issues and vulnerability, which permeates induction and continuation training in similar ways. Judges will look to find best practice as they share their experiences and to develop their judicial skills through role play and case studies.’

Emmerson, a consultant at TV Edwards, is also a part-time district judge. He says the Judicial College needs to look at a programme of strategies for dealing with LiPs, especially where both sides are

representing themselves. 'I sat in a county court case involving a small- claims building dispute and spent nearly two hours before I could start putting all the documents in order.'

'With no money for better IT or more judges, it is going to be important that judges exercise firmer case management.'

One option the CJC report suggests is for solicitors, barristers and legal executives to sell small amounts of their time or take on one or two defined pieces of work in the course of a case. One practice, it says, charges £7 for five minutes of advice. The report says this should not be prevented by regulatory barriers, as long as **there are safeguards against exploitation**.

Neil McDougall, who defended himself in a small-claims case, says 'dipping in and out' legal advice would be useful. 'But the problem is that LiPs don't have the same standing in hearings as lawyers,' he adds. 'The important advice is tactical, and I fear that it is easy for a solicitor to recommend a particular course of action without recognising that a judge may treat the LiP very differently.'

Add in new insurance products and alternative business structures and the CJC report observes: 'It is entirely possible that more people will be able to afford at least some access to legal services. The choice for the litigant may move from self-represented or lawyer-represented to self-help, or lawyer-review, or lawyer-led.'

Peter Smith, managing director at FirstAssist, says many people have access to legal advice through their motor and household policies. **'Half of home owners have BTE insurance as part of their household policies for many civil disputes, but many don't understand what they have got.'**

The costs risk is critical for both sides. In an appeal last year - French v Groupama Insurance Company Ltd [2011] EWCA Civ 1119 - the claimant LiP, who later instructed solicitors, won her case but faced paying all the defendant's costs because of confusion over a pre-litigation offer. Finding for her, the appeal judge said the fact that she was initially an LiP was a relevant factor.

Masood Ahmed, senior law lecturer at Birmingham City University, says the case is a salutary lesson for practitioners to ensure that LiPs understand part 36 offers or both sides risk adverse cost consequences. Learning that an opponent is going to self-represent is increasingly a factor in assessing the risk of defending a claim, says Emmerson. 'The prospect of long delays and extra cost can give the LiP the upper hand, as defendants may decide it is cheaper to buy the case off than fight it.'

Litigants in person event

Attend the Law Society's litigants in person event which will provide essential information for all family law legal professionals.

What is clearly crucial is to improve information and support for LiPs. The Ministry of Justice has hinted that there may be money available in the current budget by asking the CJC working party to identify immediate steps that could be taken before the end of the financial year.

An MoJ spokesman says it is studying the report and is already creating simpler forms and new online information on the Directgov website. 'We want people with problems to be aware of their options so they can choose the most suitable way forward for them, which will not always be to take legal action,' he said.

In the **Mercantile Court** in Birmingham about a fifth of users are LiPs, mostly small and medium-sized enterprises. Judges say hearings increase in length by at least 25%, rising to 50% in complex cases. The number of hearings also increases, as does the number of hopeless appeals.

Judge Simon Brown QC, the designated Mercantile judge for the Midlands, helped design the website for the Mercantile Courts with an 'easy guide' to each stage of a case and a link to relevant forms which can be emailed in to the court.

He is concerned that the court service's 'modernisation' plans will result in counter services being reduced. 'Modernisation' must mean more than just cutting, he says. He recommends webpages for all aspects of court work and an electronic documents management system which the US courts have achieved with an 'off-the-shelf easy-to-use package'. This would free up court clerks from paper-chasing, so they can act as the key interface for LiPs. Crucially, costs budgets should be filed at the case management conference, so LiPs know what they can recover and their potential exposure to the other side's costs.

He recalls one case where a claimant was suing a party under a commercial agent's agreement. 'After he opened his case, it appeared he had got the wrong end of the stick. While he had spent nothing apart from fares and downtime, the army of lawyers on the other side had spent £90,000. His wife was in court. She hauled him out and he came back in and accepted a drop-hand settlement.'

Judge Brown sees himself as a 'case manager - somewhere between a mediator and a trial judge. When one of the parties is a LiP, I will explain procedures and make observations. Lawyers on the other side are officers of the court so they should also help – **parties may want to kill each other** as in a duel but lawyers must act as seconds to help the parties with that process.'

Asked about its modernisation plans, an HMCTS spokesman said it is undertaking a 'restructure' to create a more efficient and affordable service to the public, including exploring greater use of other communication channels such as web-based services and information.

The Gazette revealed last year that HM Courts and Tribunals Service is planning to process all county court claims through a central facility from March.

Marie-Claire Clinton, litigation principal at Rugby firm JH Law, says the scheme's biggest weakness is the '**gobbledegook**' sent out by the courts. She says: 'With everything being centralised and counter services being reduced, there will be nobody to turn to for advice. The whole system could grind to a halt, especially when the small-claims limit rises **from £5,000 to £15,000**.'

She is pleased that the Patents County Court is introducing a new small-claims service for SMEs. But she points out that, unless the service is made 'layman-friendly', it will cost more in legal fees than the average predicted payout of £2,300.

When it comes to the court process, she recalls representing a company that was suing two former directors. 'It was really frustrating. I would write to them before a hearing to say this is what is going to happen. But they kept pleading ignorance and the court gave them multiple adjournments. It should have been sorted relatively quickly but it took nearly two years to get to trial. What is even more frustrating is that we were listed for a four-day trial but settled on the morning of the first day because they finally got legal representation.'

Judges are sometimes too accommodating, she adds. 'My client felt she was being penalised for being legally represented. I have enormous sympathy with judges because they are **struggling with a system that is creaking** but there needs to be a point where they say enough is enough.'

She says solicitors have a duty under the **Civil Procedure Rules** to assist the court and the administration of justice, so they are obliged to explain things to an LiP. 'The court routinely asks me "did you tell them X?" You don't charge for it - you take that hit as a practitioner. But, with modern technology, it cannot be that difficult to have self-help guides with an automated click-through system to help complete paperwork.

There is a 'very fine line' between providing some help and acting against your own client's interests, says Mark Stobbs, the Law Society's director of legal policy: 'We will be looking at the CJC's draft guidance when we prepare our own practice note giving broad guidance on solicitors' professional duties.'

For LiPs, the frustration of trying to work through the court process is immense.

McDougall likens defending the small claim through what appeared to be straightforward procedures to 'applying the handbrake to park a car on a hill, then realising that the handbrake cable is not attached - contesting jurisdiction is an open road downhill, without brakes'.

He made 10 recommendations to the CJC working party, which praised them as a 'modest and sensible checklist'.

He says: 'The fundamental requirement from my perspective is that the original purpose of the CPR is protected, that is, procedures are clear, logical and applied consistently. It was intended that LiPs could cope in small claims or even more complex claims. But it seems that the procedures are easily short-circuited, and others are not effectively activated.'

Fellow LiP Neil Jeffares won all three cases he brought against different banks, receiving the full amount claimed plus costs without actually appearing in court. 'In both cases the amounts were too small - less than £2,000 - to justify incurring legal costs, so small-claim proceedings were ideal, as I would not be at risk for the other sides' costs.

'The main lesson is you have to be very determined. The courts are hopelessly inefficient; telephone and fax numbers are rarely accessible, and **they repeatedly lost documents** and even sent me ones that belonged to a different case.'

The support groups helping LiPs to navigate the court process highlight the huge difficulties many face. The Public Support Unit (PSU) estimates that 30-40% of its 3,000 clients at the Royal Courts of Justice annually have some form of mental health issue; 27% of its clients nationwide report that they have a serious health problem; and 15% are registered disabled. A small but significant proportion is homeless or have no regular access to the internet or phone. And for a quarter of its 7,000 clients nationally, English is not their first language.

PSU director Judith March, a member of the CJC working party, says November was the busiest month they have ever had at the RCJ with 350 LiPs contacting them, compared with a monthly average of 280. Numbers are also increasing at their units at the Principle Registry, Wandsworth County Court, south-west London, **and the civil justice centres in Manchester** and Cardiff.

The PSU, which hopes to launch a second London unit as well as units in Liverpool and Birmingham this year, survives on a small grant from the MoJ, a friends' scheme and individual donations. 'A lot

of my time is taken up seeking money from trusts and foundations,' March says. 'We have funding from the Bar Council, ILEX and the Inns of Court and have submitted an application to the Law Society. We also plan to seek support from major law firms - it is important the legal world does its bit.'

Some LiPs may feel they have **not been treated fairly**, she says, but, on the whole, the judiciary and court staff do everything they can to make the experience easier. 'There are some quick wins you could make by changing the language in the guidance and forms; court websites could also be improved. It is also very important that data about LiPs is collected systematically. Judges and practitioners have been very critical of the MoJ's **'unrealistically vague'** and inadequate research into the consequences of its legal aid proposals for LiPs.

Stobbs says the lack of research is 'pathetic', given that the MoJ's own impact assessment warns the reforms **will adversely affect the most vulnerable**. 'Challenging benefit assessments or bringing an action against a housing department involves complex law - how can there be a level playing field? You will end up with bad decisions with the local authority or benefits agency getting off the hook. What that means in terms of **public accountability is very worrying.**'

The legal pro bono world is also very concerned about how it will cope. **'The crude answer is we will be deluged with applications and we won't be able to support the level of demand,'** says Rebecca Hilsenrath, chief executive of LawWorks.

'But it goes wider than that. The key issue involves our partnership with frontline agencies and advice centres on whom we depend for referrals. Every law centre forced to close is another centre where we can't base a free legal advice clinic.'

The demand for information is clearly high. Help4LiPs, which aims to be the 'Google' for LiPs, offering access to context-specific dispute resolution action points in just three clicks, has received up to 5,000 unique visitors in a single month. Founder Brad Meyer says: **'We hope to promote court-free solutions wherever possible** and direct LiPs towards expeditious litigious approaches where necessary.'

What everyone agrees on is that LiPs need early access to advice and improved guidance and forms. 'Otherwise,' says Clinton, **'the system is almost setting them up to fail.'**

Grania Langdon-Down is a freelance journalist

Mike Clarke: Well!!! There you go... that says it all!!!