Communicating the law: self-represented litigants in the Court of Appeal

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Introduction

1 Litigants in person disturb the normal conventions of the courtroom and substantially challenge the well-ordered roles of the judges and lawyers. They are, it has been pointed out, classic outsiders – legally uninformed in a technical and rarefied atmosphere, unaware of procedure, often unknowingly in breach of convention.[1] Today I want to talk about the particular issues litigants in person pose for judges, in terms of consistency of decision-making, courtroom management and, particularly, communication skills. I will also talk about the ways in which judges (and, I hope, tribunal members) can work to overcome these difficulties and to ensure fair proceedings, both for self-represented litigants and for parties appearing against them.

2 In 2011, I presided over a case, *Hamod v State of New South Wales and Anor*,[2] which concerned 4,590 tonnes of platinum with a face value of $66 billion dollars – or more specifically a bearer certificate purportedly conferring an entitlement to that quantity. Mr Hamod, had been substantially unrepresented at trial.

3 Mr Hamod, who was to be the appellant in the Court of Appeal, was arrested while attempting to sell the certificate and was imprisoned pending hearing for a period of seven months, until he was granted bail. However, of the three

[*] My thanks go to my researcher Christopher Frommer who researched widely on this topic and produced preliminary drafts for my consideration. His selective choice of case law and academic articles for inclusion in this paper is a testament to his fine analytical skills.

[1] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 *Social and Legal Studies* 405 at 405.

[2] [2011] NSWCA 375

charges brought against him, one was withdrawn prior to committal, one was discharged at the committal hearing, and he was acquitted in summary Local Court proceedings of the third.

4 Mr Hamod subsequently brought proceedings against the State of New South Wales and the bank UBS, which had purportedly issued the certificate, for false arrest, malicious prosecution and injurious falsehood, among other things. The case went for 26 days, during which period he was represented, on and off, for about 11 days. It was dismissed with costs.

5 On appeal, Mr Hamod raised some 25 grounds. As you might imagine, the case was a bit of a mess. Many of the claims raised by Mr Hamod were entirely without merit, including his continued claim that the platinum certificate was valid. Quite apart from its questionable form and an exciting but implausible story about its provenance, it purported to entitle the bearer to an amount of platinum equalling almost half of the total quantity of platinum group metals produced in the world since 1900. (Self-delusion is a wonderful thing).

6 However, a number of the grounds of appeal raised issues of some substance. There was, at least, an arguable question as to whether Mr Hamod's arrest and imprisonment for a substantial period was wrongful, given that he was acquitted of the only one of his charges that proceeded to hearing. Relevantly for my purposes today, the Court of Appeal also needed to grapple with questions of procedural fairness in the proceedings, in the context that Mr Hamod had not been represented for the majority of the trial and that he was, by his own admission, of questionable mental health.

7 My judgment, in which Giles and Whealy JJA agreed, ran to some 828 paragraphs and 230 pages. Mr Hamod's lack of representation at trial was the major complicating factor throughout. Specific complaints raised included that Mr Hamod was denied a fair trial by the trial judge's refusal to adjourn to allow him time to obtain further representation and that, because Mr Hamod

did not fully understand the trial process, the trial judge ought not to have invoked the rule that a failure to cross-examine a witness on evidence given in chief amounted to acceptance of that evidence.

8 In the result, Mr Hamod's claims relating both to the fairness of the trial below and his causes of action against the State and UBS were rejected and his appeal was dismissed.

9 However, his case throws up, in sharp relief, a number of issues posed by unrepresented litigants in the courts which I wish to explore in my talk today. First, and most obviously, the complexities of major litigation – the inference to be drawn from a lack of cross-examination, for instance – are difficult to adapt to a situation in which one party is largely unrepresented. Secondly, the problems Mr Hamod faced at trial, both in understanding process and in distinguishing between causes of action which were viable and those which were not, turned what could have been a relatively simple case for the Court into a matter which required a vast quantity of court time and resources, both at trial and on appeal. Thirdly, the additional complication of an unrepresented litigant placed the trial judge in a difficult position of having to determine how much assistance to give to Mr Hamod, and how much allowance to give him on errors of procedure, without creating unfairness for the other parties.

10 These issues raised the legal question as to the principles the Court and Tribunal is to apply in hearings involving self-represented litigants. There is also a very real question as to how to communicate the legal principles that govern the conduct of the trial to the self-represented litigant.

Experiences of self-represented litigants at NCAT and the Court of Appeal

11 Self-represented litigants are a feature of legal proceedings in every Court and Tribunal in the land. Indeed, persons have a right to appear for

themselves in the courts.[3] That right is an aspect of the right to access the court regardless of status, and is fundamental to our legal system.[4]

12 Since the Court of Appeal (belatedly) commenced keeping statistics on representation status in 2014, we have found that an average of about 20% of matters commenced have at least one party who is unrepresented, or about seven a month.

13 The experiences of self-represented litigants in the Court of Appeal are, of course, quite different from those of parties in NCAT. Section 45 of the *Civil and Administrative Tribunal Act* provides that parties at NCAT are not entitled to representation and it imposes leave requirements on parties who do desire representation, although that requirement is subject to exceptions for matters in particular Divisions.[5] The policy underlying s 45 reflects the many advantages of operating without lawyers: simplicity, informality, lower cost, greater party control, and so on. However, it should not be assumed that this creates a level playing field for the parties on either side of the dispute. There are many 'repeat' parties in the Tribunal – real estate agents being a prime example – who are often at an advantage in comparison to the individuals against whom they appear.

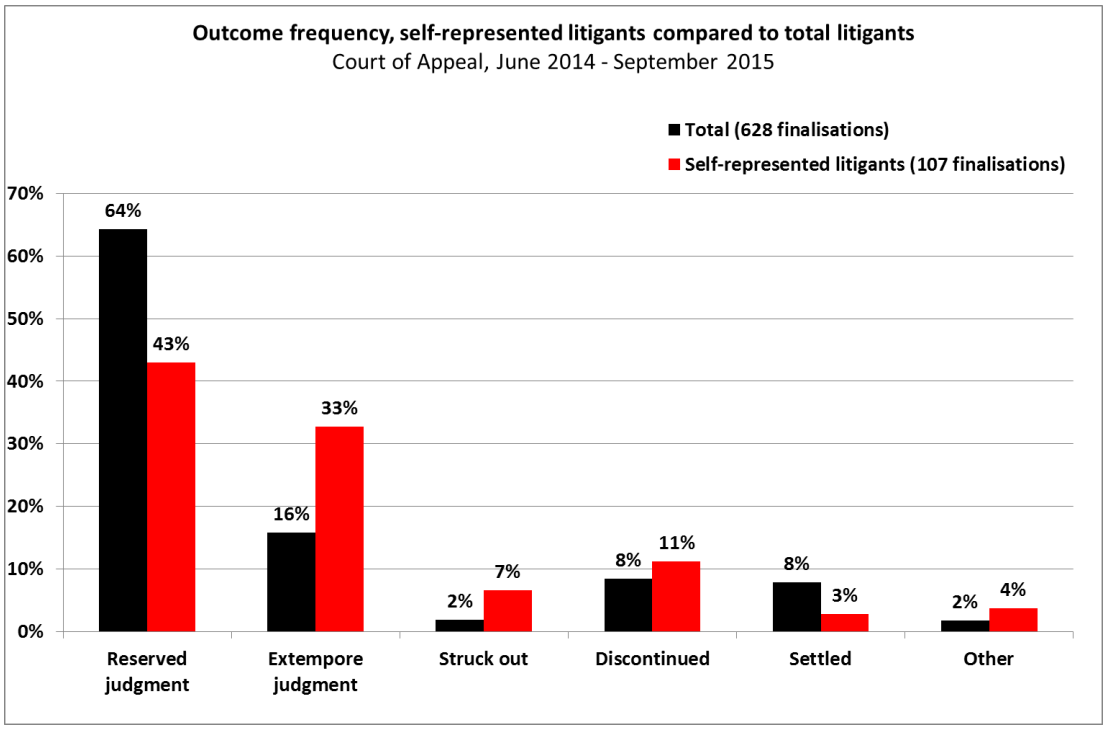
14 It is obvious that self-represented litigants face considerably more difficulty in the Court of Appeal. There are two broad reasons this: first, the types of disputes which end up in the Court are inherently more complex, particularly by the time they have filtered through several proceedings in lower courts and tribunals; and secondly, litigants must navigate the Court's formal processes and the rules of evidence and procedure.

[3] UCPR r 7.1(1); Judiciary Act 1903 (Cth) s 78

[4] *Cachia v Hanes* [1994] HCA 14; 179 CLR 403; and see Uniform Civil Procedure Rules 2005, r 7.1. In the federal system, this right is guaranteed pursuant to the *Judiciary Act 1903* (Cth), s 78.

[5] There are broad exceptions to the leave requirement for proceedings in the Administrative and Equal Opportunity Division: see Sch 3, cl 9, and the occupational division: see Sch 5, cl 3.

15 This is reflected in worse outcomes for self-represented litigants. An appeal brought by a self-represented litigant is about 25% as likely to be allowed as one brought by a party with representation.[6] It is, of course, not easy to separate the effect of difficulties caused by a lack of representation from the effect of self-represented litigants simply tending to bring less meritorious cases. However, one way of considering the problem is to look at the different procedural outcomes for matters involving self-represented litigants, outlined in this graph:



16 The graph provides the following overview. Most obviously, considerably fewer matters involving self-represented litigants are finalised by a reserved judgment, probably indicating that self-represented litigants bring less meritorious matters to the Court of Appeal. Relatedly, strike out rates are much higher, indicating that self-represented litigants are bringing more cases which disclose no causes of action. Finally, settlement rates are much lower. I suspect this indicates two things: first, cases brought by self-represented litigants are, as I have said, on average weaker, such that other parties are

[6] Research in other courts shows that this is not unusual: Moorhead, above n 1 at 410.

less inclined to settle; and secondly, self-represented litigants are almost by definition much more psychologically involved in the case and therefore less likely to be willing to compromise. That is a point to which I will return.

The Court's duty to self-represented litigants

17 The Court's duty to self-represented litigants is a function of its overriding duty, in both civil and criminal matters, to ensure a fair trial.[7] This requirement is sourced differently from the requirement that NCAT, as an executive tribunal, afford parties appearing before it procedural fairness. The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by the requirement, inherent in Ch III, that judicial power be exercised only in accordance with judicial process.[8]

18 The right to a fair hearing in Tribunal proceedings, by contrast, gains legal force from the requirement, derived from the Constitutional separation of powers, that executive bodies act pursuant to law, including by the provision of procedural fairness. This requirement is given effect by another entrenched function of the Courts, being judicial review of executive power.[9]

19 But in both cases the touchstone is procedural fairness and particularly the right to a reasonable opportunity to present a case.[10] For that reason the duty to litigants at NCAT is closely related to that to litigants in the Court of Appeal. As Bell J said at [89] in the Victorian case of *Tomasevic v Travaglini*, of the judge's "*positive duty to give proper assistance to self-represented litigants*":

> "The same duty applies to masters, magistrates, commissions and tribunals, but of course the application of the duty would have to take into account the particular demands of those jurisdictions."[11]

[7] *Dietrich v R* [1992] HCA 57; 177 CLR 292.

[8] *Dietrich v R* [1992] HCA 57; 177 CLR 292 at 362-363.

[9] *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531.

[10] *MacPherson v The Queen* [1981] HCA 46; 147 CLR 512 at 523.

[11] *Tomasevic v Travaglini* [2007] VSC 337; 17 VR 100 at [89].

20 At NCAT, this duty has an additional basis in statute. Section 38(5) of the *Civil and Administrative Tribunal Act 2013* (NSW) provides:

> "**38 Procedure of Tribunal generally**
>
> …
>
> (5) The Tribunal is to take such measures as are reasonably practicable:
>
> (a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and
>
> (b) if requested to do so-to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and
>
> (c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings."

21 The Court's duty of fairness has no such statutory basis, and is arguably the less clear for it. A trial will not be fair if a litigant suffers an "*additional disadvantage*" from exercising their right to appear in person.[12] How can this principle be applied in practice? In court, a party will always be at some disadvantage from appearing in person.[13] Indeed, in a general sense, parties before the court are always advantaged or disadvantaged by the quality of their representation, and that is a factor for which the court cannot control.[14] So the question arises as to the point at which a particular choice or act is sufficiently referable to a litigant's unrepresented status that the court must intervene to prevent an "*additional disadvantage*"?

22 It may be difficult to say more in the abstract about the duty, either in NCAT or the Court of Appeal, than that there is a duty to ensure that a litigant in person has a fair opportunity to articulate their case and is not, particularly through a want of procedural knowledge, deprived of an otherwise legally cognisable

[12] *R v Zorad* (1990) 19 NSWLR 91 at 94-95; see also *Hamod v State of New South Wales and Anor* [2011] NSWCA 375 at [309].

[13] See *Rajski v Scitec Corporation Pty Ltd* (Court of Appeal, 16 June 1986, unreported) per Mahoney JA.

[14] See GL Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (2003) 12 *Journal of Judicial Administration* 155 at 158.

argument or advantage. Beyond that, as we will see further, the specific requirements of this duty are highly context specific.[15]

The content of the duty and "*the judge's dilemma*"[16]

23 In practice the baseline duty to a self-represented litigant extends, at least, to the giving of information on court procedure and the options available. As was said by Mason J in *MacPherson v The Queen*[17] at 534:

> "A trial in which a judge allows an accused to remain in ignorance of a fundamental procedure which, if invoked, may prove to be advantageous to him, can hardly be labelled as 'fair'."

24 There is a well-recognised tension between the requirement that a judge assist self-represented litigants and the fundamentally adversarial nature of court proceedings in common law systems. As was noted by McHugh and Hayne JJ in *Gipp v The Queen*[18] at 124, the system:

> "… relies on an impartial judge as arbiter of the issues and which requires that the parties determine which issues will be put before a court for decision."

25 For these reasons, while the duty of fairness may extend to telling litigants what options are available to them, it cannot extend to advising litigants as to which option to choose.[19] However, the practicality of the distinction between advice and information is, at best, questionable, and a litigant may well assume that the information is, in fact, advice as to the option to take.[20]

26 Indeed, despite the formal impermissibility of the giving of advice, it would seem that the duty of fairness will, in some cases, require that assistance extends beyond information on procedural matters. In *MacPherson*, at 524, Gibbs CJ and Wilson J put it thus:

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[15] *Jae Kyung Lee v Bob Chae-Sang Cha* [2008] NSWCA 13 per Basten JA at [48].

[16] *Tomasevic* at [97].

[17] [1981] HCA 46; 147 CLR 512.

[18] [1998] HCA 21; 194 CLR 106.

[19] *Bauskis v Liew* [2013] NSWCA 297 at [69].

[20] See Duncan Webb, 'The right not to have a lawyer' (2007) 16 *Journal of Judicial Administration* 165 at 172-3; John Greacan, 'Legal Information vs Legal Advice' (2001) 84 *Judicature* 198.

> "There is no limited category of matters regarding which a judge must advise an unrepresented accused - the judge must give an unrepresented accused such information as is necessary to enable him to have a fair trial."

27 In *Neil v Nott*[21], the High Court considered an appeal against the refusal of a trial judge, in a succession matter, to grant an extension of time. The appellant, Mr Neil, was unrepresented. The Court noted the difficulty this had caused, and went on to comment that:

> "A frequent consequence of self-representation is that the Court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy. It has been so in this case."[22]

28 This comment brings the tension inherent in the provision of assistance to self-represented litigants into stark relief. It is one thing for a judge to take a more interventionist approach to ensure that the litigant has enough information about Court rules and procedures as to ensure a fair hearing. It would seem to be a different proposition for the Court, having been insufficiently assisted by the parties in the hearing itself, to simply ascertain the parties' rights based on first principles. Such an approach seems to be inconsistent with the requirement, articulated by Mason J in the context of private communications with the bench in *Re JRL; Ex Parte CJL*[23], that:

> "… one of the cardinal principles of the law is that a judge tries the case before him on the evidence and arguments presented to him in open court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides."

29 Notwithstanding this cardinal principal, in some cases involving an unrepresented litigant, the only possible means to a just resolution of a particular dispute involves a far more impressionistic approach to the litigant's arguments, in which the bench determines what it thinks the litigant is trying to

[21] [1994] HCA 23; 68 ALJR 509.

[22] At 510. See similarly *Edwards v Allmen Engineering Pty Ltd Anor* [1995] NSWCA 138 at 2 per Kirby P (with whom Seller JA agreed): "*Concealed in the lay rhetoric and inefficient presentation may be a just case*."

[23] [1986] HCA 39; 161 CLR 342.

get at – or even should be trying to get at – and provides assistance on that basis. As Mahoney JA held in *Rajski v Scitec Corporation Pty Ltd*:

> "… the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done."

30 Similar requirements may arise in NCAT. In *John Prendergast & Vanessa Predergast v Western Murray Irrigation Ltd*[24], the appellants, who were unrepresented at first instance and on appeal, claimed relief from payments of sums in respect of water usage. An appeal to the appeal panel lay as of right on a question of law.[25] The appeal panel noted that the notice of appeal did not articulate in express terms any such question.[26] At [12], it held that:

> "In circumstances where the appellants are not legally represented, it is apposite for the Tribunal to approach the issue by looking at the grounds of appeal generally. It is necessary for the Appeal Panel to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations that might arise to the respondent."

31 The panel considered that the notice of appeal identified only factual disputes, which, of course, do not of themselves give rise to questions of law.[27] However, having noted that "*a wrong finding of fact may be indicative of an underlying error of law and therefore raise a question of law*"[28], the appeal panel conducted a "*close reading of the grounds of appeal*", and found that it "*reveal*[*ed*]" two questions of law: first, a question of procedural fairness relating to submissions filed after the hearing; and secondly, a question of whether relevant considerations had been taken into account.

32 In the result, neither question demonstrated error and the appeal was dismissed. However, what is more interesting for present purposes is the

[24] [2014] NSWCATAP 69.
[25] *Civil and Administrative Tribunal Act 2013* (NSW), s 80.
[26] At [11].
[27] At [17].
[28] At [19].

technique utilised by the panel: the willingness to look *behind* a formal document in order to ensure fairness to an unrepresented litigant.

33 Could the same level of assistance have been provided in the Court of Appeal? The authorities I have discussed suggest it could. However, if a potentially dispositive point was "*revealed*" through close reading the bench would need to be particularly careful to ensure that the other party was not denied a full opportunity to respond to it.

34 In my opinion, this difficulty is best avoided if at all possible. The goal must be to provide litigants with sufficient assistance through careful explanations in the hearing so as to allow them to themselves articulate their cases in a legally cognisable way.

35 As I have said, however, in determining how far a court can go in providing assistance, much will depend on the context. There is no doubt that the duty to ensure a fair trial or proceeding to an unrepresented criminal defendant is more stringent than that owed to a civil litigant,[29] and there are particular issues in criminal cases which do not apply in civil litigation and upon which I will not dwell.[30] In civil cases, the extent of assistance required will depend primarily on the complexity of the case and the level of legal understanding that the litigant displays. It will also, however, vary depending on whether the litigant is appearing in person by choice.

36 *Bauskis v Liew*[31] provides an example of the factors that will lead to less assistance being appropriate. The appellant, Mr Bauskis, had appeared unrepresented in a dispute relating to payment for a construction contract. It was not suggested that he was unable to obtain representation. On the first day of the trial, the trial judge, Beech-Jones J, had repeatedly offered Mr

[29] *Minogue v The Human Rights and Opportunity Commission* (1999) 84 FCR 438; *Jeray v Blue Mountains City Council (No 2)* at [56].
[30] For instance, as to confessions, see *MacPherson v R* at 523-4.
[31] [2013] NSWCA 297.

Bauskis the option of adjourning in order to obtain representation. The offer was refused. One of the exchanges that occurred was as follows:

> "HIS HONOUR: I am asking whether you want to ask for an adjournment to get a lawyer. That's what I am giving you an opportunity to think about.
>
> PLAINTIFF: What's this got to do with this case?
>
> HIS HONOUR: You're running a legal case.
>
> PLAINTIFF: A what?
>
> HIS HONOUR: A legal case, a case in court.
>
> PLAINTIFF: So, I am entitled to do that.
>
> HIS HONOUR: Indeed you are and often run by lawyers.
>
> PLAINTIFF: That's fair enough but I choose on my own free will to do it myself so therefore you're supposed to be helping me a little bit on the way because I don't know the law as well as I should.
>
> HIS HONOUR: There's a limit as to how much I can give you help on. I am giving you time to think about your decision not to get a lawyer and whether you want to continue with the case today..."

37 Mr Bauskis appealed to the Court of Appeal, claiming that he was denied procedural fairness on the basis of, among other things, applications made for adjournments on the second day of the trial. The adjournments were sought, relevantly, on the basis that Mr Bauskis needed time to organise further witness evidence and to obtain representation which, by that stage, he had decided he did want.

38 On appeal, Gleeson JA, with whom Barrett JA and I agreed, found that there had been no denial of procedural fairness, in circumstances where, first, Mr Bauksis had made a conscious decision not to obtain representation on the first day and could not identify what had changed since he had done so; and secondly, the transcript demonstrated that he sufficiently understood the practice and procedure of the Court so as to present his case.

39 It should be emphasised that, notwithstanding the difficulty in drawing sharp lines in the application of the duty of fairness to unrepresented litigants, it is

not a duty without teeth. A failure to ensure fairness, including procedural fairness, may cause the proceedings to miscarry and thus invite appellate intervention.

40 I will give one more example. In *Jeray v Blue Mountains City Council (No 2)*[32], Mr Jeray appeared in person to challenge certain development consents. On the fourth day at trial, Mr Jeray had brought a motion that the judge recuse himself, without proffering any basis for that application. When the motion was unsuccessful, Mr Jeray stated that he could not proceed with the matter. The trial judge told him that if he did not continue, the case would be dismissed. The case was dismissed.

41 Mr Jeray appealed. Allsop P, with whom Macfarlan JA agreed, held that, in the unusual circumstances of the case, Mr Jeray had not been provided with a fair trail. His Honour held that the trial judge had failed to ascertain whether Mr Jeray was stating that he would not continue at all or, alternatively, that he could not continue immediately and required an adjournment. He also failed to communicate the consequences of the dismissal, in terms of costs and potential future proceedings.

42 Allsop P concluded, at [30]-[31]:

> "However difficult and obstinate Mr Jeray may have appeared to the learned primary judge, I am of the view that he did not have [what was occurring] sufficient[ly] explained to him for it to be concluded legitimately that he had a fair hearing on the fourth day.
>
> This is not to require perfection; it is not a call to pander to every whim of a litigant in person. Rather in my view it is an assessment of the evaluative conception of fairness in the circumstances of this case…."

[32] [2010] NSWCA 367. Another recent example is the Victorian case of *Downes & Anor v Maxwell Richard Rhys & Co Pty Ltd (in liq)* [2014] VSCA 193, in which the trial judge's failure to warn the unrepresented parties that their failure to give evidence could give rise to a *Jones v Dunkel* inference was held to result in a miscarriage. At NCAT, see *Gallo v Duflou* [2014] NSWCATAP 115.

43 Although he considered the case was "*close to borderline*"[33], Young JA dissented, finding that the trial judge's warnings to Mr Jeray had been sufficient.

44 There are two things I would point out about *Jeray*. First, the matters upon which the trial judge was found to have provided insufficient assistance were entirely procedural. While there may be some situations in which a judge will rightly give information on substantive topics, it would be a rare case, in the civil context at least, in which a failure to do so would result in a trial miscarrying. Secondly, the case focusses attention on the core requirement of good communication – the only dispute was where the standard of communication lay and whether the trial judge had met it. In particular, the case underlines the need for a particularly cautious approach to ensuring a litigant is fully informed prior to making any decision which would have the effect of foreclosing a hearing of the substance of their complaint.

Accommodating self-represented litigants

45 There are, in effect, three ways in which courts can work to improve the experiences of self-represented litigants: first, get them lawyers; secondly, make them lawyers; and thirdly, change the system.[34]

Get them lawyers

46 The best of these options, in appeal proceedings at least, must be to get self-represented litigants lawyers. This, however, is a problem which is largely beyond the reach of the Courts, at least in the current fiscal climate, although in some circumstances reference to various pro bono schemes, including that coordinated by the NSW Bar Association may be appropriate. I will say little about it except to point out that the experiences of the Court with self-represented litigants demonstrates that continuing cuts to publically funded

[33] At [86].

[34] John Faulks, 'Self-represented litigants: tackling the challenge', Managing People in Court Conference, February 2013.

sources of legal assistance are likely false economies which only cause costs elsewhere in the system to increase.[35]

Change the system

47 There is also some, but in my opinion, limited scope for the Court to change the system to accommodate self-represented litigants. It is true that the Court does, with some frequency, relax normal case management rules so as to ensure that matters involving self-represented litigants do get on for hearing. One example is that the appeal books, which under the Rules are required to be prepared by the appellant,[36] are often prepared by the respondent or even the Court when the appellant is unrepresented. The Court will also sometimes allow unrepresented parties to proceed to hearing on the basis of notices of appeal which would have been subject to case management had the party been unrepresented. The thinking here is that the litigant may realistically be unable, without assistance, to put on a notice of appeal which usefully outlines legally determinable issues, and it is more useful to get them to a hearing where the issues can, hopefully, be sorted out in person.

48 However, the particular role of the Court of Appeal means that its processes cannot easily be simplified, and these accommodations are exceptions. It is the highest Court in the State to which leave lies as of right, at least in matters involving substantial sums of money[37] and, given the strict leave requirements of the High Court, it is in practical terms the court of final appeal for most matters. The Court's procedural rules have developed to accommodate complex argument and large quantities of evidence. They are designed to ensure that matters are presented in a way that best allows the bench to understand the material and make the best decision possible. Indeed, many of the difficulties the bench often faces in dealing with unrepresented litigants

[35] For an interesting approach to this topic, see David Neuberger, 'Law in an Age of Austerity', Tom Sargant Memorial Lecture, 15 October 2013.
[36] Uniform Civil Procedure Rules, r 51.25
[37] *Supreme Court Act* s 101 .

result from failures to comply with procedural rules, particularly as to form and content of notices of appeal, written submissions and so on.

49 Nor is the solution to move away from the adversarial system to a system which borrows more from the inquisitorial courts of Europe, as some commentators have suggested.[38] Our adversarial system represents, at least in part, a value judgment that judicial reasoning is best immunised from unconscious confirmation bias and subjective relativism by distancing the judge from the investigation of the issues. There is some research in cognitive psychology supporting that view.[39]

Make them lawyers

50 The primary option of our three must therefore be to "*make them lawyers*", by which, of course, I mean ensuring self-represented litigants have sufficient knowledge of the system and the relevant law that they can effectively run their own case. As I have indicated, this is almost entirely a question of communication.

51 I might commence on this topic by modelling some *bad* communication which was recently the subject of comment by the Full Federal Court, in a case that received some media attention. *SZWBH v Minister for Immigration and Border Protection*[40] was an appeal from the Refugee Review Tribunal of its refusal of an application for a protection visa. The applicant was unrepresented and assisted by a translator before a judge of the Federal Circuit Court. The matter was brought on for a "*first court date*", which is generally, though not necessarily, in the nature of a directions hearing. The

[38] See, for instance, GL Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (2003) 12 Journal of Judicial Administration 155 at 168-9: "*It seems to me inevitable that we must substantially simplify our civil justice system if we are to accommodate litigants in person*."; Webb, above n 21 at 165.

[39] Adrian Zuckerman, 'No Justice Without Lawyers – The Myth of an Inquisitorial Solution' (2014) 33 *Civil Justice Quarterly* 355 at 364.

[40] [2015] FCAFC 88

court books and the relevant evidence had not yet been prepared by the Minister.

52 The hearing went for a total of half an hour and, on the trial judge's own motion, the matter was summarily dismissed, notwithstanding concerns raised, very properly, by the solicitor for the Minister.

53 On appeal there was held to have been a failure of the trial judge to afford the applicant procedural fairness. The court held, at [32], that:

> "Serious issues relating to the procedural fairness of proceedings must arise in circumstances such as the present in which an unrepresented applicant whose primary language is not English and who may be assumed to be unfamiliar with curial processes is called on, without notice, to mount arguments resisting the summary dismissal of his application."

54 It is unlikely that the course taken by the primary judge would have been valid even had his Honour been a model of helpful in-court communication with an unrepresented litigant. However, the approach he took certainly did not help. Consider the following exchange:

> "HIS HONOUR: … I have a concern that the grounds you've identified do not properly identify any jurisdictional error. Is there anything you wish to put to me as to why there is a jurisdictional error by the tribunal?
>
> THE INTERPRETER: Yes, I wish to put to the court certain things.
>
> HIS HONOUR: Now is your opportunity to do so.
>
> THE INTERPRETER: I described to the Department of Immigration that my younger brother, younger sister and her husband were killed. I also submitted that certificates relevant to those killings and I put forward a claim stating that because of those incidents the police will be targeting me as I was seen as being opposed to the police.
>
> HIS HONOUR: Yes.
>
> THE INTERPRETER: Therefore, I plead to this court that I have come here to seek refuge and protection, and therefore, I urge this court to grant me protection and allow me to stay in this country.

> HIS HONOUR: Is there anything else you want to say as to why there was a jurisdictional error?"[41]

55 The applicant had an opportunity to put his case, but was provided with minimal assistance to enable him to present his arguments in terms of the difficult framework of jurisdictional error. It was clear, as the Full Court noted,[42] that the applicant was ill-equipped to grapple with that concept. The submissions that the applicant did make were dealt with in a way that was arrestingly short, in a way that seems problematic not only because of their personal and traumatic nature, but also because it gives the impression that the judge did not attempt to determine if the applicant did in fact have an underlying argument. The litigant can only have been left bewildered by the rapid, unexpected and technical direction in which the case was taken.

56 What can be done better? The first step needs to be preparing litigants before the day of the hearing by providing carefully constructed resources. The Supreme Court has some information directed to self-represented litigants on its website,[43] albeit not specifically directed to the Court of Appeal.[44] Where available, pre-court information and advice sessions given in person to self-representing litigants are also likely to be of assistance.[45]

57 The primary issue, however, will inevitably be the conduct of the hearing. There is research to support the common-sense proposition that litigants perceive the court to be more legitimate if they feel that their voice is heard

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[41] Ibid at [6].

[42] Ibid at [26].

[43] Supreme Court of New South Wales, 'Representing Yourself in Civil Proceedings', at <http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_facilitiessupport/Representing-yourself-in-civil-proceedings.aspx>.

[44] The Victorian Court of Appeal has prepared has prepared a more comprehensive information pack specifically designed for self-represented litigants in the Court of Appeal: see at <http://www.supremecourt.vic.gov.au/home/law+and+practice/court+of+appeal/court+of+appeal+forms/court+of+appeal+-+civil+-+self-represented+litigants+self-help+information+pack>.

[45] Such services are provided in Queensland, for instance, by the Queensland Public Law Clearing House's Self Representation Service: see Iain McCowie, 'Self-represented parties and court rules in the Queensland courts' (2014) 14 *Journal of Judicial Administration* 18

and the court is taking them seriously.[46] There is no single approach that will ensure this for all litigants in person. However, there are some techniques that will usually help.

58 It goes without saying that it is vital to maintain respectful, courteous communication at all times, regardless of what is occurring in the courtroom. Personally, I think this approach should be modelled in all proceedings, but it is particularly important for self-represented litigants in order that they understand that the court is paying attention and that it respects their dignity and their right to bring proceedings.

59 Understandably, the litigant's personal connection with their case often causes them to feel the justice of their cause very strongly, and to see it in terms of their social or moral understanding, rather than in terms of legal doctrine. As a result, as one UK survey found, participation by litigants in person often comprised "*a reluctant struggle to translate disputes into legal form*"[47]. That study conforms with my experience that the difficulty is often in assisting the litigant to see what points are relevant and what outcomes are available, and, where possible, steering them away from a broader airing of grievances. A line must be carefully drawn here, however, to ensure that judicial interference intended to keep a party on topic does not prevent them from putting a case.

60 It is usually helpful to be clear and explicit about the structure of the appeal hearing, in which each party speaks in turn, and the appellant has a right of reply limited to matters brought up by the respondent. It is also of assistance to impose even-handed time limits – this should be communicated to parties as part of pre-hearing directions either in directions hearings or in pre-hearing written information to the parties.

[46] Tania Soudin and Nerida Wallace, 'The dilemmas posed by self-represented litigants: the dark side' (2014) 24 *Journal of Judicial Administration* 61 at 68.
[47] Moorhead, above n 1 at 409.

61 There will always be some difficulty where technical points of law arise. In those cases there is sometimes an extended exchange between the bench and the represented party (assuming there is one). In one recent case,[48] an articulate and intelligent self-represented litigant who, it was said, suffered a mental illness, had been subject of an order by the court below that a tutor be appointed for her, on the ground that she was not capable of managing her own affairs. That would have the effect that she could only commence or continue proceedings by a tutor. An order for the appointment of a tutor had been made, but no tutor had been nominated. The litigant in person challenged the correctness and appropriateness of the appointment. The bench raised with the respondent the highly technical issue of whether the court had jurisdiction to make an order in that form. In the result, it found that it did not and the appellant was partially successful in her appeal.

62 However, the discussion on this point caused significant difficulties in the courtroom. The appellant, unfortunately, was left with the impression that the bench was tutoring the respondent's counsel, when in fact we were pressing him on issues that would be decided in her favour. Despite our attempts to explain that to her, she considered that the Court was a "*club*". This was not pleasant, as the litigant in person was quite aggressively but uncomprehendingly upset. However, I am not sure that it was avoidable given that the litigant suffered a mental illness and given that the Court, in order to discharge its duty to decide the case according to law, was required to consider matters which were different from those which the litigant thought it should focus on.

63 However, the case highlights the difficulty of dealing with technical points of law, even in less difficult cases involving self-represented litigants. It demonstrates the importance of clarifying the roles of the parties so that the litigant understands the parameters of any discussion occurring between themselves, the bench, and the other party. It also underscores the importance of ensuring, so far as is possible, that the self-represented litigant

[48] [2015] NSWCA 252.

understands the substantive arguments being made in the courtroom. This may require the judge (or tribunal member) to move more slowly and provide more explanation than would usually be the case.

64 The case also demonstrated that, no matter how scrupulously the bench ensures that a hearing is conducted according to the rules of procedural fairness, there are some litigants who will always set themselves up against the court. These litigants tend to fall along the more obsessive end of the spectrum.

65 There tends to be a stereotype of unmeritorious litigation run by self-represented litigants. It is not at all clear that this stereotype is borne out statistically at trial level,[49] and clearly it is entirely misconceived in forums such as NCAT where self-representation is the norm. However, there is some research indicating that the obsessive or vexatious litigant is proportionally far more prevalent in superior courts,[50] and those findings correspond with my experience. There is, in particular, a relatively small but high-impact group whom the Court comes to know very well.

66 Common features of this group include inappropriate communications in and out of court, large numbers of spurious interlocutory applications (applications that a particular judge recuse himself or herself are a particular specialty), a strong sense of grievance against the court and the system generally, and, often, difficult in-court behaviour. This is all a significant problem for the court and can cause substantial hardship to other parties.[51]

67 Effective communication with litigants who fall into this group is very difficult. In some cases, the only option is to assert less control in the courtroom rather

[49] Webb, above n 21 at 170.

[50] Webb, above n 21 at 170 fn 26; Tania Sourdin and Nerida Wallace, 'The dilemmas posed by self-represented litigants: The dark side' (2014) 24 *Journal of Judicial Administration* 61.

[51] These issues sometimes demonstrate an additional problem: litigants in person are not constrained by professional rules, as solicitors and barristers are, and cannot any professional body in the case of misconduct: see, for instance, *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia (No 2)* [2014] NSWCA 431 at [18].

than more – the risk otherwise is that litigants will not feel as though they have had an opportunity to speak. I have had advanced, by way of argument, essay, purportedly by Sir Harry Gibbs, on why the New South Wales Parliament is not empowered to make laws, substantial tracts from the Bible and readings from any number of irrelevant UN documents – all in the same hearing.[52]

68 In my experience, a significant proportion of litigants in the 'difficult' category suffer from mental health issues. Indeed, there is at least some support in the medical community for vexatious or abnormally persistent litigating behaviour to be seen as pathological in itself, properly the concern of mental health professionals.[53] It is certainly clear from my perspective that many litigants do themselves absolutely no good – materially or psychologically – by their focus on what are generally entirely unmeritorious attempts to assert what they feel, no doubt very strongly, are their rights in a particular dispute.

69 As Mr Hamod's case demonstrated, the Court's tools for dealing with those litigants with mental health problems are blunt and mostly inadequate. If a litigant is sufficiently impaired as to be incapable of managing his or her own affairs, the Uniform Civil Procedure Rules provide that they may only commence or carry on proceedings by a tutor, and orders may be made to that effect.[54] There are, however, many litigants who do not reach that threshold. In that case, very careful explanations of procedure are likely to be required, and the court may need to make additional adjustments, such as taking additional short adjournments to give litigants time to consider their options.

70 In extreme cases, proceedings may need to be brought for orders under the *Vexatious Proceedings Act 2008* (NSW) by which a litigant's ongoing matters are stayed and he or she is prevented from instituting further proceedings.

[52] *Rafailidis v Roads and Maritime Services* [2015] NSWCA 143.

[53] Paul Mullen and Grant Lester, 'Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour' (2006) 24 *Behavioural Sciences and the Law* 333.

[54] Uniform Civil Procedure Rules 2005 (NSW), Pt 7 Div 4.

This is not the occasion for a detailed consideration of the jurisprudence on that question, but I would note that it is an area of law that is not without its complexities,[55] and that it can for that reason, paradoxically, be difficult to apply in a fair manner to a self-represented litigant.

Conclusion

71 In my experience, the courts are acutely aware both of the difficulties confronting self-represented litigants and of the issues they create for the efficiency of the system and for represented parties facing them. These difficulties do not have a simple solution and will only become more pressing if, as appears to be the case, the numbers of litigants in person we see are rising. However, I hope that with greater advertence to the issues they throw up, and particularly a greater emphasis on careful courtroom communication, at least some accommodation can be made.

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[55] See, for instance, the questions of principle discussed (several of which were not decided) in *Viavattene v Attorney General (NSW)* [2015] NSWCA 44.