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The Party Litigant in the Scottish Civil Courts

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PhD

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Abstract

The last several years have seen an increased interest in self-represented litigants in the civil courts, known in Scotland as “party litigants.” Following legal aid reforms in England and Wales, the number of self-representing litigants in that jurisdiction has risen significantly, and many believe that the number of party litigants in Scotland is increasing as well. Views on self-representing litigants can be divisive: some are deeply concerned for their access to justice in a system of courts primarily designed for lawyers, while others view them as a nuisance causing unnecessary delay and expense. On both sides of this spectrum, indications of an increase in the number of party litigants in the courts is cause for concern. However, although an entire chapter of the report of the Scottish Civil Courts Review was devoted to party litigants, there has been a lack of research and little is known about self-representation in Scotland.

This thesis makes an original contribution to the knowledge in this area by offering a survey of Scots law as it relates to the party litigant and an insight into how the law functions in practice. Traditional legal research was conducted to establish what the law and rules of court say (and do not say) to assist or regulate party litigants in the civil court process, as well as how judges exercise their discretion in relation to party litigants. Empirical research was also carried out in the form of interviews with judges, solicitors and court staff, as well as court observation, and the thesis considers how the law and rules are applied in practice and both how the civil court process challenges party litigants and how party litigants can disrupt the typical operation of the process. Other aspects of self-representation, including the role of the judge and the adversarial nature of the process, along with the potential impact of self-representation on represented parties involved in cases with party litigants, are also discussed. Finally, a number of conclusions are offered as to the present state of self-representation in the civil courts and the relationship between the law in principle and the law in practice.

Table of Contents

ABSTRACT.....	2
TABLE OF CASES.....	8
TABLE OF STATUTES AND STATUTORY INSTRUMENTS	13
ACKNOWLEDGMENTS	15
AUTHOR’S DECLARATION	16
 CHAPTER 1: INTRODUCTION	
1.1 INTRODUCTION	17
1.2 SELF-REPRESENTATION IN SCOTLAND: BACKGROUND AND CURRENT POLICY.....	19
1.3 DEFINITIONS AND TERMINOLOGY.....	21
1.4 THE STRUCTURE OF THE THESIS	22
 CHAPTER 2: METHODOLOGY	
2.1 METHODOLOGY: INTRODUCTION	24
2.2 BACKGROUND AND RESEARCH CONTEXT	25
2.3 THE “LAW IN BOOKS”: DOCTRINAL RESEARCH	32
2.3.1 LITERATURE REVIEW	32
2.3.2 “LIBRARY” RESEARCH	33
2.4 THE “LAW IN ACTION”: FIELDWORK.....	37
2.4.1 FOCUS AND RESTRICTIONS ON RESEARCH DESIGN	37
2.4.2 RESEARCH METHODS.....	41
2.4.2.1 Interviews: Judges	41
2.4.2.2 Interviews: Solicitors	43
2.4.2.3 Focus Groups: Court Staff.....	44
2.4.2.4 Court Observation.....	46
2.4.3 INTERPRETATION OF EMPIRICAL DATA	49
2.4.4 RELIABILITY, VALIDITY, LIMITATIONS AND ETHICAL CONCERNS.....	50
2.4.4.1 Reliability and Validity.....	50
2.4.4.2 Limitations.....	51
2.4.4.3 Ethical Concerns.....	53
 CHAPTER 3: LITERATURE REVIEW	
3.1 INTRODUCTION	55
3.2 CIVIL JUSTICE AND SELF-REPRESENTATION	57
3.2.1 THE FUNCTION OF THE CIVIL COURTS AND THE NATURE OF CIVIL JUSTICE PROBLEMS	57
3.2.2 THE DEVELOPMENT OF SOCIAL POLICY ON SELF-REPRESENTATION IN CIVIL MATTERS.....	61
3.3 SRLS: WHO, WHY, AND WHAT HAPPENS?	64
3.3.1 INTRODUCTION	64
3.3.2 WHO ARE SRLS IN THE CIVIL COURTS?.....	67
3.3.3 WHY DO SRLS SELF-REPRESENT?.....	69
3.3.4 NAVIGATING THE CIVIL COURT PROCESS AS AN SRL	72
3.3.4.1 INTRODUCTION.....	72

	4
3.3.4.2 <i>Framing the Dispute</i>	73
3.3.4.3 <i>Complying with Court Procedures</i>	74
3.3.4.4 <i>Court Forms and Written Pleadings</i>	75
3.3.4.5 <i>Evidential Matters</i>	76
3.3.4.6 <i>Settlement</i>	77
3.3.5 CONCEPTUALISING THE SRL	78
3.3.5.1 <i>Introduction</i>	78
3.3.5.2 <i>SRLs: Angels or Demons?</i>	79
3.3.5.3 <i>Typologies of SRLs</i>	82
3.3.6 THE EFFECT OF SELF-REPRESENTATION ON THE SRL	84
3.3.6.1 <i>The SRL's Feelings about the Process</i>	84
3.3.6.2 <i>The Wider Impact of Self-Representation</i>	88
3.3.7 DOES SELF-REPRESENTATION AFFECT LITIGANT OUTCOMES?	90
3.4 THE NORMATIVE DIMENSIONS	94
3.4.1 THE RIGHT TO SELF-REPRESENT	94
3.4.2 THE ROLE OF LAWYERS	97
3.5 SRLS: THE WAY FORWARD?	101
3.5.1 INTRODUCTION	101
3.5.2 SELF HELP, INFORMATION AND LAY ASSISTANCE	102
3.5.2.1 <i>"In Court" Advice Services</i>	102
3.5.2.2 <i>Self-Help, Guidance and Information</i>	103
3.5.2.3 <i>"Unbundled" Services</i>	106
3.5.2.4 <i>Lay Representation</i>	108
3.5.3 INSTITUTIONAL CHANGE	110
3.5.3.1 <i>Simplification of Procedures and Plain Language</i>	110
3.5.3.2 <i>Adversarial, Inquisitorial, Interventionist: Judging SRLs</i>	112
3.6 CONCLUSION	115
 CHAPTER 4: THE LAW RELATING TO SELF-REPRESENTATION IN SCOTLAND	
4.1 INTRODUCTION	119
4.2 THE RIGHT OF SELF-REPRESENTATION	119
4.2.1 THE BASIS OF THE RIGHT TO SELF-REPRESENT	119
4.2.2 LIMITATIONS ON THE RIGHT TO SELF-REPRESENT	120
4.3 THE EUROPEAN CONVENTION ON HUMAN RIGHTS	123
4.4 LAY SUPPORT AND LAY REPRESENTATION	124
4.4.1 INTRODUCTION	124
4.4.2 LAY ASSISTANCE/LAY SUPPORT	126
4.4.3 LAY REPRESENTATION	128
4.4.4 DISCUSSION	130
4.5 REGULATION OF THE PARTY LITIGANT IN THE COURT PROCESS	131
4.5.1 INTRODUCTION	131
4.5.2 THE SIMPLE PROCEDURE	132
4.5.3 ORDINARY PROCEDURE	134
4.5.4 EXPENSES	137
4.5.5 FAMILY ACTIONS	139
4.5.6 PERSONAL INJURY	141
4.5.7 GUIDANCE AND "SOFT LAW"	142
4.5.8 DISCUSSION: POLICY AND PROCEDURE	143
4.6 VEXATIOUS LITIGATION	145
4.7 CONCLUSION	148

CHAPTER 5: THE EXERCISE OF DISCRETION

5.1 INTRODUCTION	150
5.2 PARTY LITIGANTS: THE GENERAL PRINCIPLES	151
5.2.1 LEGAL AND PROCEDURAL KNOWLEDGE	151
5.2.2 THE STANDARD OF LEGAL RELEVANCE.....	152
5.3 LATITUDE, ALLOWANCE AND ASSISTANCE.....	153
5.3.1 “MOORE” LATITUDE.....	153
5.3.2 PROCEDURAL LATITUDE AND ASSISTANCE	156
5.3.2.1 <i>Introduction</i>	156
5.3.2.2 <i>Procedural Latitude</i>	156
5.3.2.3 <i>Procedural Assistance</i>	159
5.3.3 LATITUDE IN LAW AND RELEVANCE.....	160
5.3.3.1 <i>Introduction</i>	161
5.3.3.2 <i>General Considerations and the ETBB</i>	161
5.3.3.3 <i>Assistance, Allowance and the “Latent Case”</i>	163
5.3.3.4 <i>Discussion</i>	166
5.3.4 RULES OF EVIDENCE	167
5.3.5 LATITUDE AND ASSISTANCE: DISCUSSION	169
5.4 ADJOURNMENTS AND DELAY	170
5.4.1 INTRODUCTION	170
5.4.2 LEGAL ADVICE	171
5.4.3 MEDICAL DELAY.....	173
5.4.4 DELIBERATE DELAY?.....	176
5.5 CONCLUSION	176

CHAPTER 6: PARTY LITIGANTS: PERCEPTIONS AND GENERAL PRINCIPLES

6.1 INTRODUCTION	178
6.2 UNDERSTANDING THE PARTY LITIGANT	179
6.2.1 WHAT TYPES OF CASES DO PARTY LITIGANTS APPEAR IN AND WHY?.....	179
6.2.2 GENERAL PERCEPTIONS OF PARTY LITIGANTS AND SELF-REPRESENTATION.....	181
6.2.3 VEXATIOUS AND DISRUPTIVE PARTY LITIGANTS	183
6.2.4 DISCUSSION	188
6.3 THE JUDGES’ ROLE AND DECISION MAKING	190
6.3.1 ACTIVE/PASSIVE MODELS	190
6.3.2 STANDARDS	192
6.3.3 GENERAL PRINCIPLES AND FACTORS IN JUDICIAL DECISION MAKING	195
6.3.4 MANAGING EMOTION.....	198
6.3.5 DISCUSSION	203
6.4 CONCLUSION	205

CHAPTER 7: NAVIGATING THE COURT PROCESS

7.1 INTRODUCTION	207
7.2 COURT PROCEDURES	207
7.2.1 HOW WELL DO PARTY LITIGANTS COPE WITH PROCEDURAL REQUIREMENTS?.....	207
7.2.3 PROCEDURAL VS SUBSTANTIVE MATTERS.....	210
7.2.4 PARTICIPATION IN PROCEDURAL MATTERS.....	211
7.2.5 DISCUSSION	212
7.3 SUBSTANTIVE LEGAL MATTERS AND MERITS	212
7.3.1 PLEADINGS AND COURT DOCUMENTS	212
7.3.2 KNOWING AND UNDERSTANDING THE LAW.....	215

	6
7.3.3 GATEKEEPING	218
7.3.4 ASSESSING AND DEALING WITH THE CASE	220
7.3.5 DISCUSSION	222
7.4 EVIDENCE	224
7.4.1 EVIDENCE: GENERAL PRINCIPLES AND PROCEDURE.....	224
7.4.2 EXAMINATION OF WITNESSES	227
7.4.3 DISCUSSION	231
7.5 EXPENSES	232
7.5.1 THE INDEMNITY SYSTEM.....	232
7.5.2 DISCUSSION	235
7.6 APPEALS.....	236
7.6.1 THE APPEALS PROCESS.....	236
7.6.2 DISCUSSION	237
7.7 COURT STAFF AND THE ADVICE AVAILABLE FROM THE COURT	238
7.7.1 THE ROLE OF COURT STAFF AND THE LEGAL/PROCEDURAL DIVIDE.....	238
7.7.2 PARTY LITIGANTS' EXPECTATIONS VS REALITY.....	241
7.7.3 WRITTEN GUIDANCE AND REFERRAL.....	244
7.7.4 DISCUSSION	246
7.8 CONCLUSION	247
 CHAPTER 8: ACCESS TO THE COURTS FOR PARTY LITIGANTS AND THEIR OPPONENTS	
8.1 INTRODUCTION	249
8.2 THE "CAPACITY GAP"	249
8.2.1 THE ISSUE OF CAPACITY.....	249
8.2.2 DISCUSSION	251
8.3 THE EFFECT OF SELF-REPRESENTATION.....	251
8.3.1 MEASURING SUCCESS	251
8.3.2 HOW WELL DO PARTY LITIGANTS PRESENT OR DEFEND THEIR CASES?.....	252
8.3.3 THE IMPACT OF SELF-REPRESENTATION ON THE PARTY LITIGANT'S OPPONENT.....	254
8.3.4 DISCUSSION	256
8.4 PARTY LITIGANTS: IMPROVING ACCESS AND PREVENTING DISRUPTION	257
8.4.1 INTRODUCTION	257
8.4.2 "MORE LAWYERS"	258
8.4.3 OTHER SOURCES OF ADVICE AND LAY REPRESENTATION	259
8.4.4 SELF HELP: SIMPLIFYING PROCEDURES AND GUIDANCE/EDUCATION.....	260
8.4.5 OTHER SUGGESTIONS.....	262
8.4.6 DISCUSSION	262
8.5 CONCLUSION	264
 CHAPTER 9: CONCLUSION	
9.1 INTRODUCTION	265
9.2 THE "LAW IN BOOKS"	267
9.2.1 THE SUBSTANTIVE LAW	267
9.2.2 THE "CASE LAW"	268
9.3 THE "LAW IN ACTION"	270
9.4 CONCLUSION	272
 APPENDICES	 275

	7
APPENDIX A: COURT OBSERVATION PRO FORMA.....	275
APPENDIX B: COURT OBSERVATION LOG.....	276
APPENDIX C: SHERIFF INTERVIEW QUESTIONS	279
APPENDIX D: COURT STAFF FOCUS GROUP QUESTIONS.....	283
APPENDIX E: SOLICITOR INTERVIEW QUESTIONS.....	285
APPENDIX F: ETHICS COMMITTEE APPROVAL FORM	287
APPENDIX G: CONSENT FORM FOR INTERVIEWEES	288
APPENDIX H: PARTICIPANT INFORMATION SHEET	289
APPENDIX I: INTERVIEW CODING	291
BIBLIOGRAPHY	293

Table of Cases

A Ltd and ors v F [2014] CSOH 169

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Author's Declaration

I declare that, except where specific reference is made to the contributions of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: _____

Signature: _____

Chapter 1: Introduction

1.1 Introduction

The Scottish civil court system has remained largely unchanged for centuries.¹ As Lord Gill observes, “The practitioners of 100 years ago would have little difficulty in picking up the threads of today’s system.”² Efforts to modernise the courts and create a more fair and efficient civil justice system are currently in progress, most notably in the form of the Courts Reform (Scotland) Act 2014. Many believe, however, that it is not only the courts that are changing, but the litigants, as more and more “party litigants”³ forgo legal representation in favour of conducting their own case. Recession and governmental policy mean that many cannot afford a lawyer or fall through the cracks of the legal aid system, while improved access to information may lead others simply to choose to self-represent. For these litigants, a lack of qualified legal representation may create a significant obstacle to access to justice.⁴ At the same time, the party litigant’s ignorance of court procedures and the law itself causes otherwise unnecessary delay and expense for their opponents,⁵ in some cases resulting in five- or even six-figure legal bills.⁶ Party litigants are also thought to demand a disproportionate share of public resources from a justice system already strained by budgetary pressures, cutbacks and numerous court closures. However, to date there has been very little research in Scotland on the topic of party litigants. Thus, this thesis provides the first modern in-depth study regarding both the law which applies to party litigants in Scotland and its application in practice by Scottish courts.

¹ See the Report of the Scottish Civil Court Review 2009, hereafter the “SCCR”.

² *Ibid*, page iii.

³ As noted in section 2.4.1 the exact number of party litigants in Scotland is unknown, but most agree that their numbers are increasing.

⁴ See, for example, Scottish Civil Justice Council, “Access to Justice Literature Review: Party Litigants, and the support available to them,” December 2014 at page 3 and McGroarty, J, “Access to Justice, McKenzie friends and Party litigants” (2007) SCOLAG 361 Supp (Paths to Justice?) 14.

⁵ See, for example, Civil Practice Bulletin Editorial, “The Scourge of the Party Litigant” (1997) Civ. P.B. 17(Sep), 1-2.

⁶ See, for example, Leask D, “A-courting We Will go” Herald Scotland 9 June 2012 <http://www.heraldscotland.com/news/home-news/a-courting-we-will-go.17769385>.

Amongst other things, this thesis observes a paradox at the heart of the civil justice system of Scotland in relation to party litigants; on the one hand, it is underpinned by an open-door principle and right to self-representation thus allowing relatively unfettered access to Scottish courts; while, on the other hand, it is evident that the system, including the law, procedures and practise of the courts is not designed to be used by party litigants. This thesis observes and argues that there is a significant knowledge gap therefore created, which is generally filled by judges who feel obligated to assist the party litigant by a sense of “fairness” or in the “interests of justice” but also, importantly, by a regard for party litigant’s perceptions of the court and their emotions. Additionally, and relatedly, this thesis establishes that, from the perspective of judges and solicitors, party litigants have high expectations of the court, contrary to the nature and ethos of the system, assuming they will be active in the processing, progression and resolving of their disputes. This is accompanied by a lack of responsibility, in the eyes of the rules and law, on behalf of the party litigant. These factors together mean judges tend to lower the standard expected, exercise discretion without much reference to authority or precedent and fill the knowledge gap created by the nature and system of civil litigation in Scotland where possible. It is concluded therefore that because the law says so little about the party litigant, efforts occur on the fringes of the process and thus go unseen. This thesis, however, brings to light that judges, courts staff and in some instances opposition lawyers make efforts beyond their prescribed remit in order to accommodate party litigants with the system and the party litigants too are asked, by the rules and system, to extend beyond what is reasonable or possible to expect of them. In shedding light on these issues, this thesis contributes to finding ways to move forward and to address these tensions. Additionally, it observes where the Scottish experience is unique to the context, system and law of Scotland but draws upon and confirms in places existing research into PLs and the law which applies to them within a civil justice system.

1.2 Self-representation in Scotland: Background and Current Policy

There is very little if any existing literature on the development of the law in Scotland in relation to self-representation or how it relates to wider social policy aims in relation to access to civil justice. First, to date there has been no research conducted or work undertaken that collates the various laws, rules and common law principles relating to party litigants. As a result, the law in this area can appear fragmented, ambiguous or difficult to readily access. Hence, one of the aims of this project is to fill this gap in our basic knowledge of *what* the civil procedural rules are in Scotland with regard to party litigants. Additionally, through analysis of these rules, this thesis helps develop our understanding of *how* the law approaches party litigants in Scotland or in fact to what extent the law addresses them at all.

Secondly, informed by a sense of law in action, this thesis investigates and observes, as much as is possible within a study of this nature, how the judges, solicitors and court staff deal with party litigants in practice. An initial starting point is therefore the report of the SCCR, which provides some clarity as to the view of SRLs and how this is driving the current state of policy and reform in respect of self-representation. The report states that party litigants can cause “considerable trouble, delays and unnecessary expense” either through ignorance of the law and process or deliberately.⁷ The report also states that “there is a need for change to court practices and procedures so that people who do not have legal representation are able to navigate their way through the court process effectively.”⁸ The difficult task facing the courts is thus to enable party litigants to use the courts effectively while also protecting the courts and other parties from the “trouble” they can cause.

The report also notes that access to the courts for party litigants is “particularly relevant for cases of low monetary value where the cost of legal representation is disproportionate.”⁹ There is little mention of making other forms of

⁷ SCCR Vol 2 at page 8.

⁸ *Ibid.*

⁹ *Ibid.*

procedure, such as the ordinary cause and family actions, more accessible to self-represented litigants—potentially attracting more litigants who wish to self-represent. Reform for party litigants in these areas has been slow to occur. While the SCCR thus does recognise a need for some procedures to be accessible to party litigants, there is no suggestion that the traditional role of the lawyer at the centre of most procedures should be supplanted by an SRL-friendly model. As noted above, the SCCR appears to place value on efficiency rather than “consumer focus.”¹⁰ For party litigants, this translates into an emphasis on judicial case management and discretion in dealing with their cases rather than measures that empower party litigants directly. The current policy in Scotland can be said to reflect two “tracks”—one, the simple procedure where self-representation is encouraged by familiar methods such as simplified procedures and proactive judging; and another where lawyers remain central and party litigants are to be “case managed” individually. Clearly the role of the judge is pivotal in both examples.

As set out in more detail in Chapter 2, this thesis examines the operation of Scots law and civil procedure as it relates to self-representation in the civil courts. In a system designed for lawyers, the party litigant can represent a “spanner in the works” that disrupts the usual function of the process for the court and his opponent, while the party litigant in turn may find it difficult to navigate through the process effectively. The purpose of this thesis is to examine how the law and rules of court address party litigants and how the law operates in practice. The role of the judge, as noted above, is key and as research progressed it became apparent that much of the operation of the law and court process hinged on judicial discretion. The question of how judges make decisions about party litigants and their cases therefore became an important facet of the research.

The issue of access to justice is inevitably at the heart of any discussion of self-represented litigants. For purposes of this thesis, “access to justice” is considered through the lens of access to the courts: to what extent do the court processes and procedures accommodate party litigants? What aspects of the process, if any, create barriers for party litigants? How do the courts address any

¹⁰ See section 3.2.1 below.

barriers or difficulties created by the party litigant's lack of legal experience and knowledge, both in law and in practice? While the effects of self-representation and limitations on access to justice more generally can extend far beyond the courtroom,¹¹ this thesis intends not to look at the wider experience of the party litigant as such but rather at the law and the court process.

1.3 Definitions and Terminology

What exactly is a party litigant? "Party litigant" is a uniquely Scottish term to describe a litigant who acts in a civil case on his or her own behalf. This is the term generally used to describe these litigants in Scotland, although it is not itself defined where it appears in rules of court.¹² Accordingly, this thesis uses the term "party litigant" when referring to Scottish litigants who are engaged in a civil court action without a lawyer.¹³ In the wider world, however, there are many terms that could apply. In some jurisdictions, including England and Wales, the term "litigant in person" appears most often, while in the United States the litigant is described as being "*pro se*." Other terms are more loaded. While used by some, others consider that "unrepresented" litigant suggests that something is missing or lacking, preferring instead "self represented litigant" or "SRL". Still others note that a person cannot "represent" himself; representation by its nature involves another person. When referring to litigants without lawyers generally and outside the confines of the Scottish courts, this thesis uses both "SRL" and "unrepresented litigant," both without any negative connotation.

There are multiple terms to be clarified for a handful of other matters that will be discussed. Civil matters are heard by "judges" in the Court of Session, and by "sheriffs" in the lower Sheriff Court, although both are of course judicial roles. For the most part, this thesis refers collectively to "judges," although the more precise titles are used when referring to particular procedures or when judges or

¹¹ See section 3.3.6.

¹² See, for example, Act of Sederunt (Expenses of Party Litigants) 1976/1606.

¹³ This thesis is concerned with litigants who enter the court process without a lawyer, but not those who may be, for example, the defender in a civil case who does not enter appearance.

sheriffs are named or discussed in relation to specific cases. As this thesis was in progress, changes were being made to the procedures in place to deal with low-value cases, currently those under £5,000. These procedures are important to the thesis as they are designed for, and thus accommodate a higher proportion of, party litigants. At the outset of the research these were dealt with under either the small claims or summary cause procedures, with the simple procedure then being introduced in 2016. At the time of writing, the last of the small claims and summary cause cases are still progressing through the courts.¹⁴ To avoid confusion, these procedures are referred to collectively as “low value” claims, or by individual name when only the specific procedure in question is addressed.

1.4 The Structure of the Thesis

The orientation and methodology of the thesis are presented in Chapter 2, along with the ethical considerations and limitations of the empirical research in particular. Chapter 3 is a review of the existing literature in Scotland and analogous jurisdictions. Because, as noted above, self-representation raises a wide range of issues, Chapter 3 covers many related areas to provide a solid foundation for the rest of the thesis. This includes the background of civil justice and its purposes, the current state of empirical research into self-representing litigants as well as how self-representing litigants are currently conceptualised, a look at the normative dimensions of self-representation, and a summary of current and proposed methods of addressing the issues arising around self-representation.

Chapters 4 and 5 then examine the legal aspects of self-representation in Scotland as disclosed. Chapter 4 is concerned with how the law in the form of statute, case law, and court rules and procedure regulate, restrict, or assist party litigants in the civil courts, directly and indirectly. This includes fundamental matters such as the basis of the right of self-representation in the Scottish civil courts and its limitations as well as less readily apparent factors, such as the party litigant “friendly” design of certain court procedures. Chapter

¹⁴ The Simple Procedure (Special Claims) Rules are also not yet in force.

5 then looks more closely at the case law and what it discloses about the exercise of judicial discretion in relation to party litigants, particularly in respect of the question of how much latitude, allowance and assistance courts can, should, or do extend to party litigants.

With the legal position of party litigants thus established, Chapters 6, 7 and 8 then examine the empirical data gathered for the thesis to address the question of how the law operates in practice. Chapter 6 is concerned with preliminary issues regarding how party litigants are perceived and understood, as well as the role of the judge and the general principles judges use when making decisions both big and small about party litigants and their cases. This provides background to the next two chapters. Chapter 7 is the most substantial in this section, considering in detail how party litigants navigate and engage with various aspects of the civil court process, such as the procedural, legal, and evidential elements, as well as how their unrepresented status affects their opponents. This chapter also looks at the role of court staff as party litigants' cases progress through a civil procedure. Chapter 8 offers some conclusions on the matters raised in the previous two chapters, summarising views on how well party litigants are able to present or defend an action in the system as it currently functions. Along with the question of party litigants' access to the courts, the question of how their opponents' access to the courts can be affected is also addressed. Finally, Chapter 9 offers some additional conclusions and suggestions for future lines of inquiry or thought on party litigants and future research is suggested.

Chapter 2: Methodology

2.1 Methodology: Introduction

The purpose of this thesis, at its most fundamental, is an attempt to understand how Scots law and the Scottish courts approach the position of the unrepresented litigant in the civil courts. First, the project asks how the existing law and legal rules address and approach party litigants in the civil courts—how are they assisted, or constrained, as compared to their legally represented counterparts? Thereafter, the thesis looks at how these laws and rules are applied in the “real world” and how the law and civil court processes interact with party litigants, their opponents, and the courts. More specifically, the thesis asks:

1. In a system designed for lawyers, what is the effect of the provision, or lack of provision, in the process for party litigants? How are various aspects of the process, such as the procedural, legal and evidential elements of a civil action, affected by the presence party litigants in the court?
2. How is the adversarial nature of the process affected by party litigants? What additional decisions, particularly relating to the question of latitude and assistance for party litigants, are judges called upon to make as a result of the challenges party litigants both face and present? How do judges make these decisions, and what legal principles or factors do they consider?
3. How do all of these issues around party litigants impact on the court and their opponents?

For reasons that will be discussed below, the study is viewed primarily through the eyes of the other actors in the legal world, rather than the party litigants

themselves. By looking through the eyes of judges dealing with party litigants, for example, this work will seek to discover what issues are commonly encountered in the courts, how judges deal with these problems, and how they apply the rules or exercise their discretion. Moreover, there is the perhaps equally important question of how judges perceive party litigants—what can be learned about the party litigants they routinely encounter, and if or how these attitudes influence the decisions that judges make.

2.2 Background and Research Context

While traditional doctrinal methods are used, this project is primarily intended to be located within the field of socio legal studies, examining the law in a wider social context through the lens of—and with many empirical methods adopted from—the social sciences such as sociology, psychology and anthropology.¹⁵ Unlike traditional doctrinal methods of legal scholarship, which focus on the internal coherence of statutory law and (typically appellate) cases, a socio legal approach suggests that a better understanding of social context can only improve legal scholarship.¹⁶ The practice of “socio legal” research is varied and gives rise to many different approaches and research focuses.¹⁷ As will be discussed below, this project draws on research methodologies pioneered in the social sciences to examine the workings of the legal processes related to party litigants. While the main intention is to look at how the law operates, the topic of unrepresented litigants inevitably intersects with larger issues in society such as inequalities in access to justice and the impact of civil justice more generally. Self-representation also raises more personal issues, such as the emotional motivations and impact of the experience on the litigant, which—as will be discussed—are closely and often intricately linked to the traditionally “legal” issues.

¹⁵ See, for example, Harris DR “The Development of Socio-legal studies in the United Kingdom” (1983) 3 Legal Stud 315.

¹⁶ Baldwin J and Gwynn D “Empirical Research in Law” in M Tushnet and P Cane (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press 2005).

¹⁷ Different jurisdictions tend to adopt their own focus in socio legal studies; see for example Nelken D “Law in Other Contexts: A New initiative for the Journal” (2012) Int JLC 8(1) 133.

The project is oriented within the interpretivist tradition of social science, which regards social reality as subjective.¹⁸ Like a number of other projects that have investigated self-representation, this research used qualitative research methodology, primarily in the form of interview data. The implications of the qualitative nature of the project are considered throughout this chapter, but the theoretical underpinning and epistemological orientation of the project is first described here briefly. Denzin and Lincoln define qualitative research as a collection of practices that “make the world visible” by studying and recording data in its natural setting and “attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them.”¹⁹ Qualitative research is designed to acknowledge the subjectivity of social reality,²⁰ as compared to quantitative data, which focuses on measurable, testable facts and objectivity.²¹

For the purposes of this project, quantitative research design could not provide the desired depth of understanding.²² Within the interpretivist framework, quantitative data would have provided only information on, for example, the volume of party litigant cases, but would not explore the experience, perception and social context that party litigants enter. This is not to say that the project could not have been enhanced by quantitative data, particularly as a means of assessing the numbers of party litigants and thus the scale of the issue. However, consultation with the Scottish Court and Tribunal Service (“SCTS”) early in the research design process made it clear that no figures are held or

¹⁸ See for example Bryman A, *Social Research Methods* (3rd ed, Oxford University Press 2008) 19-20 and Merz E “A New Social Constructionism for Sociolegal Studies,” (1994) *Law and Society Review* 28.5 (January) 1243.

¹⁹ Denzin N and Lincoln Y (eds) *The SAGE Handbook of Qualitative Research* (2nd ed, Sage Publications 2005) 3.

²⁰ The researcher must thus interpret people’s actions from their point of view; see Bryman A, *Social Research Methods* (3rd ed, Oxford University Press 2008) 13—18.

²¹ See, for example, Webley L, “Qualitative Approaches to Empirical Legal Research” in P Cane and H Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 930.

²² The reliability of court-generated data in particular is addressed in Hannaford-Agor P and Mott N, “Research on Self-Represented Litigants: Preliminary Results and Methodological Considerations” (2003) *The Justice System Journal* Vol 24, Number 2, 163 (hereafter “Hannaford-Agor and Mott”).

could be collected on party litigants and their cases.²³ Analysis of court documents on the scale necessary to constitute a valid sample was also not possible, both because permission from all parties would be required and because there is no way for the SCTS to identify relevant cases and thus each of the thousands of court processes would have to be perused. Civil justice statistics, for example, indicate that 77,721 civil cases were initiated throughout Scotland in 2015–2016.²⁴ Studies that have made use of court records have used a team of researchers;²⁵ this study has only a single researcher and examining a meaningful sample in the tens of thousands of cases in Scotland is not feasible.

Socio legal scholarship²⁶ has many of its roots in the legal realist tradition.²⁷ Legal realism is often described as rejecting purely doctrinal or black letter approaches to law and suggesting that it is necessary to understand both the “law in books” and the “law in action”.²⁸ It is often divided into “old” and “new” categorisations, with “old” realism particularly interested in judicial decision-making.²⁹ More recently, “new” realism takes a broader interest in the law and legal processes from the “bottom up”³⁰ and the effect of the law on the

²³ This is due primarily to the functionality of the SCTS’s Case Management System, which is unable to “data mine” such figures.

²⁴ Scottish Government Civil Justice Statistics:

<http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/TrendCivil>.

²⁵ Moorhead, R and Sefton, M 2005. *Litigants in person: unrepresented litigants in first instance proceedings*. [Discussion Paper]. DCA Research Series 2/05, Department for Constitutional Affairs (hereafter “Moorhead and Sefton”)

²⁶ A useful summary of the realist adoption of social science in its various forms is provided in De Been W, *Legal Realism Regained: Saving Realism from Critical Acclaim* (Stanford University Press 2008) Chapter 4.

²⁷ This notion in “old” realism is most often associated with the ideas of Karl Llewellyn; see Llewellyn K, “A Realistic Jurisprudence—The Next Step” (1930) 30 *Columbia Law Review* 431.

²⁸ I have used the term “law in action” here as it is now most commonly applied (in contrast with “law in books”) but note that there are a number of more complex constructions of “law in action” and “living law”, as outlined by Nelken D, “Law in Action or Living Law? Back to the Beginning in Sociology of Law” (1984) 4 *Legal Stud.* 157.

²⁹ Although this interest has certainly not been abandoned in “new” incarnations; see, for example, George T, *et al*, “The New Old Legal Realism” *Northwestern University of Law Review* (2011) Vol 10 No 2, 689 and Miles T *et al*, “The New Legal Realism” (2008) *The University of Chicago Law Review* Vol 75, No 2, 831. The latter characterizes new legal realists as viewing judicial decisions as quantifiable and as “hypotheses which can and should be tested” (page 836).

³⁰ See, for example, Macaulay S, “The New Versus the Old Legal Realism: Things Ain’t What They Used to Be” (2005) *Wisconsin Law Review* Issue 2, 365 at page 390.

lives of individuals. “New” legal realism in particular does not lend itself easily to precise definitions.³¹ Katherine Kruse observes that “Scholars who explicitly lay claim to a legal realist legacy are engaged in a variety of endeavours with arguably little in common, and surprisingly, ‘have generally failed to even acknowledge each other’s existence’”.³² Arthur McEvoy argues in a similar vein that new legal realism is a “style or kinship” rather than a “substantive movement”.³³ New realism has a “characteristic approach to socio legal questions” with an “emphasis on situation and context, a postmodern approach to the relationship between the abstract and the particular, and an emphasis on recursion and reciprocal constitution in relationships between formal law, experience and culture.”³⁴ This thesis adopts this view and a pragmatic vein of “new” legal realism³⁵ employing the methodology best suited to the issue at hand.³⁶ Contrary to common criticisms of legal realism, this view acknowledges that it is necessary to understand both legal doctrine and rules and the “real world” application of these rules in order to properly understand the law as a whole.³⁷ The realist view also extends to the legal procedures and procedural decision making that forms a large part of the focus of the work.³⁸ This project has proceeded on this assumption that “law in books” alone cannot provide a full picture of the subject matter and, as suggested above, that the law itself and the implementation of the law in practice are part of the same process and equally necessary to understand the position of party litigants.

³¹ The lack of coherence as to what constitutes “legal realism” may be attributed to what has been described as its “accidental” and “haphazard origins”; see Tamanaha B, “Understanding Legal Realism” (2009) *Texas Law Review*, Vol 87, 731.

³² Kruse K, “Getting Real about Legal Realism, New Legal Realism and Clinical Legal Education,” *New York Law School Review* (2011/12) Volume 56, 295 at page 313, quoting Frank J, *Law and the Modern Mind* at page 76 (Transaction Publishers 2009) (1930).

³³ McEvoy A, “A New Realism for Legal studies” (2005) *Wisconsin Law Review* 433, at page 434.

³⁴ *Ibid* at page 454.

³⁵ See Erlanger H *et al*, “Is it Time for a New Legal Realism?” (2005) *Wisconsin Law Review*, No 2, 335 at 345.

³⁶ Suchman M and Mertz E, “Towards a New Legal Empiricism: Empirical Legal Studies and New Legal Realism” (2010) *Annu. Rev Law Soc Sci* 6:555 at page 562.

³⁷ See Dagan H, “Doctrinal Categories, legal realism, and the rule of law” (2015) *University of Pennsylvania Law Review* 163.7, 1889.

³⁸ The realist perspective here contradicts the view that legal procedures are “neutral” rather than ideological: Cross F, “Legal Process, Legal Realism and the Strategic Political Effects of Procedural Pules” (2005) *The University of Texas School of Law, Law and Economics Working Paper No 065*, October.

The need for empirical research to fully understand the subject matter of this project was clear. Part of this was practical; the “law in books” simply could not answer all the questions that I wished to set. As noted above, methods drawn from the social sciences, and particularly empirical research, are often associated with socio legal studies.³⁹ The development of legal realism is also associated with increased interest in empirical legal research,⁴⁰ although early legal realists were considered by some to promote the idea of empirical research more than they actually undertook empirical work. “New” legal realism has also developed alongside increasing calls for empirical legal research.⁴¹ Empirical study is attractive because, unlike more insular formalist approaches, it allows the researcher to engage with larger issues in social science and law in practice.⁴² However, the use of empirical methods has only begun to be recognised relatively recently as a distinct area of scholarship.⁴³ It has been suggested that the development of empirical legal scholarship has been hindered by a lack of literature in the United Kingdom in particular,⁴⁴ an issue often linked to a “capacity” deficit—the relatively small numbers of those willing and able to carry out empirical legal research.⁴⁵ Empirical legal research thus

³⁹ Harris, *supra* note 15 at page 320—321.

⁴⁰ See for example Heise M, “The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism” (2002) U Ill L Rev 819 from page 822 and Kritzer H, “The (Nearly) Forgotten Early Empirical Legal Research” (Chapter 36) *The Oxford Handbook of Empirical Legal Research*, Cane P *et al* eds (Oxford University Press 2010)

⁴¹ In the UK, this has manifested perhaps most notably in the report of Genn H *et al*, “Law in the Real World: Improving our Understanding of How Law Works” The Nuffield Enquiry on Empirical Legal Research, November 2006.

⁴² Fortney S, “Taking Empirical Research Seriously” (2009) 22 Geo J Legal Ethics 1473.

⁴³ See, for example, Heise M “An Empirical Analysis of Empirical Legal Scholarship production, 1990-2009” (2011) U Ill L Rev 1739.

⁴⁴ *The Oxford Handbook of Empirical Legal Research*, Cane P and Kritzer H, eds (Oxford University Press 2010) at page 3.

⁴⁵ Genn *et al* “Law in the Real World: Improving our Understanding of How Law Works” The Nuffield Enquiry on Empirical Legal Research, November 2006 from para 37; the problem is said to be particularly acute in the area of civil justice.

incorporates many research methods from the social sciences,⁴⁶ but some social scientists question the rigour of its methodology.⁴⁷

It is also worth noting that socio legal scholarship and legal empiricism are also associated with the process of law reform.⁴⁸ While traditional doctrinal research shapes legal reasoning, it has less to offer to improve policy and practice.⁴⁹ Empirical research, and particularly qualitative research, can be more accessible and offer a flexible and contextual approach.⁵⁰ Hensler offers a well-balanced view of empirical research, suggesting that it can “help us to more accurately measure legal knowledge, attitudes and needs, and to better understand legal behaviour and legal outcomes”⁵¹ while adding that it is equally necessary to be “modest about the promise of policy-oriented research.”⁵² Sarat and Sibley describe the potential pitfall of the “pull of policy,”⁵³ the danger that directing research at policymakers may undermine objectivity. However, while this project has been carried out against the backdrop of on-going civil court reform in Scotland,⁵⁴ some of which is directly concerned with party litigants, and it is hoped that the study could inform discussions about policy and practice in relation to party litigants, the impetus for the research has been the researcher’s own interest in the subject rather than responding to the concerns of policy makers and the research questions addressed have been those which

⁴⁶ Law is often itself classed as a social science, but does not sit entirely comfortably with other categories of social science.

⁴⁷ See, for example, Epstein L and King G, “The Rules of Inference” (2002) 69 U Chi L Rev 1,15 and Revesz, “A Defence of Empirical Legal Scholarship” (2002) University of Chicago Law Review, Vol 69 no 1 (Winter) pp 169 for a spirited rebuttal.

⁴⁸ As has the development of legal realism; see as noted in Kritzer H, “The (Nearly) Forgotten Early Empirical Legal Research” (Chapter 36) *The Oxford Handbook of Empirical Legal Research*, Cane P *et al* eds (Oxford University Press 2010) at page 879.

⁴⁹ Genn H *et al*, “Law in the Real World: Improving our Understanding of How Law Works” The Nuffield Enquiry on Empirical Legal Research, November 2006 at para 96.

⁵⁰ Sallee M and Food J, “Using Qualitative Research to Bridge Research, Policy, and Practice” (2002) *Theory Into Practice*: 51,137.

⁵¹ Hensler D, “Reflections on the use of Empirical Research in Legal Policy Reform” (2003-2004) 7 Newcastle L Rev 1 at page 12.

⁵² *Ibid* at page 12. One particularly interesting limitation Hensler observes is that data cannot “counteract the power of social legends,” such as the fallacy that Americans are “over litigious”.

⁵³ Sarat A and Silbey S, “The Pull of the Policy Audience” (1988) 10 Law and Policy 97.

⁵⁴ The Courts Reform (Scotland) Act 2014, which was passed and implemented in stages as the research was carried out.

seem most important in advancing knowledge of the phenomenon of self-representation.

The specific research methods within the project, while not ethnographic in nature, are broadly inspired by previous work in the legal ethnographic field. Like qualitative research as a whole, ethnography is not related to a singular form of data collection but rather to a holistic, open-ended and dynamic approach.⁵⁵ Nouse and Shaffer describe the strand of legal realism incorporating ethnographic methods as “contextualism.”⁵⁶ This model rejects statistical studies for “sympathetic engagement”⁵⁷ with the issue at hand, often focused on institutions:⁵⁸

“What stands out in much of the work under this variety of legal realism is the combination of empirical engagement with recursivity: scholars study a real problem in the real world (they do not start with a theory or normative agenda), and as they encounter the problem, scholars emerge with different ideas and new strategies, learning from those who must deal with the problem (“the legal subjects”). In the view of many scholars who take this approach (including ourselves) the measure of the success of many studies is not “prediction” and verification...Rather, the measure is discovery.”⁵⁹

An approach focused on “discovery” is particularly relevant in this work because so little research, and even less empirical research, has been conducted on the subject to date. In other words, there is very little upon which to gain a theoretical or even practical foothold in relation to the Scottish courts. It is thus most useful to adopt an approach that is open to possibilities and which can be adjusted as fieldwork progresses.⁶⁰

⁵⁵ See, for example, Stewart A, *The Ethnographic Method*, Qualitative Research Methods Series 46 (SAGE 1998) 6.

⁵⁶ Nouse V and Shaffer G, “Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?” (2009-2010) 95 Cornell L Rev 61 from page 79.

⁵⁷ *Ibid* at page 79.

⁵⁸ *Ibid* at 81.

⁵⁹ *Ibid*, page 85; this is echoed by Conley J and O’Barr W, “Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law” (1993-1994) 27 Ly L A L Rev 41 at page 63.

⁶⁰ Yngvesson and Coutin compare ethnography’s “unfolding potentialities” to the thought experiment of Schrodinger’s Cat; Yngvesson B and Coutin S “Schrodinger’s Cat and the Ethnography of Law” (2008) Political and Anthropology review Vol 31 Issue 1, May.

The ethnographic approach is particularly attractive for the subject matter of party litigants because as Conley and O’Barr note, it “examine[s] law as a culture unto itself, and also as a constituent of a much broader cultural milieu.”⁶¹ Viewing the law and legal institutions as a culture (or subculture) is particularly useful as a lens through which to view the party litigant as an “outsider” navigating the system. This is reflected in Conley and O’Barr’s work⁶² as well as other studies that address lay people interacting directly with legal institutions⁶³ and the role legal professionals and their practices play in shaping legal processes.⁶⁴ This project, as described in more detail below, draws upon the open-ended, mixed methods approach of legal ethnographic studies, as adapted to the subject matter and practical concerns.

2.3 The “Law in Books”: Doctrinal Research

Although this chapter has focused much on the empirical element of the project, the doctrinal element is equally important and should be considered before discussing the fieldwork in more detail. As there was no pre-existing comprehensive or systematic survey of law governing and regulating self-representation in Scotland,⁶⁵ the doctrinal element and the “law in books” serves two purposes here. It is first intended to fill in gaps in the existing literature by tying together the various disparate threads of the law and placing them in the larger context of the legal processes and function of the courts. Second, the doctrinal research provides a foundation for the empirical work.

2.3.1 Literature Review

⁶¹ Conley J and O’Barr W, *supra* note 23.

⁶² See, for example, Conley J and O’Barr W, “Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives” (1985) 19 Law and Society Rev 661; O’Barr and Conley J “Lay Expectations of the Civil Justice System” (1988) 22 Law and Society Rev 137.

⁶³ See, for example, Bezdek B, “Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process” (1991-1992) 20 Hofstra L Rev 533.

⁶⁴ See, for example, Zammit D “Maltese Court Delays and the Ethnography of Legal Practice” (2011) 4 J Civ L Stud 539; Zieger K, “The Day in Court: Legal Education as Sociolegal Research Practice in the Form of an Ethnographic study” (1990-1991) 2 Legal Educ Rev 59.

⁶⁵ The state of the literature in Scotland is discussed in Chapter 3.

The first element of the project is a literature review, primarily intended to outline and analyse the existing literature in respect of the conceptual issues around self-representation and self represented litigants. The body of empirical work on self-represented litigants, their experiences and the experiences of legal professionals dealing with them—as well as the wider impact of self-representation—are also considered. As discussed in the literature review, there is very little Scottish literature in this area. Literature from other common law and English-speaking jurisdictions that relates to the larger issues relating to self-representation is also considered.

2.3.2 “Library” Research

The subject of this project is somewhat unusual in that, unlike most other areas of law, there is no concrete definition of “party litigant” law. For the purposes of this project, a relatively broad approach was taken. The legal basis for the right to self-represent in Scotland and its limitations are the first and perhaps most fundamental matter to be considered. Thereafter, the parameters of the research were roughly as follows:

1. Provisions that relate directly to the regulation of party litigants; for example, those that allow or forbid party litigants to have lay assistance or representation.
2. Court rules or procedures that regulate or affect party litigants and the presentation of their cases, either directly or indirectly. For example, the small claims procedure is designed to be accessible to party litigants and the rules contain provisions for the court to assist party litigants by serving documents on their behalf. Conversely, the Ordinary cause procedures place an emphasis on legal relevance and written pleadings that, while applied equally to legal professionals and party litigants alike, presents a far greater challenge for the untrained party litigant to negotiate.
3. Case law illustrating principles applied to party litigants, particularly in the area of latitude or assistance that may be extended by the court due to the party litigant’s unrepresented status.

4. Official guidance or policy, such as the Law Society of Scotland's rules relating to the treatment of party litigants. Although not law as such, these are noted for their impact on how party litigants are treated in the courts.

While determining whether provisions relate directly to party litigants is straightforward, there is of course some subjectivity involved in discussing indirect impact on party litigants. These are provisions or rules which are likely to have a disproportionate impact on party litigants as compared to represented litigants. The determinative factors used are drawn from the existing literature on party litigants,⁶⁶ although it is perhaps also fair to say that many could be considered common knowledge. It is safe to take for granted, for example, that most party litigants are not familiar with court practice and procedure or aware of how to draft legal pleadings. Thus where provisions that affect the party litigant indirectly are included, the underlying reasoning for this is explained.

The doctrinal element of the project began as a search for rules and *dicta* relating to party litigants in the Scottish civil courts. However, it quickly became apparent that there are few firm pronouncements on self-representation in the Scottish jurisprudence. Some of the fundamental research questions may have been expected to be answered in the rules or case law—for example, what are the “rights” of party litigants, or should party litigants be afforded a larger degree of latitude based on their unrepresented status alone—but these answers did not readily appear. Where there was authority for a particular proposition, it was often contradicted in numerous examples within the case law. As noted later, for example, it has been held that courts are essentially entitled to hold party litigants to the same standards as lawyers, but the body of cases involving party litigants suggested that this rarely, if ever, occurs.⁶⁷ Thus, the research did not focus primarily on the most authoritative cases—which, due to a hesitance on the part of courts to make binding pronouncements on party litigants,⁶⁸ are arguably not traditionally “authoritative”. While those cases are of course a part of the project, the aim was instead to examine all available cases involving party litigants. This approach both provided an alternative method to begin to address the research questions relating to the issues arising

⁶⁶ As set out in Chapter 3.

⁶⁷ See Chapter 5.

⁶⁸ Section 4.7.

in courts when party litigants are involved and, to answer another aspect of these questions, looked for patterns in how judges dealt with these issues.

Many of these cases, while most often not authoritative or binding, provided an example of the issues that arise in cases involving party litigants and how the court approached and ruled on these issues. Because such cases were generally not authoritative (or indeed notable for other reasons) many were unreported. Instead of traditional law reports, material for much of this portion of the project was found in judgments published directly on the Scottish Court Service website.⁶⁹ Most were found using a number of keyword searches using terms including “party litigant”, “unrepresented”, “lay representative”, “in person”, and “personally present” (the latter two as these terms are often used on interlocutors to indicate that a litigant was present in court and appeared on his own behalf). Thereafter new judgments published by SCTS were monitored for those involving unrepresented litigants. A total of over 220 cases were ultimately reviewed.

The subject matter and nature these of cases naturally varied, but each example was read for issues relating to the party litigant’s unrepresented status either directly or indirectly rather than the substantive law *per se*. Categories such as procedural issues, relevance and delay emerged from the body of cases and those which were relevant were labelled with one or more of these terms, as well as any other notable issues. A handful of cases did not disclose any issues related to the unrepresented status of one or both litigants, but, perhaps notably, these were the exception rather than the rule. Ideally, it would have been better to have a more definitive and subject-specific method of obtaining case examples. It is difficult to say how representative the cases are, as there is no way of knowing how many other cases have been decided and how they might vary. Unfortunately, the project had to be limited to what was publically available. After discussions with SCTS, it was clear that there was no way to search for decisions relating to party litigants in case files, or indeed for certain types of cases. There was also the issue of confidentiality, and I was told that I

⁶⁹ A handful were obtained elsewhere. For example, one case had been noted in newspapers but not published on the SCTS website, but a copy of the judgment had been made available online by a firm of solicitors. Another was obtained, with appropriate permissions, directly from the relevant sheriff court.

could not access judgments that have not been made public without permission from all parties even if they could be found⁷⁰. Seeking to obtain permission for any number of cases would have been impractical and potentially invasive or distressing for the individuals concerned.

However, the judgments that were publically available did encompass a significant breadth of case types and issues, as well as appearing from all courts and areas of Scotland. The information provided is also, of course, limited in scope and represents only the judge's point of view and the information that the judge (or the person reporting the case) sees fit to include. This was taken into account when considering the cases. Another limitation that must be considered is that, due to lack of authority and the difficulties in obtaining cases discussed above, this portion of the project cannot ultimately be said to have definitively answered the research questions that it was originally intended, or expected, to address. However, the case law does paint a useful picture of the patterns that emerge in party litigants' cases. It also provided valuable background and direction for the empirical aspect of the project and ideas about the issues and patterns could then be tested in interviews with judges and solicitors. The cases were also important for what was *not* to be found within the judgments. There was a lack of reference to legal authority in decisions made regarding areas such as latitude or discretion for party litigants. As touched on above, even on points where such authority was available, judges rarely if ever referenced or followed these points. This does not, of course, lead to any sort of conclusive determination, but again, these observations provided ideas to explore in the empirical aspect of the project. It is worthwhile to note that this aspect of the methodology did raise many of the points that were ultimately borne out and corroborated by the empirical element of the thesis. For example, the issue of unmet expectations of the process on the part of party litigants detected in the case law⁷¹ was found to be an important theme in the empirical research as well.⁷²

⁷⁰ Minute of telephone meeting with Ian Clark of SCTS, 28 September 2015, held on file with author.

⁷¹ Section 5.3.5.

⁷² Section 7.7.2.

2.4 The “Law in Action”: Fieldwork

2.4.1 Focus and Restrictions on Research Design

The empirical element of the project consisted of interviews and court observation as detailed below. The Scottish civil courts essentially have two tiers, the Court of Session and the Sheriff Courts. With limited time and resources within the scope of a PhD project, a choice had to be made about which courts to study. Between the Court of Session and the Sheriff Courts, the choice was relatively easy as the Sheriff Court hears far more cases. According to the Scottish Government’s 2015–2016 Civil Justice Statistics, 93% of civil law cases were raised in the Sheriff Court that year.⁷³ The Courts Reform Act 2014 raised the privative jurisdiction of the Court of Session to £100,000, making it even more unlikely that a large amount of party litigant cases will be heard there. Also following the Courts Reform Act, appeals that would previously have been heard within the Sheriff Courts, or, for some, at the Court of Session, were diverted to the newly created Sheriff Appeal Court. Although party litigants are often thought to be over-represented as compared to parties with lawyers in the appeals process, much of the study is thus focused on cases at first instance. Judges and court staff interviewed were nonetheless dealing with the initial processes involved with appeals, although the appeals were now heard elsewhere. An additional interview was also undertaken with a member of staff dealing with appeals in the Sheriff Appeals Court to provide some additional insight.

Early in the project, the empirical aspect was intended to be narrowed further to focus on ordinary cause procedure⁷⁴ in the Sheriff Courts. Ordinary procedure, unlike small claims processes, was not designed with party litigants in mind and has more complex procedural and legal requirements. More straightforward small claims procedures seemed less likely to cause difficulties for party litigants. However, as the empirical work progressed, it became apparent that

⁷³ Civil Justice Statistics 2015—2016
<http://www.gov.scot/Publications/2017/03/5915/0>.

⁷⁴ In the broad sense, this includes actions such as sequestrations and summary applications.

distinctions between the procedures were not as clear-cut as originally envisaged. In early interviews, judges in particular had much to say about small claims cases and made few distinctions between these and ordinary cause cases. While strictly procedural elements are more straightforward in small claims processes, there was much in common between the different procedures in the legal, evidential and practical issues encountered. For this reason, small claims cases were not excluded and interviews were adjusted to allow for gathering data on these cases as well.

The research methods used are discussed in detail below. Restrictions on the research design and execution of the design are often noted. In addition to the time and resource limitations of a PhD project, there were a number of other limitations that required adjustment to the design. Unsurprisingly, the same restrictions discussed above in relation to case judgments also applied to court processes and papers in general. With access and a great deal of time, examination of court processes⁷⁵ involving party litigants could have allowed for tracking of the procedural and legal progress of cases and thus hopefully could have identified common issues. Perhaps even more importantly, this would have allowed for some form of analyses of paperwork and pleadings submitted by party litigants, allowing for evaluation of how successfully parties meet substantive and procedural hurdles. Without knowing the terms of access it is difficult to say exactly what form such analyses would take, but the extent that pleadings meet procedural requirements and a comparison of pleadings as submitted with the progress of the action as it developed in court would certainly be key issues.

Answering the research questions also required access to judges and court staff, as detailed below. This in turn entailed gaining institutional access via the SCTS centrally and in the individual courts.⁷⁶ Again the “ideal” research design was reshaped after discussions with SCTS.⁷⁷ It was clear that time constraints would be an important factor, as the operational considerations for the courts were naturally a priority. The access sought had to be very specific from the outset,

⁷⁵ “Process” here refers to the court’s administrative file for each case.

⁷⁶ Again this is discussed in more detail below.

⁷⁷ Minute of telephone meeting with Ian Clark of SCTS, 28 September 2015, held on file with author.

which further narrowed the methods that could be used. For example, in the hope of gathering as much information as possible, an early hope was to submit a questionnaire to all the sheriffs in several courts, to be completed by those who were willing to do so, with the offer of a follow up interview with those who were interested. Any sort of mixed methodology such as this was not available, however, as I was told I would have to identify the number of judges from certain courts I was seeking in advance, and that I would have to approach them with a single request, such as an interview, at the outset. The design was thus modified to a single hour-long interview.

Perhaps the biggest modification to the potential research design was the elimination of gathering data from party litigants themselves. While this was considered as part the earliest design of the project, as the project progressed a number of considerations led to the decision not to include party litigants personally. Some of these were practical, even as practical as a lack of available accommodation in an appropriate venue, such as a court, for interviews. Another concern, however, was the ethical aspect—party litigants are inevitably in a vulnerable position when their cases are on-going, and for many discussing the case after the fact may bring up negative memories. Such a discussion is also likely to bring up sensitive or confidential information. By contrast, judges and lawyers are accustomed to discussing their professional lives (the distinction between personal and professional being particularly important here) and are well versed in identifying what information is confidential and appropriate for disclosure in a particular setting. There was thus far less risk with the latter that sensitive information above and beyond what was relevant would be disclosed in their interviews.

Identifying and recruiting party litigants would also be prohibitively complicated. Approaching party litigants directly could be intrusive and potentially aggravating for them at a vulnerable time. Even if successful in recruitment, the time and resources needed to interview⁷⁸ the number of party litigants required for a valid sample size in addition to the other interviews is

⁷⁸ A quicker option may have been surveys of party litigants, but this method does not fit well with the overall orientation of the project as an interpretive and qualitative study; the depth of the responses would not be sufficient and would not align well with the rest of the interview data.

likely to exceed the limitations of a PhD project conducted by a single researcher.

The lived experiences and feelings of party litigants are by no means unimportant or irrelevant to the issues, but the primary focus of this thesis is on the legal aspects of self-representation and its impact on the court process—questions that judges and solicitors, for example, are more readily and accurately able to answer. This approach also helps to therefore frame our understanding of how the law and court system engages with and views the party litigant and their needs. Hence, it would, for example, be fruitless to ask a party litigant technical questions about the procedures or questions to draw out how the process was adapted for him as opposed to a solicitor, when he has no knowledge of how the process is typically intended to operate. Equally the party litigant would not be able to provide insight into the judicial decision making process, or other issues that would effectively amount to asking him what he does not know. Interviews with party litigants would thus not address the particular research questions set for this thesis to a meaningful extent. Perhaps most importantly, there are limitations on the extent to which interviews with party litigants could address the research questions. As is sometimes suggested in the existing literature,⁷⁹ unrepresented litigants are not always able to report their experiences with the law and court processes in legal terms with a great deal of accuracy, due a lack of understanding of the law involved. Their view may also be coloured by the emotional aspects of the underlying issues bringing them to court in the first place.⁸⁰ Nevertheless, while data did not come directly from party litigants, other parts of the method are designed to compensate for this as much as possible; for example, the inclusion of court observation and interviews with multiple categories of professionals, including court staff, to provide varying perspectives. While individual party litigants can only speak to their own individual experience, legal professionals encountering party litigants every day are able to identify the patterns and reoccurring issues that are at the heart of the questions this project seeks to answer.

⁷⁹ See for example section 3.3.6.

⁸⁰ See section 3.3.6.1.

2.4.2 Research Methods

2.4.2.1 Interviews: Judges

To better understand the challenges that party litigants both pose and face in the courts, a key aspect of the data was interviews with the judiciary. This was particularly important because there was so little statutory or common law authority to be found relating to the type of issues frequently encountered by courts dealing with party litigants. Because so many matters are left to judicial discretion, understanding the party litigant's journey through the civil court process requires an understanding of how and why judges make decisions about questions such as how latitude is extended to these litigants. The question thus became not what the legal rules could tell us, but rather what was happening in the courts on a day to day basis and why. Judges are able to offer insights on this, as well as their observations about the behaviour of party litigants and the issues that they encounter in the conduct of their cases. A research request was submitted in line with the SCTS research access policy,⁸¹ which was ultimately approved, as required, by the Lord President and the Sheriff Principal of each sheriffdom involved. In terms of the policy, as a researcher I was not permitted to approach individual sheriffs, but rather was supplied with names of those willing to participate in the project.

A total of 10 sheriffs were interviewed as set out in the table below. Courts A and B are large (more than 10 permanent sheriffs) urban courts located in two different sheriffdoms in the central belt. Courts C and D are mid-sized (fewer than 5 permanent sheriffs) courts both located in a third central belt sheriffdom. Each interview lasted around one hour.

Court	Sheriffs Interviewed
Court A	3
Court B	4
Court C	2

⁸¹ The request asked for interviews with 5 sheriffs each in the sheriffdoms noted in the table.

Court D	1
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The interviews were conducted in a semi-structured and open-ended⁸² style, in consideration of the additional issues involved in “elite” interviews, where open-ended questions are generally considered desirable.⁸³ Thus while an interview guide was used with set questions that had been prepared in advance, the guide was designed to allow for follow-up questions or additional questions as issues arose.⁸⁴ As each interview proceeded at its own pace, I marked questions that I wanted to ensure were asked at each interview in bold, leaving additional questions to ask as time allowed. Each interview was adjusted as it progressed to some extent, either to account for the sheriff’s stated experience⁸⁵ or when questions were anticipated and answered before I had a chance to ask them. Each judge was assigned a number for anonymity and the interviews are referred to in this thesis as J 1-10.

The judicial interview data is, of course, limited to the judge’s perspective. Subjectivity in their responses was inevitable, and I was aware that some judges seemed to have an overarching view of party litigants (whether positive or negative, or at least wishing to appear positive or negative, about the presence of party litigants in the courts) that may have influenced how they wished to respond to questions. Other judges may have been concerned about appearing unduly hard or too easy on party litigants. It is also worth noting that judges may be more likely to remember and recount the more problematic party litigants and cases—such as serial and vexatious litigants⁸⁶--which may not reflect their experiences with party litigants as whole. Anything that might suggest this was carefully noted as much as possible in a study of this nature. However, this data as a whole provided important insights into how the law operates in practice.

⁸² Although often accepted as the norm in “elite” interviewing, open ended questions may raise additional issues of validity; Berry J, “Validity and Reliability Issues in Elite Interviewing” (2002) *Political Science and Politics*, Vol 35 No 4 (Dec) 679.

⁸³ See, for example, Mikecz R, “Interviewing Elites: Addressing Methodical Issues” (2012) *Qualitative Enquiry* 18(6) 482; Rice G, “Reflections on interviewing elites” (2010) *Area* Vol 42 No 1 March 70.

⁸⁴ Appendix C.

⁸⁵ For example, a handful of questions related directly to ordinary cause procedure only were omitted if the sheriff advised that he had seen few party litigants in this type of case.

⁸⁶ See section 3.3.5.3.

While the decisions and orders that judges make in respect of party litigants and why they make them was a key research question, the interview data quickly revealed that there was much to learn about the judge's role in cases involving party litigants in court more generally, such as taking on a more active role and deliberately altering their demeanour. The views that judges had of party litigants, while of course subjective, are also important in their own right in understanding the decision making process and the treatment that the party litigant received in court.

2.4.2.2 Interviews: Solicitors

Interviews with solicitors formed another facet of the research methods. This served several purposes: first, it was a research aim in itself to gather the perspective of legal professionals acting as opponents of party litigants, both in terms of their own approach and strategy and what they observed about the effect that party litigants had on the solicitor's clients (for example, in terms of costs) and the courts. While all the solicitors were able to tell me about their own dealings with party litigants, many were also able to recount even more anecdotal observations of other party litigants and sheriffs dealing with party litigants based on hours sitting in court waiting for their own cases to call. Another aspect of the solicitor interviews was to examine how their experiences and views aligned with the other data that had been gathered, either to reinforce that data or illustrate where disparities emerged. This was particularly important in considering how the reflections of solicitors and judges, as legal professionals on the "inside" of the process, corroborated or contradicted each other. However, it is equally important to note that solicitors are likely to have a particular—and often negative—point of view in relation to party litigants, experiencing them as they do as a representative for their opponent. As with the judicial interviews, I was aware of the potential for solicitors to attempt to portray their dealings with party litigants in a particular light. A solicitor would, for example, likely be hesitant to report if he or she attempted to take advantage of party litigants' lack of legal knowledge, even anonymously. That this was not reported in the interviews thus does not mean that it does not potentially occur. Insofar as possible in a study of this nature, I was watchful in

the analyses of the interviews and the subsequent transcripts for any signs of this or other hints of bias.

In practical terms, the considerations for the solicitor interviews were much the same as the judicial interviews as discussed above, with the exception of the recruitment of subjects for interview. This proved more difficult than expected. Because party litigants are known to be a potentially troublesome part of the job for solicitors, recruiting by advertisement more generally—such as by advertisement in the court or with the law society—seemed likely to produce an unbalanced sample and subjects perhaps predisposed to a negative view of party litigants or an “axe to grind.” Initially the plan was instead to identify solicitors via court observation⁸⁷ and approach those who had been seen to have experience with party litigants. However, although half a dozen were approached, only one subject for interview was ultimately recruited in this way. The remaining seven solicitors interviewed were identified through University of Glasgow contacts (such as those working as tutors) either directly or by recommending other solicitors known to work with party litigants. The solicitors who were interviewed all focused on litigation as their primary practice area, and although they had different specialities with that area, all were experienced in court work and had encountered numerous party litigants. They also represented different types of law firm in the central belt, with most from larger commercial firms and others from smaller firms. If time and resources had allowed (and willing subjects could be found) a larger and more diverse body of interviewees would have produced a more reliable body of data. The solicitors are referred to here as S1-8.

2.4.2.3 Focus Groups: Court Staff

Court staff assist party litigants at public counters as well as acting as the clerk in civil proceedings. As such, they are part of the party litigant’s experience and are able to offer valuable insights into the issues that party litigants encounter (and cause) both in and out of the court, sometimes where lawyers and judges are not present. Like sheriffs, it is their role to be “neutral” in the process, but unlike sheriffs their experiences with party litigants are not limited to the

⁸⁷ See section 2.4.2.4.

formal constraints of the courtroom setting. Court staff, like solicitors, had their own observations about how party litigants behave in the conduct of their cases and how judges and solicitors approach them. Because part of their remit is to assist party litigants on practical matters and provide procedural advice, court staff were also able to provide data addressing questions of what information is available to party litigants and to what extent this assists them. The perspective of court staff was also of great interest because, although they are familiar with the workings of the court in their profession, they are, like party litigants, lay people and not formally legally trained. Moreover, Macfarlane found in their study that court staff were able to identify the concerns and issues encountered by party litigants with a high degree of accuracy; the comments of court staff and unrepresented litigants often mirrored each other.⁸⁸ As party litigants were not interviewed for this project, the insights of court staff on their experiences were particularly important in providing another view of the party litigant's experience.

A research request submitted to the SCTS sought interviews in the form of focus groups of up to five members of staff at each court, each lasting up to 30 minutes. As with the sheriff interviews, I was not involved in the recruitment of participants. The composition of the focus groups was ultimately as follows:

Court	Number of participants in group
A	5
B	6
C	4
D	2 ⁸⁹

⁸⁸ Macfarlane J (2013) *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* Final Report. May 2013 (hereafter "Macfarlane 2013") www.lsuc.on.ca/uploadedFiles/For_the_Public/.../Self-represented_project.pdf; Knowlton N *et al*, "Cases without Counsel: Research on Experiences of Self-Representation in US Family Court" IAALS May 2016 (hereafter "Knowlton *et al*") at page 1.

⁸⁹ Four members of staff had volunteered for this group, but due to absences only two were available on the day of the group.

A focus group format was chosen for the staff interviews, with the exception of one interview that was carried out individually. Focus groups provide a means of gathering data quickly, which was particularly important in light of the operational needs of the courts here as the sessions were conducted during the working day. Preliminary enquiries with SCTS suggested that access was unlikely to be granted if staff were taken away from their duties for too long. A focus group format was also desirable to place less pressure on each member of staff and make the process more comfortable for them, as they could be expected to be less accustomed than judges to discussing their professional experiences. The format also allowed staff to build on the comments of their colleagues and their own experiences, adding depth the conversation.⁹⁰ It also provided a quick means of evaluating issues as they came up—for example, if one member of staff noted a common behaviour in party litigants, this could quickly be put to other members of staff to determine if they agreed. Although these were not “elite” interviews as the term is sometimes applied (suggesting a power differential) from a methodological standpoint these interviews fall to be considered as elite in that participants were chosen based their experience and profession, and thus roughly the same principles discussed above were applied to composing an interview guide. The focus groups are referred to as FG1-4 and each participant in the groups has been assigned a set of initials, for example AB, CD and so on. An additional interview conducted with a single member of court staff is referred to as CS1.

2.4.2.4 Court Observation

A number of studies have demonstrated the utility of court observation in relation to unrepresented litigants.⁹¹ Court observation is particularly well established for the evaluation of judicial behaviour.⁹² The court observation element of this project was intended to provide a view of the court’s approach to party litigants not filtered through the perspective of the judge, court staff or

⁹⁰ See, for example, Macfarlane 2013.

⁹¹ See, for example, Moorhead and Sefton.

⁹² Mileski M, “Courtroom Encounters: An Observation Study of a Lower Criminal Court” (1971) *Law & Society Review* Vol 5, No 4 May 473; Conley J and O’Barr W, *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press 1990) I II.

others “in the know.” Observing the procedural and legal issues arising in the court observation also provided an opportunity, within a limited scope, to either corroborate or contradict the interview data. The aim was not to assess the progress or success of individuals or their cases—this does not form part of the research questions, not least of all because with the available data it would not be possible to do so with any degree of integrity. Instead, I was most concerned with the operation of the law and the rules and the interactions between the party litigant and the sheriff as well as how closely and consistently court rules and procedures were applied to party litigants.⁹³ What party litigants and their opponents asked the court for, and the orders ultimately granted, were also of particular interest.

The “ordinary” procedural sitting⁹⁴ of a large central belt court was selected for observation. This was chosen for many reasons. First, it was desirable to view ordinary cause cases, rather than low-value claims, as this allowed for observation of more procedurally complex cases likely to present greater challenges to party litigants. The subject matter of cases in the low-value courts tends to be more limited⁹⁵ (with most cases concerned with either payment or eviction due to rent arrears), while ordinary cause matters offer considerably more diversity in the subject matter, including all ordinary cases, summary applications, and sequestrations.⁹⁶ I examined the court rolls to assess the total number of hearings each day, the type of hearings, and how many cases appeared to involve party litigants.⁹⁷ I then determined that the ordinary

⁹³ I wished to observe both whether rules were “bent” or adjusted to provide latitude or assistance to party litigants, and how aware presiding sheriffs were of rules pertaining directly to party litigants; see Zahle J, “Practical knowledge and Participant Observation” (2012) *Inquiry* Vol 55, No 1 February 50.

⁹⁴ These courts are open to the public and did not require any special permission to access.

⁹⁵ Although cases with certain types of more complex subject matter are not necessarily excluded by the rules, they are likely to be remitted to ordinary cause procedure.

⁹⁶ Family cases, although under the umbrella of ordinary cause matters, are held in private and could not be observed.

⁹⁷ Court rolls are available online at www.scotcourts.gov.uk and list hearings and hearing types for all Sheriff courts. The rolls generally list what solicitor, if any, is representing each party. During my preliminary court observation I referred to the rolls to see how accurately they corresponded to whether parties appeared with lawyers in the hopes that they might be used as a source of data, but it was quickly apparent that they were useful only as a guide.

procedural court offered the highest volume of party litigants and would allow for the observation of several party litigant hearings per sitting. Because this was a larger court and duties for the ordinary court are shared amongst a number of sheriffs, I was able to observe the approach of nine sheriffs in total.

It is worth noting that, although such “ordinary courts” are generally characterised as procedural rather than substantive, certain matters (such as sequestrations and time to pay applications) are often determined at these hearings. Final determinations such as the granting of decree or dismissal were not uncommon. While it would be desirable to observe purely substantive and evidential sittings as well, it was clear from a review of the rolls over a period of time that proof and debate hearings involving party litigants were not common enough to produce a valid body of data over the duration of the research period.⁹⁸ I observed the ordinary court for a total of 16 sittings over 9 weeks.⁹⁹ Because I was interested in the conduct of individual hearings and not the progress of cases overall, I observed each hearing as a separate “event” to be recorded and analysed, although I did cross reference cases that appeared multiple times and recorded the results of relevant continuations wherever possible.

The methodology was loosely modelled on similar studies.¹⁰⁰ Before commencing the formal research period, I observed the court on an informal basis and developed a *pro forma* to guide and ultimately record the data gathered.¹⁰¹ The *pro forma* recorded relevant information about the case itself, such as the nature of the action and that day’s hearing, which parties were represented or unrepresented, the motions made by each party, the outcome of the hearing, and any other relevant information, such as discussion from the sheriff or parties. During observation I took extensive notes. I recorded what each party

⁹⁸ These hearings are also unpredictable and frequently cancelled at short notice.

⁹⁹ See Appendix B.

¹⁰⁰ See, for example, Mack K and Anleu S, “Performing Impartiality: Judicial Demeanor and Legitimacy” (2010) *Law and Social Inquiry* Vol 35, Issue 1 Winter 137. Audio recording of hearings is generally part of the methodology, but this is forbidden in the Scottish civil courts.

¹⁰¹ Appendix A.

said as closely as possible.¹⁰² I was able to note information that was not clear during the hearing (such as confirming case types or future calling dates) from the court rolls.¹⁰³ The limitations of the court observation data are clear and it did not provide a complete picture of any party litigant's case or information outside an individual hearing, but this was not the intention of the observation as a whole. Instead it provided insight into how a relatively high volume of party litigants dealt with court procedures and the difficulties they encountered, as well as an opportunity to note how judges and solicitors dealt with these issues and how this could be contrasted with their approach to represented parties. Again, this data was also fed back into the interviews and provided a starting point that helped to shape some of the questions asked.

2.4.3 Interpretation of Empirical Data

In respect of the court observation, I transcribed the details of each hearing onto the *pro forma* along with a summary¹⁰⁴ of each hearing involving at least one party litigant. Each hearing note was assigned one or two keyword codes at this time. Codes were developed and adjusted as necessary as observation progressed.¹⁰⁵ There were several cases that had multiple hearings during the observation period and these were cross-referenced on each hearing form with a note of the results of previous hearings. The body of data at the time observation was completed consisted of my handwritten notes of each court in date order, hearing forms grouped by each court in date order stored electronically, and the same hearing forms grouped together by keyword code.

¹⁰² I attempted to record these notes in the language each party used as closely as possible; thus technical or legal terminology was recorded where appropriate; See Spalding J, *Participant Observation* (Holt Rhinehart and Winston 1980).

¹⁰³ "Court sheets" are available to solicitors and the public on the day of each sitting and note full case names, reference numbers, and the form of procedure and crave (eg payment, delivery) of most actions. These provide more detail than the online rolls of court, which note only case name, reference and hearing type.

¹⁰⁴ These were closest to what is described as a "condensed account" (see Spalding J, *Participant Observation*, Holt Rhinehart and Winston 1980 at page 69) but I also retained my more detailed original notes to consult as necessary.

¹⁰⁵ Appendix I.

All of the interviews and focus groups, with one exception,¹⁰⁶ were audio recorded and thereafter transcribed. The interpretation of both the interview and observation data was not drawn on any single method of analysis, but was influenced by principles set out by Silverman¹⁰⁷ and Lichtmans's description of developing data into codes, categories, and finally concepts.¹⁰⁸ The development of the codes and categories was influenced in part by the doctrinal research undertaken—for example, the categories of procedural, legal, and evidential latitude were suggested by the existing literature and case law, and enquiry about these areas was built in to the questioning of interview subjects. While some categories were thus readily apparent in the interviews based on the questioning—because subjects were asked about these matters, such as latitude for party litigants, directly—others emerged after interviews were complete and the transcripts were examined as a whole.

2.4.4 Reliability, Validity, Limitations and Ethical Concerns

2.4.4.1 Reliability and Validity

Perhaps the most prevalent criticism of qualitative research is that it is merely anecdotal, subjective, or unscientific.¹⁰⁹ However, most qualitative scholars consider that objective and positivist measures of reliability¹¹⁰ and validity cannot be applied to qualitative research.¹¹¹ Methods derived from ethnographic studies are concerned more with the process of discovery, rather than validity as it is traditionally defined.¹¹² Reflexivity—the researcher's awareness of their impact on the subject matter studied, and in turn the impact of the study on the

¹⁰⁶ One interview was not recorded at the subject's request. For this interview notes were taken summarizing the subject's responses and quoting verbatim where possible.

¹⁰⁷ Silverman D, *Interpreting Qualitative Data: A Guide to the Principles of Qualitative Research* (4th ed, SAGE 2011) 58.

¹⁰⁸ Lichtman M, *Qualitative Research for the Social Sciences* (SAGE 2014) 328. This is described as a "generic style" (page 336).

¹⁰⁹ Denzin N and Lincoln Y, eds, *The SAGE Handbook of Qualitative Research* (2nd ed, Sage Publications 2005) 8.

¹¹⁰ Reliability refers to the extent to which research can be "generalized" beyond the sample studied, while validity refers to the accuracy or "truth" of the research.

¹¹¹ But see, for example, Onwuegbuzie A and Leech N, "Validity and Qualitative Research: An Oxymoron?" (2007) *Quality and Quantity* 41:233.

¹¹² Flood J, "Socio-Legal Ethnography" in Banakar R and Travers M, eds, *Theory and Method in Socio-legal Research* (Hart Publishing, 2005).

researcher—is generally considered essential to address the problem of the inherent subjectivity of qualitative research.¹¹³ The outcome of qualitative research should be regarded as constructed by the choices made by the researcher during the process rather than “existing realities”.¹¹⁴

For purposes of this project, a reflexive stance is reflected in several aspects. I considered that, given the “constructed” nature of the empirical element in particular, transparency in my own consideration and reporting of the data was particularly important. In other words, it was necessary to constantly interrogate precisely how the data should be read and, more importantly, framed to avoid making any unwarranted claims about its reliability. Extensive documentation and note-taking was another method used to maximise the integrity of the research. This was particularly necessary as the court observation was taking place, and each sitting was recorded in great detail and in parties’ own words to minimise the potential for my own bias or interest to enter into the recording process. Notes and comments were also recorded after each interview and observation period and as the project evolved.¹¹⁵

As has been discussed above, the research design also employed a mixed methodology and variety of subject types to verify or “triangulate”¹¹⁶ the data as much as possible. Although subject to the limitations discussed below, the observation data in particular was, as noted above, intended to provide an “unfiltered” view of the process that allowed the process to be viewed through the eyes of the party litigant, as well as the legal professionals and court staff present.

2.4.4.2 Limitations

¹¹³ See, for example Lichtman M, *Qualitative Research for the Social Sciences*, SAGE 2014) Chapter 2.

¹¹⁴ Mruck K and Breuer F “Subjectivity and Reflexivity in Qualitative Research” (2003) *Historical Social Research* Vol 28 No 3, 189 at page 192.

¹¹⁵ Documentation of the process is particularly important in an ethnographic context; see Kirk J and Miller M *Reliability and Validity in Qualitative Research*, *Qualitative Research Methods* Vol 1 (SAGE 1986).

¹¹⁶ The now-commonplace conception of “triangulation” is originally attributed to Campbell D and Fiske D, “Convergent and Discriminant Validity by the Multi-trait, Multi-method Matrix” (1959) *Psychological Bulletin* 56, 81.

The general limitations applicable to any qualitative research have been discussed above. In addition, the research had a number of other limitations. Access to interview subjects was perhaps the most prominent of these, and both the research design and more practical matters had to be tailored to some extent to conform to SCTS requirements. This is perhaps most regrettable in relation to limited access to judges and being thus unable to canvass more responses or to use the mixed methodology described above. Equally, more time with court staff would have been desirable, but was not possible due to the court's operational pressures on the focus groups. The number of interviewees overall is small, reflecting the limitations of this as a PhD project with a single researcher. Due to the SCTS research policy discussed above, in which the researcher is not able to contact interviewees directly and interview subjects are designated by the SCTS and the individual courts, it is also possible that judges or court staff with a particular point of view about party litigants were put forward for interview. As both judges and court staff can only be accessed through this procedure, there was little potential to mitigate that concern. As noted above, most solicitors were approached for interview through connections with the University of Glasgow, which may also have influenced their experience and viewpoint. Most, although by no means all, for example, worked in larger commercial firms. This approach to recruitment was also not ideal but, as noted above, earlier efforts to recruit solicitors observed to have frequent court experience with party litigants had proved unsuccessful.

The size of the courts and their geographic locations, all in the central belt, can be said to lack diversity. Smaller, more remote courts are particularly likely to be under-represented by the study, as these courts may have different customs and practices as well as less availability of relevant services such as mediation and in-court advice from organisations such as Citizen's Advice Bureau. Due to these factors, smaller courts may have offered quite different perspectives than the larger courts, although more litigants pass through the larger courts and the data gathered is thus more likely to reflect the experiences of a larger number of party litigants.

The court observation data was also limited by taking place at a single court over a relatively short timescale. As noted above, I was able to observe a variety

of cases and several different sheriffs. A handful of the cases were observed at multiple hearings and some reached a substantive outcome. However, the court observation data does not, and is not intended to, offer statistical or demographic information about party litigants or their cases. Instead it is intended to provide a “snapshot” of the court and the issues emerging in party litigant cases. The examples observed highlight the possibilities and provide only starting point to consider how these particular examples were addressed.

2.4.4.3 Ethical Concerns

As required of any research involving human subjects, an application outlining the research was submitted to and approved by the University of Glasgow College of Social Sciences Ethics Committee.¹¹⁷ Had party litigants been interviewed, the most pressing ethical concern would have been proper handling of the interviews, ensuring that they did not cause distress and that proper support was in place if necessary. However, as noted above, this was much less likely to occur in the interviews conducted with professionals only. Instead the primary ethical concern for the project overall was ensuring both the anonymity of the participants as well as any third party (for example, in the course of a sheriff describing a case he presided over.) Due to the relative ease with which judicial office holders in particular could be identified, transcripts were all anonymised and special care has been taken to ensure that no identifying details (including, for example, reference to particular courts, cases or experience) appear. SCTS policy requires researchers to submit notes or transcripts to interview subjects to ensure accuracy. In addition to this step, an additional term was included in the interview information to ensure that direct quotations would not be used from interviews without the interviewee’s approval. This was intended both to ensure that the subjects were satisfied with the level of confidentiality, and to ensure that they felt comfortable being candid in the interviews.

All interviewees received a prescribed Participant Information Sheet¹¹⁸ and signed a consent form.¹¹⁹ In relation to the court observation element, however,

¹¹⁷ Appendix F.

¹¹⁸ Appendix H.

only proceedings open to the public were observed and consent from those in the court was not sought. Due to the number of litigants, solicitors and others in these courts, it was not practicable to obtain consent. This practice conformed to the UK Socio-Legal Studies Association's Statement of Principles for Ethical Research Practice.¹²⁰ This policy states that where there is no expectation of privacy in public proceedings, consent from subjects is not required to observe in the courts. Only proceedings that would be considered public knowledge and where there was no expectation of privacy were observed. However, names and any identifying details from cases observed have been treated as confidential.

¹¹⁹ Appendix G.

¹²⁰http://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf at 7.1.3.

Chapter 3: Literature Review

3.1 Introduction

Although the Scottish Civil Courts Review highlighted a perceived growth in the number of party litigants potentially causing added pressure on the courts and concerns about access to justice,¹²¹ to date there remains little literature relating to party litigants, and even less empirically grounded research, in Scotland. A literature review, focused primarily on the legal provisions in Scotland and ancillary matters such as lay representation, published by the Scottish Civil Justice Council in late 2014¹²², relies in many areas on research and publications from other jurisdictions.¹²³ Rules relating to party litigants and self-representation are also mentioned briefly in some works on Scottish civil procedure.¹²⁴ The Journal of the Law Society of Scotland also occasionally publishes pieces on party litigants or updates on cases involving party litigants. These articles are typically, as can be expected, from the legal practitioner's point of view.¹²⁵

This literature review will be focused more on self-representation itself and the experiences of SRLs, but will take a similar approach to the Scottish Civil Justice Council's literature review by considering relevant work from analogous English-

¹²¹ SCCR Ch 11.

¹²² Scottish Civil Justice Council, "Access to Justice Literature Review: Party Litigants, and the support available to them," December 2014 (hereafter "Access to Justice Literature Review")

<http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-publications/literature-review-on-party-litigants-and-the-support-available-to-them.pdf?sfvrsn=2>.

¹²³ Although a lack of data in many of these other jurisdictions has in turn been noted; on the United States see Landsman S, "Pro Se Litigation" (2012) 8(1) Annual Review of Law and Social Science 231 (hereafter "Landsman 2012"); on England and Wales see Williams K, "Litigants in Person: A Literature Review" Ministry of Justice 2011 (hereafter "Williams 2011").

¹²⁴ See Welsh T (ed) *MacPhail's Sheriff Court Practice* (3rd ed, W. Green 2006) (hereafter "*MacPhail*") and Hennessy C, *Civil Procedure and Practice* (4th ed, W. Green 2014).

¹²⁵ See for example Mackenzie R, "Party Time" (2009) JLSS 54(2) 18.

speaking jurisdictions as well. Literature from England and Wales is likely to be the most relevant to the position in Scotland, as, in addition to the geographical proximity and links, the legal system is also adversarial and allows for self-representation.¹²⁶ While there have now been two significant studies relating to self-represented litigants in England and Wales,¹²⁷ much of both the empirical data and other literature on the topic originates in America, Canada and Australia.¹²⁸ The bulk of the theoretical literature in particular originates in the United States, with a significant portion of this focused on the role of the judge in cases when one or more parties is unrepresented.¹²⁹

The issues arising around self-representation are far-reaching, encompassing wider societal and policy issues such as the needs of vulnerable populations and legal aid provision. Although these are all relevant issues, this chapter will primarily focus on the self represented litigant within the civil court process, in alignment with the aims of the thesis as a whole. Also as with the rest of this thesis, the focus will remain on what are sometimes referred to as “active” or participant SRLs¹³⁰ who engage to at least some extent with the court process. This thus excludes unrepresented litigants who are served an action but never enter the process, although these individuals may, for example, take steps to settle the case without coming to court. Other potential litigants experiencing legal problems may not take any action at all.¹³¹ This chapter will instead address the issues most relevant to the topic of this thesis. The first section will provide context to the purpose of the civil courts as a whole, as well as some of the issues related to the delivery of civil justice as a public service. It will then go on to consider how social policy has developed around self-representation in the civil courts, and then how this has been translated into law in Scotland in

¹²⁶ Although historically the position in relation to legal aid and the funding of litigation has also been similar throughout the United Kingdom, this has changed in recent years and will be discussed further below.

¹²⁷ Moorhead and Sefton and Trinder, L *et al* (2014) “Litigants in Person in Private Family Law Cases” Ministry of Justice (hereafter “Trinder *et al*”) <https://www.gov.uk/government/publications/litigants-in-person-in-private-family-law-cases>.

¹²⁸ Williams 2011 at page 3.

¹²⁹ As discussed in section 3.5.3.2.

¹³⁰ See, for example, Moorhead and Sefton at page 117.

¹³¹ Genn H *et al*, *Paths to Justice Scotland: What People Think and Do About Going to the Law* (Hart Publishing 2001) (Hereafter “Genn *Paths to Justice Scotland*”).

particular. The next section will examine the literature concerned with the SRL's journey through the civil court process: how SRLs navigate the system, how others (such as legal professionals) view them, and how self-representation impacts the SRL as an individual. The normative questions around the right of self-representation and its alternative, the role of lawyers in the courts, are then considered. Finally, the last section of the chapter looks at current and proposed measures to address the presence of SRLs in the courts.

3.2 Civil Justice and Self-Representation

3.2.1 The Function of the Civil Courts and the Nature of Civil Justice Problems

Consideration of the position of self-represented litigants in the civil courts requires consideration of the civil justice system itself, its purpose, and how problems and circumstances in the lives of individuals become civil justice issues. Because this thesis is intended to examine party litigants in the Scottish civil courts, it is necessary to first consider the nature of civil justice itself. As discussed below, the civil justice system exists to serve both individuals and a wider purpose in society at large. There are a handful of competing views on the nature of civil justice, which in turn inform ideas about access to the courts and access to justice.

An early and essential conception of the civil courts was to provide a forum for individuals to assert their rights instead of taking matters into their own hands. The existence of civil courts as an alternate route for solving problems thus justified restrictions on forms of “self help”.¹³² Today, of course, the landscape of civil justice and the motivations of individuals coming to court are considerably more complex. A significant strand of the literature on civil justice addresses the latter point of how and when individuals turn to the civil courts to resolve problems they experience in their lives. Genn conceptualises the types

¹³² In Scotland, this view is echoed by Erksine; see the Stair Memorial Encyclopedia *Civil Procedure (Reissue)*: Right of action (1,1,3). Cairns summarises theories about the transition between private and amateur “feuding” in sixteenth century Scotland and the public and professional world of courts and lawyers that dominate today; Cairns J “Academic Feud, Bloodfeud, and William Welwood: Legal Education in St Andrews, 1560-1611: Part 2” (1998) Edin LR 2(3) 255 at pages 281—285.

of issues that may (or may not) lead individuals to pursue a matter in civil court as “justiciable problems.” Justiciable problems are “a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.”¹³³ Felstiner *et al* offer the similar framework “injurious experiences.” An individual may be unaware that he has suffered an unperceived injurious experience, such as exposure to radiation that may cause cancer.¹³⁴ If he becomes aware, Felstiner *et al* describe this process as naming and it becomes a “perceived injurious experience” (PIE) which can transform into a grievance, then into a claim and (if this claim is rejected) a dispute.¹³⁵ It is important to note that the civil courts are just one possible forum for justiciable problems or PIEs—many will be dealt with using other means, such as self-help, or the individual will choose not to pursue the issue at all.

When the individual does chose to bring the dispute to the courts, one purpose of the civil justice system is of course to adjudicate and deliver an opinion that decides the dispute. Much of the narrative relating to the civil courts in recent years has focused on the civil courts as a means of dispute resolution.¹³⁶ However, Zuckerman argues that emphasising dispute resolution, and thus the assertion of private rights, obscures the wider role the courts play in supporting the rule of law: “Court adjudication is the process which provides citizens with remedies for wrongs that they have suffered. Without remedies there are no rights and without enforceable rights there is no rule of law.”¹³⁷ While the public conception of the civil courts is perhaps most often associated with private law disputes, it is important not to overlook the underlying constitutional role played by the civil courts. Leitch suggests that courts “perform a distinctly political process within a democracy—namely rule-making and rule-administering,

¹³³ Genn, *Paths to Justice Scotland* at page 12.

¹³⁴ Felstiner W *et al*, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming “ (1980) *Law and Society Review* 15(3) 631.

¹³⁵ *Ibid*.

¹³⁶ Zuckerman A, *Zuckerman on Civil Procedure: Principles of Practice* (3rd ed, Sweet and Maxwell 2013) at 1.5.

¹³⁷ *Ibid*; see also Genn H, *Judging Civil Justice* (Cambridge University Press 2009).

whether it be in a private, public or constitutional law context.”¹³⁸ Meaningful access to the courts (which is often difficult for SRLs) is therefore a necessary component of democratic participation.¹³⁹ Leitch also suggests that litigant satisfaction with the process—which is said to occur most often when the litigant feels they have been heard and listened to—legitimizes the system and may encourage other forms of democratic participation.¹⁴⁰

Another strand of thought relating to conceptions of modern civil justice (and one quite relevant to the question of self-representation) relates to the question of how best to deliver, or even ration, civil justice to the public.¹⁴¹ The courts are clearly unable to spend an infinite amount of time and money to resolve or find the “truth” in each case. Instead the notion of proportionality has increasingly shaped how the courts approach the delivery of civil justice—the time and money spent on a case should reflect the value of the action and its importance to the parties involved.¹⁴² Furthermore, there is the question of whether the cost of litigation in the civil courts should be borne by the public, or by the parties bringing their cases to court in the form of court and lawyer’s fees.¹⁴³ Essentially many of these questions boil down to a choice of offering imperfect justice to many, or very high quality justice only to the few who can afford it.¹⁴⁴

Until relatively recently, it has been suggested, quality of justice has been paramount, but this is being displaced by an increased emphasis on efficiency in

¹³⁸ Leitch J, “Having a say: ‘access to justice’ as democratic participation” (2015) UCL JL and J 4(1) 76.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ See Adler M, “The Idea of Proportionality in Dispute Resolution” (2008) Journal of Social Welfare and Family Law 30:4 309 and Zuckerman A “Reform in the Shadow of Lawyers’ Interests” in Zuckerman A *et al* eds *Reform of Civil Procedure: Essays on “Access to Justice”* (Oxford, 1995).

¹⁴² Adler M, *supra* at note 141.

¹⁴³ The question of court fees that meet the full cost of litigation has been raised recently in both England and Wales and Scotland, with the former seeing considerable rises in the fees required to pursue an action.

¹⁴⁴ Zuckerman A, *supra* at note 146.

the courts.¹⁴⁵ Hanycz argues that recent years have seen an “obsession” with efficiency. In fact, efficiency has become conflated with access to justice, as seen in the Woolf Report’s “assumption, maintained to this day, that enhancing efficiency results in enhanced access to justice.”¹⁴⁶ Hanycz acknowledges that proposals for quicker, less expensive processes would seem to improve access to the courts, but suggests that the issue of whether streamlined procedures can still result in just and accurate outcomes has not been properly addressed.¹⁴⁷ Thomas argues that processes should be designed around litigants rather than the court’s objectives. Because litigants are typically involuntary users of the civil justice system (which have a monopoly on the function they provide), there is an onus on the courts to identify and deliver the services litigants expect.¹⁴⁸ Courts should be run in a way that both provides the best access possible and caters to litigants’ needs.¹⁴⁹ This is in stark contrast to the opposing view, which often appears to prevail today,¹⁵⁰ that the civil courts are a public service like any other and subject to budget constraints. The court has a duty to be efficient and litigants are not entitled to “demand the best possible law enforcement process regardless of cost, any more than they are entitled to demand unlimited health support or boundless educational facilities.”¹⁵¹

In Scotland, the Report of the SCCR embraces efficiency and proportionality as a means to enhance access to justice: “The theme of this report is that the legal system is a public service and that in the allocation of the resources available to it the public interest is of vital importance. Since resources are limited, the excellence that the system cannot at present achieve must be pursued in the

¹⁴⁵ See, for example, Menkel-Meadow, C, “Pursuing Settlement in an Adversary Culture: Tale of Innovation Co-Opted or The Law of ADR” (1991) *Florida State University Law Review* 19(1) 1.

¹⁴⁶ Hanycz C, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform” (2008) *CJQ* 27(1) 98.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* at page 51.

¹⁴⁹ Thomas R, “Civil Justice Review—Treating Litigants as Consumers” (1990) *CJQ* (9) Jan 51; see also Crompton G, “Making Civil Justice Work for Consumers: The Consumer Perspective on Making the Civil Justice System in Scotland Fit for the 21st century” (2010) *Consumer Focus Scotland*.

¹⁵⁰ At least among those responsible for civil justice reform; see the discussion of the Woolf Review and the SCCR below.

¹⁵¹ Editorial, (2007) “Civil Litigation: a Public Service for the Enforcement of Civil Rights” (2007) *CJQ* 26(Jan) 1.

most cost-effective way.”¹⁵² Lord Gill also rejects the idea that court processes should be litigant or “consumer” led: “We consider that in this public service it is not for the user to decide what use he shall make of it, nor in what manner he shall do so. It is for the legislature to decide which level of adjudication and which modes of procedure are proportionate and appropriate for the type of dispute in question...and when a dispute goes to litigation, control of the progress of the action should be in the hands of the court and not of the parties. In this way, public resources can be deployed to best effect.”¹⁵³ The varying views of the role of civil courts often come sharply into focus when considered alongside the issue of self-representation. SRLs are often thought to require more resources and time than their represented counterparts¹⁵⁴ and are thus problematic within a model that prioritises efficiency. Those advocating for litigant-focused courts, on the other hand, are more likely to consider that the courts should be more responsive to SRLs’ additional needs.¹⁵⁵

3.2.2 The Development of Social Policy on Self-Representation in Civil Matters

While the question of how best to deliver the civil justice system to the public at large raises a number of issues, refining these ideas into the development of social policy for those who choose to or must self-represent in the courts raises still more. For the most part, courts have been the domain of lawyers and other legal professionals; processes and procedures are designed with legal professionals in mind. In the United Kingdom, the solution for those who cannot afford the services of a lawyer has traditionally not been for the individual to represent himself, but rather for a lawyer to be provided at no or little cost via the legal aid system. A relatively robust provision of legal aid in place--with lawyers thus available even to those without the means to pay--is thought by some to perpetuate the idea that courts are primarily for lawyers and the

¹⁵² SCCR, page i.

¹⁵³ *Ibid* at pages *i-ii*. Much of the SCCR is focused on ensuring that litigation takes place in the most appropriate “level” of forum. Raising the privative jurisdiction of the Court of Session—and thus removing the choice of litigants to raise lower value cases there rather than in the Sheriff Courts—was one of key reforms proposed and implemented.

¹⁵⁴ Section 3.3.5.

¹⁵⁵ See section 3.5.3.1 below.

attendant complexity in the court processes that this entails.¹⁵⁶ It has been suggested that the legal aid system serves the needs of lawyers and their professional interests rather than the needs of the public it is intended to serve. In this view, the legal aid model narrows the focus from access to justice in the broader sense to access to legal services.¹⁵⁷ This can be problematic because many legal (or potentially legal) problems could be better-solved outwith the confines of formal court processes.¹⁵⁸

The provision of legal aid is, of course, subject to changing budgetary and policy factors. The effect of reductions in legal aid funding, and the resulting impact on policy relating to self-representation, has been highlighted following the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) in England and Wales. Where previously Scotland and England and Wales were broadly in line with each other in terms of the availability of legal aid, LASPO eliminated legal aid in a number of areas, including family actions. This has resulted in an increasing divergence in the jurisdictions’ policies relating to self-representation, as those in England and Wales who cannot afford lawyers must go to court on their own—and the courts there must in turn adjust to a large increase in the number of SRLs.¹⁵⁹ In Scotland, legal aid is still more widely available and more lower income people with legal problems are able to be represented. While the relatively small number of party litigants in Scotland creates a less pressing need for a coherent approach to self-representation, there have been increasing calls south of the border for the courts to address the new reality that many courts there now have more SRLs than represented litigants.¹⁶⁰

Alongside the development of the legal aid system, there have also been attempts to make some forms of adjudication more “user-friendly” and therefore more accessible to SRLs. One example is the tribunal system, where

¹⁵⁶ See, for example, Flood J and Whyte A, “What’s Wrong with Legal Aid? Lessons From Outside the UK” (2006) CJC 25 (Jan) 80.

¹⁵⁷ Cousins M, “The politics of legal aid—a solution in search of a problem?” (1994) CJC 13 (April) 111.

¹⁵⁸ *Ibid.*

¹⁵⁹ Genn H, “Do it Yourself Law: Access to Justice and the Challenge of Self-Representation” (2013) CJC 32(4) 411 (hereafter “Genn 2013”); Trinder *et al.*

¹⁶⁰ See, for example, Trinder *et al.*

subject-specific disputes are heard, usually by specialist panels often including laypeople as well as legally trained judges. Many tribunals adjudicate disputes and appeals between individuals and state bodies, on matters such as immigration, social security benefits, and mental health, although the employment tribunals deal primarily with disputes between individual parties. While the tribunals bear some similarities to the courts, they are marked by a number of distinctive features, some of which are intended to facilitate self-representation. Tribunals generally have relatively straightforward processes for initiating claims and procedural steps are minimised and simplified, with relaxed rules of evidence and more proactive decision-makers and judges.¹⁶¹ Costs are usually not awarded, discouraging legal representation.¹⁶² While the tribunal system is distinct from the civil courts, it has been suggested that, despite the intention to keep proceedings simple and user-friendly, some tribunals are becoming more complex and more like the civil courts over time.¹⁶³

Small claims and other low-value claims regimes have also been introduced to facilitate self-representation within the traditional court structure itself. As the name suggests, small claims are generally disputes of low monetary value.¹⁶⁴ Small claims procedures are designed with SRLs in mind, allowing individuals to pursue matters when the cost of representation would be disproportionate in relation to the value of the action—in other words, actions where the sum sought would be exceeded by the cost of a lawyer, whether funded by the litigant himself or legal aid. The characteristics of small claims procedures bear a number of similarities to the tribunal processes described above. Because the process is intended for lay people, the procedures are intended to be relaxed and informal, including a flexible approach to the giving of evidence. Again the judge is given a more proactive role and has greater latitude in determining how to approach the hearing and resolve the dispute.¹⁶⁵ Representation by a lawyer

¹⁶¹ See for example Genn H *et al* “Tribunals for diverse users” DCA Research Series 1/06 January 2006 at page 3.

¹⁶² *Ibid.*

¹⁶³ See for example Corby S and Latrelle P, “Employment Tribunals and the Courts: Isomorphism Explained” (2012) ILJ 41(4) 387.

¹⁶⁴ Currently under £5,000 in Scotland.

¹⁶⁵ Baldwin J, “Is there a Limit to the Expansion of Small Claims?” (2003) Current Legal Problems Vol 56 Issue 1, 313 at pages 317—318.

is allowed in the small claims courts in the United Kingdom¹⁶⁶ but, as in tribunals, parties are not typically able to recover their legal costs and use of a lawyer is thus discouraged. In Scotland, the small claims procedure was first introduced in 1986 to create a simple and inexpensive process for low-value claims.¹⁶⁷ More recently, however, concerns from the Scottish Civil Courts Review that the existing small claims procedures were still too complicated and insufficiently “user friendly”¹⁶⁸ led to the introduction of the simple procedure.¹⁶⁹ The simple procedure shares many of its basic elements with the small claims procedure it replaces, but features a set of rules drafted in plain language with straightforward wording, set out in a “question and answer” format.¹⁷⁰

3.3 SRLs: Who, Why, and What Happens?

3.3.1 Introduction

As noted above, there is a distinct lack of data in Scotland relating to party litigants, both in terms of demographics and the roles they play in the civil courts—for example, whether they are most commonly pursuers or defenders, or what types of case they are most likely to be involved in. This is particularly problematic because any attempt to understand SRLs and how the law operates in relation to SRLs—much of the purpose of this thesis—should be informed by knowledge of who SRLs are and how they experience the civil court process. At present, these questions in relation to party litigants in Scotland remain unanswered. To provide background to this project, it is thus necessary to look to the literature and data from other jurisdictions. However, some of the information about SRLs in other jurisdictions cannot be applied too readily to

¹⁶⁶ In some jurisdictions, representation in this type of court is forbidden; see Baldwin, *ibid*, at page 317.

¹⁶⁷ See Ervine W, “Small Claims: Recent developments in Scotland” (1986) *Journal of Consumer Policy* 191 on the process of developing and introducing the new procedure.

¹⁶⁸ The Report of the SCCR Vol 1 at pages 131—132.

¹⁶⁹ In the Act of Sederunt (Simple Procedure) 2016 (SSI 2016/200).

¹⁷⁰ While still relatively new, it has been suggested that the unusual format of the rules may lead to difficulties interpreting the provisions; see Editorial, “Simple Rules for Simple People” (2016) *Civ PB* 2016 131,1.

party litigants in Scotland. Demographics of SRLs elsewhere are especially likely to vary from those in Scotland. The reasons SRLs have for self-representing are likely to be particularly variable and sensitive to the social policy and economic policy of the jurisdiction in question. For example, while legal aid in family actions is still relatively well provided for in Scotland, in other jurisdictions there is little or no provision. In the latter jurisdictions, self-representation in family courts is common and family actions are thus a major focus of a number of the existing empirical studies. These SRLs are likely to have a unique set of motivations and goals to be achieved in court, as well as an especially fraught emotional experience due to the subject matter. In Scotland the pool of party litigants is likely to contain fewer litigants involved in family actions, and litigants involved in different forms of action, such as debt, will have their own differing motivations and experiences.

This project also looks quite closely at the particular rules, practices and procedures of the Scottish courts—the procedures in other jurisdictions may vary considerably, making the experiences of SRLs there very different from those of their Scottish counterparts. This is true both in terms of how readily the SRL is able to navigate the court processes (for example, in jurisdictions or forms of action with simplified procedures) and in turn how they feel about the process and any perceived barriers they encountered. However, there is much from the data that can be generalised, in broad strokes, to party litigants in Scotland. Data from the US and Canada¹⁷¹ has looked quite closely at the emotional impact of self-representation on SRLs and the often negative feelings that appearing in court on their own can invoke; there is little reason to think that that litigants in Scotland in the same types of situations do not experience similar feelings. There is also little reason to think that party litigants in Scotland are not susceptible to some of the pitfalls that their counterparts abroad come across, again in general terms. For example, the cognitive difficulties that SRLs encounter in giving evidence¹⁷² in other jurisdictions inform the issues that party litigants may encounter in Scotland.

¹⁷¹ Discussed in section 3.3.6.

¹⁷² See section 3.3.4.5.

There are also a number of similarities and difference to be noted in the methodology of the empirical research that is the subject of much of this section. All of the studies discussed have used a qualitative approach for at least a portion of the data. Interviews, typically with both SRLs and legal professionals (including judges) are a key element in all of the work.¹⁷³ Some studies have included more ethnographic methods such as participant observation.¹⁷⁴ Qualitative methods, of course, have limitations. There is an element of subjectivity to all qualitative research. Interviews are further complicated by the self-reported nature of the data, which is subject to the accuracy of the interviewee's ability to report their own viewpoint and experience accurately and honestly. This is perhaps even more true when dealing with SRLs—SRLs themselves may not have the legal knowledge to convey what is happening in their case correctly, while legal professionals may find it difficult to divorce perceptions and stereotypes about SRLs from their actual lived experiences. At times, however, the underlying views revealed in interview data may be telling regardless of the accuracy of the information. For example, when an SRL reports feeling that a judge was biased against him and the process was unfair, the fact that he feels this way is important—and suggests a need for further enquiry—regardless of whether or not it is true. Equally, qualitative methods have the potential to provide a depth of information that would be lacking in purely quantitative studies. Self-representation is a complicated and multifaceted experience that cannot be readily distilled into facts and figures. The existing qualitative data also provides a starting point that tells us what further questions should be asked.

In addition to qualitative methods, some work has also adopted a mixed methodology incorporating quantitative data as well. It is worth noting that many of the studies are slightly different in orientation as compared to this thesis in that they are not academic work *per se* but rather government-funded studies, many with relatively large teams of researchers. The larger studies are thus able to use more varied and sophisticated methodology than would be available for a PhD thesis. Perhaps the best example is the Moorhead and Sefton study, which incorporates qualitative interview and focus group data seen in

¹⁷³ Macfarlane 2013, Knowlton *et al*, Trinder *et al*, Moorhead and Sefton and the Australian studies discussed below all use qualitative interview methods.

¹⁷⁴ Moorhead and Sefton, Trinder *et al*.

most studies with quantitative methods. This study is arguably the most comprehensive work on SRLs to date. Moorhead and Sefton had access to case databases for courts in England, allowing for data mining, as well as case files. This allowed for an objective and relatively detailed analysis, for example, of errors made by SRLs in their cases as compared to lawyers.¹⁷⁵ It would not be possible to carry out such a credible analysis using qualitative methods alone. Research using quantitative and “scientific” methods,¹⁷⁶ however, is still more the exception rather than the rule in this area. While qualitative work has been invaluable in establishing the issues arising around self-representation, complementary quantitative work, currently in short supply, has the potential to prove equally valuable.

3.3.2 Who are SRLs in the Civil Courts?

Even with those caveats in mind, a handful of themes relating to common characteristics in SRLs emerge in the literature. The perception that the number of SRLs in the civil courts in the UK is on the rise is generally accepted.¹⁷⁷ In at least some types of case they can even be considered common.¹⁷⁸ A party’s status as a self-representing litigant may also fluctuate as the case progresses. A litigant, or their opponent, may be represented at the beginning or at any other point in the case, and then self-represent at another stage. These forms of “partial representation” appear to be relatively common.¹⁷⁹ This is particularly significant because partial representation may act as a “reality check” for litigants, as the SRL receives at least some assistance on the framing of their

¹⁷⁵ See section 3.3.4.3.

¹⁷⁶ See, however, the studies on litigant outcomes discussed in section 3.3.7 below.

¹⁷⁷ See, for example, Marfarlane 2013. While Moorhead and Sefton expressed some uncertainty on this point, their study pre-dates the LAPSO reforms and there is little doubt that numbers, at the very least in family actions, have risen since then; see Trinder *et al* at page 2.

¹⁷⁸ Moorhead and Sefton.

¹⁷⁹ See Macfarlane J *et al* “Tracking the Continuing Trends of the Self-Represented Litigant Phenomenon” (2016) <https://representingyourselfcanada.com/wp-content/uploads/2017/02/Intake-Report-2015-2016-FINAL1.pdf> at page 4 and Knowlton *et al* at page 8; Moorhead and Sefton at page 44 and Hunter R *et al*, “The changing face of litigation: Unrepresented Litigants in the Family Court of Australia” (2002) Sydney: Law and Justice Foundation of NSW (hereafter “Hunter 2002”), Chapter 6.

case and what to expect.¹⁸⁰ While SRLs can be of any age or background, most data indicates that SRLs as a group tend to be younger, less educated and on a lower income than represented litigants.¹⁸¹ There is some indication that SRLs in family actions are more likely to be male.¹⁸² In Trinder *et al*'s study of the family courts, men were more likely to initiate the court action as an SRL, while female SRLs were "less likely to be in court by choice."¹⁸³ Overall, there is conflicting data on whether SRLs are more likely to be the initiators, or pursuers in their cases, or whether they are more likely to have been brought to court as defenders or respondents. While some studies have found that SRLs are most often respondents,¹⁸⁴ others have found that SRLs are more likely to be the petitioner in their case.¹⁸⁵ These differences may well be accounted for by differing legal issues and forms of procedure, as SRLs will inevitably be less likely to initiate more complex legal processes without the aid of a lawyer, while simpler processes such as small claims are intended to be accessible to self-representing litigants who wish to pursue a claim.

It is worth noting that there is a lack of consistency in the data on the question of how frequently court actions involve unrepresented litigants on both (or all) sides of the case. This is an important question because, as will be discussed, judges often report relying on the solicitors of represented opponents in cases involving SRLs.¹⁸⁶ Cases in which none of the litigants is represented may thus present particular challenges to the judge and to the court. Macfarlane's most recent data found low rates of fully unrepresented cases, with 90% of SRLs facing opponents who were represented at least some point in the proceedings.¹⁸⁷ Knowlton *et al* found significantly higher rates of SRLs involved in cases with opponents who were themselves self-representing; in this study, 47.6% of opponents were unrepresented for the entirety of the case, while only 29.8% were represented throughout.¹⁸⁸ Perhaps most tellingly, Moorhead and Sefton noted in 2005 that in most cases SRLs had represented opponents and

¹⁸⁰ Trinder *et al* at page 36.

¹⁸¹ Williams 2011 at page 4.

¹⁸² Hunter *et al* 2002 at page 50; Moorhead and Sefton at page 67.

¹⁸³ Trinder *et al* at page 12.

¹⁸⁴ Moorhead and Sefton at page 67; Trinder *et al* at page 12.

¹⁸⁵ Macfarlane 2016 at page 4, Knowlton *et al* at page 8.

¹⁸⁶ See for example Moorhead and Sefton at page 181.

¹⁸⁷ Macfarlane 2016 at page 4.

¹⁸⁸ Knowlton *et al* at page 8.

that cases in which both parties self-represented were “rare”.¹⁸⁹ However, in 2014 (post-LASPO) Trinder *et al* found that many of the cases studied involved fully unrepresented litigants, with only 25% of the cases observed having full representation for both parties and 23% having no representation at all.¹⁹⁰ Cases involving only self-representing litigants and cases where both litigants are only partially represented appear to be relatively common, and perhaps increasingly common, in at least some courts.

3.3.3 Why do SRLS self-represent?

It is often noted that, for many SRLs, self-representation is not a “choice” but a necessity. Many SRLs end up self-representing because they simply cannot afford to pay a lawyer and are not eligible for legal aid.¹⁹¹ The latter problem, lack of access to legal aid has, unsurprisingly, itself been linked to increased rates of self-representation.¹⁹² In other cases, when the services of a lawyer are not entirely out of reach financially for the litigant, cost or financial reasons are still often considered to the foremost deciding factor in whether to hire a lawyer or self-represent.¹⁹³ It has been suggested that few litigants would chose to self-represent if the cost of a lawyer was not a factor.¹⁹⁴ However, even those driven primarily by a desire to avoid the expense of representation have differing motivations in choosing to self-represent. The literature notes a range of reasons for those who could afford to pay a lawyer but choose not to do so, although these (often subtle) distinctions are not quantified. Some litigants may be disinclined to pay for a lawyer in principle, for example because they feel that the legal issue is not their fault and they therefore should not have to incur the expense.¹⁹⁵ The litigant may simply feel that the services of a lawyer are

¹⁸⁹ Under 10%; Moorhead and Sefton at page 1.

¹⁹⁰ Trinder *et al* at page 4.

¹⁹¹ Macfarlane at page 41, Moorhead and Sefton at page 20 and 21; Trinder *et al* at page 15.

¹⁹² Hunter *et al* 2002.

¹⁹³ Macfarlane 2013 at page 39; Knowlton *et al* at page 13; Dewar J *et al*, “Litigants in Person in the Family Court of Australia” (2000) Family Court of Australia Research Report No. 20 “Dewar 2000”). at page 33.

¹⁹⁴ Moorhead and Sefton at page 16.

¹⁹⁵ Ipsos Mori “The Views and Experiences of Civil Sheriff Court Users” Findings Report, July 2009 (hereafter “Ipsos Mori 2009”)

overpriced or otherwise too expensive.¹⁹⁶ Equally the SRL may have other financial priorities and consider that the money is better spent elsewhere, for example wishing to spend the money they save on their children rather than on a costly family court battle.¹⁹⁷ Moorhead and Sefton also describe litigants performing a “cost/benefit” analysis of the situation, ultimately resulting in a decision to self-represent.¹⁹⁸

On a similar note, some litigants perceive that the case is straightforward and does not justify the involvement and attendant expense of a lawyer.¹⁹⁹ In fact, some litigants report that they were advised that their case was straightforward and that they did not require a lawyer.²⁰⁰ For others, the motivation may be a belief that not only is a lawyer not necessary for their case, but in fact that they can do a better job with their case than a lawyer. Some litigants report that they believed that they should self-represent because a lawyer would not be as familiar with the case as they were themselves.²⁰¹ Others seem to have a strong desire to “have their say” in court and believe that a lawyer might hinder their ability to do so; they thus choose self-representation so they can “assert their position without constraint”.²⁰² However, it is worth noting that for at least some SRLs, the belief that a lawyer is not necessary is not always well-founded. Trinder *et al* found that many SRLs had an “exaggerated sense of their own competence” and were in fact unable to comply properly with court requirements.²⁰³ As will be discussed later,²⁰⁴ SRLs also often find their confidence in their ability to handle a court action on their own diminishes as they navigate the process, with those who are able to do so sometimes opting to hire a lawyer at this later stage.²⁰⁵

http://www.slab.org.uk/export/sites/default/common/documents/about_us/research/stakeholders/FinalIpsosMORIreportFINALconsumerfocus.pdf at page 17.

¹⁹⁶ Hannaford-Agor and Mott at page 173.

¹⁹⁷ Knowlton *et al* at page 15.

¹⁹⁸ Moorhead and Sefton at page 21.

¹⁹⁹ Hannaford-Agor and Mott at page 173; Williams 2011 at page 4.

²⁰⁰ Ipsos Mori 2009 at page 17; unfortunately this report does not state *who* had provided this advice to the litigant.

²⁰¹ Moorhead and Sefton at page 252.

²⁰² Trinder *et al* at page 16; see also Macfarlane 2013 at page 49.

²⁰³ Trinder *et al* at page 24.

²⁰⁴ Section 3.3.6.1.

²⁰⁵ Hunter *et al* 2002.

Rates of self-representation have been linked not only to individual circumstances, but also to wider social trends. Landsman (2009) suggests that self-representation is increasingly common because the population of the United States is relatively literate and well educated.²⁰⁶ A prevailing “do-it yourself” or “DIY” mentality²⁰⁷ is also often cited as driving interest in self-representation, as individuals wish to retain control and self-sufficiency over their own problems or legal issues. This is closely related to the idea of “disintermediation,” the desire to cut “middlemen” out of one’s affairs²⁰⁸ and the idea that it is the litigant, rather than a lawyer, who is best placed to handle his case. The increased ability of individuals to access information, particularly online, is also said to contribute to the idea that “the noble amateur can do just about anything as well as the expert.”²⁰⁹ There is some suggestion that increasing rates of self-representing, and the resulting need to accommodate SRLs in the courts, may itself contribute to rising rates of self-representation in the courts. Mather has noted²¹⁰ that institutional change in the form of simplified procedures in some courts make self-representation a more attractive option. In other words, courts that are more accessible to lay people may not only serve existing SRLs, but also motivate other litigants to choose self-representation.

Dissatisfaction with a lawyer or a distrust of the legal profession more generally may also contribute to the decision to self-represent. Macfarlane notes that litigants may choose to become unrepresented later in the process due to dissatisfaction with their lawyer. SRLs cited a number of reasons for shifting from legal representation to self-representation, including a feeling that their lawyer was “doing nothing”, that they did not listen or explain matters properly, or that they were incompetent and made mistakes.²¹¹ As Macfarlane notes, it is important to understand that this view reflects only the SRL’s perceptions of their lawyer’s performance, and not the extent to which those concerns were

²⁰⁶ Landsman S, “The Growing Challenge of Pro Se Litigation” (2009) *Lewis & Clark Law Review*, vol 13 no. 2, 439 at page 445 (hereafter “Landsman 2009”).

²⁰⁷ Landsman 2009 at page 445 and Knowlton *et al* at page 20; in the United States this is often referred to as the “Home Depot” mentality.

²⁰⁸ Greacen J, “No Legal Advice from Court Personnel: What Does That Mean?” (1995) 34 *Judges' Journal* 10 (Winter) 2 (hereafter “Greacen 1995”).

²⁰⁹ Landsman 2009 at page 445.

²¹⁰ Mather L, “Changing Patterns of Legal Representation in Divorce: from Lawyers to *Pro Se*” (2003) *Journal of Law and Society*, Volume 30, Number 1 at page 145.

²¹¹ Macfarlane 2013 pages 44-47.

justified. Distrust of lawyers as a profession is sometimes cited as a reason to choose self-representation.²¹² For example, litigants may be put off hiring a lawyer by stereotypes of lawyers as dishonest.²¹³ On a related note, litigants may also perceive that the presence of a lawyer may make the process more hostile or adversarial. In family matters particularly, litigants report choosing not to engage a representative fearing that the presence of a lawyer would make it less likely that parties would be able to work things out themselves or remain “amicable”.²¹⁴

3.3.4 Navigating the Civil Court Process as an SRL

3.3.4.1 Introduction

There is little dispute that most court processes and procedures are primarily used by, and are designed for, legal professionals. The demands of an adversarial system on litigants to frame and present their case are particularly high and rules are often complex.²¹⁵ It is therefore unsurprising that SRLs encounter a number of difficulties when attempting to act on their own behalf, without the extensive legal training and qualification lawyers must receive. It seems fair to say that SRLs may encounter problems with virtually any element of the of the civil court process. There has been a great deal written about the areas of difficulty that SRLs encounter—a key theme in this thesis—but there is a lack of specification as to exactly where the problems are encountered within these areas and how these problems can be fixed. This is one of the areas that this project is intended to address, providing a closer look at the problems party litigants encounter with court rules and procedures and how the courts address these problems. While it does not relate directly to Scottish court practices, the existing literature provides a background to the most common areas of difficulty

²¹² Moorhead and Sefton at page 20.

²¹³ Landsman 2009 at pages 446-447.

²¹⁴ Knowlton *et al* at page 18.

²¹⁵ See for example Landsman 2012 at page 232-233 and Greacen J, “Resources to Assist Self-Represented Litigants: A Fifty-State Review of the “State of the Art” Greacen Associates Report, June 2011 (hereafter “Greacen 2011”) <https://www.srln.org/system/files/attachments/Greacen50StateReviewReportNationalEdition2011.pdf> at page 6.

for SRLs: framing the dispute, complying with court procedures, court forms and written pleadings, evidential matters and settlement.

3.3.4.2 Framing the Dispute

An adversarial process requires litigants to state and present their case in law to the court.²¹⁶ However, SRLs often struggle to identify the legal basis for and issues involved in their case.²¹⁷ This may be due to fundamental conceptual misunderstandings. It has been suggested that they may conflate the law with broader moral ideas of “justice”²¹⁸ and thus do not understand the need for a relevant case in law. Problems with relevance also extend to the SRL’s understanding of what facts and legal arguments are relevant to their case (and which are not).²¹⁹ This can lead SRLs to present far too much information and evidence to the court, or far too little. The SRL’s emotional attachment to the matter plays a role in their conception of “relevance” as well. What is important to the SRL personally may not be relevant to the case in law,²²⁰ but the SRL may nonetheless have the desire to “have their say” in court.²²¹ Because they are not legally trained, SRLs can also be more likely to have a claim or defence that is fundamentally misconceived in law,²²² or to seek a remedy that is misconceived or outwith the court’s ability to grant.²²³ Although relevance is one of the most fundamental difficulties facing SRLs, it is one of the most problematic to quantify or qualify; as noted below in the discussion of outcomes, it is very hard in practice to assess the relative merits of an SRL’s case and thus assess the impact of the SRL’s understanding (or lack thereof) of the law. As such the

²¹⁶ The adversarial nature of common law legal systems is discussed in more detail below.

²¹⁷ ETBB at 12.5; Trinder *et al* at page 36.

²¹⁸ Moorhead and Sefton at page 256.

²¹⁹ Courts and Tribunals Judiciary “The Judicial Working Group on Litigants in Person: Report,” July 2013 <https://www.judiciary.gov.uk/publications/judicial-working-group-lip-report/> at 3.12; Moorhead and Sefton at page 139.

²²⁰ See for example Knowlton *et al* at page 35.

²²¹ Trinder *et al* at pages 71—72.

²²² Moorhead and Sefton at page 154.

²²³ *Ibid* at page 155.

existing literature is not able to go much farther than identifying this issue and speculating on its causes.²²⁴

3.3.4.3 Complying with Court Procedures

SRLs, unlike lawyers, generally do not begin the court process with procedural knowledge. Court procedure and practice is often complex and difficult to comprehend. SRLs may thus encounter difficulty understanding and complying with court procedures, or may not be able to meet court deadlines or comply timeously.²²⁵ SRLs may also confuse procedures and not choose the appropriate procedure for the circumstances.²²⁶ These procedural difficulties can in turn have a substantive effect on the SRL's case and its eventual outcome. Hunter *et al* identifies as a distinct category the "procedurally challenged" litigant. These SRLs suffer disadvantage as a result of their lack of procedural knowledge in the conduct of their case.²²⁷ Moorhead and Sefton's research on procedural and administrative errors in SRLs' cases seems to support the view that SRLs are more likely to make mistakes in their cases and that these mistakes can potentially produce substantive consequences. SRLs were found to be not only more likely to make *more* errors than solicitors, but also more likely to make *serious* errors.²²⁸ These serious errors in turn caused additional expense or delay, or even appeared to affect the outcome of the case.²²⁹ The procedural problems that SRLs encounter are also said to be compounded by a lack of available procedural advice or assistance. Although assistance on procedure is ostensibly available from court staff, court staff are able to provide procedural advice only, and not legal advice. The "legal/procedural" distinction is uncertain in nature and fear of overstepping and providing legal advice (and potentially

²²⁴ By comparison, as discussed below, Moorhead and Sefton were able to measure the number of procedural errors SRLs made in their cases, but the substance of a case is far more difficult to measure.

²²⁵ The Judicial Working Group on Litigants in Person: Report, July 2013 at 3.12.

²²⁶ Bell E, "Judges, Fairness and Litigants in Person" (2010) Judicial Studies Institute Journal 1 at page 2.

²²⁷ Hunter 2002 at pages 105-106.

²²⁸ Moorhead and Sefton, Chapter 6.

²²⁹ Moorhead and Sefton at page 130.

facing repercussions) may leave court staff hesitant to provide anything but the most basic procedural advice.²³⁰

3.3.4.4 Court Forms and Written Pleadings

SRLs are typically also required to submit court documents, forms, and pleadings to the court as their case progresses. Some SRLs are able to produce clear and comprehensible pleadings, but generally the paperwork submitted by SRLs is thought to be lengthier and more difficult for the court to understand (at times because it is handwritten) than pleadings drafted by lawyers.²³¹ Again there appears to be a disconnect between the perceptions of SRLs and the view of legal professionals, as SRLs often indicate that the paperwork they were required to complete seemed straightforward,²³² but lawyers tend to view their efforts as poorly executed. The completion of court forms (as opposed to written pleadings which must be drafted entirely by the litigant²³³) requires less legal knowledge and skill and may be thought to be easier for SRLs. However, SRLs still encounter challenges completing court forms and documents. Even identifying the correct form²³⁴ can present difficulties, and once the form is found SRLs may struggle to provide the correct (and complete) information required.²³⁵ Perhaps as a result, SRLs often report feeling that court paperwork is overwhelming and excessively time-consuming to complete.²³⁶ This may be because court forms are not always sufficiently straightforward for SRLs and often still use technical and legal language.²³⁷ Tkacukova argues, using as an example court forms for family actions in England, that court forms are often not suitable for SRLs. Far from being accessible for a layperson, the forms Tkacukova evaluated were found to contain ambiguities and sentence

²³⁰ Greacen 1995, Macfarlane 2013 at page 69, Moorhead and Sefton, Chapter 10.

²³¹ Moorhead and Sefton at pages 138—141.

²³² *Ibid* at page 138.

²³³ The use of court forms is less common in Scotland than in most of the jurisdictions discussed in this chapter. Forms are used in only a handful of Scottish civil procedures (most notably the Simple Procedure and Simplified Divorce). In most other forms of action, including all other types of family action, litigants must draft pleadings.

²³⁴ Macfarlane 2013 at page 59.

²³⁵ Knowlton *et al* at page 33.

²³⁶ *Ibid* at page 32.

²³⁷ Macfarlane 2013 at page 61.

construction “on the level of very advanced language users.”²³⁸ Difficulties in completing court documents can lead not only to frustration for the SRL, but also delay and increased work for the court. Court staff report that SRLs make frequent and even repeated mistakes on documents, leading to staff having to return forms to the SRL for correction--a cycle described as “filing, review, rejection, and return.”²³⁹

3.3.4.5 Evidential Matters

The presentation of evidence and the examination and cross-examination of witnesses are particularly challenging for SRLs.²⁴⁰ In court proceedings, evidence is given in accordance with the rules (albeit more relaxed rules in civil than in criminal proceedings) and is restricted to what is relevant to the litigant’s case in law. There is much that the SRL has to know and understand to comply with the requirements that may be both procedural and substantive in nature. Due to the complexity of the procedures, the potential pitfalls are numerous: SRLs may be unaware of how to ask questions of witnesses or may instead make statements.²⁴¹ They also tend to fail to identify relevant evidence, fail to enter the correct documents into evidence (or simply forget to bring them to court) or fail to see the need to provide witnesses in support of their pleadings (or, again, to bring their witnesses to court).²⁴² Cross examining witnesses is often identified as both one of the most challenging aspects of the process for SRLs as well as one of the most important.²⁴³ Trinder *et al* describe cross-examination as task that SRLs “simply could not perform effectively, if at all.”²⁴⁴ Where expert witnesses are needed, this gives rise to a plethora of new challenges for SRLs, both in seeing the need for experts²⁴⁵ and identifying and arranging payment for

²³⁸ Tkacukova T, “Communication in the Family court: Financial Remedy Proceedings from the Perspective of Litigants in Person” (2016) *Journal of Social Welfare and Family Law* 38:4 430 at page 441.

²³⁹ Knowlton *et al* at page 33.

²⁴⁰ See for example Bell, *supra* at note 226 at pages 22-28.

²⁴¹ Knowlton *et al* page 35; the ETBB at 12.5; Moorhead and Sefton at page 158.

²⁴² *Ibid.*

²⁴³ See, for example, Knowlton *et al* at page 35.

²⁴⁴ Trinder *et al* at page 70.

²⁴⁵ Equal Treatment Bench Book, 3rd edition, May 2014, <http://www.scotland-judiciary.org.uk/Upload/Documents/EqualTreatmentBenchBookMay2014.pdf>. (the “ETBB”) at 12.5.

experts.²⁴⁶ The SRL may also not have the knowledge required to properly instruct an expert witness and ensure that they are aware of all relevant information.²⁴⁷

The evidential difficulties that SRLs experience cannot entirely be attributed to the procedural elements of evidence, but relate to larger conceptual and cognitive issues. O'Barr and Conley suggest that, even in the relatively informal format of the small claims courts, laypeople are typically unable to deliver "legally adequate" narratives. In other words, the SRL's evidence is not framed in the manner that judges are accustomed to hearing from lawyers in the court.²⁴⁸ The SRL is unaware of the "highly specific" narrative requirements of the court and thus delivers their story as a "common sense" or everyday narrative. As a result the SRL's narrative, and their evidence, are insufficient from the judge's point of view.²⁴⁹ More recent research echoed O'Barr and Conley's conclusion, finding that the SRLs were unable to properly adduce evidence in conformance with the court's requirements, resulting in detriment to the SRL's case. Again this occurred even in small claims court, where rules and the presentation of evidence are already somewhat relaxed.²⁵⁰ Tkacukova notes that the nature of court proceedings itself causes challenges for SRLs. The procedure combines written and spoken communication, a less natural form of communication that makes it more difficult for SRLs to develop narratives in relation to their cases.²⁵¹

3.3.4.6 Settlement

²⁴⁶ Moorhead and Sefton at page 158.

²⁴⁷ Solon M, "LIP Service" (2015) 165 NLJ 7665, 25.

²⁴⁸ O'Barr W and Conley J, "Litigant Satisfaction Versus Legal Adequacy in Small claims Court Narratives" (1985) Law & Society Review Vol 19 No 4, 661.

²⁴⁹ *Ibid* at page 698 and page 685.

²⁵⁰ Lewis P, "Litigants in Person and their Difficulties in Adducing Evidence: a Study of Small Claims in an English County Court" (2007) International Journal of Evidence and Proof 2007 11(1) 24.

²⁵¹ Tkacukova T, "Communication in the Family court: financial remedy proceedings from the perspective of litigants in person" (2016) Journal of Social Welfare and Family Law 38:4, 430 at page 442.

Moorhead and Sefton found that SRLs were less likely to attempt to settle their cases.²⁵² The reasons for this posited by their interview subjects were particularly interesting: SRLs tended to suggest that this was because they thought settlement was prohibited or because they were afraid of being exploited by their opponent's solicitor, while legal professionals and court staff tended to think that the SRLs had "something to hide" or wanted their day in court.²⁵³ Toy-Cronin found that SRLs in New Zealand were also potentially less likely to settle because they had difficulty viewing the case strategically, because the opponent's lawyer may be wary of entering into negotiations for fear that they could become "heated" or that the SRL would disclose discussions to the court.²⁵⁴ There are also pitfalls for SRLs that do wish to settle their case. Because SRLs are less familiar with the law and the legal position in their case, there is a danger that they will not be able to negotiate a settlement on equal terms with a represented opponent, or that they could even be intimidated into an unfavourable settlement.²⁵⁵

3.3.5 Conceptualising the SRL

3.3.5.1 Introduction

While the matters in the previous section of this chapter have been examined primarily through the lens of the SRL, this section will view SRLs from the perspective of legal professionals, judges and other "insiders" in the legal system. In his report on civil court reform in England and Wales, Lord Woolf famously observes:

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

²⁵² Moorhead and Sefton at page 257; see also Trinder *et al* at page 52.

²⁵³ Moorhead and Sefton at page 257.

²⁵⁴ Toy-Cronin B, "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (2015) (Thesis, Doctor of Philosophy) University of Otago at pages 165-169 (hereafter "Toy Cronin").

²⁵⁵ See, for example, Engler R, "Access to Justice and the Role of the Private Practitioner" (2014) 24 Kan JL & Pub Pol'y 554 at page 562 ("Engler 2014")

which are still too often inaccessible and incomprehensible to ordinary people.²⁵⁶

Lord Woolf's view addresses the two most common bodies of thought on the presence of SRLs in the civil court system: for some, they are viewed as interlopers in a domain reserved for legal professionals; to others, like Lord Woolf, the purpose of the civil justice system and the courts is to serve all individuals, not just lawyers. As the discussion below will demonstrate, much of the thinking on self-representation and SRLs in general can be related back to one of these two essential points of view. Indeed, the conception of party litigants reflected in the SCCR—as discussed above—reflects both of these competing ideas about SRLs.

3.3.5.2 SRLs: Angels or Demons?

In addition to views about the role of self-representation within the wider landscape of civil justice, there are a wide variety of perceptions of SRLs as a group. Again the competing ideas of SRLs suggested by Lord Woolf are apparent, summarised aptly here by Moorhead: "Litigants in person inspire a fascinating mix of sympathy and hostility."²⁵⁷ Broadly, negative views about SRLs stem from two related complaints: the first is that they are "pests" or "nuts."²⁵⁸ A number of negative motivations and traits are attributed to SRLs by those with this view, not least of all that they selfishly choose to "file rambling, illogical lawsuits to settle personal vendettas and advance [their] own social and political agenda."²⁵⁹ There is the suggestion that these SRLs may be cynically manipulating the system, opting deliberately to self-represent not out of necessity but as a means of gaining an advantage over their opponent by gaining

²⁵⁶ Lord Woolf (1995) "Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales" Chapter 17 at paragraph 2.

²⁵⁷ Moorhead R, "Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation" (2003) CJC 22(Mar) 133 at page 133.

²⁵⁸ See for example Rosenbloom J, "Exploring Methods to Improve Management and Fairness in Pro Se cases: a Study of the Pro Se Docket in the Southern District of New York." (2002) Fordham Urban Law Journal 305.

²⁵⁹ Swank D, "The *Pro Se* Phenomenon" (2005) BYU Journal of Public Law 19(2) 373 at page 385.

the sympathy of the court while flouting the court's practices and procedures.²⁶⁰ Even the public at large may have developed a negative view of SRLs. It has been suggested that the often-repeated adage "one who is his own lawyer has a fool for a client" may contribute to a public perception that those who represent themselves in court are underprivileged, uneducated and incapable.²⁶¹

A second complaint often repeated about SRLs is that even those who may be well intentioned slow the process due to their inexperience or "clog up" the running of the courts.²⁶² Zuckerman describes SRLs as creating an "efficiency deficit": "Since lay persons are not familiar with the substantive law and court procedure, they have difficulty to prepare adequately and to comply with rules and court orders, with the result that the court is forced to devote disproportionate time and effort to cases".²⁶³ It may be perceived that the cases of SRLs are more likely to be without merit, but equally even those that do have a foundation in law may be regarded as more onerous for the court because it takes more time for the court to evaluate a case set out in layman's terms rather than by lawyers.²⁶⁴ The impact of SRLs on the courts is often said to be detrimental to their opponents and society at large, placing even more pressure on courts that are already overpopulated and underfunded.²⁶⁵

Many, however, reject these undesirable images of the SRL, and argue that it is either unsupported or disproven by the available evidence.²⁶⁶ Swank sums a compassionate image of the SRL as "the poor person who cannot afford counsel and is therefore unable to participate in the hyper-technical procedural maze of the modern judicial system."²⁶⁷ Graecen argues that negative views of SRLs as

²⁶⁰ Van Wormer N, "Help at Your Fingertips: Twenty-First Century Response to the *Pro Se* Phenomenon" (2007) *Vanderbilt Law Review* 60(3), 983 at page 996.

²⁶¹ *Ibid.*

²⁶² Goldschmidt J, *Meeting the Challenge of Pro Se Litigation: a Report and Guidebook for Judges and Court Managers* (National Center for State Courts 1998) 121.

²⁶³ Zuckerman A, "No Justice Without Lawyers - the Myth of an Inquisitorial Solution" (2014) *CJ* 33(4) 355 at 355.

²⁶⁴ Schneider R, "Illiberal Construction of *Pro Se* Pleadings" (2010) *University of Pennsylvania Law Review* 159, 585 at page 598.

²⁶⁵ This view appears to be particularly common in the legal profession; see for example the colourfully titled Editorial, "The Scourge of the Party Litigant" (1997) *Civ. P.B.* 17(Sep), 1-2 and Mackenzie R, "Party Time" (2009) *JLSS* 54(2) 18.

²⁶⁶ See for example Schneider R, *supra* at note 264 at page 597.

²⁶⁷ Swank D, *supra* note 259 at page 385.

pests or nuts amount to “institutional prejudice” against SRLs and that these “attitudes are based on factual misconceptions...and represent a perversion of the legal system’s commitment to justice for all.”²⁶⁸ On a similar note, Toy Cronin suggests that, rather than acknowledging that there are limits to capacity of courts to hear all disputes, which could undermine the legitimacy of the system, barriers are instead put in place to discourage SRLs. Legal professionals then “personalize LiPs’ failures,” so that “...the illusion that the courts are accessible is maintained, while the failure is blamed on the individual, not on systemic factors that few LiPs, if any, can overcome. This focus on individuals’ failings then easily elides into thinking of LiPs as persistent and vexatious litigants.”²⁶⁹

Engler also notes an “institutional bias” against SRLs in the courts.²⁷⁰ He suggests an entirely different, and more sympathetic, lens through which the behavior of SRLs should be viewed: they are not, as is often assumed, pests who choose to self-represent, but are effectively compelled to. Moreover, their actions throughout the process “such as whether to settle or go to trial, what witnesses and evidence to produce or on what terms to settle are ‘voluntary’ if they are understood and not the product of coercion...we should use a standard akin to ‘informed consent’ accepting as voluntary only the choices made by litigants who are aware of their options and advantages and disadvantages of those options.”²⁷¹ Far from other views that assume that SRLs are ill-intentioned, Engler suggests that most of their actions can instead be considered involuntary. This of course begs the question, discussed below, of whether they should be permitted to self-represent, and thus take actions for which they are unable to give informed consent, in the first place.²⁷²

²⁶⁸ Greacen J, “Self-Represented Litigants, The Courts, and the Legal Profession: Myths and Realities” (2014) *Family Court Review*, 52: 662 at pages 663-664.

²⁶⁹ Toy Cronin at page 253.

²⁷⁰ Engler R, “And Justice for All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks” (1999) *Fordham Law Review* 67, 1987 at page 1997.

²⁷¹ Engler R, (2011) “The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented Ones” (2011) 62 *Juvenile and Family Court Journal* 10 at pages 23-24.

²⁷² Section 3.4.1.

3.3.5.3 Typologies of SRLs

In addition to more general views of SRLs, a handful of classifications of different types have also been proposed. It is notable that the “persistent” or “vexatious” litigant tends to figure prominently in many of these, although the actual number of truly problematic litigants is generally acknowledged to be low.²⁷³ Genn differentiates “vexatious or querulous” litigants from “one-off” SRLs. The repeated attempts of the former to conduct “repeated and relentless” meritless²⁷⁴ litigation may be related to mental health difficulties or other vulnerabilities,²⁷⁵ but regardless of their reasons, they “place a strain on judicial and court resources.”²⁷⁶ Genn’s description of “one-off” litigants, who are said to be “the category of main concern in this discussion,” is “someone involved in a legal problem or dispute which requires judicial determination in court or tribunal and for which they cannot access or afford legal advice and representation...The matter is important enough for them to take the step of appearing in legal proceedings without legal support.”²⁷⁷ There seems to be an emphasis on the idea that “one-off” SRLs, unlike with the more problematic vexatious litigants, do not choose to self-represent and do so only when it is the only option. Moorhead and Sefton also differentiate “difficult and obsessive” litigant from the body of SRLs as a whole.²⁷⁸ These litigants who tended to pursue meritless, misconceived or even “wild” claims,²⁷⁹ make repeated or harassing claims of the same type or involving the same individual,²⁸⁰ or conduct themselves in an abusive or obstructive manner.²⁸¹ It is noted that they are not common, but the characteristics of this sub-group of SRLs are “often taken to be the paradigm for unrepresented litigants generally.”²⁸²

²⁷³ See the discussion below and note 156.

²⁷⁴ Genn 2013 at page 427.

²⁷⁵ *Ibid* at page 428—429.

²⁷⁶ *Ibid* at page 429.

²⁷⁷ *Ibid*.

²⁷⁸ Moorhead and Sefton at Chapter 4.

²⁷⁹ *Ibid* at pages 83—84.

²⁸⁰ *Ibid* at page 84.

²⁸¹ *Ibid* at page 86.

²⁸² *Ibid* at page 90.

Some typologies of SRLs are more nuanced. As noted above, one category identified by Hunter *et al* was the “procedurally challenged” SRL. In addition to the procedurally challenged, Hunter’s study also divided SRLs into groups as “vanquished” litigants and “serial appellants”.²⁸³ Vanquished litigants are those who cannot afford legal representation and are “overwhelmed” or “defeated” by the system, typically resulting in abandonment or early disposal of their case.²⁸⁴ Serial appellants are far more persistent, as these litigants “...brought multiple appeal applications before the Court [and] created significant difficulties for the Court, as they had a tendency to appeal every decision...abused the assistance of Appeals Registrars, and often based their multiple grounds for appeal on a belief that their personal rights had been infringed.”²⁸⁵ This description echoes Moorhead and Sefton’s view of “difficult and obsessive” litigants and Hunter *et al* also associate serial appeals with vexatious litigants, although those in their study had not formally been declared as such.²⁸⁶ Trinder *et al* suggest a further category to be added to Hunter’s typology, “legally challenged” SRLs.²⁸⁷ “Legally challenged” SRLs are those with complex cases in law who find themselves out of their depth.

Trinder *et al* formulate their own typology as well. Rather than focusing entirely on the features of self-representing litigants, their typology is developed around the characteristics of the court hearings involving SRLs. There are four types of “working” and four types of “not working” hearings involving SRLs.²⁸⁸ “Working” hearings, for example, were found to include those that feature a fully inquisitorial judge.²⁸⁹ “Not working” hearings include chaotic “hot potato” hearings where the judge fails to control the proceedings and must adjourn.²⁹⁰ It is interesting to note that Trinder’s typology of hearing reveals within it, amongst other factors,²⁹¹ a further typology of the SRLs involved. In the “working” hearing category are “holding their own” litigants in person, who

²⁸³ Hunter *et al* 2002 at page 103.

²⁸⁴ *Ibid* at pages 103-104.

²⁸⁵ *Ibid* at page 104.

²⁸⁶ *Ibid*. Moorhead and Sefton avoid the use of the term “vexatious” in their study for this reason; a true “vexatious” litigant is subject to a court order to that effect.

²⁸⁷ Trinder *et al* at page 25.

²⁸⁸ *Ibid* at Chapter 4.4.

²⁸⁹ *Ibid* at page 62.

²⁹⁰ *Ibid* at page 64.

²⁹¹ Such as the approach of the judge and opponent solicitor.

have experience of previous hearings and co-operate with their opponent's lawyer.²⁹² Hearings that did not work were populated with "over confident" litigants in person who tended to be well prepared but possessed of only limited understanding of the law and procedure.²⁹³ "Out of their depth" litigants in person were those who made errors and were incapable of understanding the court's requirements.²⁹⁴

3.3.6 The Effect of Self-Representation on the SRL

3.3.6.1 The SRL's Feelings about the Process

The experience of self-representing in the civil courts affects SRLs in a number of different ways. Despite the difficulties discussed above, not all SRLs are ultimately left with a negative view of the process. Some do report being satisfied with their experience in court,²⁹⁵ or have a favourable view of the treatment they received from the judge²⁹⁶ or court staff.²⁹⁷ Others reported feeling a sense of accomplishment or empowerment for handling their case on their own.²⁹⁸ One study noted that one or two litigants interviewed even seemed to "enjoy" the experience.²⁹⁹ However, the experiences of many SRLs are far less positive. An overarching theme in the literature is that the experience of self-representing causes a great deal of stress and anxiety for the SRL. Often SRLs are intimidated by the prospect of self-representing from the outset and feel vulnerable or hopeless.³⁰⁰ Trinder *et al* report that SRLs commonly found self-representing in their case difficult, experiencing fear, bewilderment, confusion and the feeling that they were being marginalised.³⁰¹ Many SRLs are

²⁹² Trinder *et al* at page 63.

²⁹³ *Ibid* at page 64; these SRLs also appeared most interested in "beating" their opponent's lawyers rather than settling their case.

²⁹⁴ *Ibid* at page 65. Trinder also notes the presence of "unprotected" litigants who are not given the chance to explain their case in the hearings and relates these to Hunter's "vanquished" litigants.

²⁹⁵ See, for example, Macfarlane 2013 at page 105.

²⁹⁶ Ipsos Mori 2009 at page 15.

²⁹⁷ Ipsos Mori 2009 at page 20-21.

²⁹⁸ Knowlton *et al* at page 47.

²⁹⁹ Ipsos Mori 2009 at page 15.

³⁰⁰ Knowlton *et al* at page 47.

³⁰¹ Trinder *et al* at page 80-82. Trinder also notes that SRLs with self-belief and confidence tended to report fewer negative experiences.

unhappy with the length of the process, and feel that the court process itself is too time-consuming and slow.³⁰² Some SRLs feel the absence of support from a lawyer keenly, desiring the distance of an emotional “buffer” or the feeling that someone is “in their corner”.³⁰³

Another theme emerging in the literature is that the SRL’s feelings about the self-representation often change as the reality of the situation sinks in. SRLs who report feeling confident at the beginning of the court process very often see their confidence diminish as the action progresses.³⁰⁴ Moorhead and Sefton note that the SRL’s confidence is often “fragile” and can be diminished by something as simple as being asked to speak in court.³⁰⁵ This may be due in part to the SRL’s expectations of the process. Some SRLs appear to underestimate the complexity of the law and court procedures and overestimate how much help they will receive, for example thinking that court staff will take a more active role in advising them of future hearings and steps they need to take.³⁰⁶ Related to this, as touched upon in the previous section, is the suggestion that the SRL’s perception of how complicated the court process is and how able they will be to get through it unassisted does not always line up with the reality of the situation.³⁰⁷ Although SRLs may feel that the case, or the procedural requirements of the case, are “straightforward,” judges and lawyers often view the SRL as being out of their depth or as making an inadequate effort.³⁰⁸ This suggests that, in the absence of legal advice or guidance, at least some SRLs are not able to make an informed or realistic decision to self-represent.

It is also common for SRLs to report feeling like an “outsider” in the court process.³⁰⁹ This idea of the SRL as being on the “outside,” while lawyers and judges are “insiders,” can be exacerbated by a number of factors. One of these is the tendency of lawyers and judges to use legal and technical terms that SRLs

³⁰² *Ibid.*

³⁰³ Knowlton *et al* at page 48.

³⁰⁴ Macfarlane 2013 at page 52; Hunter *et al* 2002 (at page 105) note that a number of SRLs in their study began their cases intending to act for themselves, but later realized their need for a lawyer and obtained representation.

³⁰⁵ Moorhead and Sefton.

³⁰⁶ Ipsos Mori 2009 at page 21.

³⁰⁷ Trinder, Moorhead and Sefton at page 163.

³⁰⁸ Moorhead and Sefton at page 138.

³⁰⁹ See, for example, Macfarlane 2013 at page 97; Knowlton *et al* at page 43.

do not understand, shutting out the SRL and making it difficult for the SRL to follow what is happening.³¹⁰ (However, some SRLs do report judges making a concerted effort to use layman's terms.³¹¹) Often judges and lawyers are already familiar with each other and have established relationships or rapport, which can further contribute to the SRL feeling like an "outsider."³¹² Unlike SRLs, legal professionals are also experienced in the court's formalities and other practical matters. Lack of knowledge of court etiquette is a common cause of concern for SRLs, who may be left feeling confused or embarrassed for not knowing, for example, where to stand in court or how to address the judge.³¹³ Even the physical environment of the courthouse itself may be intimidating to the SRL or cause additional anxiety.³¹⁴ The feeling of being an "outsider" thus seems to relate in large part to the formality of the court process, which is foreign to most SRLs. Unsurprisingly, Baldwin notes that, at least in the small claims context, reducing the formality of the process had an impact on litigant satisfaction and litigants were happier with less formal court procedures.³¹⁵

The SRL's perception of the court process is also dependent on how fair it appears. SRLs are often positive generally about the fairness of the court and the judge.³¹⁶ When SRLs feel that the process is unfair, this often relates to a sense that the court is biased in favour of lawyers—again hinting at the theme of the SRL as an outsider. For example, SRLs may perceive attempts by the judge to curtail their submissions (often by not allowing the SRL to address the court on minor points or matters irrelevant to their case) as unfair or biased towards their opponent's lawyer, who understands the requirements of legal relevance and is thus less likely to be cut off by judge in the same way.³¹⁷ The view that judges may be biased in favour of lawyers and their clients, or that they have

³¹⁰ Macfarlane 2013 at page 97.

³¹¹ Ipsos Mori 2009 at page 15.

³¹² Knowlton *et al* at page 44.

³¹³ Ipsos Mori 2009 at page 18; Macfarlane 2013 at page 98.

³¹⁴ Citizen's Advice "Standing Alone: Going to Family Court without a Lawyer" June 2006 <https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/justice-policy-research/access-to-justice-policy-research-and-consultation-responses/access-to-justice-consultation-responses/standing-alone-going-to-the-family-court-without-a-lawyer/> at page 34.

³¹⁵ Baldwin J, "Litigants' Experiences of Adjudication in the County Courts" (1999) CJQ 18 (Jan) 12 at pages 39—40.

³¹⁶ Moorhead and Sefton at page 189, Ipsos Mori 2009 at page 15.

³¹⁷ Moorhead and Sefton at page 189; Macfarlane 2013 at page 101.

negative views of self-representation or SRLs, appears relatively commonly among litigants. For this reason, some SRLs feel pressured by the judge not to self-represent and to get a lawyer.³¹⁸ Others feel that the judge was not interested in what the SRL had to say and was more concerned with hearing from their opponent's lawyer.³¹⁹ This latter belief is perhaps not entirely unfounded, as judges do report relying on opponent solicitors to keep cases involving SRLs moving forward. The judge may ask the represented party to speak first or explain the legal issues in the case before hearing from the SRL, possibly leading the SRL to feel excluded.³²⁰ Other SRLs report experiencing more overt hostility or a sense of moral judgement from judges, or that the judge is prejudiced against them and expects their case to fail because they were self-representing.³²¹ While an SRL's perception of judicial bias and hostility is important in itself, again it is difficult to verify the extent to which this reflects the reality of the situation. It is possible that some judges may look unfavourably towards SRLs, but at the same time SRL perceptions of the process must be considered in context.

Although government policy on tribunals has in general assumed that ordinary people will be able to represent themselves,³²² a number of similar themes appear in the literature suggesting that SRLs often experience negative feelings about the tribunal process as well. Echoing the experiences of SRLs noted above, Adler suggests that SRLs in tribunals can regret the decision to self-represent, finding that the process is more complicated than they had expected.³²³ Genn and Genn argue that SRLs in tribunals often do not understand the proceedings, the role of the tribunal, and their own role and thus are still "disadvantaged" by their lack of representation.³²⁴ A recent study of the employment tribunal

³¹⁸ Knowlton *et al* at page 43.

³¹⁹ Macfarlane 2013 at page 101.

³²⁰ Moorhead and Sefton at page 181.

³²¹ Macfarlane 2013 at pages 101-104.

³²² Report of the Committee on Administrative Tribunals and Enquiries, Cmnd 218 (1957); Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (The Stationery Office, 2001); Transforming Public Services: Complaints, Redress and Tribunals Cm 6243 (2004).

³²³ Adler M and Gulland J "The Experiences, Perceptions and Expectations of Tribunal Users" (2003) Council on Tribunals.

³²⁴ Genn, H and Genn Y, "The Effectiveness of Representation at Tribunals" (1989) Lord Chancellor's Department ("Genn and Genn 1989") at page 237.

presented a similar picture, finding that SRLs there, like many SRLs in the civil courts, often considered the process “bewildering, time consuming and stressful” and experienced “high levels of anxiety...including the fear of failure...and the lack of knowledge of how to negotiate a settlement, prepare a case and self-represent at the [employment tribunal].”³²⁵ The experience of employment tribunal litigants are particularly relevant to the civil courts, as, like the civil courts but unlike most other tribunals, they are involved in “party vs party” rather than “party vs state” disputes.

3.3.6.2 The Wider Impact of Self-Representation

Involvement in the types of legal issues decided in the civil courts can have a negative impact on the lives of those involved, including those who are legally represented. Individuals experiencing civil justice problems can experience alienation,³²⁶ worry, loss of confidence, and even mental or physical health problems as a result.³²⁷ It is thus worth keeping in mind that the impact of navigating the court process as an SRL rather than a represented litigant may not always be easy to untangle from the impact of the problem that brought the litigant to court in the first place. However, it is significant that many SRLs feel they have negative effects following their experience in court. In a small-scale study by Citizen’s Advice,³²⁸ SRLs reported wide-ranging consequences from their experience self-representing, with 9 in 10 indicating that their experience affected at least one other area of their life, such as their work, health, or finances.³²⁹ 7 in 10 Citizen’s Advice advisors felt that going to family court as an SRL makes existing mental health problems worse,³³⁰ and 69% said that it can

³²⁵ Busby N, “Experiences and Perceptions of Claimants to the Employment Tribunal” (2017) Emp LB 137, 2.

³²⁶ Genn H *et al*, *Paths to Justice Scotland* at page 264.

³²⁷ Pleasance P *et al*, *Causes of Action: Civil Law and Social Justice* (TSO 2006) at pages 60 and 149—50.

³²⁸ Citizen’s Advice “Standing Alone: Going to Family Court without a Lawyer” (2015) <https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/justice-policy-research/access-to-justice-policy-research-and-consultation-responses/access-to-justice-consultation-responses/standing-alone-going-to-the-family-court-without-a-lawyer/> (hereafter “Citizen’s Advice 2015”).

³²⁹ Citizen’s Advice 2015 at page 15.

³³⁰ *Ibid* at page 16.

cause the SRL's physical health to suffer.³³¹ Much of this correlates with Macfarlane's finding that some SRLs are left with depression and other physical ailments.³³² Intriguingly, even SRLs who were themselves lawyers described the experience of self-representation with terms such as "traumatizing".³³³ SRLs also indicated often-significant financial detriment, including some having to take time off work for court hearings or due to late nights researching. Others even reported giving work up entirely to concentrate on their case.³³⁴ SRLs also felt they had become "fixated" on their experience to an extent that it begins to isolate them socially from family and friends.³³⁵ There is, again, some concern about the self-reported nature of these issues and the extent of their causation by the experience of self-representation. For example, while it can safely be said that there is evidence that some SRLs *perceive* that they have to give up work in order to pursue their case, the available evidence cannot be considered conclusive on the question of whether this is true and that leaving a job was truly necessary.

On the other side of the emotional spectrum, SRLs may also leave the court process feeling angry about their experience. While it is often stated that the process distresses SRLs, it is less clear how often this leads to more serious aggressive or even violent behaviour. Such behaviour will, of course, have its own impact on the SRL and others. Landsman suggests that the experience of self-representation can lead to frustration and distrust of the court and, in turn, increased anger, volatility and potential violence.³³⁶ It is not clear whether aggressive SRLs are common—or any more prevalent than represented parties who become aggressive—or whether anecdotal evidence of the hostile SRL prevails because they are simply more likely to be remembered and discussed by the judges and lawyers who encounter them. Trinder *et al* found that, while many of the lawyers interviewed for their study had "stories" of abusive SRLs, including those who had been physically violent, only a few SRLs that they

³³¹ *Ibid* at page 17.

³³² Macfarlane 2013 at page 108.

³³³ *Ibid* at page 109.

³³⁴ Macfarlane 2013 at page 109-110; Knowlton *et al* reports that their results on consequences for SRLs were consistent with Macfarlane's findings (at page 50).

³³⁵ *Ibid* at page 110.

³³⁶ Landsman 2009 at pages 451-452, citing an unpublished manuscript by Tyler T and Zimerman N, "The Psychological Challenges of Pro Se Litigation" (2008).

observed could be characterised as aggressive.³³⁷ This was not unique to the self-representing litigants, as some represented parties observed were considered to be aggressive or disruptive as well.³³⁸ Again there is also the difficulty isolating the effect of the experience of self-representing from other factors that could lead a litigant to become aggressive or violent. The aggression from SRLs that was observed could also potentially be attributed to mental health issues or vulnerabilities and not necessarily the experience of self-representation itself.³³⁹

3.3.7 Does Self-Representation Affect Litigant Outcomes?

The extent to which self-representation affects case outcome for party litigants has not been studied at all in Scotland. This is perhaps not surprising as, even in relation to all of the other matters discussed in this chapter, the question of how self-representation affects the outcome of a litigant's case is particularly fraught. Assessing case outcomes of SRLs and comparing them to their represented counterparts is a far more difficult task than it may initially appear.³⁴⁰ While it may seem a forgone conclusion that litigants without lawyers are less likely to be successful, it is far from simple to establish the impact of self-representation in a way that is empirically sound. Landsman suggests that this is due to the complexity of the problem, arguing that few studies have been able to isolate the effect of legal representation effectively³⁴¹ due to “confounding variables and selection effects”.³⁴² To get an accurate comparison between represented and unrepresented litigants, both the population the litigants are drawn from and the strength of their cases (itself not entirely straightforward to assess) must be comparable.³⁴³ Engler identifies a further series of variables that may impact outcome, of which the presence of representation for a party is just one: the complexity of the procedures, the individual practices of the judge, and the typical operation of the court (which

³³⁷ Trinder *et al* at page 32.

³³⁸ *Ibid* at page 32.

³³⁹ *Ibid* at page 32 and 33.

³⁴⁰ Hannaford-Agor and Mott at page 180.

³⁴¹ Landsman 2012 at page 241.

³⁴² *Ibid*.

³⁴³ *Ibid*.

may, for example, have a presumption in favour of claimants).³⁴⁴ Perhaps most tellingly, Engler also includes the substantive law as one of these variables. While the law should be the most determinative element, Engler argues, SRLs experience poor outcomes even when the law seems to be “on their side.”³⁴⁵ If this is correct, even overcoming the problem of accurately assessing the relative merits of SRLs’ cases will not necessarily allow for an accurate evaluation of their outcome.

Another complication is the question of how success itself is to be measured. Hannaford-Agor and Mott note one particularly fundamental issue: is success measured in objective terms (by what happened in the case) or subjective terms—did the litigant receive a fair and just outcome?³⁴⁶ Hannaford-Agor and Mott’s study chose to address the former, but notes that the latter question is perhaps the most important of all in relation to access to justice (as well as being even more difficult to set criteria for).³⁴⁷ The outcome of civil court matters is often not as simple as “winning” or “losing”. Many cases ultimately settle. Often this could be considered a favourable outcome, but not if the SRL felt pressured into settling or into agreeing to terms they are unhappy with, or just felt they were unable to carry on with the case due to the difficulty involved in self-representing.³⁴⁸ There is also evidence that the cases of SRLs are more likely to end in dismissal, withdrawal or default judgment³⁴⁹ rather than having a full hearing and being decided on the substantive merits. Again, this could be either a favourable or unfavourable outcome for the SRL. If the case is meritless it is ultimately better to have it disposed of more quickly, but it is clearly a poor outcome to have a valid case dismissed or to be forced to give up on it.³⁵⁰ The question of measuring success can be complicated by the type of case being assessed as well. For example, in an action for divorce, decree is almost always granted. On a similar note, if a landlord will almost always prevail

³⁴⁴ Engler R, “Connecting Self-representation to Civil Gideon: What Existing Data reveal about when Counsel is Most Needed” (2010) *Fordham Urban Law Journal*, 37(1) at section IV.

³⁴⁵ *Ibid* at section IV A.1.

³⁴⁶ Hannaford-Agor and Mott at page 178.

³⁴⁷ *Ibid*.

³⁴⁸ See Engler’s “informed consent” model in section 3.3.4.2.

³⁴⁹ Hunter *et al* 2002 at page 88; Hannaford-Agor and Mott at page 171.

³⁵⁰ *Ibid*.

in housing matters,³⁵¹ how can the effect of self-representation be measured in these cases?

With all of this said, a review of the literature reveals at least some consensus that outcomes are unfavourably affected by self-representation.³⁵² Two studies addressing SRL outcome particularly are worth noting, both in terms of their methodology and the quality³⁵³ of the data. Seron *et al*³⁵⁴ recruited unrepresented participants waiting in line to attend a New York housing court. Around half of the subjects were then assigned a lawyer, while the other half remained unrepresented.³⁵⁵ The subjects who were represented had significantly better outcomes than those who were not, and were more likely to receive favourable orders from the court, such as rent abatements or repairs.³⁵⁶ Judgments were made against only 32% of the represented participants, as compared to 52% of the unrepresented subjects.³⁵⁷ Sandefur³⁵⁸ measures the impact of representation by performing a “meta-analyses”³⁵⁹ on the existing data from other studies. This analysis revealed that lawyers did increase the litigant’s chances of success considerably.³⁶⁰ Perhaps surprisingly, the study suggested that the impact of lawyers was higher in procedurally complex case, but lower in cases where the substantive law was more complex.³⁶¹ Overall, Sandefur suggests, lawyers do influence outcomes for litigants, but this “comes

³⁵¹ Landsman 2012 at page 241.

³⁵² Williams 2011 at page 6. See also Trinder *et al*, Moorhead and Sefton, and Hannaford-Agor and Mott; in respect of tribunal cases, see Genn and Genn 1989.

³⁵³ Williams 2011 at page 6.

³⁵⁴ Seron C *et al*, “The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment” (2001) *Law & Society Review*, Vol. 35, No. 2, 419 (“Seron *et al*”).

³⁵⁵ The experiment was also subject to a number of controls; for example, the lawyers (who were also representing other litigants *pro bono*) and judges did not know which litigants were part of the experiment.

³⁵⁶ Seron *et al* at page 429.

³⁵⁷ *Ibid* at page 426.

³⁵⁸ Sandefur R, “Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers’ Impact” (2015) *American Sociological Review* Vol 80(5) 909.

³⁵⁹ See *ibid* pages 912-920 for the details of Sandefur’s (very complex) methodology.

³⁶⁰ *Ibid* at page 921.

³⁶¹ *Ibid*.

more from managing relatively simple legal procedures than from deploying the complex legal theories that are the stuff of formal legal education.”³⁶²

It is worth considering the impact of self-representation within the tribunal model as well—do SRLs achieve better outcomes in these less formal, more “user-friendly” environments? Genn and Genn found that representation, and particularly specialist representation (including lay representation), improved outcomes for SRLs.³⁶³ This is consistent with the data from the civil courts as discussed above. However, more recently Adler found that SRLs in most tribunals who had received pre-hearing advice tended to achieve outcomes almost as good as those who had representation.³⁶⁴ Adler attributes this to the proactive, enabling approach taken by many tribunals.³⁶⁵ While Adler’s findings suggest potential for this approach to assist SRLs in the civil courts, there are a number of important caveats that must be applied. Adler’s finding that SRLs fared nearly as well as represented litigants did not apply to litigants in the employment tribunal (which, again, hear “party vs party” disputes similar to those in the civil courts). Adler suggests that tribunals may take a more adversarial approach to “party vs party” cases, tempering the enabling approach that seems to benefit SRLs.³⁶⁶ It is also worth noting that while comparing data on tribunal outcomes and civil court outcomes is instructive, many tribunals hear cases on narrow and specialist subject matter, and this may make it easier for them to take a more inquisitorial approach, while the matters heard in civil courts are far more diverse.

While all of this data provides a useful starting point to consider the impact of self-representation on litigant outcomes, more data is needed. The existing state of knowledge lacks precision as to how SRLs fare in different jurisdictions and types of cases, what factors influence their outcomes, and how (or if) measures to assist SRLs influence outcomes.

³⁶² *Ibid* at page 926.

³⁶³ Genn and Genn 1989.

³⁶⁴ See for example Adler M, “Can tribunals deliver justice in the absence of representation?” (2008) https://s3-eu-west-1.amazonaws.com/esrc-files/.../meUsgZhp1UazQ-k4cX6F_w.pdf at page 24.

³⁶⁵ *Ibid* at page 25.

³⁶⁶ *Ibid*.

3.4 The Normative Dimensions

3.4.1 The Right to Self-Represent

In the United Kingdom, as well as a number of other common law systems, the right to self-represent has been largely taken for granted and has been subject to little consideration or examination. Genn suggests that this is because the right to self-represent is taken as “axiomatic.”³⁶⁷ While self-representation is typically viewed alongside the larger issue of access to justice, there are conflicting views as to the relationship between the two. One view can be described as a principled approach stemming from the right of the individual to self-determination. Of the right to self-represent, Genn observes “if forced to say why such a right exists, we might argue that it manifests a commitment to the principle of autonomy and self-determination.”³⁶⁸ Self-representation promotes autonomy by allowing the individual who the matter is concerned with to conduct the case himself, without requiring an intermediary. In this context, the rights enforceable in the civil courts are personal and it must be possible for the individual to enforce them directly. Landsman suggests that the right to self-represent in the United States was in turn fueled by England’s “growing espousal of the principles of self-reliance and individualism.”³⁶⁹ Cerruti suggests that self-representation is often viewed as “a portrait of direct democracy at work, a self-represented individual throwing off the formal trappings of the state and its lawyers to present an unmediated narrative in the courtroom.”³⁷⁰ The right to self-represent in the civil courts may have arisen from, or been conflated with, the right to self-represent in criminal courts,³⁷¹ where direct participation in the proceedings is again viewed as an assertion of the rights of the individual against the state.

³⁶⁷ Genn 2014 at page 423.

³⁶⁸ *Ibid.*

³⁶⁹ Landsman 2012 at page 233.

³⁷⁰ Referring here to criminal cases; see Cerruti E, “Self-representation in the International Arena: Removing a False Right of Spectacle” (2009) Georgetown University of International Law 40.3, 919 at Part I.

³⁷¹ Where early courts emphasized a right for the accused to confront his accuser personally; see Landsman 2012 at page 233.

Genn argues, however, that more often self-representation is seen as part of the individual's right to access to justice and access to courts.³⁷² While the argument that self-representation promotes individual autonomy is principled, this view represents a more practical understanding of access to justice. Here self-representation must be allowed because otherwise those who cannot afford lawyers will simply be unable to access to the courts and enforce or defend their legal rights. Viewed through this lens, self-representation is also a necessary protection for the poor and vulnerable in particular, as they are likely to be shut out of the courts due to their inability to afford a lawyer.³⁷³ While self-representation is intended here to provide access to the courts in the most literal sense, there is also a distinction made between access to the court process and true access to justice. While a self-representing litigant may be able to engage in the process in the most rudimentary sense, in the absence of legal procedural knowledge he is not necessarily able to participate meaningfully or properly vindicate his rights in law. Genn suggests that the right of access to the courts by way of self-representation "offers theoretical access to the courts that may be illusory," arguing that more scrutiny is required to consider the potential negative effects of self-representation on the litigant, his opponent and the court.³⁷⁴

The most significant, and perhaps most critical, consideration of these justifications for the right of self-representation is found in Rabeea Assy's *Injustice in Person: The Right of Self-Representation*.³⁷⁵ This work is worth considering in some detail because it offers a rare examination of the theoretical underpinnings of self-representation. Assy's model inverts a common narrative regarding self-representation, which is that an overcomplicated court system is failing SRLs.³⁷⁶ Instead, Assy posits, the system is not failing SRLs, nor must it be adjusted to meet their needs. The real problem is the unqualified right to self-representation, which is not worthy of the fierce protection it

³⁷² Genn 2013.

³⁷³ Assy R, *Injustice in Person: The Right of Self-Representation* (Oxford University Press 2015) at page 21 (hereafter "Assy"); See also Painter R, "Pro Se Litigation in Times of Financial Hardship" (2011) Family Law Quarterly Vol 45 No 1, 45.

³⁷⁴ Genn 2014 at page 423—424.

³⁷⁵ *Supra* note 373.

³⁷⁶ See, for example, Lord Woolf's comments as quoted above.

currently receives.³⁷⁷ Assy argues against an automatic and unfettered right to self-representation, suggesting that SRLs “strain court resources”³⁷⁸ and disrupt the administration of justice.³⁷⁹ The existing justifications for self-representation are said to be unfounded or based in fallacy.³⁸⁰ Self-representation, Assy suggests, is not a necessity nor a natural extension of the right of access to the courts—this notion is instead the result of the conceptual bias that rights are personal and should thus be available to the individual to exercise. Assy argues that this is another fallacy: “It is a mistake to suppose that the primary form of access to court is self-representation and that legal representation is derivative from it. Neither is specifically warranted by the right of access to court—and in practice legal representation is usually the more effective way to *exercise* that right.”³⁸¹

The idea that self-representation is necessary to respect the individual’s personal autonomy is also rebutted. Litigation always entails some form of limitation to the litigant’s choices.³⁸² Forbidding self-representation as long as there are reasonable alternatives does not affront the individual’s autonomy.³⁸³ Instead, “a litigant’s control over the process is enhanced rather than diminished by legal representation, which renders her participation more meaningful, regardless of whether one views such participation as outcome-oriented or not”.³⁸⁴ Menashe and Gruner³⁸⁵ adopt Assy’s conclusions in relation to self-representation and propose a further argument in relation to autonomy, the risk of error. SRLs increase their chances of an incorrect verdict or inferior

³⁷⁷ *Ibid* at page 11.

³⁷⁸ *Ibid* at page 22.

³⁷⁹ Perceptions of the impact of SRLs in the courts are discussed in more detail below. It is worth noting here that a number of the complaints often made about SRLs—such as the extra time their cases are said to take—are not all supported by the available empirical evidence.

³⁸⁰ Although not discussed here, Assy also argues for a distinction between criminal and civil self-representation.

³⁸¹ *Ibid* at page 18.

³⁸² Such as rules of procedure.

³⁸³ *Ibid* at page 168.

³⁸⁴ *Ibid*. This is a summary of Assy’s conclusions, but he considers the question of autonomy in more detail; see Chapter 7 of *Injustice in Person*, “Litigants as Authors of Their Lives”.

³⁸⁵ Menashe D and Gruner E, “Litigants in Person and the Risk of Error—a New Perspective in Rabeea Assy’s ‘Injustice in Person: The Right of Self Representation’” (2016) CQJ 2016, 35(3) 237.

litigation by foregoing legal representation. However, “we cannot say that the litigant consents to risks of error, because this consent is based on a misapprehension of the legal world, and thus his consent is vitiated.”³⁸⁶

Disallowing self-representation thus does not interfere with the individual’s right to self-determination, but instead prevents the SRL from making a choice he would not make himself if he were better informed.³⁸⁷

3.4.2 The Role of Lawyers

Views of self-representation bring the role of the lawyer into focus. Again there are opposing views, with some viewing lawyers as a necessary part of the process; access to justice inevitably requires access to lawyers and legal advice. However, another strand of thought rejects the idea that access to a lawyer is the only way to deliver access to the courts.

Particularly for those who view lawyers as a necessity, perhaps the most fundamental conception of lawyers is as intermediaries between laypeople and the law or and courts. Lawyers have thus been described as “gatekeepers of justice through law, particularly through formal legal procedures such as litigation.”³⁸⁸ Not only do lawyers provide access to the justice system, they also have a role in identifying and framing the issues that result in court actions. In Felstiner *et al*’s “naming, blaming and claiming” model noted above, lawyers are the key agent in transforming PIEs into claims and disputes.³⁸⁹ Lawyers influence what cases do or do not come to the civil courts by either encouraging or discouraging potential litigants.³⁹⁰ Sandefur describes the lawyer using their “substantive expertise” to translate the individual’s lived circumstances into a case in law: the lawyer evaluates the individual’s experience and separates

³⁸⁶ *Ibid* at page 255.

³⁸⁷ As noted above, it can be said that this argument, like some of Assy’s, makes assumptions about SRLs that are either generalizations or not supported by the available empirical evidence. This can be said to demonstrate the difficulty of conceptualizing self-representation and SRLs.

³⁸⁸ Sandefur 2015 at page 909.

³⁸⁹ Felstiner *et al* 1980 at pages 645—646.

³⁹⁰ Kritzer H, “Contingency Fee Lawyers as Gatekeepers in the Civil Justice System” (1997) 81 *Judicature* 22 1997-1998, 22.

aspects that do not offer recourse in law (such as emotional elements like anger and hostility) from those that can be placed in legal terms (such as adultery).³⁹¹

Much of the role of the lawyer involves similar forms of translating legal principles and procedures into concepts that their client can understand and utilize. The lawyer provides advice and guidance to enable the litigant to make informed decisions³⁹² and advises and explains the law and legal processes, and how they may be used.³⁹³ Sarat *et al* suggest that “Practicing lawyers thus play an important role in shaping mass legal consciousness and in promoting or undermining the sense of legitimacy that the public attaches to legal institutions.”³⁹⁴ Often the services that a lawyer provides are conceptualized as empowering his client. Engler suggests that the lawyer’s knowledge of the court procedures is one of many sources of power that offers represented litigants an advantage.³⁹⁵ Power imbalances can occur outside of the court process as well, such as during negotiation or settlement discussions, where the represented party is placed at an advantage. Opponent lawyers are thus cautioned to avoid intimidating or unduly influencing SRLs.³⁹⁶ At times the power imbalance may be more subtle; for example, it has also been suggested that access to a lawyer, or to a particularly well-known or well-regarded lawyer, may increase the appearance of legitimacy of the litigant, and thus perhaps increase their chance of success.³⁹⁷

Another line of thought posits that lawyers are an unqualified necessity to provide a genuine right of access to the courts. This idea has perhaps been

³⁹¹ Sandefur 2015 at page 911. In other words, what the lawyer offers is an understanding of legal relevance and how it applies to the individual’s circumstances.

³⁹² Mather L, “What Do Clients Want What Do Lawyers Do” (2003) *Emory Law Journal* 52(Special Edition) 1065. Mather explores the extent to which lawyers, or their clients, are in control of a case and finds that is often depends on the type of lawyer and subject matter of the case as well as the balance of power within the lawyer/client dynamic.

³⁹³ Sarat A and Felstiner W, “Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office” (1989) *Yale Law Journal* 98(8) 1663 at page 1663.

³⁹⁴ *Ibid.*

³⁹⁵ Engler 2010 at section B 1.

³⁹⁶ See for example Engler 2014 at page 562.

³⁹⁷ Hanretty C, “Haves and Have-Nots before the Law Lords” (2014) *Polit Stud*, 62: 686. This is just one element of the application of Galanter’s oft-repeated “have” and “have nots” model; see Galanter M, “Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change” (1974) *Law & Society Review*, 9 (1), 95.

examined most thoroughly in relation to the “civil Gideon” movement in the United States. The *Gideon*³⁹⁸ case concerned the constitutional right to a fair trial on a criminal charge, which was found to lead to a requirement that the accused has access to legal (and if necessary, state-funded) counsel. The civil Gideon movement posits that parties should also have a right to be legally represented in civil matters. The civil Gideon movement is based on two premises: first, that many of the rights exercised in civil courts³⁹⁹ are often as important to individuals as those adjudicated in the criminal courts; and second, that individuals are not able to receive a fair trial in civil matters without legal representation.⁴⁰⁰ A right to counsel is thus necessary to avoid injustice and inequality, particularly for the poor. Those who oppose the notion of the civil Gideon movement generally accept the first premise, but consider that a right to counsel is not the only, or best, way to achieve fair outcomes. Barton suggests that, in addition to the practical difficulties (such as cost and the potential for increased caseloads causing less effective representation) the civil Gideon movement is “inherently conservative and backwards-looking.”⁴⁰¹ The civil Gideon movement assumes that lawyers are the only solution, rather than a reform of the court structures that could widen access for SRLs.⁴⁰² Aviel argues against extending the right to counsel while maintaining adversarial court processes in family actions; what these cases need is a more collaborative approach for parties, not more lawyers.⁴⁰³

There are others who also believe that lawyers are not the solution to access to justice, but rather that they are contributing to the problem. Goldschmidt argues against the idea that lawyers are a necessity, suggesting to the contrary

³⁹⁸ *Gideon v Wainwright* 372 US 335 (1963).

³⁹⁹ Engler suggests that a right to counsel should apply when “basic needs are at stake” (such as housing); Engler R, “The Twin Imperatives of Providing Access to Justice and Establishing a Civil Gideon” (2011) 93 Mass L Rev 214 at page 219.

⁴⁰⁰ See for example Gardner D, “Justice Delayed is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases” (2007) University of Baltimore Law Review 37(1), 59.

⁴⁰¹ Barton B, “Against Civil Gideon (And for *Pro Se* Court Reform)” (2010) Florida Law Review 62(5), 1227 at page 1274.

⁴⁰² *Ibid.*

⁴⁰³ Aviel R, “Why Civil Gideon Won’t Fix Family Law” (2013) Yale Law Journal 122.8 (June) 2106. Many of the arguments relating to the civil Gideon can, of course, also be related to the question of provision of civil legal aid.

that the real problem is the “lawyerization” of the courts.⁴⁰⁴ Lawyers’ interests have made the court processes needlessly complex, even secretive. As a result litigants are not able to control their own cases. The solution Goldschmidt proposes is not strengthening the grip that lawyers have on the courts, but instead simplifying or “delegalizing” the process. “Delegalization,” Goldschmidt suggests, “consists of eliminating the secrecy regarding basic legal information, such as the elements of causes of action, and relaxing the rules of procedure and evidence. These do not effect changes in substantive law, only in the fairness of the proceedings for all litigants.”⁴⁰⁵

A similar strand of thought examines the influence of lawyers’ professional and economic interests and their potential impact. The most glaring of these is the idea that lawyers view self-representation as a threat to their profession and livelihood.⁴⁰⁶ If self-representation becomes commonplace, there will be less work for legal professionals or the profession could even become obsolete. Some suggest that lawyers may therefore wish to keep SRLs out of the courts, and to keep the court processes too complex for laypeople to understand so as to discourage self-representation.⁴⁰⁷ Zuckerman suggests that lawyers’ business interests influence court processes as whole. Because most lawyers are paid by the “billable hour” they have an interest in making litigation more prolonged and complex.⁴⁰⁸ For example, it is a challenge to keep pleadings clear, concise and brief—and while the courts may encourage brevity, lawyers have little incentive to meet the challenge.⁴⁰⁹ In a wider study of the relationship between fee structure and lawyer behaviour, Kritzer explores the possibility that lawyers’ fees and how they operate may have a larger impact. For example, he explores whether American lawyers being more “aggressive” than their English counterparts, leading in turn to American society becoming more litigious, can

⁴⁰⁴ Goldschmidt J, “Meeting the Challenge: The Pro Se Litigant’s Struggle for Access to Justice” (2002) Family Court Review, vol 40 no. 1, 36 at page 53.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ See for example Greacen J, “Self-Represented Litigants, The Courts, and the Legal Profession: Myths and Realities” (2014) Family Court Review, 52: 662 at pages 663-664.

⁴⁰⁷ See for example Goldschmidt 2002 at page 53.

⁴⁰⁸ Zuckerman AA et al eds *Reform of Civil Procedure: Essays on “Access to Justice”* Chapter 3, “Reform in the Shadow of Lawyers’ Interests” Clarendon Press: Oxford, 1995 at pages 64-67.

⁴⁰⁹ *Ibid* at page 69.

be attributed to American lawyers being permitted to charge percentage fees.⁴¹⁰ Ultimately, however, Kritzer concludes that the evidence does not support relating professional behaviour entirely to a particular business model.⁴¹¹

3.5 SRLs: The Way Forward?

3.5.1 Introduction

While most agree that the current state of affairs in respect of SRLs is in need of change, there is no consensus as to how this can best be accomplished. Most of the measures currently in place or proposed can be divided into two broad categories: firstly, advice, self-help and other forms of assistance short of full legally qualified representation for SRLs, and secondly, institutional changes to the courts to make it possible for SRLs to conduct their own cases more effectively. Because this thesis is concerned with SRLs who are already engaged in the civil court process, this section considers addressing the needs of these SRLs under the assumption that, for whatever reason, they are unwilling or unable to obtain full representation. Measures such as expanding access to legal aid or a “civil Gideon” have the potential to reduce the number of SRLs in the courts rather than to address existing SRLs, and thus are not considered here.⁴¹² Some of the measures discussed below have already been implemented, or considered, in the Scottish courts. As noted above, styles of judging and judicial discretion are a key issue in relation to how the Scottish courts currently approach party litigants, and approaches to judging cases involving SRLs are considered in some detail below. A number of the other measures discussed below as implemented in Scotland, particularly lay representation, are discussed later in the thesis and attempts to understand the feasibility and potential effectiveness of these measures in Scotland informed the collection of a portion of the empirical data.

⁴¹⁰ Kritzer H, “Lawyer fees and Lawyer Behaviour in Litigation: What does the Empirical Literature Really Say?” (2001) 80 Tex. L. Rev. 1943 at page 1982.

⁴¹¹ *Ibid* at page 1983.

⁴¹² Much of the benefit of access to legal representation has been addressed above.

3.5.2 Self Help, Information and Lay Assistance

3.5.2.1 “In Court” Advice Services

As they typically start with little or no knowledge of the law and court procedures, one of most pressing needs of SRLs is for information or advice. Self-help information and advice may be available in a number of venues. In some jurisdictions, information may be provided in the court by dedicated court staff or volunteers.⁴¹³ Due to the requirement for the court itself to remain neutral, the courts are restricted to providing information only. While this may be tailored to the SRL’s particular needs, it cannot amount to advice.⁴¹⁴ As noted above, Graecen argues that the “legal/procedural” information model makes court staff hesitant to provide SRLs even with appropriate information—court staff could in fact be far more helpful.⁴¹⁵ Graecen suggests that “paralegals and court staff are fully capable of providing sophisticated and adequate legal information services to self-represented litigants,” although “legal advice, of course, can only be given by lawyers.”⁴¹⁶ However, as the line between advice and information is not always entirely clear even for lawyers, there is some question as to how well SRLs understand this distinction. Others have also called for court staff to be better trained to know what advice they can and should dispense to SRLs,⁴¹⁷ although it is also noted that court staff are also subject to a workload and time constraints that make it difficult to find time to assist SRLs.⁴¹⁸ Hough describes the efforts in California to assist SRLs in the family courts, which include, in additions to forms and self-help websites, court-based “self-help centres” staffed or supervised by lawyers where litigants can receive

⁴¹³ See Graecen J, “Resources to Assist Self-Represented Litigants: A Fifty State Review of the ‘State of the Art’” (2011).

⁴¹⁴ Zorza R, “An Overview of Self-Represented Litigation Innovation, Its Impact, and an Approach for the Future: An Invitation to Dialogue” (2009) *Family Law Quarterly* Vol. 43, No. 3 (Fall 2009) 519 at page 523.

⁴¹⁵ Graecen 1989.

⁴¹⁶ Graecen J, “Self-represented Litigants: Learning from Ten years Experience in the Family Courts” (2005) *The Judge’s Journal* 28.

⁴¹⁷ See for example Moorhead and Sefton at page 218.

⁴¹⁸ *Ibid.*

assistance with forms and ask questions.⁴¹⁹ Assistance may be offered to SRLS through classes or workshops or one-on-one and may also be combined with the services of a qualified family law facilitator.⁴²⁰

In-court advice and advice on court matters may also be available from advice agencies (such as Citizen's Advice Bureaux in the UK). Advice providers may be solicitors, paid employees of the advice agency, or volunteers.⁴²¹ The services that advice agencies are able to provide tends to vary, but can include anything from advice on the merits of a case to guidance on the court process to written information.⁴²² Research in Scotland has shown that litigants were "almost universally positive" about in-court advice services and advisors,⁴²³ but advice services were also perceived as being "very busy and the advisors stretched to capacity."⁴²⁴ Research in England paints a similar picture; many reported that they were unable to access advice agencies,⁴²⁵ with many therefore left to solve their legal problem on their own.⁴²⁶ In-court advice and advice agencies are also limited to an extent in the type of services they are able to provide, particularly as many advice providers are not legally qualified. SRLs with cases outwith the simpler and most common forms of procedure may not be able to get assistance.⁴²⁷

3.5.2.2 Self-Help, Guidance and Information

⁴¹⁹ Hough B, "Self-Represented Litigants in Family Law: the Response of California's Courts" (2010) The Circuit Paper 52 at pages 19-21; other programs in California include "JusticeCorps," which recruits university students to assist court staff in self-held centres (pages 21-22.)

⁴²⁰ *Ibid.*

⁴²¹ Access to Justice Literature Review at page 38.

⁴²² Civil Justice Council 2011 at page 49.

⁴²³ Ipsos 2009 at page 21.

⁴²⁴ *Ibid* at page 22.

⁴²⁵ Pleasance P, *Causes of Action: Civil Law and Social Justice* (TSO 2006) at page 98.

⁴²⁶ *Ibid* at page 102. 2/3 of those who could not access advice agencies went on to deal with their legal issue on their own.

⁴²⁷ Morris S *et al*, "Uniquely Placed: Evaluation of the In Court Advice Pilots" (2005) <http://www.gov.scot/Publications/2006/01/24132154/1> found that 2/3 of advisees were involved in summary procedure, with 1/5 in small claims.

Guidance and information may also be available for SRLs to access directly, often online.⁴²⁸ Forms and other documents may also be available online or on paper to assist SRLs.⁴²⁹ In Scotland, official guidance and forms are available from the courts for lower-value procedures only.⁴³⁰ There is no guidance available for all other forms of procedure, and it appears that what is available is insufficient. In one Scottish study, respondents indicated that they would have liked more information on their options in the process and what to expect. Many said that guidance on the practicalities of the process of appearing in court would have avoided unnecessary apprehension.⁴³¹ The Report of the SCCR recognised the need for information for party litigants, and for more information than currently available, but focuses on those involved in lower-value claims.⁴³² There is little in the Report to address the lack of guidance for litigants involved in other types of cases, such as ordinary and family actions. Courts in other jurisdictions, particularly in the United States, offer sophisticated forms of self-help on their websites, such as guidance, tips for SRLs, FAQs, and even instructive video content.⁴³³ Self-help information for SRLs may also be found from other sources, both on- and off-line, but the quality of the information, and the ability of the SRL to find what he needs, can be inconsistent.⁴³⁴ The format of information may also be difficult for laypeople to follow and digest. The Civil Justice Council notes that some of the information available can be hard to follow with “long text based sections of advice.” They suggest that instead “videos, magazine type visual formats, templates, checklists and interactive tools”⁴³⁵ should be available as more layperson-friendly forms of assistance.

While more and better information for SRLs is widely acknowledged as a necessity, it is worth noting that it has limitations, particularly for litigants

⁴²⁸ Macfarlane’s 2013 study found that most information from the courts was conveyed online; see page 114.

⁴²⁹ Zorza 2009 at 527.

⁴³⁰ Access to Justice Literature Review at page 27.

⁴³¹ Ipsos 2009 at page 19—20.

⁴³² SCCR at page 14.

⁴³³ Flaherty M, “How Courts Help you Help Yourself: the Internet and the *Pro Se* Divorce Litigant” (2002) Family Court Review Vol 40, 91 at page 93.

⁴³⁴ Civil Justice Council at page 58.

⁴³⁵ *Ibid.*

involved in more complex matters and procedures.⁴³⁶ Moorhead and Pleasance, quoting Mather's often-repeated view on self-help, observe that "In the legal aid context, self-help cannot therefore be regarded as a universal panacea. As Mather concludes, for some people and some problems, self-help suggests 'abandonment, not empowerment'."⁴³⁷ Landsman echoes this notion, suggesting that courts have placed an emphasis on providing information in the hope that SRLs will help themselves rather than addressing the real and pressing need for more systemic change.⁴³⁸ At present most agree that forms of self-help do not eliminate the need for lawyers entirely, except in the simplest and most routine matters.⁴³⁹

Others, of course, have a more positive view of the potential for self-help, particularly with the continued growth in the capability of technology. Susskind argues that, in future, technology and access to information will reduce the need for lawyers and alter how legal services are delivered.⁴⁴⁰ In England and Wales, this is seen most notably the Briggs Report's⁴⁴¹ proposals for online courts for matters up to £25,000. While online courts have been developed in other jurisdictions, such as Canada and the Netherlands, the online courts envisioned by Briggs represent "the first court ever to be designed in this country, from start to finish, for use by litigants without lawyers."⁴⁴² The report suggests that the system will allow litigants to answer a series of questions that will provide the court with the essential details of their case and their evidence from the outset, as well as providing the litigant with simple advice. The next stage of the process would attempt conciliation, and if this fails there are a number of options for determining the case, including a decision on the papers, by telephone or a traditional hearing.⁴⁴³ Although the online courts represent an unprecedented effort to make the civil process in England and Wales accessible

⁴³⁶ See, for example, the SCCR at page 15.

⁴³⁷ Moorhead and Pleasance at page 8.

⁴³⁸ Landsman 2009 at page 447.

⁴³⁹ See for example Kritzer H, "The Professions are Dead, Long Live the Professions" (1999) 33 Law & Soc'y Rev. 713.

⁴⁴⁰ Susskind R, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press 2008).

⁴⁴¹ Lord Justice Briggs, Civil Court Structure Review: Interim Report (2015) and Final Report (2016) Judiciary of England and Wales.

⁴⁴² *Ibid*, Interim Report at para 6.5.

⁴⁴³ *Ibid*; the judge will also adopt a more investigative approach.

to SRLs, some have met these proposals with scepticism.⁴⁴⁴ One broad concern relates to the feasibility of the proposals, both in terms of the technology and the actual usability of the end product for SRLs.⁴⁴⁵ Assy offers an interesting take on another issue raised around the online courts, the idea that they offer “second-class” justice as compared to traditional courts. Assy suggests that, at present, “first-class justice”—and what Assy describes as “the sanctification of correct judgments”⁴⁴⁶—are in practice available only to the wealthy at present. The value in the Briggs reform thus lies in offering a compromise between the correctness of a judgment and a quicker and less expensive process: “when the choice is between inaccessible first-class justice and accessible second-class justice,”⁴⁴⁷ the latter is preferable.

3.5.2.3 “Unbundled” Services

SRLs who cannot afford full representation may wish to opt for “unbundled” assistance instead. “Unbundling”⁴⁴⁸ refers to the practice of an individual receiving services from a lawyer short of full representation: the client may use any part of the lawyer’s services in virtually any combination, including researching the law, advice, drafting pleadings and court paperwork, and representation at court hearings.⁴⁴⁹ Although the lawyer thus assists the client to some extent, they are never the lawyer of record in the case.⁴⁵⁰ Proponents of unbundling argue that it allows lawyers to provide access to legal services to those who are unable to afford full representation.⁴⁵¹ Some, however, also note

⁴⁴⁴ See the Final Report, pages 36—64.

⁴⁴⁵ See, for example, *Ibid* and McCloud V, “The online court: suing in cyberspace-how the court challenges us to raise our legal and technological game so as to ensure access to justice” (2017) CJQ 36(1) 34.

⁴⁴⁶ Assy R, “Briggs’ online court and the need for a paradigm shift” (2017) CJQ 36(1) 70 at page 70.

⁴⁴⁷ *Ibid* at page 85-86.

⁴⁴⁸ The term “unbundling” is used here, but it is also referred to as “discrete task representation”.

⁴⁴⁹ Mosten F, “Coaching the Pro Se Litigant: Unbundling Services of the Family Lawyer” (1995) *The Compleat Lawyer* Vol. 12, No. 1 (Winter 1995) 1 at page 8; Mosten is usually credited with devising the term “unbundling”.

⁴⁵⁰ *Ibid*.

⁴⁵¹ Mosten F, “Unbundling Legal Services in 2014; Recommendations for the Courts” (2014) *Judges’ Journal* 53(1), 10. In turn, unbundling also creates a new avenue of

that unbundling raises ethical issues in the relationship between lawyer and client.⁴⁵² One key point is the issue of whether a “lawyer-client” relationship is created when unbundled services are used; this can be difficult to determine.⁴⁵³ It has been suggested that, unlike “full service” representation, where the expectations are clear, the nature of the service the client is contracting for have to be set out very clearly.⁴⁵⁴ The lawyer should also consider whether the case, and client, is suited to an unbundled approach.⁴⁵⁵

One form of unbundling is sometimes referred to as “ghostwriting.” Here the client employs a lawyer to draft pleadings or other court documents, but the client represents himself in court and otherwise appears to be a SRL.⁴⁵⁶ Ghostwriting is sometimes said to raise the additional concern of unfairness. This is primarily based on the idea that, because the litigant appears to be unrepresented, he is accorded leniency from the courts (including a more liberal construction of his pleadings) to compensate for the lack of counsel, when in fact he has had the advantage of legal assistance.⁴⁵⁷ Rotherham argues that, because of the danger that the litigant will receive undue leniency, the ghostwriting of pleadings should be disclosed to the court.⁴⁵⁸ Goldschmidt, however, suggests that the concerns about ghostwriting have not materialised into any real evidence of detriment to litigants and their opponents.⁴⁵⁹ Furthermore, imposing a requirement that the litigant discloses any assistance

potential business for lawyers; Hudson Jr D, “A Boost for Unbundling: Lawyers Offering Unbundled Legal Services Must Consider the Ethics Issues.” (2013) ABA Journal 22.

⁴⁵² See for example Hornsby W, “Unbundling and the Lawyer’s Duty of Care” (2012) Family Advocate, Vol. 35, No. 2, 26.

⁴⁵³ Engler 2014 at page 559.

⁴⁵⁴ See for example Kimbro S, “The ethics of unbundling” (2010) Family Advocate Vol. 33, No. 2, 27.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ See for example Engler 2014 at page 559.

⁴⁵⁷ Fisher-Brandveen F and Klempner R, “Unbundled Legal Services: Untying the Bundle in New York State” (2002) Fordham Urban Law Journal 29.3 (Feb) 1107.

⁴⁵⁸ Rothermich J, “Ethical and Procedural Implications of Ghostwriting for *Pro Se* Litigants: Toward Increased Access to Civil Justice” (1999) Fordham Law Review 67, 2687 at page 2711—2712.

⁴⁵⁹ Goldschmidt, J, “An Analysis of Ghostwriting Decisions: Still Searching for the Elusive Harm” (2011) Judicature 95(2) 78; see also Mincieli T, “Let Ghosts Be Ghosts” (2014) St. John's Law Review 88(3) 763.

they receive would, Goldschmidt argues, violate the litigant's right to confidentiality.⁴⁶⁰

3.5.2.4 Lay Representation

Lay representation, or representation of an SRL by another individual who is not legally qualified, is perhaps one of the more controversial forms of assistance for SRLs. As with SRLs generally, lay representatives (often called "McKenzie Friends" in the United Kingdom) are a diverse group and lay representation may take a number of forms. The Legal Services Consumer Panel (LSCP) offers a typology of lay representatives: they may be "the family member or friend who gives one-off assistance; volunteer McKenzie Friends attached to an institution/charity; fee-charging McKenzie Friends offering the conventional limited service understood by this role; or fee-charging McKenzie Friends offering a wider range of services including general legal advice and speaking on behalf of clients in court."⁴⁶¹ As this description suggests, the skill levels and legal knowledge of lay representatives are variable and a number of concerns have been raised about how effectively they are able to act for SRLs, or for their potential to be disruptive to the proceedings.⁴⁶² The LSCP notes a number of other "risks" of lay representation, including agenda-driven McKenzie friends, poor quality advice, overcharging of fees, and breach of the client's privacy.⁴⁶³ However, the LSCP ultimately concludes that lay representatives can widen access to justice and provide litigants with more choice in accessing legal services, and the courts should thus be more permissive of lay representatives.⁴⁶⁴ A survey of lay representatives in Scotland took a similar

⁴⁶⁰ Goldschmidt J, "In Defence of Ghostwriting" (2002) Fordham Urban Law Journal 29.3, 1145.

⁴⁶¹ Legal Services Consumer Panel "Fee-Charging McKenzie Friends" April 2014 http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf at 1.4; see also 3.19. ("LSCP").

⁴⁶² Judicial Working Group at 6.8.

⁴⁶³ LSCP at 11.1.

⁴⁶⁴ *Ibid* at Part 4. The LSCP considers the first three categories of lay representatives listed here to be low risk or relatively low risk, while full-service fee charging lay representatives are the highest risk.

view, that courts should offer more access to lay representatives as well as training judges on the role of the lay representative.⁴⁶⁵

Trinder *et al* argue that the positive view taken by the LSCP study can be attributed to its methodology, as the LSCP primarily gathered the views of fee-charging lay representatives who naturally wished to promote their position.⁴⁶⁶ Trinder *et al* instead express the concern that “problematic behaviour” by lay representatives typically occurs out of sight of the court. The court therefore cannot monitor the position and protect the litigant.⁴⁶⁷ Trinder notes that while in their study one case was observed in which a litigant had a justifiably positive view of the lay assistance they received, in two other cases the litigants had a positive view of a lay representative who appeared to have damaged their case.⁴⁶⁸ At minimum, Trinder suggests, some form of regulatory framework for lay representatives is needed.⁴⁶⁹ Smith *et al*’s study of fee-charging McKenzie friends found that, while there is often a focus on McKenzie friends in the courtroom setting, most of their work is in fact done out of court, in the form of assistance with paperwork and providing legal advice.⁴⁷⁰ While there were some problems caused by McKenzie friends, others made a positive contribution and Smith *et al* concluded that “the case for excluding fee-charging McKenzie friends from the courts has not yet been made out.”⁴⁷¹ However, like Trinder, Smith *et al* suggest that there should be better consumer protections for the clients of McKenzie friends and identify a “regulatory gap” particularly in relation to the ability of McKenzie friends to provide legal advice, but not conduct litigation.⁴⁷²

⁴⁶⁵ Citizen’s Advice Scotland and Shelter, “Lay Representation in Scotland’s Civil Courts” June 2015 <https://www.cas.org.uk/publications/lay-representation-scotlands-civil-courts>.

⁴⁶⁶ Trinder *et al* at page 111; the same can of course be said of the above noted report in Scotland.

⁴⁶⁷ Trinder *et al* at page 112.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ Smith *et al*, “A study of fee-charging McKenzie Friends and their work in private family law cases”(2017) The Bar Council https://www.barcouncil.org.uk/media/573023/a_study_of_fee-charging_mckenzie_friends.pdf

⁴⁷¹ *Ibid* at page 85; however, it is also noted that the data in this study may have tended to skew towards a positive view of McKenzie friends and more research is needed.

⁴⁷² *Ibid* at pages 86-87; the conduct of litigation is a reserved activity while the provision of legal advice is not. For the position in Scotland, see section 4.4.

Zuckerman suggests a different solution: consideration should be given to developing an “intermediate profession of litigation assistants who could provide more meaningful assistance than at present at affordable rates.”⁴⁷³ Reform relating to the provision of lay representation, he suggests, has been slow and ineffective, due in part to a hesitation on the part of the legal profession to give up a monopoly on the services they provide.⁴⁷⁴ Zuckerman also notes that lay representatives are generally acknowledged to be beneficial in tribunals and suggests that this should be examined to determine how litigants in courts may also be assisted.⁴⁷⁵ In the United Kingdom, there are no restrictions on access to lay representation in tribunals and lay representation is thus more common.⁴⁷⁶ Supporting Zuckerman’s view that further research may hold promise, as noted above, Genn and Genn found that in certain types of tribunal cases, specialist lay representatives could be as effective as lawyers,⁴⁷⁷ although Alder’s later research found that pre-hearing advice had a greater effect than representation.⁴⁷⁸

3.5.3 Institutional Change

3.5.3.1 Simplification of Procedures and Plain Language

Rules of civil procedure are necessary to provide structure to the process and provide a framework to resolve legal disputes.⁴⁷⁹ However, civil procedure is often complex and intricate⁴⁸⁰ and, because it is learned primarily through

⁴⁷³ Zuckerman A, “The Court’s Approach to McKenzie Friends—No Improvement in Assistance to Unrepresented Litigants” (2016) CJQ 35 (4) 268 at 278.

⁴⁷⁴ *Ibid.* Moorhead makes a similar suggestion and argues that courts have been too hasty to refuse lay representation, but this observation was made pre-LAPSO and the position is likely to have changed since then; Moorhead R, “Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation” (2003) CJQ 22(Mar) 133.

⁴⁷⁵ *Ibid* at page 277.

⁴⁷⁶ See for example the Judicial Working Group at 6.10.

⁴⁷⁷ Genn and Genn 1989.

⁴⁷⁸ Discussed in Section 3.3.7.

⁴⁷⁹ See, for example, Hennessy C, *Civil Practice and Procedure* at 1-02 and 1-03.

⁴⁸⁰ *Ibid.*

experience and repetition, it is virtually inaccessible to the layperson.⁴⁸¹ This is particularly problematic in light of Genn's finding that procedural barriers lead individuals to feel a sense that their rights are unenforceable.⁴⁸² Many thus argue that procedural reform is a key element in providing SRLs with meaningful access to the courts.⁴⁸³ Moorhead and Pleasance argue that procedural rules should be included in our conception of access to justice, and that rules should be simplified rather than becoming increasingly obscure. Adaption of the rules should provide access rather than "seek[ing] to perfect, through increasing complexity, notions of procedural and substantive 'justice'" to improve access to the courts.⁴⁸⁴ Zorza suggests a number of principles to guide reform of court procedures: information should be collected from litigants only when needed and at a convenient and early stage; procedural steps should not be required unless truly necessary and a triage system should be used to determine which steps are needed; parties should be required to attend court only when absolutely necessary; and courts should play a larger role in the enforcement of their decisions.⁴⁸⁵

However, others suggest that simplification of court procedure is not necessarily a straightforward process. Rules of court must still be capable of providing order to the process and promoting underlying principles such as fair notice—a task often not compatible with the simplicity SRLs would prefer. As noted above, even in tribunals, where procedures are designed to be as straightforward and informal as possible, SRLs still often feel overwhelmed by the legalistic nature of the process.⁴⁸⁶ In addition, Zorza argues that a number of existing forces, including lawyers and special interests, create an environment in which procedures are driven into increasing complexity.⁴⁸⁷ The idea that rules tend to "creep" into more complicated forms also appears elsewhere in the literature. Crompton argues in favour of more informal and user-friendly court processes,

⁴⁸¹ Leith P, "Re-engineering Sources of Law for Unaided Litigants" (2010) *European Journal of Law and Technology* Vol 1 at 3.3.

⁴⁸² Genn *Paths to Justice Scotland* at page 264.

⁴⁸³ See, for example, Engler 1999 at page 2069.

⁴⁸⁴ Moorhead R and Pleasance P, "Access to Justice after Universalism: an Introduction" (2003) *Journal of Law and Society* Vol 30 No 1, 1 at page 9.

⁴⁸⁵ Zorza R, "Some First Thoughts on Court Simplification: the Key to Civil Access to justice Transformation" (2012) 61 *Drake L. Rev.* 845.

⁴⁸⁶ Section 3.3.6.1.

⁴⁸⁷ Zorza, *Ibid.*

but notes that even the small claims procedure that was designed with SRLs in mind does not operate as informally as was intended.⁴⁸⁸ This may be due in part to the fact that lawyers still appear in lower-value and small claims court, and in behaving like lawyers they drive up the complexity of the proceedings. It has also been suggested that the small claims courts, although ostensibly intended for the self-representing individual, have instead been “hijacked” by business interests, although Lewis’s study of the “hijack thesis” found that while business interests dominated the court, SRLs did not often face represented opponents.⁴⁸⁹ Swank argues against excessive adjustment for SRLs entirely, suggesting that while rules should be in clear language and information should be provided to SRLs, efforts to accommodate SRLs are a “slippery slope.” The existing rules serve a purpose and must be applied equally to all litigants.⁴⁹⁰

Calls for reform typically include encouraging the use of plain language in court proceedings and paperwork and avoiding legal terminology and jargon.⁴⁹¹ However, Assy argues that the ability of plain language to provide individuals with direct access to the law has been exaggerated. While plain language can increase the ability of represented parties to engage in the process along with their lawyers, and make the law more intelligible for professionals, proponents of plain language focus too narrowly on language and style, rather than the underlying complexity of the law and legal concepts.⁴⁹² Many of the technical terms used in law require legal knowledge to comprehend, not just simpler language.⁴⁹³

3.5.3.2 Adversarial, Inquisitorial, Interventionist: Judging SRLs

⁴⁸⁸ Crompton G, “Making civil justice work for consumers: The consumer perspective on making the civil justice system in Scotland fit for the 21st century” (2010) at page 24.

⁴⁸⁹ Lewis P, “The Consumer’s Court? Revisiting the Theory of the Small Claims Procedure” (2006) CJQ 25 (Jan) 52.

⁴⁹⁰ Swank D, “In Defence of Rules and Roles: the Need to Curb Extreme Forms of *Pro Se* Assistance and Accommodation in Litigation” (2004) 54 Am. U. L. Rev. 1537.

⁴⁹¹ See, for example Macfarlane 2013 at page 113.

⁴⁹² Assy R, “Can the Law Speak Directly to its Subjects? The Limitation of Plain Language” (2011) Journal of Law and Society Vol 38 No 3, 376.

⁴⁹³ Such as “piercing the corporate veil” and “due care”; *ibid* at page 400.

The adversarial nature of most processes within common law legal systems is often blamed for many of the difficulties that SRLs face.⁴⁹⁴ Because an adversarial process is led by the parties, there is an inherent imbalance of power when a party is not represented and lacks legal knowledge. Accordingly, Cerruti suggests that “an adversarial proceeding cannot proceed as such when the adversaries are not capable of behaving as such.”⁴⁹⁵ Judicial intervention or assistance to SRLs has the potential to balance the scales to some extent. However, there is an inherent conflict between the need to provide fairness to SRLs and the need to avoid the appearance of bias in an adversarial system, wherein the judge is meant not to intervene but instead to remain neutral or passive.⁴⁹⁶ If the judge does not assist, the SRL is disadvantaged; if the judge does assist the SRL, this can be perceived as unfair to a represented opponent.⁴⁹⁷ The presence of SRLs in the courts is thus often conceptualised as a threat to judicial impartiality or neutrality.⁴⁹⁸ However, Zorza argues that the notion that SRLs threaten judicial neutrality is ill-founded and based on a false equivalence. Neutrality has become linked with passivity, when in fact a judge can be both engaged in the process and truly neutral.⁴⁹⁹

Moorhead takes a similar approach, arguing that “the traditional role of judges as passive arbiters is no longer accepted as the dominant paradigm.”⁵⁰⁰ Judges should instead adopt an “interventionist” approach, relaxing rules of relevance and procedure and hearing the dispute in the parties’ own terms.⁵⁰¹ An

⁴⁹⁴ See, for example, Landsman 2009 at page 447; Dewar 2000.

⁴⁹⁵ Cerruti, *supra* note 370 at part III.B.

⁴⁹⁶ Snukals B and Sturtevant G, “Pro Se Litigation: Best Practices from a Judge’s Perspective” (2007) 42 U Rich L Rev 93.

⁴⁹⁷ However, one study found that lawyers were more likely to perceive that a judge was being unfair towards an SRL when he did *not* assist him, rather than being unfair to his opponent when he did: see Goldschmidt J and Stalans L, “Lawyers’ Perceptions of the Fairness of Judicial Assistance to Self-represented Litigants” (2012) 30 Windsor YB Access Just 139.

⁴⁹⁸ See, for example, Goldschmidt J, “Judicial ethics and assistance to Self-Represented Litigants” (2007) 28 Just Sys J 324.

⁴⁹⁹ Zorza R, “The Disconnect between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear *Pro Se*: Causes, Solutions, Recommendations, and Implications” (2004) Georgetown Journal of Legal Ethics 17(3) 423.

⁵⁰⁰ Moorhead R, “The Passive Arbiter: Litigants in Person and the Challenge to Judicial Neutrality” (2007) Social & Legal Studies 16: 405 at page 422.

⁵⁰¹ *Ibid.*

interventionist approach is often called for in small claims and other low-value claims courts.⁵⁰² While the adversarial or inquisitorial nature of the proceedings is always a matter of degree, the interventionist judge occupies his own place on the spectrum that cannot be classified as either entirely adversarial or inquisitorial. While the process itself remains adversarial, the interventionist judge takes on the role of a “manager” of the process rather than acting as an “umpire”⁵⁰³ as he would in an adversarial process. The judge may thus inform parties of court protocol and rules or advise them on what is required to make their case, explain the structure of the proceedings, and ask questions of the litigant or witnesses.⁵⁰⁴ Baldwin suggests that an interventionist approach is often adopted (and required) in small claims court, but found that judges more accustomed to adversarial settings found this difficult and often did not play the role consistently.⁵⁰⁵ In addition, Williams notes that there is little evidence that an interventionist approach is more effective than the traditional adversarial approach.⁵⁰⁶

Another strand of thought advocates for a more inquisitorial approach to cases involving SRLs. Inquisitorial systems are often thought to promote the ability of SRLs to achieve more just outcomes. Trinder *et al* recommend that judges should take a fully inquisitorial role in cases where both parties are unrepresented.⁵⁰⁷ The Judicial Working Group on Litigants in Person suggest adaptation of the system for SRLs, proposing that court rules could include provisions allowing the judge to conduct more inquisitorial proceedings when at least one party is an SRL.⁵⁰⁸ Zuckerman takes a firm stance against the latter proposal, arguing that the adversarial approach is essential: “An adversarial process is central to any enlightened system of justice because it is the only procedure capable of providing a rational, objective and even-handed dispute

⁵⁰² Baldwin J, “Small Claims hearings: the ‘Interventionist’ Role Played by District Judges” (1998) CJQ 17 (Jan) 20.

⁵⁰³ Johnston E, “All Rise for the Interventionist” (2016) *The Journal of Criminal Law* Vol 80, Issue 3, 201.

⁵⁰⁴ Albrecht R *et al*, “Judicial Techniques for Cases Involving Self-Represented Litigants”(2003) 42 *Judges J* 16.

⁵⁰⁵ Baldwin, *supra* note 502.

⁵⁰⁶ Williams 2011 at page 7.

⁵⁰⁷ Trinder *et al* at page 121.

⁵⁰⁸ Judicial Working Group at 5.11.

resolution process.”⁵⁰⁹ Furthermore, Zuckerman argues, a truly inquisitorial system is a myth. While a number of European systems are more inquisitorial than the British systems, representation is also required in all but the lowest value cases and the courts have no more power to investigate matters.⁵¹⁰ The only real solution for SRLs, Zuckerman concludes, is not change to the system, but for them to receive competent legal advice—thus returning us again to the “more lawyers” solution to the issue of SRLs in the courts.

3.6 Conclusion

Looking at the body of the literature as a whole, there are a handful of gaps and unanswered questions to be considered. In the context of this thesis, the most glaring gap is of course the lack of literature and research in Scotland. To some extent, this research is intended to examine many of the same issues already explored in other jurisdictions in the Scottish context. More than that, the thesis is also intended to address some of the disparity between the legal aspects of self-representation and the operation of self-representation in practice. With the exception of Assy’s work,⁵¹¹ which looks at self-representation in more broad conceptual terms, there has been little research mapping out the legal basis and operation in law of self-representation in the civil courts. This work begins from the starting point of establishing the “why” and “how” of self-representation in law in Scotland, and then turns to the types of questions that research in other jurisdictions has already started to address, as discussed throughout this chapter.

Another feature of the literature in this area worth noting is that the empirical data often comes from a particular point of view. As will be explored throughout, there are a variety of “pro” and “anti” SRL perspectives that inform the discourse on self-representation. The Macfarlane and Knowlton *et al* studies, for example, can be said to address the issue of self-representation primarily from the SRL’s point of view. The research carried out by Moorhead and Sefton and Trinder *et al* takes a neutral or balanced approach, commenting both on the experience of the SRL and how their self-representation affects the other parties

⁵⁰⁹ Zuckerman 2014 at 372.

⁵¹⁰ *Ibid* at page 360—361.

⁵¹¹ Section 3.4.1.

involved. The commentary on SRLs often has a similar orientation, being either sympathetic to SRLs and encouraging of measures to assist of them, or wary of self-representation and the impact it can have on other parties and the courts. This thesis seeks, insofar as is possible, to view SRLs from a balanced standpoint such as Moorhead and Sefton's. Much of the empirical work—particularly, for example, Trinder *et al*, as a study carried out in the wake of the LASPO changes—considers self-representation in light of the availability (or lack thereof) of legal aid. In other words, the data is gathered in large part to look at the impact that withdrawal of legal aid or inability to access a lawyer has on the SRL. This is less of an issue in Scotland, where access to legal aid is still relatively robust and has not been subject to the sort of dramatic cuts seen south of the border. This thesis is therefore less concerned with questions that are central to Trinder *et al* and other studies—what is the impact of the withdrawal of legal aid? Is there is a need or a right to more free/affordable legal representation? Instead this research begins from a point that takes for granted that party litigants are and will continue to be in the civil courts, either by choice, in low-value procedures, or because they are otherwise unable to use a lawyer. The intention is to look in more detail at the processes and procedures that regulate party litigants and at the operation of these in practice, particularly relating to the important matter of the exercise of judicial discretion in relation to these matters.

The existing empirical research has focused to a larger extent on the emotional element of self-representation for SRLs—and how this impacts the legal professionals around them, such as the issue of aggression discussed above. Studies such as Knowlton and Macfarlane in particular look very closely at how SRLs about the experience of self-representation and it can be taken as well established that this is often negative. However, while this is important in itself, it does not necessarily address the question of how well SRLs are *in fact* able to access the courts, and what (short of providing more lawyers) can be done to improve their access. This work seeks to address this by looking more closely than the existing work at the details of the court processes and how these impact SRLs. The focus of this work is thus on how judges perceive party litigants, and how this and other factors influence the decisions made about them and, ultimately, how their cases progress. Ultimately, it is hoped that this

can both provide a clearer picture both of how the law currently operates, and how it can be improved in future.

The existing literature relating to the difficult topic of SRLs is also rife with unanswered questions, and in fact often raises as many questions as it answers. Some information about who SRLs are and why they self-represent is available, but the picture is painted only in broad strokes. This is inevitable due to the diversity of SRLs and their cases, but more precision is needed to properly address the underlying issues. For example, as noted above, ideas about the extent of the court's obligation to cater to SRLs often hinge on the matter of whether SRLs have no choice other than to self represent. However, it is not yet known with any real accuracy how often SRLs are forced into self-representing or choose to self-represent. (Whether this should truly matter, of course, is yet another question.) In terms of the operation of self-representation in practice, it is worth summarising the points consistent enough to be relied upon. There is a clear consensus SRLs are very often disadvantaged in the civil courts as compared to represented litigants and that many of the elements of the court process are difficult or even impossible for them to navigate effectively. While more research is needed on the effect of self-representation on outcome, the bulk of the available data also suggests that SRLs are less likely to be successful in their cases. Despite a number of on-going efforts to make courts and tribunals easier for SRLs to use (and to minimise the disruption that the presence of SRLs in the courts can cause) there appears to be universal agreement that problems still remain and there is a great deal of work yet to be done.

What is far less clear is how to proceed with addressing these issues, particularly given that there is little agreement even as to the nature of the problem itself—are SRLs vulnerable individuals who should be helped to make their own cases, or misguided souls who should be kept out of the courts for their own good? Must self-representation be allowed at all costs in the name of autonomy, or should the courts take a more paternalistic view and prevent potential SRLs from causing problems and delays that can impact both the SRL and their opponent? The literature reveals a range of opinions on these issues, which in turn leads to a lack of coherence in the suggestions for addressing the problems presented by SRLs. Those with a positive view of SRLs are more likely to advocate for systemic

change, with inquisitorial judges and simplified procedures; others take the more conservative view that the answer is not to change the system, but find ways to provide lawyers to those in need and prevent self-representation altogether. Perhaps even more crucial than this lack of theoretical consistency is the lack of empirical data addressing the question of what measures truly assist SRLs. While, as discussed above, there is some data on what SRLs want and how they feel about the process, this data is inherently coloured by the SRL's lack of knowledge of the law and the court processes. In other words, what SRLs want may not be what they truly need, or what is realistic for the courts, who must also consider the needs of the public at large, to deliver. A cynical view would suggest that the views of legal professionals working in the courts, whose livelihoods depend on lawyers being essential, are equally biased. While the last several decades have seen the state of knowledge about self-representation and those who self represent continue to grow, there is still a great deal to be learned in order to understand and address this incredibly complex issue.

Chapter 4: The Law Relating to Self-Representation in Scotland

4.1 Introduction

The sources of law that regulate party litigants are diffuse, and at times contradictory or unclear. In many respects, the law relating to party litigants is the same as the law governing all civil litigants, regardless of whether they are represented. However, in some areas there are particular provisions that make allowances for the party litigant or restrict their actions within the process of litigation. Broadly, these are drawn from statute, rules of court, and when necessary, the inherent power of the Scottish courts to regulate their own procedure. There is also “soft law” which has some influence on the party litigant’s experience in the litigation process. The implications of human rights law on the party litigant are also discussed below. Within this context, this chapter discusses the basis of the right of self-representations and the limitations thereon, the provisions allowing for lay support and lay representation, the regulation of the party litigant in the court process and the implications of different forms of court procedure on party litigants, and the law relating to vexatious litigation.

4.2 The Right of Self-representation

4.2.1 The Basis of the Right to Self-represent

The right of a party to represent himself in civil court proceedings is so fundamental to Scots law that it is often taken for granted. The right to self-represent today is drawn from the Scots Acts 1532⁵¹² which also established the basis for the Court of Session.⁵¹³ Chapter 51 reads: “That na man pley bot

⁵¹² Attributed to 1537; see also *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* [2011] SC 115.

⁵¹³ See Hannay R, *The College of Justice: Essays on the Institution and Development of the Court of Session* (William Hodge 1933).

parties and their procuratoures⁵¹⁴ Item, That na man enter to pley bot parties contained in their summoundes, and their procuratoures, gif they will ony have.” In other words, the right to plead a case belongs to the parties to an action or an advocate, and no one else. Further provisions of the Act also refer to the delivery of bills of continuation⁵¹⁵ and the examination of witnesses⁵¹⁶ as being carried out by “parties or their procuratoures.” Self-representation was envisioned in the earliest stages of Scottish civil court system as we know it today. Although the Act is now nearly 500 years old, it was observed as recently as 2010 that it has not fallen into desuetude.⁵¹⁷

Even in the absence of this express authority, self-representation is also part of the constitutional right of access⁵¹⁸ to the courts.⁵¹⁹ The right of access is perhaps best expressed as the State’s duty not to create barriers or impede access to the courts.⁵²⁰ More recently, with the abolition of employment tribunal fees, the Supreme Court has made clear that any serious hindrance can be an impediment to access to the courts, even if it does not make access entirely impossible.⁵²¹ It is thus generally taken for granted in the Scottish courts that a party litigant is allowed, or indeed “entitled,”⁵²² to act on his own behalf.⁵²³ It is perhaps because this entitlement has been taken for granted for centuries that the precise nature of the right remains nebulous.

4.2.2 Limitations on the Right to Self-represent

⁵¹⁴ “Procuratoures” refers to advocates.

⁵¹⁵ Scots Acts 1532, Chapter 52.

⁵¹⁶ *Ibid*, Chapter 53.

⁵¹⁷ *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* 2011 S.C. 115 at page 123.

⁵¹⁸ See, for example, *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909.

⁵¹⁹ See, for example, *Lord Advocate v Rizza* [1962] SLT (Notes) 8.

⁵²⁰ Per Lord Justice Laws, *Children's Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34 at para 37.

⁵²¹ *R (On application of Unison) v Lord Chancellor* [2017] 3 WLR 409 at para 78. Any such hindrance must be authorized by primary legislation.

⁵²² Per Lord Chancellor (Viscount Simon) in *Equity and Law Life Assurance Society v Tritonia, Ltd* [1943] SC (HL) 88 at page 89.

⁵²³ “It is clear beyond doubt that an individual party who is a natural person does not require to be represented by a lawyer”; per Lord Macfayden, *Cultural and Educational Development Association of Scotland v Glasgow City Council* [2008] SC 439 at page 442.

The right to self-represent is virtually absolute and there are only a few exceptions. One of these is that, unsurprisingly, litigants who lack legal capacity may not self-represent. Thus, for example, children⁵²⁴ and adults with incapacity⁵²⁵ may not act as party litigants. Those resident in a “hostile territory” in wartime are also excluded.⁵²⁶ This is the full extent on the limitations placed on self-representation for individuals. The most far-reaching exception, however, is non-natural or “artificial” persons, such as limited companies, trusts or partnerships. The default rule is that artificial persons may not self-represent in any forms of action other than the simple procedure.⁵²⁷

To understand the bar on self-representation for non-natural persons, it is helpful first to consider how such litigants are conceptualised in Scots law. An artificial entity is incapable of being a “party litigant.” Sheriff Principal Dick observed in *Bargeport Ltd v Adam*, “A limited company is not a party litigant and has no right of audience in the Sheriff Court...A limited company is a ‘person’ in law but not a party litigant”.⁵²⁸ When a non-natural person is unrepresented, neither the entity nor anyone purporting to represent the entity, such as a director or employee, can be considered a party litigant. An unqualified person who appears can only do so as a lay representative. Lay representation for artificial entities is allowed in some low-value claims procedures.⁵²⁹ The general rule, however, is that non-natural persons must be represented by a solicitor or advocate to ensure that the representative is able to serve the court, is aware of the law and procedure and is subject to

⁵²⁴ A parent has the right to act as the child’s legal representative (Children (Scotland) Act 1995 s1(1). A child may instruct a solicitor to carry out civil proceedings on his behalf provided he has an understanding of what it means to do so (Age of Legal Capacity (Scotland) Act 1991 s2(4A)).

⁵²⁵ Adults who are subject to an order under the Adults with Incapacity (Scotland) Act 2000. The capacity of a litigant may also be challenged in the course of an action.

⁵²⁶ They do not have the right of access to the courts; see, for example, *Sovfracht (V/O) Appellants; v Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.) Respondents* [1943] AC 203.

⁵²⁷ Simple Procedure Rules Part 2. Prior to the introduction of the simple procedure, lay representatives could appear for companies only at certain types of hearings.

⁵²⁸ *Bargeport Ltd v Adam*, unreported, Glasgow Sheriff Court, 15 February 1985, as quoted in *Dana Ltd v Stevenson* [1989] SLT (Sh Ct) 43 at page 44.

⁵²⁹ For an example of how lay representation for a company can go wrong, see *Libby Dale v Lets Glasgow Ltd*, [2007] Civ PB 73(Feb), 8.

professional rules and disciplinary codes.⁵³⁰ This has been upheld despite no shortage of challenges, including those from a company,⁵³¹ a partnership,⁵³² a club,⁵³³ a voluntary association⁵³⁴ and the Scottish Gas Board.⁵³⁵ A representative of the entity may not sign documents such as an initial writ commencing an action on its behalf.⁵³⁶

It is only very recently that this has begun to change. In *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd*,⁵³⁷ the court noted that, under certain conditions, an absolute bar on lay representation could lead to a breach of Article 6 of the European Convention on Human Rights.⁵³⁸ However, the court declined to change the rule using either its inherent power or by making an act of *sederunt*, considering it a matter to be legislated. The Courts Reform (Scotland) Act 2014 introduced new provisions allowing for lay representation of non-natural persons,⁵³⁹ subject to a number of qualifications. The representative must hold a relevant office, such as director or secretary in the case of a company.⁵⁴⁰ The court must be satisfied that the representative is suitable and that allowing them to act is in the interests of justice.⁵⁴¹ Unlike the rules for lay representation of an individual, the court must also find that the non-natural person is unable to pay for the services of a legal representative⁵⁴² and must have regard for the complexity of the proceedings

⁵³⁰ *Equity Law and Life Assurance Society v Tritonia Ltd* 1943 SC (HL) 88. It has been noted that this rationale could equally be applied to cases involving party litigants who are natural persons; see *Clark Advertising Ltd v Scottish Enterprise Dunbartonshire* [2004] SLT (Sh Ct) 85 at pages 87-88.

⁵³¹ *Apollo Engineering Ltd (in liquidation) v James Scott Ltd* [2012] SC 282.

⁵³² *Clark Advertising Ltd v Scottish Enterprise Dunbartonshire* [2004] SLT (Sh Ct) 85.

⁵³³ *Strathclyde RC v Sheriff Clerk, Glasgow* [1992] SLT (Sh Ct) 79.

⁵³⁴ *Cultural and Educational Development Association of Scotland v Glasgow City Council* [2008] SC 439.

⁵³⁵ *Scottish Gas Board v Alexander* [1963] SLT (Sh Ct) 27. In this case an employee who also happened to be an advocate was not allowed to represent the pursuer, as she was not appearing in her capacity as a member of the Faculty.

⁵³⁶ *Cultural and Educational Development Association of Scotland v Glasgow City Council* [2008] SC 439.

⁵³⁷ [2011] SC 115.

⁵³⁸ Article 6 is discussed further below.

⁵³⁹ Courts Reform (Scotland) Act 2014 s97; lay representation in simple procedure, which replaces the current low-value claims procedures, is dealt with in s96.

⁵⁴⁰ *Ibid*, s95(5)(a).

⁵⁴¹ *Ibid*, s97(3)(b-c).

⁵⁴² *Ibid*, s97(3)(a).

and the non-natural person's prospects of success.⁵⁴³ Rules of court and forms have now been introduced to implement these provisions,⁵⁴⁴ but to date there has not been any reported case law on its application. The terms of the statute and the rules, however, suggest that lay representation for companies is intended to be the exception, rather than the rule.

4.3 The European Convention on Human Rights

Article 6 of the European Convention on Human Rights ("the Convention") is the most relevant to the party litigant. Article 6(1) states: "In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 6(1) encompasses the right of access to the civil courts.⁵⁴⁵ Unreasonable impediments, such as excessive court fees, may constitute a breach of Article 6,⁵⁴⁶ although (as with most Convention rights) reasonable measures prescribed by law, such as orders for caution, do not violate the litigant's rights under Article 6.⁵⁴⁷

While Scots law provides for a right to self-represent in civil matters, there is no such right in Convention law.⁵⁴⁸ In fact, many European countries forbid or restrict self-representation in their civil courts.⁵⁴⁹ When civil self-representation has been addressed within the context of Article 6, it is usually not in relation to access to the courts or equality of arms, but rather the question of the State's obligations to provide legal advice and legal aid. This occurred most famously in *Airey v Ireland*,⁵⁵⁰ when a lack of provision for legal aid in complex judicial separation proceedings was held to have breached Article 6(1). In *Airey*, the state's argument that legal aid was not necessary because self-representation

⁵⁴³ *Ibid*, s97(6).

⁵⁴⁴ Act of Sederunt (Lay Representation for Non-Natural Persons) 2016/243.

⁵⁴⁵ *Golder v United Kingdom* [1979-1980] 1 EHRR 524.

⁵⁴⁶ *Kreuz v Poland* [2001] 11 B.H.R.C. 456.

⁵⁴⁷ *Miloslavsky v United Kingdom* (1995) 20 EHRR 442.

⁵⁴⁸ In criminal cases, the accused has the right to self-representation in terms of Article 6(3)(c).

⁵⁴⁹ Zuckerman A and Coester-Waltjen D, "The Role of Lawyers in German Civil Litigation" (1999) 18(Oct), 291.

⁵⁵⁰ (1979-1980) 2 EHRR 305.

was available was rejected. This argument was also rejected when the litigant lacked the mental capacity to self-represent.⁵⁵¹ However, there is no absolute right to legal assistance and parties are not guaranteed complete equality of arms, only that there is no substantial disadvantage.⁵⁵² Where the complexity of law and procedures or capacity impede access to the courts, Convention law provides an “escape valve” in the right to legal aid and representation, but not adjustment of the process for unrepresented parties. Article 6 thus does little to advance the rights of the party litigant in civil matters over and above the right to self-represent already present in domestic law.

However, there are other ways that self-representation can intersect with Convention rights. Issues have recently been raised in England in respect of incompatibilities with Article 6 which may arise in family actions where a party litigant may have to question a witness he stands accused of abusing. In *Q v Q*,⁵⁵³ it was observed that, due to the bar on a litigant personally questioning a witness in cases concerned with sexual offences,⁵⁵⁴ the litigant cannot do this himself. However, to comply with Article 6, the litigant must be able to examine the witness. With legal aid no longer available in these cases, it was held that the court might have to bear the cost of counsel to examine the witness on the litigant’s behalf.⁵⁵⁵ In fact, where the litigant also faces criminal charges, the court may also have to bear the cost of legal advice to ensure that he does not incriminate himself in the course of the family matter.⁵⁵⁶

4.4 Lay support and Lay Representation

4.4.1 Introduction

⁵⁵¹ *Stewart-Brady v United Kingdom* [1997] 24 EHRR 38; however, a breach of Article 6 had not occurred in this case because the applicant had no reasonable prospect of success.

⁵⁵² *Steel v United Kingdom* (2005) EMLR 15.

⁵⁵³ [2014] EWFC 31.

⁵⁵⁴ Youth Justice and Criminal Evidence Act 1999 s34.

⁵⁵⁵ Both the litigants’ rights under Article 6 and the witnesses’ rights under Article 8 are potentially engaged in these cases.

⁵⁵⁶ *Q v Q* [2014] EWFC 31 at para 58 onwards.

The question of whether a layperson may assist a party litigant in the Scottish courts, and to what extent, has historically been answered in a surprisingly complex area of law, full of conflicting and overlapping provisions.⁵⁵⁷ It is only recently that the rules have been rationalised. It is worth noting, however, that while a description of the law suggests a more strict approach to the regulation of lay assistance and representation, there is some evidence that lay assistants⁵⁵⁸ and lay representatives⁵⁵⁹ have at times been permitted to appear outwith the scope of the rules in place at the time.

The English term “McKenzie friend”⁵⁶⁰ is often used in Scotland to refer to any person who assists a party litigant. However, there is a significant difference between a “lay assistant” (or “lay support”) and a “lay representative,” although both are often referred to on either side of the border as “McKenzie friends.” “McKenzie friend” is a colloquial and not legal term, but remains commonly used.⁵⁶¹ Essentially, the role of the lay assistant is to sit beside the party litigant in court, helping him to manage documents, taking notes or quietly providing advice. A lay representative also addresses the court on the litigant’s behalf and may be allowed to do whatever the party litigant could do on his own behalf. Lay support or assistance may come from a variety of sources. In some cases, it is a friend or family member with no more legal knowledge than the party litigant himself. However, a potential lay representative may be legally qualified in another jurisdiction, or may be an experienced volunteer or employee of an agency like the Citizen’s Advice Bureau, Money Advice Scotland or Shelter. Some agenda-based groups, such as Families Need Fathers, may also facilitate lay support.⁵⁶² The law and rules do not make any distinctions between these different sources of lay representation or support.

⁵⁵⁷ McIntosh A, “Fifty shades of lay?” (2013) JLSS 15 April
<http://www.journalonline.co.uk/Magazine/58-4/1012423.aspx>.

⁵⁵⁸ *Frost and Parkes v Cintec International Limited* [2005] CSOH 119.

⁵⁵⁹ See, for example, *McClure Naismith v Stephen*, unreported, Edinburgh Sheriff Court, 21 October 2011; Citizens Advice Scotland, “Ensuring Effective and Affordable Access to Appropriate Dispute Resolution” 24 September 2010, page 6.

⁵⁶⁰ Sometimes spelled “Mackenzie.”

⁵⁶¹ Stephenson LJ suggests that courts “Let the ‘McKenzie friend’ join the ‘Piltdown man’ in decent obscurity” in *R v Leicester City Justices and Another* [1991] QB 260.

⁵⁶² Families Need Fathers: McKenzie Friends Listing, <http://www.fnf.org.uk/law-information-2/courts/mckenzie-friends/mckenzie-friend-listings>.

4.4.2 Lay Assistance/Lay Support

The Scottish approach to lay assistance represents one example of a theme often repeated in the law of the party litigant: a cautious adoption of a pre-existing English principle. While the genesis of the “McKenzie friend” in England is often attributed to *McKenzie v McKenzie*⁵⁶³ in 1971, *McKenzie* affirmed what was already regarded as a pre-existing right to lay assistance. Over 100 years earlier, the following was noted in *Collier v Hicks*⁵⁶⁴: “Any person, whether he be professional man or not, may attend as friend of either party, may take notes, may quietly make suggestions, and give advice.”⁵⁶⁵ This dictum shows two fundamental differences between English and Scots law on this point: firstly, lay support is available in England in terms of the common law. Secondly, in English law lay support is a right or “entitlement”.⁵⁶⁶ In Scotland, lay assistance is not a common law principle and was not formally introduced into Sheriff Courts⁵⁶⁷ and the Court of Session⁵⁶⁸ until 2010. Lay support is now allowed by rules of court made under the general powers of the courts to regulate civil procedure.⁵⁶⁹ The rules are in virtually the same terms for both the Sheriff Courts and Court of Session. In contrast to the position in England, in Scotland lay assistance is not an entitlement and must be applied for and approved by the court.⁵⁷⁰

The role of the lay assistant is prescribed by the rules. He may provide moral support; help manage documents; take notes; and quietly advise on points of law and procedure, issues which the litigant may wish to raise with the court,

⁵⁶³ [1971] P 33.

⁵⁶⁴ [1831] 2 B & Ad 663.

⁵⁶⁵ *Ibid*, per Lord Tenterden CJ at page 669.

⁵⁶⁶ Per Sachs LJ in *McKenzie v McKenzie* 1971 P. 33 at page 41.

⁵⁶⁷ Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No. 2) 2010/416, Rules 2-5. There is a rule inserting provision for lay support into the rules for each of the procedures (Ordinary Cause, Summary Applications, Small Claims and Summary Cause).

⁵⁶⁸ Act of Sederunt (Rules of the Court of Session Amendment No.4) (Miscellaneous) 2010/205, Chapter 12A of the Rules of the Court of Session 1994.

⁵⁶⁹ The Sheriff Courts (Scotland) Act 1971 s32 and the Court of Session Act 1988 s5 respectively. When lay representation was later introduced, statutory provisions were required.

⁵⁷⁰ See, for example, the Rules of the Court of Session, Rule 12.A.1(1); reference is made to the Court of Session rules hereafter, but the Sheriff Court procedure is in very similar terms.

and questions which the litigant may wish to pose to witnesses.⁵⁷¹ The lay assistant may not receive any remuneration.⁵⁷² An application for assistance is made by motion and a form is provided⁵⁷³ for the party litigant to complete. The prospective lay assistant must also sign the form, declaring any financial interest in the cause, that they are receiving no financial remuneration, and that they will keep any documents and information provided by the party litigant confidential.⁵⁷⁴ While lay support is not automatically allowed in Scotland, the court may refuse an application *only* if it considers the named person to be unsuitable, or is of the opinion that it would be contrary to the efficient administration of justice to grant it.⁵⁷⁵ The court thus retains a degree of discretion, but cannot arbitrarily refuse to allow lay support. However, it is also quite clear that the wording of the rules is careful not to create a “right” to lay assistance.

As the lay assistant plays a relatively passive role in the proceedings, his presence is likely to be uncontroversial and there has not been any reported case in Scotland addressing the application of these rules. However, a handful of English cases illustrate that difficulties can possibly occur. One area of concern is the presence of lay support in confidential hearings. In England, a judge appears to have some discretion to exclude a lay assistant from a private hearing held in chambers.⁵⁷⁶ Generally, however, there is a presumption in favour of allowing lay support even for private proceedings.⁵⁷⁷ The rules in Scotland also provide for lay assistance in chambers,⁵⁷⁸ but the judge may withdraw permission if he considers that the presence of the lay assistant either in court or in chambers is contrary to the efficient administration of justice.⁵⁷⁹ In at least one case, it has been necessary for an English court to make a “banning order”

⁵⁷¹ *Ibid*, Rule 12.A.1(1).

⁵⁷² *Ibid*, Rule 12.A.1(2); any expenses are not recoverable in the proceedings in terms of Rule 12.A.1(8).

⁵⁷³ Act of Sederunt (Rules of the Court of Session Amendment No.4) (Miscellaneous) 2010/205, Schedule 1.

⁵⁷⁴ The lay assistant may access court documents and information; Rules of the Court of Session, Rule 12.A.1(7).

⁵⁷⁵ *Ibid*, Rule 12.A.1(3); emphasis added.

⁵⁷⁶ *R v Bow County Court Ex p Barrow* [1991] 2 QB 260.

⁵⁷⁷ *Re: H (McKenzie Friend: Pretrial Determination)* [2001] EWCA Civ 1444.

⁵⁷⁸ Rules of the Court of Session, Rule 12.A.1(1).

⁵⁷⁹ *Ibid*, Rule 12.A.1(5).

barring a difficult lay assistant from acting in future cases.⁵⁸⁰ Because lay support is not an automatic right in Scotland, an unsuitable lay assistant could simply be denied permission to act.⁵⁸¹ Due to the fundamental difference between the English and Scottish law, English authorities are unlikely to be very helpful when, and if, the limit of the Scottish judge's discretion on the matter of lay assistance is tested.

4.4.3 Lay Representation

Turning to lay representation, the basic rule in Scots law is that no one but a party litigant, solicitor or advocate may address the court on a litigant's behalf.⁵⁸² The regulation of the legal profession is also relevant to the question of lay representation. Rights of audience in the courts and the right to conduct litigation are regulated by statute,⁵⁸³ but the court retains the power to grant or refuse rights of audience as necessary.⁵⁸⁴ It is an offence for an unqualified person to pretend to be a solicitor⁵⁸⁵ or to prepare documents including writs relating to a court action⁵⁸⁶ unless they are unremunerated or paid only under a contract of employment.⁵⁸⁷ A layperson could therefore assist a party litigant by drafting court documents, as long as they did so gratuitously.⁵⁸⁸ In principle, courts have strictly upheld these restrictions on lay representation. It has been held that a man could not represent his wife,⁵⁸⁹ nor a son his 88-year old father,⁵⁹⁰ and a paralegal could not appear in immigration proceedings.⁵⁹¹ (It is

⁵⁸⁰ *Paragon Finance plc v Noueiri (Practice Note)*, [2001] 1 WLR 2357.

⁵⁸¹ Assuming, of course, that the lay assistant was known to the court. A blanket ban in future attempts to act as a lay assistant could be achieved by making a "vexatious behavior order" under the Courts Reform (Scotland) Act 2014, once this has come into force; see below.

⁵⁸² In terms of the Scots Acts 1532 and at common law; see *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* 2011 S.C. 115.

⁵⁸³ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s27; Solicitors (Scotland) Act 1980 s25A.

⁵⁸⁴ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s27(3).

⁵⁸⁵ Solicitors (Scotland) Act 1980 s31.

⁵⁸⁶ Solicitors (Scotland) Act 1980 s32(1)(a).

⁵⁸⁷ *Ibid*, s 2(a).

⁵⁸⁸ The document must be signed by the party litigant and not a representative.

⁵⁸⁹ *Gordon v Nakeski-Cumming* [1924] SC 939, which remains the leading case today.

⁵⁹⁰ *Rush v Fife Regional Council* [1984] SLT 391; see also *Anderson, petitioner* [2008] SCLR 59.

⁵⁹¹ *Mushtaq v Secretary of State for The Home Department* [2006] SLT 476.

interesting to note, however, that in the latter case the petitioner's brother-in-law was allowed to address the court on her behalf as an "informal interpreter".⁵⁹² Although a wife was effectively permitted to represent her husband in one Outer House decision,⁵⁹³ the court's approach in that case has since been disapproved.⁵⁹⁴

However, while the default position is that lay representation is not allowed, rules are now in place that allow a party litigant to have a lay representative. In the simple procedure, a lay representative may act for a party litigant on submission of a form.⁵⁹⁵ The lay representative may do anything in the conduct of the case that the litigant could do for himself.⁵⁹⁶ The court's approval is not required, but the lay representative can be removed if they are found to be unsuitable. The lay representative may not be remunerated for appearing, unless they are representing a company or partnership.⁵⁹⁷ In other forms of procedure, the court must receive a form from a lay representative and then grant permission for him to appear if the judge considers it to be "in the interests of justice".⁵⁹⁸ As in the simple procedure, the lay representative can do anything the litigant could do in the conduct of the case⁵⁹⁹ and may not be remunerated.⁶⁰⁰ Any expenses incurred by the litigant in connection with the lay representation are not recoverable in the case.⁶⁰¹

A handful of statutory actions also include provision for lay representation. The Home Owner and Debtor Protection Act 2010 allows lay representation⁶⁰² in actions relating to repossession of heritable property.⁶⁰³ There are similar

⁵⁹² *Ibid*, at pages 477-478.

⁵⁹³ *Kenneil v Kenneil* [2006] SLT 449.

⁵⁹⁴ *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* 2011 S.C. 115.

⁵⁹⁵ Simple Procedure Rules, Rule 2.4 (1).

⁵⁹⁶ *Ibid*, Rule 2.3.

⁵⁹⁷ *Ibid*, Rule 2.4(6).

⁵⁹⁸ Ordinary Cause Rules 1993 ("OCR") Rule 1A.2(3).

⁵⁹⁹ *Ibid*, Rule 1A.2(6A)

⁶⁰⁰ *Ibid*, Rule 1A.2(4).

⁶⁰¹ *Ibid*, Rule 1A.2(8).

⁶⁰² Section 7(2).

⁶⁰³ Heritable Securities (Scotland) Act 1894 s5F and the Conveyancing and Feudal Reform (Scotland) Act 1970 s24E. The lay representative must be approved by the Scottish Ministers.

provisions relating other actions including sequestrations,⁶⁰⁴ some forms of diligence,⁶⁰⁵ and Children's Hearings.⁶⁰⁶ In these cases, a lay representative may again do what the litigant could do for himself. These rules allow agencies such as the Citizen's Advice Bureau to assist litigants in court.⁶⁰⁷ While previously these provisions overlapped with the provisions in the rules of court, effectively requiring the litigant to choose which set of rules to apply⁶⁰⁸, after amendment of the rules the statutory provisions now take precedence.⁶⁰⁹

4.4.4 Discussion

Lay representation engages the question of rights of audience, which in turn challenges the established body of law ensuring that only solicitors and advocates enjoy these rights. As already noted, in principle the courts were quite firm prior to the introduction of the new rules on lay representation⁶¹⁰ that only a solicitor or advocate could represent a litigant in court. Although the right of the court to grant rights of audience as necessary has been preserved in statute,⁶¹¹ doubt has been expressed as to whether the court can in fact exercise its discretion to extend rights of audience to lay representatives.⁶¹² This is the crux of the *UK Bankruptcy*⁶¹³ case: it was not for the court to extend rights of audience to lay representatives, but rather (as indeed occurred) for Parliament to introduce legislation if the position was to be altered. When courts have been asked to make a decision on lay representation in principle, a clear line of authority has been established rejecting the notion that the court should, or even can, exercise its discretion to allow lay representatives into the courts.

⁶⁰⁴ The Bankruptcy Rules 2016, Chapter 4.

⁶⁰⁵ Bankruptcy and Diligence etc (Scotland) Act 2007, s33.

⁶⁰⁶ Children's Hearings (Scotland) Act 2011 s185(2)(b).

⁶⁰⁷ Citizens Advice Scotland, "Ensuring Effective Access to Appropriate and Affordable Dispute Resolution"; see also *City of Edinburgh Council v John Stevens* 2011 WL 5903076.

⁶⁰⁸ See McIntosh, *supra* at note 577.

⁶⁰⁹ OCR, Rules 1A.1(1) and 1A.2(1).

⁶¹⁰ And subject to specific statutory provisions allowing lay representation in certain cases.

⁶¹¹ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s27(3).

⁶¹² *Gordon v Nakeski-Cumming* [1924] SC 939; *Anderson, petitioner* 2008 SCLR 59.

⁶¹³ *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* 2011 S.C. 115.

With this in mind, it is all the more surprising that examples of lay representation in the courts can be found prior to the new rules coming into force in 2013. As noted, one of these cases, *Kenneil v Kenneil*,⁶¹⁴ has since been disapproved. Prior to *Kenneil*, however, a husband was allowed to represent his wife and co-pursuer in the Court of Session in *Frost v Unity Bank plc*.⁶¹⁵ Even more significantly, he was allowed to represent his wife in her absence.⁶¹⁶ It is unfortunate that the judgment in this case does not note on what basis or the reasoning behind why the husband was permitted to represent his wife, but only that the husband sought permission to represent her and that the defender did not object. An English barrister was permitted to represent a party litigant in the Sheriff Court as a “lay representative” after giving the court assurance that he would not be remunerated for his services.⁶¹⁷ Again the reasons for allowing this are not entirely clear. It would be particularly interesting to know whether the representative’s status as a barrister in another jurisdiction⁶¹⁸ influenced the decision to allow him to appear. In another case, a judge observed that a party litigant’s mother could have appeared when the party herself was too ill to attend, despite the fact the mother would not, of course, have a right of audience unless it had previously been granted.⁶¹⁹ Despite what would appear to be a number of instructive authorities excluding the use of lay representatives, the courts still retained, and sometimes exercised, discretion to grant rights of audience. This perhaps indicates that the recent expansion in the rules allowing lay representation was necessary.

4.5 Regulation of the Party Litigant in the Court Process

4.5.1 Introduction

⁶¹⁴ [2006] SLT 449.

⁶¹⁵ Unreported, Court of Session, 2 February 1999.

⁶¹⁶ The suggestion that a husband can represent his wife in court was rejected in *Gordon v Nakeski-Cumming* 1924 SC 939.

⁶¹⁷ *McClure Naismith LLP v Stephen*, unreported, 31 October 2011, Edinburgh Sheriff Court; this case was an Ordinary Action not covered by any of the pre-existing rules allowing lay representation.

⁶¹⁸ A solicitor or barrister qualified in England does not have rights of audience or indeed any special status above a layperson in the Scottish courts.

⁶¹⁹ *Clark v Hope and anr* [2006] SCLR 98.

This section considers how the law and rules of court regulate the party litigant as he progresses through the process of civil litigation. Variations in civil procedure, some of which are far more “party litigant friendly” than others, and how these affect the party litigant are also discussed. However, it is important to note that litigants, and particularly defenders, do not choose the procedure their case will be heard under. This is instead dictated by the crave (often the amount of money sued for) of the action and its legal underpinnings. Within the possible exception of a pursuer who may undervalue his case to bring it under the small claims or summary cause procedures, the party litigant cannot opt-in to a more “party litigant friendly” procedure. This section will discuss the simple procedure, ordinary cause procedure, the issue of expenses, family actions, personal injury actions and the role of guidance and “soft law.” Finally the potential implications of policy in court procedure are noted.

4.5.2 The Simple Procedure

The simple procedure has recently replaced the small claims and summary cause procedures⁶²⁰ for low-value claims, currently claims under £5,000.⁶²¹ The simple procedure is intended to be accessible to party litigants, and is described in the rules as a “court process designed to provide a speedy, inexpensive and informal way to resolve disputes.”⁶²² While parties can be represented, this is discouraged by the rules on expenses.⁶²³ The simple procedure rules make a number of allowances for party litigants to make the procedure more manageable for party litigants. The rules are written in a “question and answer” format and legal terminology has been eliminated whenever possible; for example, the word “pause” is used instead of “sist”.⁶²⁴ The sheriff clerk is tasked with serving the claim form when a party is unrepresented, saving the

⁶²⁰ It is worth noting that many of the features of the simple procedure were also present in the small claims and summary cause rules.

⁶²¹ At this time, plans to implement the simple procedure for “Special Claims” such as heritable actions and personal injury actions, have not yet been implemented. The smalls claims and summary cause rules remain in effect for these certain types of claims, but will eventually be shifted to the simple procedure.

⁶²² Simple Procedure Rules, Rule 1.1(1).

⁶²³ *Ibid*, Part 12.

⁶²⁴ *Ibid*, Part 9.

expense of a solicitor or sheriff officer.⁶²⁵ The sheriff has an expanded role to play in the simple procedure, as he is tasked with helping parties negotiate a settlement if possible.⁶²⁶ If the case cannot be settled and proceeds to a hearing, the sheriff must establish the factual and legal basis of the claim and response and the matters genuinely in dispute.⁶²⁷ This departs from a fully adversarial approach, easing the burden on the party litigant to know the law in his case. Rules of evidence are also relaxed and the sheriff has a wide discretion to determine how evidence is to be led and heard.⁶²⁸

The simplicity of the procedure is not suitable for cases that are complex⁶²⁹ and complicated actions may be remitted to the Ordinary Cause.⁶³⁰ While the simple procedure is still relatively new, remitting low value claims to Ordinary Cause has generated a degree of controversy in the past. It has been argued, albeit unsuccessfully, that remitting a low-value claim may infringe the rights of the party litigant, as they will find it much more difficult to navigate the Ordinary Cause procedures without the advice of a solicitor.⁶³¹ However, it is worth noting that remitting a low-value claim to the Ordinary Cause affects not only how easily a litigant can navigate the more complex procedures, but also raises the more tactical issue of his exposure to an adverse award of expenses.⁶³²

While the simple procedure is certainly more accessible to party litigants than the Ordinary Cause and others that will be discussed below, it is perhaps best described as “simpler” rather than “simple” procedure. The rules are lengthy, running to 21 parts with two additional schedules. The sections dealing with the fundamentals of the procedure are easy enough to follow, but others are more convoluted. The section dealing with “provisional orders” (diligence on the dependence) is particularly difficult to follow and is littered with references to the legislation without explanation in plain language. This is surely not intentional, as the rules were subject to an extensive consultation as well as

⁶²⁵ *Ibid*, Rule 6.11.

⁶²⁶ *Ibid*, Rule 12.3(2).

⁶²⁷ *Ibid*, Rule 12.4(2-3).

⁶²⁸ *Ibid*, Rule 12.6.

⁶²⁹ Alternately, the sum sued for may be amended or a counterclaim may be introduced.

⁶³⁰ Simple Procedure Rules, Rule 17.2.

⁶³¹ *Walls v Santander UK plc*, unreported, Glasgow Sheriff Court, 12 July 2010.

⁶³² *Hamilton v Royal Bank of Scotland plc* [2009] GWD 9-144.

focus groups.⁶³³ Instead, it demonstrates just how difficult it is to simplify the complex process of dispute resolution. In addition to being easy to understand, an accessible process also has to be flexible enough to ensure that it can accommodate as many cases as possible—otherwise, too many actions will end up being remitted to the Ordinary cause courts. In addition to being easy to read, the rules also have to be utilised and interpreted by sheriffs in the courts like any other rules of court.

4.5.3 Ordinary Procedure

The Ordinary Cause procedures in the Sheriff Court and Court of Session are similar and will be discussed together with any differences noted. The Ordinary Cause encompasses rights of action including debt, damages, or delivery valued at over £5,000, actions of declarator, family actions and personal injury cases. In the most general terms, these actions involve submitting a writ or summons to the court seeking authority to serve the document on the defender, the lodging of a notice of intention to defend or entering appearance, the lodging of defences and adjustment of pleadings by both parties, and a procedural or “options” hearing, followed by the leading of evidence in a proof. However, there is scope for a number of incidental procedures,⁶³⁴ including the hearing of preliminary pleas in debate or proof before answer.⁶³⁵ The procedure is considerably more complicated than the low value claims process.

Initiating an action is likely to be more difficult for the party litigant in the Ordinary Cause than it is in the low-value procedures, as the initial writ or summons must be drafted in its entirety. Very basic styles dictate what the writ must contain,⁶³⁶ such as the Condescendence and Pleas-in-law, but there is no formal guidance available for this or any other aspect of the procedure. The

⁶³³ <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-publications/report-on-the-consultation-on-the-draft-simple-procedure-rules.pdf?sfvrsn=2>.

⁶³⁴ Some of which are also used in the summary cause and even small claims procedures, albeit less commonly.

⁶³⁵ OCR Chapter 21.

⁶³⁶ Style Form G1 of the OCR 1993; summons Form 13.2-A of the Court of Session Rules.

rules are prescriptive but not instructive or illustrative of the procedures the litigant will be expected to know.

In the Court of Session, a series of rules places limitations on the party litigant commencing an action and the documents he may lodge by regulating what he may sign.⁶³⁷ To initiate an action, an agent must sign the summons.⁶³⁸ This requirement may be dispensed with only with the permission of the Lord Ordinary.⁶³⁹ If this is granted, a party litigant may then sign on his own behalf. There is no provision in the rules for party litigants to be heard and no route of appeal if the judge refuses to grant permission.⁶⁴⁰ The rules are silent as to what criteria are to be applied by the Lord Ordinary, and as the summons is considered in chambers there is an unfortunate lack of information as to precisely how these decisions are made. Permission should not be granted if the writ is patently incompetent or appears to amount to an abuse of process.⁶⁴¹ Permission for the party litigant to sign on his own behalf does not guarantee that the action is relevant, sufficiently specific⁶⁴² or indeed has merit.⁶⁴³ It also does not guarantee that the action is not vexatious and or that it is based on reasonable grounds.⁶⁴⁴ There appears to be some variation in the approach to these decisions, as permission to sign may be granted based on whether the summons is in proper form,⁶⁴⁵ or refused for legal deficiencies.⁶⁴⁶

The rule requiring an agent's signature also applies to other parts of process after an action has commenced, including petitions, notes, applications and minutes.⁶⁴⁷ The party litigant does not require permission to sign certain

⁶³⁷ With the recent changes to the privative jurisdiction of the Sheriff Court, these rules will become less significant as far more cases will be excluded from the Court of Session. It is not yet known whether new rules for raising actions will be put in place in the Sheriff Court.

⁶³⁸ Court of Session Rules, Rule 4.2(1).

⁶³⁹ *Ibid*, Rule 4.2(5).

⁶⁴⁰ *Ibid*.

⁶⁴¹ *The petition of Gordon Graham to the nobile officium*, [2015] CSIH 51.

⁶⁴² *Kiani v Secretary of State for Business, Innovation and Skills* [2013] CSOH 121.

⁶⁴³ *Carew-Reid v Lloyds Banking Group* [2013] CSOH 5.

⁶⁴⁴ *HM Advocate v Frost* [2007] SLT 345.

⁶⁴⁵ *Ibid*, para 42.

⁶⁴⁶ *Carew-Reid v Lloyds Banking Group* [2013] CSOH 5.

⁶⁴⁷ Court of Session Rules, Rule 4.2(3).

documents, including defences and answers.⁶⁴⁸ In the Sheriff Court, a party litigant is entitled to sign all documents and parts of process in the case on his own behalf, but a Sheriff may refuse to grant a warrant for service for a writ drafted by an unqualified person.⁶⁴⁹

There are also restrictions on how party litigants may serve documents, including writs and motions. In the Sheriff Courts, a solicitor may serve these documents by recorded delivery,⁶⁵⁰ but a party litigant cannot and must engage either a solicitor or Sheriff Officer to effect service on his behalf. Despite the practical impact and the additional cost to the party litigant, this restriction does not explicitly appear in the rules. In *Duff v George Wimpey West of Scotland Ltd*,⁶⁵¹ a party litigant served a motion himself by recorded delivery. It was held by the Sheriff that this attempt at service was ineffectual. As the Ordinary Cause Rules are silent on this point, this conclusion required a tortuous journey through authorities beginning with the Citation Act 1540 and arriving at the current form of citation for a motion,⁶⁵² which says only “solicitor or Sheriff Officer” under the line for signature.⁶⁵³ It was also observed that the party litigant’s opponent had not repaired the defect in service⁶⁵⁴ by writing to the court to advise that the motion hadn’t been properly served and by appearing at the resulting hearing on the motion. The Sheriff declined to make any order on the motion or allow it to be argued because it had not been effectively served, even though it was not in dispute that the opponent had received it. This is understandable from a purely legal standpoint, but surely a baffling and artificial decision from the perspective of a layperson. It is unsatisfactory to have a lack of clarity and transparency for what should be a simple matter. In the Court of Session, the rules are more clear, but again do not state that

⁶⁴⁸ *Ibid*, Rule 4.2(4).

⁶⁴⁹ See, for example, *Bank of Scotland v Mitchell* [2002] SLT (Sh Ct) 55 (in that case, the unqualified persons were English-qualified solicitors) and *Duff v The Law Society of Scotland*, unreported, 8 August 2012, referred to in *HM Advocate v James Duff* [2013] CSIH 50 at para 29.

⁶⁵⁰ OCR 1993, Rule 15.2.

⁶⁵¹ [2012] WL 3062548.

⁶⁵² Form G8 of the OCR 1993.

⁶⁵³ See also *McKechnie v Murray* [2016] CSIH 4.

⁶⁵⁴ OCR 1993, Rule 5.10.

outright the party litigant cannot serve documents himself.⁶⁵⁵ Instead, the several rules must be read together to understand that documents can only be served by a solicitor⁶⁵⁶ or messenger at arms.⁶⁵⁷

While solicitors or their clerks may borrow parts of process and productions in a case, the party litigant in the Sheriff Court requires the permission of a Sheriff to do so.⁶⁵⁸ There is no analogous rule in the Court of Session.⁶⁵⁹ When an order for commission and diligence for the recovery of documents has been granted, documents may be sent directly from the haver to a solicitor, but a party litigant must have the documents sent to the court in the first instance for collection.⁶⁶⁰ Perhaps the most important restriction on the party litigant relates to the citation of witnesses. A party litigant must apply by motion at least four weeks in advance of any proof for the Sheriff to fix a sum of caution for the expenses of the witnesses he intends to call.⁶⁶¹ Caution must be found before the witnesses can be cited.⁶⁶² This adds additional expense, and a degree of procedural complexity, for a party litigant who wishes to conduct his own proof. There is no need for represented parties to find caution, although a solicitor may be personally liable for the expenses of a witness.⁶⁶³ All of these rules appear to reflect a degree of distrust in the party litigant, although equally they may result from the special status of officers of the court and the privileges that this entails.

4.5.4 Expenses

The civil courts have the inherent power to award expenses and in most cases “expenses follow success.”⁶⁶⁴ The successful party will usually be able to claim

⁶⁵⁵ This was recently affirmed in *AB v CD* [2015] CSOH 24; in this case, postal service by a party litigant (and former solicitor) was held to have been ineffective.

⁶⁵⁶ Court of Session Rules, Rule 16.1 and 16.4.

⁶⁵⁷ *Ibid*, Rules 16.1, 16.3 and 16.4.

⁶⁵⁸ OCR 1993 Rule 11.3; see also *Levison v The Jewish Chronicle Limited* [1924] SLT 755.

⁶⁵⁹ Court of Session Rules, Rule 4.12.

⁶⁶⁰ OCR 1993, Chapter 28.

⁶⁶¹ *Ibid*, Rule 29.8(1)(a).

⁶⁶² *Ibid*, Rule 29.8(1)(b).

⁶⁶³ *Ibid*, Rule 29.7(5).

⁶⁶⁴ *Thomson v Edinburgh Tramway Co Ltd* [1901] 8 SLT 352.

all or part of his expenses, including solicitor's fees, from the opposing party.⁶⁶⁵ Depending on the length and complexity of the case, the amount of expense can be substantial and may even exceed the value of the principle sum sued for.⁶⁶⁶ While solicitors and advocates who work in litigation are inevitably familiar with the importance of expenses in civil actions, party litigants are less likely to understand how significant expenses may be. There is a danger that a party litigant, who has no solicitor's fees of his own to pay, may carry on with a case either unaware that he may face decree for expenses at the end of the action, or so misguidedly certain of victory that he does not fully take the possibility into account. A party litigant is also unlikely to be able to make any sort of accurate assessment of risk in relation to the amount of potential expenses. Uplift in the amount of expenses awarded may be granted to represented litigants if a case is particularly complex or raises novel points of law.⁶⁶⁷ There has been at least one unsuccessful attempt by a represented litigant to gain such an uplift based in part on his opponent's unrepresented status, and the related issue of the protracted proceedings and voluminous amount of written material lodged by the party litigant.⁶⁶⁸ In a similar case, it was held that fees for extra preparation time should not form part of an award of expenses simply because the opponent was a party litigant.⁶⁶⁹ However, the court did acknowledge that, in cases where party litigants present with vague pleadings, his opponent's representative may have to spend additional time preparing to address the court on the wider range of points that may arise.

On the other side of the question of expenses, there are special rules in place to govern the recovery of a party litigant's expenses when an award has been made in his favour.⁶⁷⁰ A party litigant may recover outlays and costs for work on his

⁶⁶⁵ The law relating to recovery of expenses in civil matters is complex and cannot be rehearsed in any detail here. Generally a party's account of expenses will be reviewed or "taxed" by the auditor of court before the court formally grants decree for the amount of expenses, but as taxation is an additional expense it is often in the paying party's interest to negotiate an agreement on the account.

⁶⁶⁶ Expenses and funding in civil litigation were recently reviewed; see the Taylor Review <http://www.scotland.gov.uk/About/Review/taylor-review>.

⁶⁶⁷ An application for additional fees may be made by represented litigants in terms of Rule 42.14 of the Rules of the Court of Session.

⁶⁶⁸ *Singh v Biotechnology Sciences Research Council, The Roslin Institute* [2013] CSIH 2.

⁶⁶⁹ *Frost v Unity Trust Bank plc* [2000] SLT 952.

⁶⁷⁰ Act of Sederunt (Expenses of Party Litigants) 1976/1606.

own behalf up to a maximum of two-thirds⁶⁷¹ the sum allowed for solicitors.⁶⁷² An auditor of Court assesses a party litigant's account and must consider that the sums claimed are reasonable with regards to the circumstances, particularly time taken and time reasonably required, any loss of earnings, the importance of the cause to the party litigant and complexity of the cause.⁶⁷³ It is interesting to note that prior to an amendment in 1983,⁶⁷⁴ these conditions were absent from the rules and party litigants were simply allowed "such sums in respect of any work done". The amendment thus introduced a further requirement of reasonableness for the sums claimed, and gave the auditor of court wider discretion in awarding expenses. The restriction to two-thirds of the sum allowed to solicitors has been challenged unsuccessfully as discriminatory,⁶⁷⁵ but it has also been suggested that the rules place a successful party litigant in a favourable position, as unlike a represented litigant, the party litigant can claim reasonable expenses for his own time.⁶⁷⁶ A litigant who is represented will inevitably expend his own time as well, but has no recourse for recovery. Unlike represented litigants, party litigants cannot apply for an additional award of expenses due to the complexity or importance of the case.⁶⁷⁷

4.5.5 Family Actions

Family cases have become a highly specialised area and are subject to a number of special rules and procedures.⁶⁷⁸ Divorce/dissolution of civil partnership,⁶⁷⁹ a common form of family action, provides a study in contrasts in terms of accessibility for the party litigant. The simplified or "DIY" divorce procedure⁶⁸⁰ is intended for unrepresented parties, although a solicitor may act as well. The

⁶⁷¹ Act of Sederunt (Expenses of Party Litigants) 1976/1606 art 2(1).

⁶⁷² In the tables of judicial fees; *Ibid*, art 2(3)(d).

⁶⁷³ Act of Sederunt (Expenses of Party Litigants) 1976/1606 art 2(2).

⁶⁷⁴ Act of Sederunt (Expenses of Party Litigants) (Amendment) 1983/1438.

⁶⁷⁵ *Bank of Scotland plc v Forbes* [2012] CSIH 76.

⁶⁷⁶ *Ibid*, at para 29.

⁶⁷⁷ *Secretary of State for Trade and Industry v Brown*, unreported, 21 January 2004, Court of Session (Outer House).

⁶⁷⁸ As these cases are most common in the Sheriff Courts, the Sheriff Court rules are referred to in this section; again rules in the Court of Session are in similar terms.

⁶⁷⁹ Referred to hereafter as "divorce", but the same general rules apply for dissolution of civil partnership as well.

⁶⁸⁰ Divorce (Scotland) Act 1976.

simplified procedure is available for certain grounds for divorce⁶⁸¹ only, and there must be no children of the marriage under the age of 16,⁶⁸² no mental disorder in either party,⁶⁸³ and no financial provision sought.⁶⁸⁴ An application form is provided,⁶⁸⁵ which allows the applicant to provide much the same information as is contained in an initial writ⁶⁸⁶ via blanks for the applicant to complete and boxes to tick. Once lodged, a clerk of court serves the application on the applicant's behalf;⁶⁸⁷ if service is successful and no objection is received, divorce is usually granted after the period of notice expires⁶⁸⁸. If an objection is received, the application must be dismissed unless the reason for objection is "frivolous".⁶⁸⁹ Like the low-value claims procedures, the "DIY" divorce is made accessible to party litigants with the use of forms, shifting the duty of service to the clerks of court, and the provision of instructive guidance notes.⁶⁹⁰

This can be contrasted with an "Ordinary" divorce, which must be sought when parties cannot use the grounds allowed in the simplified procedure or are seeking any orders. Even when no orders are sought and parties are in agreement on all matters, the simplified procedure is not available when there are any children of the marriage under the age of 16. A simplified form-based procedure is available in England to parties with children,⁶⁹¹ but this is precluded in Scotland by the Children (Scotland) Act 1995, which requires a judge to be satisfied as to the arrangements for children of the marriage before divorce can be granted.⁶⁹² Thus, even in an undefended divorce, the full Ordinary procedure must be followed and affidavits from the pursuer and

⁶⁸¹ Such as one year of separation with consent or two years without (OCR 1993 Rule 33.73(1)(a)); other grounds, such as unreasonable behavior or adultery, must be pursued in an "ordinary" divorce.

⁶⁸² *Ibid*, Rule 33.73(1)(d).

⁶⁸³ *Ibid*, Rule 33.73(1)(f).

⁶⁸⁴ *Ibid*, Rule 33.73(1)(g).

⁶⁸⁵ *Ibid*, Form F31 or F33.

⁶⁸⁶ In terms of civil procedure, a simplified divorce is not an ordinary action but a form of summary application.

⁶⁸⁷ OCR 1993, Rule 33.76(4).

⁶⁸⁸ *Ibid*, Rule 33.80(1).

⁶⁸⁹ *Ibid*, Rule 33.78.

⁶⁹⁰ <http://www.scotcourts.gov.uk/rules-and-practice/guidance-notes/simplified-divorce-and-dissolution-of-civil-partnership-guidance-notes>.

⁶⁹¹ Get a Divorce, <https://www.gov.uk/divorce/file-for-divorce>.

⁶⁹² Children (Scotland) Act 1995 s12.

another party must be lodged along with the minute for decree.⁶⁹³ The requirement for affidavits makes it virtually impossible for a party litigant to divorce without at least some assistance from a solicitor.

With the exception of the simplified divorce, family actions follow a version of the Ordinary Cause procedure and commencing an action requires drafting an initial writ. However, more active case management is applied to actions in relation to children. Many of these cases are not legally complex, and child welfare hearings (which all parties are generally required to attend personally, even if they are represented) give the litigants an opportunity to discuss matters with the judge.⁶⁹⁴ Matters may be resolved without the need for further procedure or a formal proof. Recently introduced rules also provide for quicker resolution and close management of actions involving children.⁶⁹⁵ The additional structure provided by judicial case management is likely to benefit party litigants, who are unlikely to know how best to steer the cases they are involved in. However, any benefit to the party litigant is incidental and not designed to make the process more accessible.

4.5.6 Personal Injury

Procedurally, personal injury actions present a particular challenge for party litigants. Parties are represented in the vast majority of these cases, and this is reflected in the procedure. Personal injury cases follow a streamlined procedure that places an emphasis on negotiations between parties and judicial case management. A personal injury case need never call in court, unless a proof is required.⁶⁹⁶ However, documentation such as valuations of claim and minutes of the required pre-proof conference must be lodged by prescribed dates. If this is not done, a hearing will automatically be fixed to explain the party's default and decree by default or dismissal of the case could be granted. The emphasis on written pleadings and documentation, rigid deadlines, and the frequent need for medical reports or expert evidence in these cases make them particularly

⁶⁹³ OCR 1993, Rule 33.28(2). Many other forms of family action have a similar requirement for affidavit evidence.

⁶⁹⁴ OCR 1993, Rule 33.22AA.

⁶⁹⁵ *Ibid*, Chapter 33AA.

⁶⁹⁶ OCR 1993 Chapter 36, Court of Session Rules Chapter 42A -43.

difficult to undertake without the assistance of a solicitor.⁶⁹⁷ However, for the majority of parties who are represented, a quicker resolution is achieved and expenses are minimised. The commercial court procedure operates in a similar fashion.⁶⁹⁸

4.5.7 Guidance and “Soft Law”

While not law *per se*, it is worth noting the available guidance (or lack thereof) that affects the experience of the party litigant in the court process. For all procedures, as noted above, the rules of court are prescriptive, but not instructive; it would be difficult for a party litigant to initiate even a small claim based on the rules alone. Guidance booklets were produced for the small claims and summary cause procedures, but when the simple procedure was introduced guidance was incorporated into the structure of the rules, including a glossary of terms.⁶⁹⁹ Guidance is available for the simplified divorce procedure, instructing parties on how to complete the forms and what to expect from the process.⁷⁰⁰ Guidance is offered to party litigants involved in an Ordinary Action in the Court of Session⁷⁰¹ but, curiously, not in the Sheriff Courts. There is no guidance for any other procedures, such as summary applications or family actions. Scottish civil procedure is complex and generally requires practice even for solicitors to navigate effectively.⁷⁰² The lack of guidance for the party litigant could represent a real obstacle to pursuing his case. It should be noted, however, that the court is permitted to provide procedural advice, but not legal advice,⁷⁰³ so any guidance offered from the court must be limited to procedural matters.

⁶⁹⁷ See, for example, *McLeod v Tayside Health Board* [2014] CSOH 141, *JD v Lothian Health Board* [2017] CSIH 27.

⁶⁹⁸ Court of Session Rules Chapter 47, OCR 1993 Chapter 40.

⁶⁹⁹ Simple Procedure Rules, Part 21.

⁷⁰⁰ Simplified Divorce Guidance, <http://www.scotcourts.gov.uk/rules-and-practice/guidance-notes/simplified-divorce-and-dissolution-of-civil-partnership-guidance-notes>.

⁷⁰¹ <http://www.scotcourts.gov.uk/docs/default-source/scs---taking-action/raising-and-defending-ordinary-action-in-the-cos100810.pdf?sfvrsn=2>

⁷⁰² See, for example, Hennessy at para 1-05.

⁷⁰³ See section 7.7.1.

The Law Society of Scotland's Code of Conduct is also worth noting, as it sets out how solicitors should approach party litigants:

“Where you appear against a person who represents him or herself, you must avoid taking unfair advantage of that person and must, consistently with your duty to your client, co-operate with the court in enabling that person's case to be fairly stated and justice to be done. However you must not sacrifice the interests of your client to those of the person representing him or herself.”⁷⁰⁴

This imposes something of a positive duty on solicitors in respect of the party litigant, although this is a duty to the court, rather than the party litigant himself. On a similar note, the Scottish Civil Justice Council (the “SCJC”) has proposed creating additional guidance and a code of conduct for party litigants.⁷⁰⁵ However, this is described as a “medium-term” priority, which may take some time materialise as the SCJC copes with more pressing reforms. A code of conduct would represent an answer to the common complaint that party litigants, unlike solicitors, have no clear guidelines. However, as the SCJC has already noted,⁷⁰⁶ the enforceability of any code of conduct for party litigants is dubious at best. Unlike the Law Society's code of conduct for solicitors, there is no threat of professional discipline to ensure compliance with rules. However, if a code of conduct is in place the court might feel more confident that party litigants are familiar with what is required of them and (perhaps more importantly) might consider that they cannot claim to be ignorant of the court's expectations.

4.5.8 Discussion: Policy and Procedure

One point that emerges from the discussion above is that court procedures vary in accessibility for party litigants, sometimes by design. Although unsurprising, this is a matter that merits further consideration. Low-value claims and divorces not involving children are relatively procedurally simple and facilitated by clerks of court, while those who wish to pursue higher value claims or orders in respect

⁷⁰⁴ Law Society of Scotland Code of Conduct, Rule B1.13, 1.13.4.

⁷⁰⁵ Interim Report on the ‘Making Justice Work 1’ Rules Rewrite Project by The Scottish Civil Justice Council Rules Rewrite Working Group, March 2014 at para 62. However, this is not mentioned in the SCJC's most recent report on the Rules Rewrite Project, “The First Report” May 2017; see section 9.3.

⁷⁰⁶ *Ibid.*

of children must be willing, and able, to educate themselves on the law and procedures that solicitors and advocates practice. It is clear that in some areas, a choice has been made to make the civil courts more “party litigant-friendly.”

The impact of public policy on civil procedure is often subtle, but nonetheless can have a great impact. The provisions of the Home Owner and Debtor Protection (Scotland) Act 2010 provide an illustrative example. The aim of the 2010 Act is, as the title suggests, offering additional protections to homeowners facing repossession of their properties. It is a matter of common sense that homeowners already facing difficulties paying their mortgages are unlikely to be able to afford legal representation. One solution offered in the 2010 Act is to make lay representation available. The Act also changed the procedure for repossession under a standard security from an Ordinary Action to a summary application. The effect of this is more significant than it may initially appear. Previously decree would pass in absence if the homeowner failed to lodge a minute⁷⁰⁷ under section 1 of the Mortgage Rights (Scotland) Act 2001 seeking suspension of the standard security (usually seeking additional time to pay the arrears or sell the property). It was difficult for a party litigant to learn how to draft and serve a competent minute within the time allowed without legal assistance. If he managed it, the minute was served and the court usually ordered answers and a hearing.⁷⁰⁸

Following the 2010 Act, the procedure is much simpler: a warrant to serve the application is granted only when prescribed pre-action protocols⁷⁰⁹ have been followed. The burden is therefore on the court to ensure that the appropriate notices have been served, rather than on the defender,⁷¹⁰ who, if unrepresented, is unlikely to be familiar with the requirements. A hearing is

⁷⁰⁷ A notice of intention to defend could also be lodged, but as noted above these cases are usually quite straightforward in law and in most there will not be a defense for the failure to make payments under the standard security.

⁷⁰⁸ OCR 1993 Chapter 14.

⁷⁰⁹ Home Owner and Debtor Protection (Scotland) Act 2010 s4.

⁷¹⁰ In a summary application, the pursuer and defender are generally referred to as the applicant and respondent.

fixed in the first instance,⁷¹¹ with no requirement for the defender to lodge anything in writing at this stage. The Sheriff can make enquiries at the hearing and, if appropriate, an order may be made for payment of the arrears in instalments, time to sell the property, or for further procedure. A form is also provided for any entitled residents of the property who wish to make representations.⁷¹²

Overall, these changes make it easier for party litigants to enter the process and make representations in these cases. While this, of course, does not guarantee they will be successful,⁷¹³ it provides a starting point so that potentially unnecessary and, in terms of social policy, undesirable home repossessions may then be less likely to occur. It is important to add that this comes at the price of an increased workload and costs for the court and for the lender. The social aims and inherent imbalance of power between pursuer and defender in repossession cases perhaps justify the departure from a more “hands off” adversarial approach and this example suggests that procedural adjustments in targeted areas or certain types of case may be a tool to provide better access to the courts for party litigants.⁷¹⁴ However, a sharp contrast can be seen between the forms of procedure discussed in this section that at least attempt to address the difficulties party litigants encounter navigating the court process,⁷¹⁵ and the other forms (such as ordinary cause procedure) where there is an absence of concessions for party litigants in the rules.

4.6 Vexatious Litigation

Some of the ways that courts regulate party litigants in the civil court process have been considered above. For the vexatious litigant who habitually abuses of

⁷¹¹ This is similar to the summary cause heritable procedure (Chapter 31) that is raised to evict tenants from rented properties. Unlike other summary cause procedures, decree is not granted in absence and all cases must call in court.

⁷¹² Home Owner and Debtor Protection (Scotland) Act 2010 s5.

⁷¹³ As discussed throughout this thesis but particularly in Chapter 7, there is still much for party litigants to contend with in the court process.

⁷¹⁴ See, however, the discussion of party litigants and compliance with procedural requirements in section 7.2.

⁷¹⁵ Chapters 8 and 9 will suggest that there is still a need to establish a more substantial policy direction on self-representation.

the court process, however, special measures are required. “Vexatious” is a term of art in law, referring to a particular species of litigant who raises frequent and unfounded claims. These litigants are not merely difficult or problematic, but habitually and persistently pursue hopeless cases; it has even been suggested “obsessive litigation” is indicative of underlying mental health difficulties.⁷¹⁶

The first laws addressing vexatious litigation were introduced in England in 1896⁷¹⁷ and, in virtually the same terms,⁷¹⁸ two years later in Scotland.⁷¹⁹ The Vexatious Actions (Scotland) Act 1898 allows the Lord Advocate to petition the Court of Session to make an order barring the litigant from instituting legal proceedings in any court without leave from the Lord Ordinary.⁷²⁰ Leave will be granted if the Lord Ordinary is satisfied that the proposed action is not vexatious and has *prima facie* grounds.⁷²¹ Once in force, the Courts Reform (Scotland) Act 2014 then expanded the court’s power to make these orders. Under the 2014 Act, the court is able to consider not only the institution of vexatious actions, but also vexatious applications in the course of an action not instituted by the litigant⁷²² as well as actions instituted outside Scotland.⁷²³

The 2014 Act will also enable the Scottish courts to make “vexatious behaviour” orders similar to England’s civil restraint orders. These orders may be sought by a vexatious litigant’s opponent or made *ex proprio motu* by a judge in any court.⁷²⁴ Unlike vexatious litigation orders, which can only prevent future

⁷¹⁶ International Bar Association, Judges Forum Session Report “Obsessed litigants—an important but neglected subject” September 2005, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=22F47040-65B4-4A82-B4EB-1D414B32E7A1>.

⁷¹⁷ Taggart M, “Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896” (2004) CLJ 656.

⁷¹⁸ There is a degree of overlap with the inherent powers already possessed by the courts; see the English case *Ebert v Venvil* [2000] Ch 484.

⁷¹⁹ It appears that the first order under the 1898 was not made until over half a century later, in 1950; see *Lord Advocate v Gracie* [1951] SLT 116.

⁷²⁰ Section 1.

⁷²¹ *Ibid.*

⁷²² Courts Reform (Scotland) Act 2014, s101(1)(b); this eliminates an ambiguity which the defender unsuccessfully attempted to rely on in *HM Advocate v Frost* [2007] SLT 345.

⁷²³ *Ibid*, s101(2).

⁷²⁴ *Ibid*, s102(4).

actions, a vexatious behaviour order is more flexible and the judge dictates its terms. The order may require a litigant to seek permission of the court before taking a specified step in the litigation before the court or any other litigation, or before instituting new proceedings.⁷²⁵ Unlike a “vexatious litigation” order, which requires “habitual and persistent” litigation without reasonable grounds, a “vexatious behaviour” order can be made if vexatious proceedings are initiated or vexatious applications are made.⁷²⁶ The 2014 Act provides for the Scottish Ministers to make regulations to include, amongst other important elements, for how long these orders can be made.⁷²⁷

Notably, “vexatious” is not defined in the 1898 or 2014 Acts. The Scottish courts have generally adopted the view that vexatious proceedings have little or no discernible legal basis, subject the opposing party to detriment out of proportion with any potential gain, and involve an abuse of the process of the court.⁷²⁸ As noted above, a litigant who is only difficult or even obstructive is unlikely to be considered vexatious. Judicial interpretation has often distinguished between actions that are vexatious, and those that are conducted vexatiously;⁷²⁹ the 2014 Act now “catches” both.⁷³⁰ As noted above, there is a degree of overlap between the court’s inherent powers and newer power to make vexatious behavior orders. There is no evidence that courts have previously been inclined to use the inherent powers to prevent vexatious behavior, so it will be very interesting indeed to see if, and how, they make vexatious behavior orders under the 2014 Act.

At present, there are only 10 individuals in Scotland subject to orders under the Vexatious Actions (Scotland) Act 1898. Most are very prolific before an order is made preventing any new cases. In one application under the 1898 Act heard in 2013, a litigant had initiated or attempted to initiate no fewer than 15 unsuccessful actions, with most of his grievances arising from his sequestration

⁷²⁵ *Ibid*, s102(2).

⁷²⁶ *Ibid*, s102(1) and (3).

⁷²⁷ *Ibid*, s102(4)(e).

⁷²⁸ *HM Advocate v Frost*, 2007 SLT 345 at para 30, citing with approval *Attorney General v Barker* [2000] 1 FLR 761.

⁷²⁹ See, for example, *Lord Advocate v McNamara* [2009] CSIH 45 at para 34-35.

⁷³⁰ Under the 2014 Act, both vexatious litigation and vexatious behaviour orders can be made as a result of vexatious applications as well as instituting vexatious proceedings.

in 1976.⁷³¹ He eventually turned to suing public bodies, including the Chief Constable.⁷³² In another case, a litigant was involved in only four cases, but each of these was prolonged, marked by a series of meritless appeals, and one involved arresting the bank account of a defender “to teach him a lesson”.⁷³³ A review of the reported cases under the 1898 Act reveals that these are common patterns. It is also common for the vexatious litigant to be bankrupt (many as the result of an earlier adverse award of expenses) ensuring that his opponent has no hope of recovering his expenses. Due to their extreme behaviour vexatious litigants, although rare, are undoubtedly memorable and thus receive what is perhaps a disproportionate amount of attention, compared to the more typical “one-off” party litigant.⁷³⁴

4.7 Conclusion

It is perhaps worthwhile to pause at this point to consider the overall picture of “party litigant law”. The provisions discussed above suggest that lawmakers and the courts have been careful not to create additional “rights” for party litigants beyond the fundamental right to self-represent. Lay assistance and lay representation, which are kept firmly within the discretion of the court, are examples of this approach. Another example is the rules for party litigants’ expenses, which, as noted above, were amended to introduce a test of “reasonableness” and widen the discretion of the auditor. Equally, judges are permitted to excuse a party litigant’s default or allow them more time to comply; a judge may also determine whether to dispose of a case summarily, order caution, or allow a case to proceed to proof or debate. The overarching theme is that of judicial discretion, rather than “rights” for the party litigant or even firm rules. With the exception of low-value claims, the adversarial nature of the process is preserved and there are few concessions for the party litigant.

⁷³¹ *HM Advocate v James Duff* (2013) CSIH 50.

⁷³² Suing public bodies and the courts themselves when previous actions are unsuccessful is a fine tradition for vexatious litigants, dating back to the very first of their kind; see Taggart, *supra* at note 717.

⁷³³ *Lord Advocate v Cooney* [1984] SLT 434.

⁷³⁴ See, for example, Genn 2013 at 428.

However, it must also be kept in mind that rules are often a blunt instrument, perhaps most of all where the unrepresented litigant is concerned. Each party litigant will present with a different level of skill, and each case will turn on its own facts and legal foundation. The rights of the party litigant's opponent must also be considered. It is thus perhaps quite correct that the courts should answer the question of the party litigant not with an abundance of specific rules and procedures, but rather with judicial discretion and close case management. The next chapter will consider the case law to gain an insight into how judges use their discretion to deal with the issues raised by party litigants in their courts and how the interests of party litigants and their opponents are balanced.

Chapter 5: The Exercise of Discretion

5.1 Introduction

As noted in the previous chapter, there is little direct regulation of the party litigant in the civil courts in the forms of statutory provisions or rules. Much of the treatment of party litigants is thus left to judicial discretion. This chapter will consider what the body of existing case law involving party litigants (referred to collectively in this chapter as the “case law”) can tell us about when and how courts address the exercise of discretion in relation to party litigants. It is worth noting that the case law in this area is often illustrative, rather than authoritative. As will become apparent by the end of this chapter, there is little real authority to guide the exercise of judicial discretion in relation to party litigants, particularly when considered in proportion to the number of additional decisions judges may be called upon to make due to a litigant’s unrepresented status.⁷³⁵ The Equal Treatment Bench Book⁷³⁶ (“ETBB”) also provides written guidance to the Scottish judiciary in relation to a variety of litigants, including those who are unrepresented. This guidance does not form part of the law *per se*, but provides some insight into what the judiciary views as a proper approach to party litigants.

Discretion may be required on fundamental questions such as the standard of legal and procedural knowledge required of a party litigant in light of the litigant’s lack of legal training and education.⁷³⁷ The same lack of knowledge can also create the need for discretion in situational matters, most often in the form of extending latitude or assistance to a party litigant when they make errors or are unable to comply with the court’s requirements. This chapter will consider how courts have considered and addressed the more fundamental matters first.

⁷³⁵ Many of these are discussed in Chapter 7.

⁷³⁶ <http://www.scotland-judiciary.org.uk/Upload/Documents/EqualTreatmentBenchBookMay2014.pdf>.

⁷³⁷ See section 5.2 below.

Then the latter question of how courts have made decisions in relation to various forms of latitude and assistance, including procedural matters, legal matters and relevance, and delay, will be addressed.

5.2 Party Litigants: The General Principles

5.2.1 Legal and Procedural Knowledge

One important question to consider is the standard of legal and procedural knowledge that the courts are entitled to expect of party litigants. In the Scottish civil courts, all litigants are expected to come to court with the legal and procedural knowledge necessary to conduct their case. Because the Scottish civil system is adversarial, all litigants are expected to present and prove a relevant case in law, as well as comply with the rules of procedure and evidence.⁷³⁸ The onus rests entirely on the litigant to prepare his case, and it is his responsibility to inform himself where there are gaps in his knowledge.⁷³⁹ The typical or “default” litigant is not a layperson, but a solicitor or advocate.⁷⁴⁰ In other words, the level of knowledge expected is likely to be met only by trained professionals. Strictly speaking, there is no “right” or entitlement in law to a lowering of this standard for a party litigant.

The case of *Gemmell v Marleybone Warwick and Balfour Group Plc*⁷⁴¹ is an interesting and illustrative case on the standard that can be required of party litigants. This appeal concerned a party litigant pursuer who sought to withdraw his minute of abandonment some eighteen months after it had been lodged. In terms of the procedure for withdrawing a minute of abandonment, the defender is entitled to seek decree of absolvitor if the pursuer cannot demonstrate that

⁷³⁸ See, for example, *Wilkie v Direct Line Insurance plc* [2009] CSIH 70 at para 88.

⁷³⁹ *Wilson v North Lanarkshire Council* [2014] CSIH 26. (Hereafter “*Wilson*”.)

⁷⁴⁰ This is often not explicitly stated, but implicit in the court’s discussion of the standard required of litigant; see, for example, *Wilson*.

⁷⁴¹ [2012] CSIH 57.

the withdrawal was in good faith. Absolvitor was granted at first instance.⁷⁴² On appeal, Lady Paton observed:-

“For our part, we are willing to accept that the pursuer may not have been in mala fides as such: but if he did not properly understand the law, and if he has failed to demonstrate a valid reason for withdrawing his Minute of Abandonment, the sheriff was, in our view, entitled to reach the conclusion that he did.”⁷⁴³

It is particularly interesting to note that the court considered the pursuer’s withdrawal of the minute of abandonment after so much time had elapsed bordered on an abuse of process; the question of whether this was deliberate or an error caused by his inexperience was irrelevant. Lady Paton’s observation that litigants must “properly understand” the law is particularly important, as it suggests that the party litigant may have an obligation not only to educate himself, but also to interpret the law correctly.⁷⁴⁴

5.2.2 The Standard of Legal Relevance

Legal relevance represents a perennial problem for the party litigant. Many of the difficulties encountered by unrepresented parties relate to relevance in some way. It is thus worthwhile to briefly consider what exactly is meant by “relevance” in Scottish civil procedure. As noted previously, much of the process is centred on written pleadings. Pleadings must contain a relevant case in law. It is not sufficient for a litigant to state only that he has been wronged, but he must also set out why the wrong gives rise to a cause of action in law. Some types of action are formulaic and require certain averments to be successful, and party litigants may be unaware of these requirements. This is perhaps best illustrated by example. In one case of medical negligence, party litigant pursuers failed in their case because they had failed to make averments to establish causation.⁷⁴⁵ To the parties, it perhaps appeared sufficient to plead that the medical staff had made errors and that the patient had died. However, without proper averments on causation, there was no relevant case in law. As a result,

⁷⁴² Thus precluding the party litigant from re-raising the action, as he wished to do.

⁷⁴³ *Ibid*, para 16.

⁷⁴⁴ See section 7.3.2.

⁷⁴⁵ *McLeod v Tayside Health Board*, [2014] CSOH 141; the standard is as famously set out in *Hunter v Hanley* [1955] SC 200.

the cases of party litigants are often decided not on their merits, but rather on the issue of relevance or lack thereof.⁷⁴⁶

Relevance is also an issue in court, both in submissions and the questioning of witnesses. When a case comes to proof, it is confined to what is contained in the written pleadings. Any matters outwith the pleadings should not be raised. Again, the issue of fair notice arises; litigants cannot introduce new issues or evidence at this stage. Party litigants are often unaware of these constraints. Lady Clark of Calton provided a particularly helpful summary of the underlying principles:

“From the pursuer’s perspective as a layperson, he may find it difficult to understand the reasons why we have written pleadings and not merely a proof at large about any matter a party wishes to bring to the attention of the Court in the course of the proof. There are inevitable constraints as a result of legal pleadings and the rules relating to timeous intimation of a case. In my opinion, these constraints exist for good reasons. Some party litigants may struggle with written pleadings and legal rules in an adversarial system...Efforts have been made to assist [the pursuer] but the judge cannot act as a legal advisor to one of the parties. Our system is an adversarial system and the rules of pleading and the general principles cannot be ignored.”⁷⁴⁷

Although it is perhaps commonplace in practice, strictly speaking any lowering of the established standard of knowledge and relevance for party litigants requires the exercise of discretion on the part of the judge and represents a form of latitude in its own right, albeit one that is particularly likely to be invisible to party litigants. The exercise of discretion in the form of latitude and assistance in particular aspects of the court process are considered in the next section.

5.3 Latitude, Allowance and Assistance

5.3.1 “*Moore*” Latitude

⁷⁴⁶ See section 5.3.3 below.

⁷⁴⁷ *McGregor v Alpha Airports Group plc*, [2011] CSOH 81 at para 15.

The case of *Moore v Secretary of State for Scotland*⁷⁴⁸ provides authority for the proposition that party litigants may be afforded a degree of “indulgence” or latitude in the presentation of their case.⁷⁴⁹ As this principle appears frequently, the precise nature of this form of indulgence merits further consideration. In *Moore*, a party litigant was permitted to address the court on issues not contained in his written pleadings, which were irrelevant and sought incompetent remedies.⁷⁵⁰ The opinion of the court states:

“As the pursuer developed his argument it became apparent that he had done a great deal of research...Unfortunately much of this was irrelevant to the real legal issues in this case, but, in view of the intensity with which he presented his case and his obvious disability as a layman, we allowed him to range much wider than counsel would have been allowed to do in his presentation. In deciding the case, however, the court must confine itself to the appropriate legal issues.”⁷⁵¹

The court goes on to state that “indulgence” is often given to a party litigant, “so long as it does not result in an injustice to the other party.”⁷⁵² The court thus allows the party litigant to make irrelevant arguments, but these arguments are not admitted to probation. The ETBB recognises the type of latitude discussed in *Moore* but adds, “[t]his does not mean that judges will allow irrelevant submissions which would not be permitted in the case of counsel or a solicitor.”⁷⁵³ (However, it must be noted that this appears to be exactly what occurred in *Moore*.) As any irrelevant arguments made are not factored into the court’s decision, this form of latitude does not truly assist the party litigant. A court need not even respond to or address irrelevant submissions in its judgment;⁷⁵⁴ the party litigant is thus “spinning his wheels” rather than making his case. *Moore* indulgence for the party litigant thus primarily serves the purpose of allowing the litigant to feel that he has been heard or “had his say”.

It must also be considered that the alternative to indulging the party litigant in this manner is for the court to curtail his submissions or questioning of a witness.

⁷⁴⁸ [1985] SLT 38.

⁷⁴⁹ See, for example, MacPhail at para 4.120.

⁷⁵⁰ Including what the court interpreted as a crave for declarator that he had been wrongly convicted for murder.

⁷⁵¹ *Moore v Secretary of State for Scotland* 1985 SLT 38 at page 39.

⁷⁵² *Ibid*, at page 40.

⁷⁵³ ETBB, para 12.11.

⁷⁵⁴ *Wilson*.

The ETBB notes that it is often better not to interrupt, as this may make the party litigant “more nervous and insecure”.⁷⁵⁵ However, *Moore* latitude is still discretionary and it is within the judge’s power to regulate the party litigant’s conduct in court. This may include confining him to relevant submissions⁷⁵⁶ or limiting the questioning of a witness.⁷⁵⁷ Indeed, it has been observed that it is appropriate, and of assistance to the party litigant, for a judge to interrupt and guide him to focus his case on relevant matters.⁷⁵⁸

However, the distinction between what is relevant and what is irrelevant can be a fine one. This is perhaps illustrated best in the cases of *Baretdji v Baretdji*⁷⁵⁹ and *Taylor v Taylor*.⁷⁶⁰ In *Baretdji*, the party litigant defender was directed by the judge that he was not permitted to cross-examine his estranged wife with further questions concerning religion. On appeal, it was held that this evidence was wrongly excluded, as the issue of religion was material to the defender’s contention that religious differences were the real cause of the parties’ separation and inability to reconcile. It was noted in the appeal judgment that the judge at first instance may have been concerned that the witness had already been questioned at some length (and a slow pace) and that the judge may not have fully understood the point that the defender sought to make.⁷⁶¹ The facts of *Taylor* are similar, but in this case it was held that the defender was correctly curtailed in his questioning of his wife on religious matters (for example, on the question of whether God could heal their marriage⁷⁶²) because this line of questioning did not truly relate to the grounds for divorce, but spiritual matters on which the court could not rule. It is, as the court in *Taylor* notes, “difficult to draw precise boundary lines”⁷⁶³ in these matters. It may be

⁷⁵⁵ ETBB, para 12.20.

⁷⁵⁶ See, for example, *Unity Trust Bank v Frost and anr*, unreported, Court of Session (Inner House) 6 February 2011 at para 13.

⁷⁵⁷ *Cairns v Torq Partnership Limited*, unreported, Glasgow Sheriff Court, 23 March 2000.

⁷⁵⁸ See, for example, *Thomson v Harris and anr*, unreported, Edinburgh Sheriff Court, 2 September 2011.

⁷⁵⁹ [1985] SLT 126.

⁷⁶⁰ [2000] SLT 1419.

⁷⁶¹ [1985] SLT 126 at page 127.

⁷⁶² 2000 SLT 1419 at page 1424.

⁷⁶³ *Ibid.*

necessary to hear the party litigant's arguments in full—even if they ultimately prove to be irrelevant—to make a sound determination.

5.3.2 Procedural Latitude and Assistance

5.3.2.1 Introduction

The ETBB acknowledges that party litigants often face difficulty navigating court procedures. The guidance suggests that judges should take extra steps to explain courtroom matters to party litigants in plain English,⁷⁶⁴ as well as their judgment and any technical terms.⁷⁶⁵ It is suggested that clerks of court and advice agencies may also offer some assistance on procedural matters.⁷⁶⁶ However, the ETBB is largely silent on the thornier issue of how the court should respond to procedural errors or default that occur due to the party litigant's lack of knowledge of the procedures.⁷⁶⁷ There is also little said about if and when the court should assist the party litigant in procedural matters. The inherent power of the court to regulate procedure is wide-ranging.⁷⁶⁸ Procedural errors by party litigants may lead to adverse findings, including decree by default, but it is also within the court's power to exercise its discretion to dispense with the consequences of error or default, or in some cases adjust the procedure altogether.

5.3.2.2 Procedural Latitude

Two important principles emerge in the consideration of procedural latitude and the party litigant. The first is that rules of court apply equally to party litigants.⁷⁶⁹ Ignorance of the law or procedure is not, in itself, an excuse for the

⁷⁶⁴ See, for example, the ETBB at para 12.15.

⁷⁶⁵ *Ibid*, para 12.22.

⁷⁶⁶ ETBB, para 12.4.

⁷⁶⁷ An interesting exception in the ETBB is the suggestion that a judge may advise a party litigant of the need to seek leave to appeal (in decisions where this is required) "there and then" after the decision is made; see para 12.27.

⁷⁶⁸ *Newman Shopfitters Ltd v MJ Gleeson Group Plc* [2003] SLT (Sh Ct) 83.

⁷⁶⁹ See, for example, *Hamilton v Glasgow Community and Safety Services* [2016] SLT (Sh Ct) 367.

party litigant's mistakes or procedural irregularities.⁷⁷⁰ The role of the judge is not to provide procedural advice.⁷⁷¹ However, the second principle is that, while rules should generally be applied, a lack of legal representation may be a factor to excuse a minor failure to comply with a rule that results in little or no prejudice to the other party.⁷⁷² Thus, for example, a relatively unimportant technical matter such as failing to properly incorporate documents into pleadings may be excused because a litigant is unrepresented.⁷⁷³

However, again, there is no "right" to latitude and it can never be assumed that the party litigant's procedural errors will be excused. It is within a judge's discretion to grant decree against a party litigant on the basis of default alone,⁷⁷⁴ but other factors may be considered. The substance of a party litigant's case may be one such factor. A party litigant may face greater difficulty in taking the necessary procedural steps to remedy errors in the legal elements of his case. Courts often extend latitude to party litigants in respect of procedural matters, but may factor the substance of the case into its decision. For example, in one case⁷⁷⁵ a party pursuer attempted to lodge a minute of amendment that was both late and incompetent; the Sheriff excused the lateness in respect that the pursuer was a party litigant, but dismissed the action because the substance of the minute was incompetent and irrelevant. In a similar decision,⁷⁷⁶ a party litigant lodged "answers" that did not comply with the procedural requirements, despite being told what was required by the court. It was observed that it could be unfair for the court to grant decree by default against a party litigant too quickly, but decree by default was granted after the judge was satisfied both that the party pursuer was in default and that there was no substance to her arguments. It is perhaps a matter of common sense that

⁷⁷⁰ See, for example, *Henderson v The Royal Bank of Scotland* [2011] CSIH 71.

⁷⁷¹ *Wilson* at para 13.

⁷⁷² *Ibid.*

⁷⁷³ See, for example, *Todd v Scottish Qualification Authority*, unreported, 29 June 2001, Court of Session (Inner House).

⁷⁷⁴ See also *Bennett v The Scottish Down's Syndrome Association*, unreported, Aberdeen Sheriff Court, 4 November 2003.

⁷⁷⁵ *Moberly v Strathclyde Regional Council* [1992] SLT 799.

⁷⁷⁶ *Clark v Hope* [2006] SCLR 90.

amendment of the party litigant's case will not be allowed if the case or amendment itself is fundamentally flawed or irrelevant.⁷⁷⁷

Unsurprisingly, a party litigant may receive less latitude on a procedural matter when the principle of fair notice is engaged. Because party litigants are often unaware of the legal and factual requirements for their pleadings, amendment may be sought at a late stage of the proceedings, but amendments that come too late or seek to introduce a new basis for the case are generally not allowed.⁷⁷⁸ The case law indicates that this often results in something of a "catch-22" for the party litigant: as the case progresses, the process of litigation makes him aware of the deficiencies in his case,⁷⁷⁹ but he will not be allowed to introduce an amendment that comes too late,⁷⁸⁰ or introduces a new basis for the action in fact⁷⁸¹ or in law.⁷⁸² A strict approach is also taken with the requirement for fair notice of a party's grounds of appeal (in other words, the basis of his contention that the judge at first instance erred) when initiating the appeal⁷⁸³ or lodging a note of argument.⁷⁸⁴ Failure to provide valid grounds of appeal is another common difficulty for party litigants, who often misunderstand the role of the appellate courts and the nature of the appeal process.⁷⁸⁵ While some allowance in form may be made when the appellant is a party litigant, an appeal is likely to be held to be incompetent if valid grounds are not provided.⁷⁸⁶

The conduct of the party litigant in the proceedings as a whole has also been considered a factor in decisions on latitude in procedural matters, even when

⁷⁷⁷ See, for example, *Smith v The Braer Corporation and ors*, unreported, 26 May 1999, Court of Session (Outer House); *Fraser Trading Company and ors v Bank of Scotland*, unreported, 1 December 2000, Court of Session (Inner House).

⁷⁷⁸ *Pompey's Trustees v The Magistrates of Edinburgh* [1942] SC 119.

⁷⁷⁹ See, for example, *Laudanska v The University of Abertay*, unreported, 4 November 2003, Dundee Sheriff Court.

⁷⁸⁰ *Campbell v The University of Edinburgh*, unreported, 14 May 2004, Court of Session (Outer House).

⁷⁸¹ *McGregor v Alpha Airports Group Plc* [2011] CSOH 81.

⁷⁸² *Crooks v Haddow* [2000] SCLR 755.

⁷⁸³ In Form A1 of the OCR 1993 in the Sheriff Court.

⁷⁸⁴ *Smith v The International Development Company (Aberdeen) Limited*, unreported, 26 May 2006, Aberdeen Sheriff Court; *Percy v Govan Initiative Limited* [2012] CSIH 22.

⁷⁸⁵ See, for example, the commentary of Sheriff Principal Derek Pyle in *Krajciová v Feroz*, [2014] SCABE 40 at para 4.

⁷⁸⁶ *S v S* [2003] SCLR 261.

the procedural default itself is relatively minor. In the Inner House decision *Mullan v Les Brodie Transport Limited*,⁷⁸⁷ it was held that granting decree of absolvitor against an unrepresented pursuer for failing to lodge an updated record was within the Sheriff's discretion, although it was noted that this was "radical step, particularly in the case of a party litigant...".⁷⁸⁸ The Sheriff's decision was informed by his observation that the pursuer had protracted the litigation by failing or refusing to be represented, by the "wide-ranging" nature of her complaints, and by inconsistent accounts presented to the court, which the Sheriff considered amounted overall to an abuse of the court process.⁷⁸⁹ In another case,⁷⁹⁰ a party litigant's "dilatatory, if not cavalier"⁷⁹¹ approach to the rules of court was a factor in the decision to uphold the granting of decree by default for failure to lodge defences.

5.3.2.3 Procedural Assistance

In some circumstances, particularly where procedural matters are concerned, courts have found themselves in a position where allowing latitude to the party litigant is the only option to preserve the fairness of the process. This may entail shifting procedural burdens to the party litigant's opponent or the court, thus extending into assistance even though, strictly speaking, the court should not be seen to assist one party over another. At times, such assistance may be offered by a represented opponent; for example, a represented defender may be asked or may volunteer to produce the record when the pursuer is unrepresented.⁷⁹² A represented party may take the pragmatic step of advising the party litigant on court procedures in the hopes of minimising any future delay.⁷⁹³ While this sort of accommodation may be made for convenience, the court may be placed in a position where there is little choice but to extend procedural assistance to the party litigant to preserve the appearance of fairness. This may occur when a party litigant attempts to lodge a document that is not in the correct format.

⁷⁸⁷ [2005] CSIH 9.

⁷⁸⁸ *Ibid* para 12.

⁷⁸⁹ *Mullan v Les Brodie Transport Limited* [2005] CSIH 9 at para 7.

⁷⁹⁰ *General All Purpose Plastics Ltd v Young* [2017] SAC (Civ) 30.

⁷⁹¹ *Ibid*, per Sheriff Principal Stephen.

⁷⁹² See, for example, *Thomson v Rush*, unreported, Court of Session (Outer House), 12 May 2000.

⁷⁹³ See, for example, *McGeever v Nicol*, [2012] CSOH 115 at para 4.

The court may then accept such a document⁷⁹⁴ or extend procedural deadline *ex proprio motu*⁷⁹⁵ to ascertain the party's true intentions.

In at least one case, it has been suggested that the court may even have a positive duty to notify a party litigant of a significant procedural failing. In *East Lothian Council v Crane*,⁷⁹⁶ Sheriff Principal MacPhail recalled a decree against a party litigant defender that had been granted at debate because she did not have any pleas-in-law or denial of the pursuer's averments. The Sheriff Principal noted "In my opinion, the formal defects in the defender's pleadings could with advantage have been considered at the options hearing...It would have been preferable for the court to encourage the remedying of those formal defects...rather than to pronounce decree against the defender on points of pleading which the average party litigant could not be expected to meet on his or her own initiative."⁷⁹⁷ However, it can be said that the basis for the decision to interfere with the Sheriff's exercise of discretion in granting decree at first instance is not entirely clear. The Sheriff Principal suggests that it is in the "spirit" of the rule⁷⁹⁸ for the Sheriff to "take an active part in focusing the matters truly in dispute" as well as an appropriate exercise of the inherent jurisdiction of the court to "do justice between parties".⁷⁹⁹ However, this decision appears to be firmly at odds with the established principle, which has been discussed at length above, that the party litigant is responsible for his or her own case and that the court is not required to intervene. In light of the principles established in more authoritative decisions, there is little basis in law for the sort of positive duty on the courts that *Crane* suggests.

5.3.3 Latitude in Law and Relevance

⁷⁹⁴ See the commentary of Lord Hodge in *Service Temps Inc v Macleod and anr*, [2013] CSOH 162 at para 17. In *Jamie Boyd v Mark Fortune* [2014] CSIH 93, it is noted that an appeal which had not been marked in compliance with OCR Rules 31.3 was nonetheless accepted by the Sheriff Court.

⁷⁹⁵ *Kaur or Singh v Singh*, unreported, Court of Session (Outer House) 22 July 2005.

⁷⁹⁶ Unreported, Haddington Sheriff Court 23 December 2003.

⁷⁹⁷ *Ibid*, para 5.

⁷⁹⁸ Referring to OCR Rule 9.12.

⁷⁹⁹ *Crane*, at para 5.

5.3.3.1 Introduction

The question of relevance in the conduct of the party litigant's case, or *Moore* latitude, has been considered above. However, this is only one aspect of the issue of relevance. This section considers how the courts address issues of relevance in law. The standard of legal relevance required of all litigants has been noted above, but it is worthwhile to consider what this means in practice. To the layperson, the function of the courts and the civil legal process is often difficult to understand. As legal professionals know, the Scottish civil courts do not make rulings at large as to who is "right" or "wrong" in a given situation and can only make a decision on legal principles. The court also does not have the power to make any order it sees fit, but can only offer competent and appropriate remedies.⁸⁰⁰ Judges are not permitted to decide a case on grounds not raised in court when the opposing party has not been given fair notice.⁸⁰¹ The courts have been quite clear on the point that the judge cannot act as the party litigant's legal advisor.⁸⁰² The position is further complicated by the high standard of legal relevance expected by the Scottish civil courts, including the requirement for sufficient specification in the pleadings.⁸⁰³

5.3.3.2 General Considerations and the ETBB

As noted above,⁸⁰⁴ the high standard of relevance and restriction of an action to its written pleadings applies equally to party litigants and legal professionals.⁸⁰⁵ Relevance is essentially the first "hurdle" in an action, but it is also the most technical requirement. It is thus unsurprising that the case law reveals that the actions of party litigants commonly fail on the issue of relevance, rather than

⁸⁰⁰ See, for example, the list of incompetent and irrelevant remedies sought in *RK, Petitioner* [2007] CSOH 104 (from para 8).

⁸⁰¹ *Kay's Tutor v Ayrshire and Arran Health Board* [1986] SLT 435 at 440; see MacPhail at par 4.112.

⁸⁰² *Wilkie v Direct Line Insurance Plc* [2009] SCLR 853.

⁸⁰³ See, for example, *Singh v Brian Napier QC*, unreported, Edinburgh Sheriff Court, 29 July 2011, at page 7.

⁸⁰⁴ Section 5.2.

⁸⁰⁵ This section refers to actions that are not within the low-value claims procedures. In low-value claims, the requirements are less stringent and it is for the Sheriff to note the points of law arising in the claim.

questions of substantive law or fact.⁸⁰⁶ Ironically, at the same time, party litigants are also often criticised for narrating irrelevant facts and producing long and unwieldy pleadings.⁸⁰⁷ In other words, these party litigants are providing a lot of information, but not the “right” information, to the courts.

The ETBB’s observations on this matter highlight these difficulties and offer some guidance on the proper approach. It is clear that, again, judicial discretion plays a significant, if not necessary, role:

“A much more difficult question arises, however, in circumstances (which are not uncommon) where it appears that a party litigant may have some sort of stateable case, but has failed to express it in the pleadings. The question in such circumstances is whether a judge has a duty, or is even entitled, to assist the party litigant to develop and to express his or her case. The inevitable, though somewhat unsatisfactory, answer to that question is that it will be a matter of degree, and will depend on the circumstances of the particular case. It also has to be said that this is an area where different judges are likely to hold different views. In a simple situation, where a party litigant does not make reference to the Sale of Goods Act 1979, it may be appropriate for the judge to decide the case by reference to that statute notwithstanding that it had not been specifically mentioned by the party litigant...On the other hand, if a party litigant has a case which appears to be plainly irrelevant, it is thought that there is no duty on a judge to offer any suggestions as to how it might be made relevant.”⁸⁰⁸

As these observations suggest, the problem of legal relevance gives rise to two questions for the judge: *can* the judge assist a party litigant in legal matters, and *must* the judge assist? The ETBB answers the first question: the judge can assist the party litigant to a degree under some circumstances, when there is no ambiguity around the legal point to be made. However, the ETBB notes, but does not elaborate on, the second question of whether a judge has a duty to assist, apart from the suggestion that intervention “may be appropriate.” This is perhaps answered by omission, as the ETBB does not refer to any authority that establishes an outright duty to assist. It could be that such a duty could arise

⁸⁰⁶ As demonstrated by the examples given below.

⁸⁰⁷ *CMEC v David Roy* (2013) CSH 105; in *Ecclesiastical Insurance Office plc v Whitehouse-Grant-Christ* [2015] CSH 23, the court notes that a party litigant defender’s answer on the point of prescription in the record was 160 pages long.

⁸⁰⁸ ETBB, para 12.21.

from general principles⁸⁰⁹ of fairness⁸¹⁰ if a deficiency in the party litigant's case is both minor and patently obvious. The ETBB is clear that there is no duty when the party litigant's case is plainly irrelevant, but does not specify when such a duty could arise.

5.3.3.3 Assistance, Allowance and the “Latent Case”

What legal and procedural options do courts have when a party litigant presents with a plainly irrelevant case, or a case riddled with deficiencies in the pleadings? The first and perhaps most obvious is to adhere to established standard and rules of relevance. In other words, the judge looks only at the litigant's pleadings and only as they are stated, inevitably resulting in the failure of the litigant's case. This is, strictly speaking, the “default” position. As the ETBB notes, the decision to exercise discretion on this question is a matter of degree. The body of party litigant cases suggests that a case that is difficult to understand or plainly without merit is likely to attract little or no judicial intervention.⁸¹¹ It is sometimes apparent that the party litigant was almost entirely unaware of the legal requirements of the case he is seeking to make; the eventual judgment in such a case is thus likely to read primarily as a list of the averments he has failed to make.⁸¹² At other times the party litigant himself may realise that his case is ill-founded as the action progresses and his opponent makes legal arguments.⁸¹³

Another possibility is for the judge to step outside the court process itself to encourage the party litigant to seek legal advice or undertake further research

⁸⁰⁹ Unlike the English courts, the Scottish courts do not have a formal “over-riding objective”, although the Rules Committee has raised the possibility of introducing guiding principles.

⁸¹⁰ As seen in the *Crane* case discussed above, but this case was concerned with a procedural matter, which, as discussed below, generally attracts a wider degree of latitude from the courts.

⁸¹¹ See, for example, *Singh v Brian Napier QC*, unreported, Edinburgh Sheriff Court, 29 July 2011; *RK, Petitioner*, [2007] CSOH 104; *Krajciová v Feroz*, [2014] SCABE 40; *CMEC v David Roy* [2013] CSIH 105; *Duff v Merrick Homes Limited*, unreported, Court of Session (Outer House) 18 March 2003.

⁸¹² In addition to the cases cited above, *Dunn v Roxburgh* [2013] CSOH 42 offers a particularly characteristic example.

⁸¹³ See, for example, *The Advocate General for Scotland v Shepherd*, unreported, Court of Session (Outer House) 10 July 2001.

himself.⁸¹⁴ It has been suggested in English research that referring the party litigant to a solicitor or Citizen's Advice Bureau may be viewed as an "escape valve" for the courts.⁸¹⁵ While the court cannot force the party litigant to take legal advice, it is protected from the appearance of outright unfairness to some degree by ensuring that the party litigant is aware that legal advice is needed. (Of course, whether or not the litigant can get access to and afford legal advice is another matter.)

The judge also has the option to exercise his discretion to make some form of allowance for the party litigant. For example, the judge may take it upon himself to undertake an extra level of scrutiny to a represented opponent's submissions,⁸¹⁶ ensuring that the opponent's submissions do not go unchallenged due to the party litigant's ignorance of the law. Another option for the judge is to "look behind" the party litigant's pleadings. "Looking behind" can take several forms, but often essentially means that the judge is looking beyond a strict reading of the pleadings. In some cases, the judge may excuse a party litigant's failure to use correct terminology or properly formulate a legal principle in his pleadings. Even if the party litigant has not used the correct wording to make a legal point, it is accepted as if he did. For example, where the relevant legal formula required a party litigant pursuer to aver that her condition was "sufficiently serious," a Sheriff noted "I am satisfied that although the pursuer has not used the specific words 'sufficiently serious', that was what she was in effect saying at pages 21 and 22 of the Record".⁸¹⁷ The judge may go further and translate the party litigant's averments of fact into legal principles. Thus, for example, a party litigant's pleadings were interpreted to amount to a case of negligence based on direct and vicarious liability,⁸¹⁸ despite the absence of the usual supporting pleadings.⁸¹⁹ In another example, a defence in an action

⁸¹⁴ See, for example, *RK, Petitioner*, [2007] CSOH 104 at para 3.

⁸¹⁵ Moorhead and Sefton.

⁸¹⁶ See, for example, *The Right Honourable Dame Elish Angioloini QC v Green* [2013] CSOH 196 at para 34.

⁸¹⁷ Per Sheriff Reith QC in *MacKay v Scottish and Southern Energy*, unreported, Perth Sheriff Court, 13 March 2000.

⁸¹⁸ *Campbell v The University of Edinburgh*, unreported, Court of Session (Outer House) 14 May 2004.

⁸¹⁹ See also *Fitchie v Worsnop*, unreported, Court of Session (Inner House) 23 January 2004. In this case, the Sheriff identified that the substance of a party pursuer's case was not negligence as pled, but rather defamation.

of defamation was looked at “in the most favourable way possible” and found to amount to the legal concepts of *veritas* and fair comment,⁸²⁰ despite the absence of the necessary pleas-in-law.⁸²¹ This exercise can also be referred to as identifying a “latent” case.⁸²² A “latent” case or defence can be said to exist when the pleadings suggest that the litigant may have a relevant case in law, but the case is not formally made out in the pleadings.

At times “looking behind” the pleadings may go a step further to identify a legal test and then searching the pleadings for averments that may satisfy it. In *Prentice v Sandeman*,⁸²³ the party litigant pursuer sought compensation for professional negligence after his solicitor had missed the deadline to lodge an appeal in the Employment Appeal Tribunal. Lord Stewart was “prepared to treat the bald averment of professional negligence as satisfying the requirement of relevancy”⁸²⁴ due to the particular circumstances of the case. A similar approach was taken in *Houston, petitioner*.⁸²⁵ Here, Lord Menzies wrote, “While I make allowance for the fact that the petitioner is a party litigant, nonetheless there are no averments whatsoever in the petition which might amount to a relevant case of fraud or bad faith”.⁸²⁶ In this context, the notion of “allowance” appears to refer to a broad interpretation of the pleadings and thus, to some extent, setting aside the requirement of specification. In another case, a sheriff went a step further to allow a party defender to introduce a defence not contained in the pleadings at proof on the basis that “the defender’s position was plain from the history between the parties.”⁸²⁷

As noted above, the party litigant’s inexperience sometimes leads the court to shift some of the “work” in the process from the party litigant to represented opponents. This may be as simple as counsel for the represented party taking

⁸²⁰ *The Right Honourable Dame Elish Angioloini QC v Green* [2013] CSOH 196 at para 40.

⁸²¹ *Ibid*, para 41.

⁸²² *McLeod*, below, refers to this as a “latent claim”.

⁸²³ [2012] SCLR 451.

⁸²⁴ *Ibid*, para 34. This is the correct approach, but it is notable because the points of law are being made by the judge, when they should have been clearly set out in the pleadings.

⁸²⁵ [2007] CSOH 44.

⁸²⁶ *Ibid*, at para 17.

⁸²⁷ Per Sheriff Anwar in *McWilliams v Russell* [2017] SC GLA 64.

extra care to make their submissions clear and easy for the party litigant to follow.⁸²⁸ Represented opponents may also be called upon to explain the party litigant's case to the judge.⁸²⁹ *McLeod and Ors v Tayside Health Board*⁸³⁰ offers a particularly striking example. In this case, the pursuers were party litigants and counsel represented the defence. Counsel for the defence moved for the court to dismiss the action for lack of relevancy, but also offered to examine the pursuer's productions, so that "...if any of these revealed a semblance of a case he would draw this to the attention of the court and try to assist the pursuers if he could...".⁸³¹ It is significant that the defender's counsel is looking not only at the pursuer's averments, but also the evidence they have presented in the productions. One wonders just how matters would have proceeded if counsel for the defence *had* in fact detected a "latent claim" in the pursuer's productions—a claim that he would then have to defend.

*Mazur v Primrose and Gordon*⁸³² presents another aspect of the concept of the "latent" claim. In this case, the party litigant was advised by the judge at first instance and at each of two appeal stages that, while he had been unsuccessful in the current action, the facts of the case suggested that he might have a cause of action against another party. This is particularly interesting in light of the fact that the court was under no obligation to consider anything other than the case before it. It appears that the judges were sympathetic enough to the party litigant to advise him that he may have a "latent case" elsewhere. An important, but at times subtle point to consider in most cases of "looking behind" a party litigant's case is that it is usually restricted to the pleadings already lodged by the litigant. Cases like *Mazur* and *McLeod* are significant because the judges here have expressed a willingness to interpret not only existing pleadings, but also the evidence and circumstances as a whole.

5.3.3.4 Discussion

⁸²⁸ See, for example, *The Royal Bank of Scotland plc v Hill* [2012] CSOH 110.

⁸²⁹ See, for example, *Green v The Lord Advocate*, unreported, Court of Session (Inner House) 27 June 2003 at para 2.

⁸³⁰ [2014] CSOH 41.

⁸³¹ *Ibid*, para 11.

⁸³² [2015] CSIH 8.

From the layperson's point of view, restricting the case to the pleadings as lodged could make the process appear artificial and overly technical. Drafting concise and relevant legal pleadings is a skill that even legal professionals often struggle with.⁸³³ For the party litigant, another paradox emerges on the question of relevance. On one hand, without legal training, the party litigant often does not know what facts or legal principles are relevant and essential to his case. He thus runs the risk of not providing these in his pleadings, as many of the cases discussed above demonstrate. A common theme in many of the cases discussed in this section is that many party litigants simply do not understand what is expected of them not only in court, but also and perhaps more importantly, in the formulation and articulation of their case in law.

What may be most interesting about all the examples from case law provided above is that, for all of the varying degrees of allowance or assistance provided (or not provided) to the party litigant, the unrepresented litigant was ultimately unsuccessful in every one of these actions. There is thus little evidence that latitude or "looking behind" offers substantive assistance to the party litigant. Or, in a more cynical view, the court is more likely to narrate how it has "looked behind" the pleadings when it is clear there is nothing to find. To explain how the court has come to decision about the failure of a party litigant's case—and thus justifies its own decision—is one thing, but to advise the litigant on how his case *should* be made is quite another. Again, this form of latitude seems to protect the court more than it genuinely assists the litigant.

5.3.4 Rules of Evidence

The ETBB suggests that a litany of problems can occur when party litigants are called upon to give evidence. Party litigants may not understand the need to have important facts "spoken to" by other witnesses, the need to lodge productions into evidence, or for expert testimony:⁸³⁴ "[Party litigants] may be surprised when they are told that it is not good enough for them simply to say 'If

⁸³³ See, for example, Zuckerman A, "Reform in the Shadow of Lawyers' Interests" *supra* at page 69.

⁸³⁴ ETBB, para 12.5.

you phone up Mr Smith he will confirm what I have been saying’”.⁸³⁵ The ETBB suggests that, when a judge encounters the party litigant at an early stage of the proceedings, he may wish to “offer some general information and advice regarding the next stage or stages of his case. For example...it is likely to be helpful if the judge were to offer some explanation about the need to bring witnesses to the proof and to lodge any documentary or other productions which are likely to be required at that stage.”⁸³⁶

The ETBB is likely to offer early intervention as an attractive option because, when problems do materialise, the issues around extending latitude to party litigants on evidential matters are particularly thorny. On some matters, latitude may simply not be an option. The court cannot consider evidence that is not properly presented. As observed in the *Wilson* case,⁸³⁷ “...it is not open to a judge at first instance to overlook the laws of evidence, which can be complex, in order to support or bolster an unrepresented party’s case.”⁸³⁸ The party litigant pursuer in *Wilson* encountered several difficulties in the presentation of his case due to his ignorance of the rules of evidence. Perhaps the most fundamental is the need to have productions either spoken to by a witness or agreed between parties by way of joint minute.⁸³⁹ The pursuer also wished to use academic articles to challenge the testimony of the defender’s expert witness, but did not appreciate the need to have these articles spoken to by a witness.⁸⁴⁰ Evidence was also excluded because it had not been foreshadowed in the litigant’s pleadings.⁸⁴¹

However, in some cases judges have allowed party litigants’ evidence to be received (or presented under reservation) despite objections that it did not comply with rules of evidence. In one such case,⁸⁴² a party defender sought to play a tape recording in an attempt to rebut expert medical testimony that the

⁸³⁵ *Ibid.*

⁸³⁶ ETBB, para 12.14.

⁸³⁷ *Wilson*.

⁸³⁸ *Ibid*, per Lord Menzies at para 14.

⁸³⁹ *Ibid*, para 14.

⁸⁴⁰ *Ibid*, para 15.

⁸⁴¹ *Ibid*, at para 35; see also *Duncan v Duncan*, unreported, Court of Session (Outer House) 7 June 2000, at para 8 and *CR or D v ARD* [2005] CSOH 88 at para 19.

⁸⁴² *Boyle and anr v Wilson and ors*, unreported, Court of Session (Outer House) 12 March 1999.

writer of a will lacked the capacity to test. The tape was heard in court despite the pursuer's objection that it should have been played during their expert's cross-examination, the judge noting that "this omission is perhaps understandable given that the defender is a party litigant".⁸⁴³ As the judge ultimately determined that the tape did not cast doubt on the expert's evidence, the question of the pursuer's objection and the admissibility of the tape despite the defender's "understandable omission" were not addressed. In another case, a judge allowed a party pursuer's set of "accounts" to be lodged at the bar, late and not properly presented as productions, despite the defender's objections, but ultimately did not consider the documents because they were not relevant to the pursuer's pleadings.⁸⁴⁴ This sort of exercise is similar to *Moore* latitude in that it allows the litigant's evidence to be "heard", but ultimately the court still did not admit or allow evidence outwith the rules and there was no impact on the outcome of the case.

Within the context of the law as it relates to the party litigant, the case law suggests that rules of evidence occupy a place conceptually between procedure and substantive matters. They do not form a part of the party litigant's case in law, and the court thus has some scope, as suggested by the ETBB, to advise the party litigant of the procedural necessities. However, as with relevance, it is not open to the court simply to dispense with the party litigant's requirement to comply with the formalities of the rules of evidence as it may in purely procedural matters.

5.3.5 Latitude and Assistance: Discussion

The question of "latitude" for the party litigant is often presented as a singular notion. However, while the case law rarely offers firm legal tests or rules, it does indicate that latitude is more properly considered as a spectrum. The courts are most free to offer *Moore* latitude to the party litigant, but this is also the form of allowance that offers the least substantive assistance. The scope is narrowed considerably for procedural latitude, and further still in respect of relevance. Although the rules of evidence are closely observed, the judge is

⁸⁴³ *Ibid*, at page 7.

⁸⁴⁴ *Duncan v Duncan*, unreported, at paras 5 and 8.

freer, if he sees fit, to offer the party litigant more useful advice on evidential procedure. Overall, there are occasions when a judge *may* assist the party litigant, but there is little in the case law or the ETBB that *requires* the judge to assist. The single exception to this rule is the case of *East Lothian Council v Patricia Crane*, discussed above. However, this case does not sit well with the determinations of higher courts and may better reflect a sympathetic approach to an individual party litigant rather than the established law in this area.

The case law also discloses that, while positive duties or a “right” to latitude for party litigants cannot be found to exist in law, they are very much alive in the minds of many party litigants. The *Wilson*⁸⁴⁵ case provides a characteristic example, as much of the party pursuer’s appeal was concerned with his unmet expectations as a party litigant: “Time and again Mr Wilson observed that he was unrepresented, while the defenders were represented by senior and junior counsel instructed by solicitors, and ‘one would have hoped the court would show a little more sympathy in this regard’. He complained that the Lord Ordinary did not suggest to him that he might seek to recall a witness, and that he failed to give procedural advice to him.”⁸⁴⁶ This is not, as both the *Wilson* case and the others discussed in this section demonstrate, the role of the court or an obligation the court holds towards party litigants. In another particularly illustrative example, a party litigant argued that the Sheriff should have informed him that he may have had grounds to dispute jurisdiction, even though he had marked on his response form that he did not intend to do so.⁸⁴⁷ There is no duty on the court to provide any such advice, and indeed it would usually be inappropriate to do so.

5.4 Adjournments and Delay

5.4.1 Introduction

⁸⁴⁵ *Wilson*.

⁸⁴⁶ *Ibid*, per Lord Menzies at para 12.

⁸⁴⁷ *Lindsays WS v Senior-Milne* [2011] GWD 28-625.

The amount of time required for cases in the civil courts to proceed and conclude has been the subject of increased scrutiny over the last several years. Perhaps most notably, it was held in *Anderson v UK* that excessive delay in a civil action amounts to a violation of Article 6 of the ECHR.⁸⁴⁸ In extreme cases, prolonging or failing to pursue a case may be considered an abuse of process.⁸⁴⁹ Delays often occur, of course, regardless of whether or not parties are represented. This section examines delay and requests for adjournment (often referred to as “continuation” or “continuing” a case in the Scottish courts) that are related directly to the party litigant’s unrepresented status. The ETBB recognises that it may be appropriate to offer a short adjournment if unanticipated problems arise in the course of a hearing, to allow a party litigant time to consider matters or consult with a lay assistant.⁸⁵⁰ However, more significant delays may occur when the party litigant seeks time to obtain legal advice, or is unable to attend court for medical reasons. The decision of whether to allow a case to be adjourned or delayed is another matter within the judge’s discretion.⁸⁵¹

5.4.2 Legal Advice

A party litigant may seek additional time to obtain legal advice or representation, or apply for legal aid, after a case is well underway. An adjournment is usually sought by way of motion, either in court or lodged for consideration in chambers. In practice, a continuation for legal advice may be granted (or even suggested by the judge) if it is sought at an appropriate stage.⁸⁵² In *Terence Connelly v Whitbread plc*,⁸⁵³ the court suggested that a continuation for legal representation would be considered even at a late stage of the appeals process.⁸⁵⁴ It was noted that the party litigant’s lack of representation was “unfortunate” and that his late presentation of evidence

⁸⁴⁸ *Anderson v United Kingdom*, Application No. 19859/04.

⁸⁴⁹ *Tonner v Reisch and Hall* [2008] SC 1.

⁸⁵⁰ ETBB paras 12.16 and 12.18.

⁸⁵¹ See, for example, *Scottish Ministers v Stirton and Anderson* [2014] SC 218.

⁸⁵² See, for example, *Clark v Hope and anr*, [2006] SCLR 98 and *Young, Petitioner* [2007] CSOH 194.

⁸⁵³ [2012] CSOH 51.

⁸⁵⁴ *Ibid*, at para 5.

may have had a bearing on the case.⁸⁵⁵ This reflects the “escape valve” approach noted above; the court has identified that the party litigant may have a valid case, but it is unable to advise him how to meet the technical requirements.⁸⁵⁶

In certain cases, the court has a duty to raise the issue of legal advice. When a litigant in a civil case is suspected of contempt of court, he should be advised of the need for legal advice, as he may face penalties including fines and imprisonment.⁸⁵⁷ On a practical level, legal advice may also ensure that an intractable party litigant is aware of the gravity of the need to comply with court orders. For example, in *F v H*⁸⁵⁸ an unrepresented litigant repeatedly refused to comply with a contact order. The case was adjourned a number of times for her to receive legal advice before a sentence was finally handed down. Even after a custodial sentence was imposed, it was suspended for a period to allow the litigant one last chance to obtain legal advice.⁸⁵⁹

While courts may be inclined to allow or even encourage party litigants to take time to secure legal advice or representation, the court is not obliged to allow a party litigant time to seek legal advice or representation whenever he sees fit. The leading case on this point is *Scottish Ministers v Stirton and Anderson*.⁸⁶⁰ Here, a party litigant appealed the decision at first instance to refuse his motion to adjourn the on-going proof in the case to allow him to obtain legal representation. It was held that it was the party litigant’s responsibility to conduct his own case, inclusive of the decision to seek legal advice at an appropriate stage. In the opinion of the court, Lord Carloway stated, “It is, of course, generally to be expected that a party litigant will have less of an understanding of the law attaching to the proceedings than any legal

⁸⁵⁵ *Ibid*, at para 24.

⁸⁵⁶ In *Francis v Pertemps Recruitment Ltd* [2012] CSIH 25, the Inner House held that an Employment Tribunal should have offered a party litigant an adjournment when his opponent introduced a new issue. The case law discussed in this section suggests that this would not constitute a successful point of appeal in the civil courts.

⁸⁵⁷ MacPhail at para 2.22.

⁸⁵⁸ [2014] GWD 26-515.

⁸⁵⁹ Excessive continuations will not be allowed even in cases of contempt of court; a delay for legal advice was denied after repeated and, in the view of the court, false medical delays had been occasioned in *M v S* [2011] SLT 912.

⁸⁶⁰ 2014 SC 218.

representatives. However, he is not entitled to found on his lack of understanding in order to gain the opportunity to gain representation, or funding for that purpose, at a stage of the proceedings of his own choosing.”⁸⁶¹ The party litigant does not have the “right” to additional time to engage legal representation or apply for legal aid at any stage of the case.⁸⁶² Practical considerations are engaged when the procedure has advanced to the stage of proof and, for example, witnesses have already been cited. In one case⁸⁶³ a party litigant defender was denied a continuation to seek legal representation on the day her case called for proof before answer. Although the defender argued that she had a “right to be represented,”⁸⁶⁴ the judge considered that she had had a year to obtain representation and was unlikely to do so in future.⁸⁶⁵ Lady Dorrian was even more frank in refusing another party litigant time to get a solicitor, observing that the request appeared to be “simply another effort to have the case delayed further”.⁸⁶⁶ Unsurprisingly, an attempt by another party litigant to adjourn his case on the day of an appeal hearing to allow for the attendance of a lay representative was similarly unsuccessful.⁸⁶⁷ While there is no definitive “cut off” point for adjournment for legal advice, it is unlikely to be granted when sought at the later stages of the case and particularly at a substantive hearing, or when the judge suspects that the litigant is simply attempting to delay the proceedings.

5.4.3 Medical Delay

Appearing in court for hearings is generally not an issue for represented parties, as the litigants generally do not have to attend personally.⁸⁶⁸ For a party litigant, however, personal attendance is compulsory and can be excused only

⁸⁶¹ *Ibid*, at para 92.

⁸⁶² See for example *Mitchell v Somerville and anr* [2017] CSIH 4.

⁸⁶³ *McGeever v Nicol*, [2012] CSOH 1151.

⁸⁶⁴ *Ibid*, at para 3.

⁸⁶⁵ See also *Forrest v Fleming Buildings Limited and Others* [2014] CSOH 258; *Connolly v Connolly* [2005] CSIH 78.

⁸⁶⁶ *Van Overwaele, Petitioner* [2009] CSOH 164 at para 10.

⁸⁶⁷ *East Lothian Council v Martin* [2014] SC EDIN 42.

⁸⁶⁸ There are exceptions, most notably Child Welfare Hearings in family actions; see OCR 1993 Rule 33.22A(5).

for medical reasons.⁸⁶⁹ Adjournment for medical reasons is distinct from other forms of delay or adjournment in that it is, by its nature, usually sought at short notice or even after the fact. When a party litigant is unable to attend, this can be excused upon production of a letter or medical certificate indicating that the litigant was too unwell to appear. The court must then decide whether to allow the case to be continued to a future hearing, to proceed in the party litigant's absence, or to grant decree by default due to the failure to attend.

A small but interesting body of law has developed around the question of continuation of a case due to a party litigant's illness. The ETBB suggests that judges may wish to explain to party litigants that all future hearings must be attended unless prevented by illness, and that "a 'soul and conscience' certificate from a doctor must be sent to the court" if the litigant is ill.⁸⁷⁰ While this is likely to be the best advice to offer the party litigant, it is a simplified view of a somewhat more complicated position. It is first worth noting that, although previously necessary, it is no longer a requirement that a medical certificate is certified on "soul and conscience."⁸⁷¹ However, the absence of certification can be taken into account by the court.⁸⁷² More importantly, the ETBB's advice does not make it clear that a medical certificate is not conclusive proof that the party litigant should be excused from attending court. It is, in fact, only one of the factors that the judge may consider.

In fact a judge exercises a wide discretion, and must decide based on any medical certificate tendered and all other relevant circumstances whether the party is truly unable to attend and what the consequences of the their non-attendance will be.⁸⁷³ A medical certificate, whether or not it is certified on "soul and conscience", is only one factor in the judge's decision. A judge is likely to be particularly minded to proceed in the party litigant's absence if the medical certificate does not provide sufficient information about the litigant's

⁸⁶⁹ See, for example, ETBB, para 12.16; in practice, it is possible that hearings may be re-assigned or continued for another reasons. Decree by default may be granted for the first instance of non-attendance, but generally a further hearing is fixed before decree is granted; *Canmore Housing Association v Scott* [2003] SLT (Sh Ct) 68.

⁸⁷⁰ ETBB, para 12.16.

⁸⁷¹ Practice Note, 6 June 1968.

⁸⁷² *The Scottish Ministers v Smith* [2010] SLT 1100; *Smith* is the leading case on this principle.

⁸⁷³ *The Scottish Ministers v Smith*, 2010 SLT 1100, page 1102.

illness and when they can be expected to be well enough to attend court.⁸⁷⁴ The history of the case and any previous delays are also relevant considerations. Requests for an indefinite delay or repeated continuations are unlikely to be allowed.⁸⁷⁵ This is an important point, as GPs and other doctors who are asked to produce a medical certificate may be unaware that they are not being asked to “excuse” their patients from court, but rather to provide information that will enable the court to make a decision on how the case will proceed. Medical certificates that provide little information on the diagnosis (although understandable in light of concerns for the patient’s privacy⁸⁷⁶) and prognosis of the illness make it more difficult for a judge to form a conclusion on the future of the case.

It is worth noting that, despite the right to self-represent, there may be an expectation by the court that a party litigant who is unable to attend personally should obtain legal representation. *Clark v Hope and another*⁸⁷⁷ illustrates this point. In this case, the party litigant pursuer had previously been granted additional time for both legal advice and medical reasons. A medical certificate was produced to explain her failure to attend a further continued hearing. Lord Glennie determined that the hearing should proceed in her absence because she had “every opportunity of obtaining representation and had been encouraged on more than one occasion to do so”.⁸⁷⁸ Furthermore, the judge noted that “Even if there were difficulties obtaining legal representation...she could have been represented by some other person at the hearing. Her mother had frequently attended and, indeed, had addressed the court.”⁸⁷⁹ This case pre-dates the current rules formally allowing lay representation. Even now the representative’s right of audience is not automatic and must be granted by the

⁸⁷⁴ *Ibid*, pages 1101-1102; see, for example *East Lothian Council v Martin* [2014] SCEDIN 42 at para 30 and *Boyd v Fortune* [2014] CSIH 93.

⁸⁷⁵ See *G v B*, 2011 S.L.T. 1253. In *East Lothian Council v Martin*, [2014] SCEDIN 42, the 5th attempt to conduct a proof finally proceeded despite the party litigant’s attempt to provide a medical certificate.

⁸⁷⁶ A medical certificate may be made available to the party litigant’s opponent despite his requests to keep it private; see *Boyd v Fortune*, [2014] CSIH 93. This is because the opponent must have the information to enable him to make submissions on the request for a continuation.

⁸⁷⁷ [2006] SCLR 98.

⁸⁷⁸ *Ibid*, page 6 of transcript.

⁸⁷⁹ *Ibid*.

judge; it cannot be presumed in advance by the party litigant that his representative will be permitted to appear on his behalf. As noted at the beginning of this section, the only real options open to the party litigant are to attend court personally or engage a lawyer.

5.4.4 Deliberate Delay?

It is clear that the courts are placed in a difficult position in these cases. There is, perhaps, a degree of scepticism towards the party litigant. It is worth noting that failed requests for adjournment for legal advice precede absences for illness and the production of medical certificates in several of these cases;⁸⁸⁰ in these circumstances it is unsurprising that a judge may suspect that the litigant is not truly unable to attend or is even simply seeking to delay matters.⁸⁸¹ At times, these suspicions may be well justified. In *A Ltd and ors v F*,⁸⁸² a party litigant defender was refused more time to prepare for proof and then produced a medical certificate the day before the proof was due to commence. The judge took the unusual step of instructing his clerk to query a party litigant's medical certificate with the surgery, and the pursuer's agents later produced affidavits confirming that the certificate had not been produced by any of the doctors at the surgery. The defender produced a further certificate from a different doctor, but the court soon received a letter from this doctor advising that the defender had obtained this letter by dishonestly stating the nature of his involvement in the case and by exhibiting to him the same (forged) letter provided to the court. As a result, decree by default (for his failure to appear at the proof) was pronounced against the defender.

5.5 Conclusion

Overall, "party litigant law" is underdeveloped and hindered by a number of factors. There are only a handful of Scottish cases that make any type of firm pronouncement on the legal position of party litigants. While courts are often required to address the issue of a party litigant's unrepresented status in a

⁸⁸⁰ *McGeever v Nicol*, [2012] CSOH 1151; *Clark v Hope and anr* [2006] SCLR 98; *A Ltd and ors v F* [2014] CSOH 169.

⁸⁸¹ See also *CEC v MM* [2017] CSIH 50, *Campbell v Lindsays* [2017] SAC Civ 23.

⁸⁸² [2014] CSOH 169.

judgment, it is most often an ancillary matter. It is thus sometimes difficult to gauge how authoritative a court's statements are, or are intended to be, on these matters. In turn, matters such as the question of "latitude" being extended to party litigants are often referred to without reference to authority and are apparently taken as being within the general knowledge of the court.

The nature of these problems also hinders the development of any sort of legal precedent in this area. Party litigants are often ill equipped to argue questions of law at appeal and may fail to understand the constraints of the appeal process. As a result, a party litigant may, for example, appeal a finding of decree by default, but fail to meet the requirement to present grounds that justify interfering with the decision of the judge at first instance.⁸⁸³ In the absence of relevant submissions, the appeal court has little choice but to dismiss the appeal as irrelevant and does not have the opportunity to address the substantive issues. Again, the result is a lack of real guidance on how discretion can and should be exercised in relation to latitude or assistance when a party is unrepresented: looking only at the "law in books" highlighted in this chapter begins to reveal some of the shape of the position, but ultimately yields more questions than answers. The next three chapters will turn to the "law in action", and the empirical research conducted for this thesis, to examine how party litigants navigate the court process in practice and how judges address the issues party litigants can present on a daily basis.

⁸⁸³ See, for example, *Mullan v Les Brodies Transport Limited*, [2005] CSIH 9 at paras 8, 9 and 12.

Chapter 6: Party Litigants: Perceptions and General Principles

6.1 Introduction

This chapter, along with the next two, will consider the empirical data gathered for this thesis with a view to understanding how the law operates in relation to party litigants in practice, as well as the effect of self-representation on a number of aspects of the court process. This chapter will begin by providing background information and addressing preliminary matters that will inform subsequent chapters. The first section of the chapter will offer a view of party litigants—who they are, why they self-represent, and how they are perceived by judges, solicitors, and court staff. The perennial problem of the vexatious litigant is also considered. The next section of the chapter will look at the judge as the decision maker in a party litigant's case, discussing how dealing with unrepresented litigants changes the judge's role and approach, and outlining the general principles that factor in the judge's decision making process. All of this will provide a foundation for the next chapter, which will look at the court process in more detail, considering the particular issues or problems that can arise in party litigants' cases, what can be learned about how party litigants navigate the process, and how the court addresses these issues. Thereafter, the following chapter will look at the wider questions of access to the courts and access to justice in relation to party litigants and their opponents and discuss how this can potentially be improved.

Before examining the substance of the empirical data, it is important to first re-iterate the limitations of the qualitative data. As noted in both Chapter 2 and Chapter 3, qualitative data, and interview data in particular, is subject to the accuracy of the subject in reporting their experiences and perceptions. Some of the data includes interviewees' observations as what party litigants do and/or why they do it; interviewees are of course not able to read minds, but are able to give an opinion based on their experience. For example, judges often note

that party litigants are unaware of court procedures. They cannot know this for a fact, but are able to draw reasonable conclusions from their interactions with party litigants in court and, perhaps more importantly, from the types of decisions they are asked to make in party litigants' cases. The data discussed in this chapter and (other chapters) is intended to be read in conjunction with the caveats noted here and in previous chapters.⁸⁸⁴

6.2 Understanding the Party Litigant

6.2.1 What Types of Cases do Party Litigants Appear in and Why?

Just how common or prevalent are party litigants in the Scottish civil courts, and why do they self-represent? While there are no figures available from the Scottish Court and Tribunal Service,⁸⁸⁵ the data gathered for this thesis indicates that party litigants are common in many courts. All interviewees, including court staff, reported having regular or even daily contact with party litigants.⁸⁸⁶ Three judges noted that the number of party litigants appears to be increasing.⁸⁸⁷ Unsurprisingly, low-value claims (small claims, summary cause and now the simple procedure) were consistently named as having the highest volume of party litigants.⁸⁸⁸ Insolvency proceedings⁸⁸⁹ and actions for recovery of heritable property⁸⁹⁰ were also cited as having a relatively high number of party litigants. There was some disagreement as to the prevalence of party litigants in ordinary and family cause procedures. Some judges said that there are few party litigants in the ordinary cause⁸⁹¹ and family procedures.⁸⁹² Others, however, indicated

⁸⁸⁴ See in particular sections 2.4.4.1-2.

⁸⁸⁵ Section 2.4.1.

⁸⁸⁶ For court staff, see FG1, FG2, FG3 and FG4. Because court staff work in dedicated areas, such as ordinary cause or small claims, they are able to respond only on how common party litigants are in their particular area, but not as able to make comparisons. The more specific observations of judges and solicitors are discussed below.

⁸⁸⁷ J2, J9, J3.

⁸⁸⁸ J2, J4, J9, J5, J7, J6, J10, J8, S1, S4, S3, S2, S5, S6, S8.

⁸⁸⁹ J10, S1, S4, S5.

⁸⁹⁰ J4, J7, S2, S1.

⁸⁹¹ J2, J7, J6.

⁸⁹² J6, J10, J8.

that they had encountered a significant number of party litigants in the family courts.⁸⁹³ One solicitor, who works primarily in the area of ordinary actions and mortgage repossession summary applications, indicated that of these “probably more than 50% is party litigants representing themselves.”⁸⁹⁴ Viewing the interview data as a whole, it is noteworthy that party litigants are at some point cited as appearing in virtually every form of procedure and type of action available in the Scottish courts, including summary applications, such as Antisocial Behaviour Orders and child support liability orders,⁸⁹⁵ and more uncommon actions, such as judicial review⁸⁹⁶ and applications for director’s disqualification.⁸⁹⁷

Although party litigants were often cited as being scarce in the ordinary cause procedure, it is worth noting that in the course of the court observation carried out for this study (which took place in the “ordinary court” in a larger Sheriff court) there were party litigants present at each sitting observed, and often there were many.⁸⁹⁸ In a total of sixteen sittings of the court, 89 party litigants appeared.⁸⁹⁹ Party litigants were seen in all of the forms of procedure heard in that court, including 27 in sequestrations, 37 in ordinary cause actions, and 25 in summary applications.⁹⁰⁰ In the sequestration hearings, all of the party litigants were respondents.⁹⁰¹ Most of the party litigants in the other cases were also defenders or respondents, but there were 8 pursuers in ordinary cause cases and 5 in the summary applications.⁹⁰² This data, of course, provides only a snapshot of a particular court at a particular time, but does appear to correlate with the interview data suggesting that party litigants appear frequently even in some ordinary courts.

⁸⁹³ J5, S8.

⁸⁹⁴ S2.

⁸⁹⁵ J4.

⁸⁹⁶ J3.

⁸⁹⁷ S5.

⁸⁹⁸ See Appendix B.

⁸⁹⁹ *Ibid.*

⁹⁰⁰ *Ibid.*

⁹⁰¹ *Ibid.*

⁹⁰² *Ibid.*

In terms of why party litigants self-represent, judges tended to have the impression that this was due to a lack of available legal aid.⁹⁰³ Some noted that legal aid appeared to be getting more difficult to obtain and that more people fell into the “gap” between making too much money to qualify for legal aid and being able to afford to pay for a solicitor.⁹⁰⁴ However, the availability of legal aid was not the only reason cited. One judge noted that party litigants offer a variety of reasons for representing themselves, including a desire to represent themselves, being unable to afford a lawyer, and being unable to find a lawyer to take the case.⁹⁰⁵ The same judge observed that some litigants start out with lawyers, but after falling out with them are unable to find another firm to take on the case.⁹⁰⁶ A solicitor described a similar pattern in the context of legal aid in the family courts:

“...the ones I come across in family law are usually where solicitors have tendered advice to particular person, they’ve not taken on board that advice, and so they’ve withdrawn from acting. And they’ve been around the legal aid solicitors and end up on their own basically.”⁹⁰⁷

Personality issues were cited by one judge as another reason why a litigant may be unrepresented: “their difficulty in expressing things, their hostility, their volatility, and perhaps as a result, their difficulties in getting and retaining professional help.”⁹⁰⁸ As discussed in more detail below, personality or psychological issues were also associated with those party litigants classed as “serial” or “vexatious” litigants,⁹⁰⁹ suggesting that the reasons these litigants self-represent may be different, and more complex, than those of one-off party litigants with financial concerns or a lack of legal aid.

6.2.2 General Perceptions of Party Litigants and Self-representation

⁹⁰³ J5, J3, J1, J10; see also S2.

⁹⁰⁴ See also S8, FG1.

⁹⁰⁵ J1.

⁹⁰⁶ *Ibid.*

⁹⁰⁷ S8.

⁹⁰⁸ J5.

⁹⁰⁹ See section 6.2.3.

As noted earlier, there are conflicting views on SRLs in the existing literature on self-representation, representing both positive and negative perspectives.⁹¹⁰ For this thesis, judges, lawyers and court staff were asked at the beginning of each interview to provide the first two or three words that came to their minds when thinking about party litigants in the Scottish civil courts. Most of their responses, unsurprisingly, related to how party litigants impact the conduct of the interviewee's own role. Overall the most common response was "difficult," "difficulties" or "challenging".⁹¹¹ In all of the groups interviewed, the single most consistent response was from clerks, with six associating party litigants with "more time/time intensive".⁹¹² Other clerks used related terms such as "hard work", "needy", "extra work"⁹¹³ and "demanding". Terminology relating to issues party litigants may cause in the civil court process was used by solicitors and judges, including "delay," "complication,"⁹¹⁴ "problem(s),"⁹¹⁵ and "disruption."⁹¹⁶ Some judges and court staff opted for words describing the perspective or emotional state of party litigants, such as "blinker,"⁹¹⁷ "awkward," "unknowing", "confused", or "naïve". Two judges responded with the word "disadvantage". It is interesting to note that, out of all of the groups, a handful of solicitors were the only ones who chose terms relating to their own emotions or experience, such as "hassle," "unfair" "tread with caution" and "frustrating." Unlike judges and court staff, none of the solicitors referred to the party litigant's perspective.

When asked for these first impressions, none of the interviewees chose any form of positive sentiment about party litigants or self-representation. This may seem to paint a negative picture of party litigants. However, in the course of the interviews many also expressed sympathy for party litigants;⁹¹⁸ as one clerk said in a focus group, with the agreement of colleagues, "You do feel sorry for them,

⁹¹⁰ See section 3.3.5.2.

⁹¹¹ Four solicitors, four judges, and three members of court staff used these terms.

⁹¹² One judge also said "more time".

⁹¹³ One solicitor and one judge also used this term.

⁹¹⁴ Solicitors used these first two terms.

⁹¹⁵ Two solicitors and one judge.

⁹¹⁶ This term was used by a judge. Another judge replied with simply "oh dear"; J10.

⁹¹⁷ Two clerks and one judge.

⁹¹⁸ See, for example, J5. The sympathetic approach of many judges in particular is discussed in detail in section 6.3.4.

to a certain extent.”⁹¹⁹ Other clerks discussed how difficult or daunting the experience must be for party litigants.⁹²⁰ Although they noted the difficulties and extra work occasioned by party litigants, clerks and judges also distinguished between these difficulties and the behaviour or character of party litigants as individuals. As one judge said,

“Generally people are very courteous and decent...I generally find that I’m quite sometimes surprised, because I generally find that they will behave themselves in court perfectly well, and listen to requests and directions from the bench.”⁹²¹

Some party litigants do not behave so well, but judges were careful to draw a distinction between the majority of party litigants who may cause problems but who do so unknowingly, and those who deliberately or carelessly caused delays or disruption.⁹²² As discussed below, the latter tended to be “serial” or repeat litigants, consistent with the views noted in the existing literature that distinguish between worthy “one-off” litigants who are forced into self-representation for financial reasons from the more problematic serial litigants who choose to self represent.⁹²³ One judge underlined this distinction, suggesting that party litigants can be separated into two types, one made up of party litigants who believe they have a genuine claim or defence, and another smaller and more disruptive group who treats coming to court as a hobby.⁹²⁴ The latter group are discussed in the next section.

6.2.3 Vexatious and Disruptive Party Litigants

“True” vexatious litigants⁹²⁵—those who are subject to an order under the provisions now contained in the Courts Reform (Scotland) Act 2014—are rare. However, virtually every interview throughout the project included reference to experiences the interviewee had with repeated, difficult, or disruptive party

⁹¹⁹ FG3; see also S3.

⁹²⁰ FG1, FG3, and FG4; the only focus group that did not express a similar sentiment was FG2, a court that appeared to be particularly beset with many problematic party litigants (see section 6.2.3).

⁹²¹ J7.

⁹²² J10, J4, J9, J3, J1, J5, J7.

⁹²³ Section 3.3.5.3.

⁹²⁴ J1.

⁹²⁵ Section 4.6.

litigants. Obtaining an order against a vexatious litigant can be a protracted and complicated process, and many interviewees described encountering party litigants exhibiting “vexatious” qualities who had not (yet) reached this stage. Judges sometimes described these as “serial”⁹²⁶ or “quasi-vexatious”⁹²⁷ litigants. Another suggested that repeat litigants are those who would take any opportunity to mount a “crusade.”⁹²⁸ As discussed above, these litigants are distinct from the majority of party litigants. “It’s not that they’re party litigants,” another judge said, “they’re vexatious litigants”.⁹²⁹ The same judge outlined the characteristic behaviour of these litigants:

“And they can cause enormous delays and procedural difficulties, spurious arguments and when you rule against them, appeals...And they will inundate you with lengthy written arguments, most of which are spurious, but demonstrate a sort of superficial knowledge of the law. It’s as if they looked at a textbook and found all sorts of passages which they misinterpret, misapply, and they appeal everything.”⁹³⁰

Court staff echoed the judges’ observations regarding repeat litigants, which they often referred to a “regulars” in the courts. One clerk, when asked if she had encountered any difficult, awkward or abusive party litigants, answered that while not common, “we have a few regular civil party pursuers, could be party defenders as well, that come to the desk. Also from my experience in [another court] we had a vexatious litigant as well. So dealt with quite a few awkward and difficult customers.”⁹³¹ In another court, staff recalled seeing litigants who were successful in one case, “and then they come in the following week with another ten!”⁹³² Perhaps unsurprisingly, given the observations about a vexatious litigant’s propensity to appeal, one clerk who works primarily with appeals reported encountering vexatious or obsessive litigants “a lot of the time,” including one who “threaten[ed] to give me a bunch of fives and punch me in the face” as well as another who made a complaint against the clerk when he

⁹²⁶ J4, J9; see also J3 and J1.

⁹²⁷ J10.

⁹²⁸ J9.

⁹²⁹ J10.

⁹³⁰ J10.

⁹³¹ FG4, AB.

⁹³² FG3 AB, EF.

was unable to accept an appeal, “but that’s just par for the course I think when dealing with vexatious litigants”.⁹³³

“Regulars” presented a particular problem in one court, ranging from deliberately making excessive phone calls or requesting copies of documents they did not need to cause disruption⁹³⁴ to some being described as “aggressive, violent”.⁹³⁵ “Regulars” were also identified as taking up a great deal of staff time, with staff suggesting that some might be “playing dumb” to get more information than court staff are authorised to provide:

Staff Member 1: “I mean, you’ll get regulars that come to the counter, and one of them I spoke to on three different days telling him that I couldn’t give him legal advice and he still came in the next time and asked me the same questions, came in the next time and he’s a regular that knows the procedure probably better than I do, but they just try to push and push.”

Staff Member 2: “And they know what they’re doing. They know.”⁹³⁶

Staff in this court appeared sceptical about the value of Vexatious Litigation Orders. One litigant who had been made subject to a Vexatious Litigation order was cited as still very much a presence in the court, as the litigant still had a case on-going from 2006 prior to the order being made:

Staff Member 1: “There’s loads of other actions that have slowly dropped away, and everything will be appealed. Every--all along to the way to the Court of Session, to the appeal court. So yeah, it’s the same people for years. Generations.”

Staff Member 2: “There was a famous family case, I think the guy was attempting to get access to his daughter, and the only way that ended was because the daughter eventually turned sixteen.”⁹³⁷

As noted above, a clerk dealing in appeals still had frequent encounters with litigants who have been declared vexatious seeking to lodge appeals and noted that there is some ambiguity as to whether vexatious litigants can enter into

⁹³³ CS1.

⁹³⁴ FG2, AB.

⁹³⁵ FG2, AB.

⁹³⁶ FG2, GH and KL.

⁹³⁷ FG2, AB and IJ.

certain types of actions—for example, whether the litigant could raise an appeal if he or she has been made subject to a guardianship order.⁹³⁸

Clerks also noted that, although they had encountered many disruptive repeat litigants, there is a degree of confusion as to how a disruptive litigant can be formally declared vexatious and thus kept from raising further actions:

“And quite a few times somebody phones and says ‘are they not a vexatious litigant?’ and to be honest genuinely I don’t really know what the procedure is to get somebody up, because there’s so many of them here. If we knew how to do it, we would have them all declared, but nobody really knows!”⁹³⁹

The same clerk noted that the Lord Advocate must make an application for a Vexatious Behaviour Order and expressed doubt that the Lord Advocate is overly concerned with these types of order; solicitors wishing to halt a problem litigant would have to go to great difficulty to bring the matter to the court.⁹⁴⁰ With the potential for existing cases to drag on and (as vexatious litigants are wont to do) be appealed, the orders are slow to make any real impact. While true “vexatious litigants” can rightly be regarded as rare, this may mask the wider category of “serial” litigants. Serial litigants, while still very much a minority, appear to be more common than the low number of existing Vexatious Litigation Orders would suggest. For every litigant who has been formally declared vexatious, there may be any number who have managed to thus far fly under the radar, managing not to attract the attention of someone willing to go to the trouble of attempting to have an order made against them.

It is worth noting that one judge noted an experience with a “serial” litigant in relatively positive terms: this litigant raised claims relating to unauthorised use of his intellectual property, often successfully, and the judge observed that he had become well-versed in that area of law and came to court well prepared to present his case. However, the judge regarded this litigant as an exception: “a lot of serial litigants are almost by definition ‘cranks’. Or vexatious.”⁹⁴¹ This was

⁹³⁸ CS1.

⁹³⁹ FG2 AB.

⁹⁴⁰ FG2 AB; more precisely, the clerk said “I don’t know that the Lord Advocate gives a monkey’s about it.”

⁹⁴¹ J4.

echoed by another judge, who recalled a few litigants who “just always turn up on their own”:

“And sometimes there can almost be an advantage, that if they present right and appear to have a point, appear fair and reasonable, appear to be disadvantaged, then perhaps that will sit with you to their advantage, as it were.”⁹⁴²

Other disruptive forms of behaviour were noted from party litigants who may or may not be “serial” litigants. Interestingly, some judges associated this behaviour, which was considered to be atypical of party litigants in general, with the character or personality of the individual. One of these said that party litigants generally conduct themselves properly in court, but:

“There are some exceptions, and they are exceptions...it’s a pity that these ones are the tail that wags the dog, the aggressive disruptive party litigants who are just hell-bent on causing disruption...Almost a nuisance, and enjoying it. And it’s a reflection, I think, of just the character of the individual.”⁹⁴³

Another judge said that “a very few” people came to court who “want to fly a kite” and that these were “masters at deflecting things and trying to get away from issues and just being very disruptive. Fortunately these folk are few and far between.”⁹⁴⁴ This type of behaviour was also related to stubbornness and a belief that the litigant has been wronged as “almost psychological characteristics”⁹⁴⁵ or to a form of personality disorder.⁹⁴⁶

Some court staff faced real and worrying issues with difficult party litigants, with some being shouted at, having irate litigants approaching the bench in court or threatening the sheriff, sometimes to the point of having to call in the police.⁹⁴⁷ Sometimes clerks would ask for a police presence in advance for a known problem “repeat” litigant, but others “kick off when you least expect, when it doesn’t go their way.”⁹⁴⁸ Because civil courts, unlike criminal courts, do not routinely have a police presence and often do not have a bar officer, clerks

⁹⁴² J5.

⁹⁴³ J7.

⁹⁴⁴ J5.

⁹⁴⁵ J2.

⁹⁴⁶ J1.

⁹⁴⁷ FG2 AB, CD, EF, GH.

⁹⁴⁸ FG2 CD, GH.

were sometimes left alone with the sheriff and a difficult litigant, or even alone entirely after the sheriff left the bench.⁹⁴⁹ For this reason, one clerk said, he felt safer clerking a criminal court as compared to a civil court.⁹⁵⁰

6.2.4 Discussion

The data gathered suggests that party litigants are far from uncommon. Although there is little doubt that they appear most commonly in the low-value claims procedures, they can be found anywhere in the Scottish civil courts. While it is difficult to avoid the conclusion that many interviewees viewed going to court without a lawyer in negative terms, due either to the problems it can cause or a perceived disadvantage to the party litigant, there is also a prevailing view that the majority of party litigants are trying their best in a difficult situation. These party litigants may be viewed by judges, solicitors and court staff as naïve or “blinkered”, but are also regarded with a degree of sympathy. The assumption that legal professionals are hostile to self-representing litigants, perhaps seeing them as a threat to the livelihood, was not in evidence.⁹⁵¹ There was also little evidence to suggest that, as one judge put it, disruptive litigants are the “tail that wags the dog,” tarring all party litigants with a poor reputation. Most interviewees instead recognised “problem” litigants as a separate group from the typical party litigant. However, with problems such as additional time and work associated with even well-meaning but uninformed party litigants, it is hardly surprising that those litigants who are perceived as being deliberately disruptive or vexatious do attract a great deal of attention. As the previous section suggests, there is in particular a view that litigants who choose—or even enjoy—self-representation (especially repeatedly) are more likely to be problematic or “cranks” as compared to those who can’t afford a lawyer or obtain legal aid. There is something a bit troubling about the idea that “good” party litigants are those who are forced into court alone, while those who wish to forego a lawyer may be regarded with suspicion. One might ask what is so wrong with self-representing by choice, provided that it is done without the intention to be vexatious or disruptive?

⁹⁴⁹ FG2 GH, IJ.

⁹⁵⁰ FG2 GH.

⁹⁵¹ See section 3.4.2.

However, the data does suggest that suspicion of party litigants who choose to self-represent and/or appear repeatedly may be well-founded in some cases, and that often there may very well be a connection between the reason a party litigant is self-representing and how likely they are to be a difficult or disruptive litigant. As in the examples above, a litigant who is self-representing because he refused to take a lawyer's advice or became too difficult to work with may bring the same attitude to court. A litigant who brings his case to court despite being told by solicitors that it has no merit may bring the same stubbornness to court. Sadly, litigants with mental health difficulties may also be less likely to be able to find or keep a lawyer. Some believe that the pursuit of obsessive or vexatious litigation is, in itself, a form of mental health problem,⁹⁵² and indeed a number of judges interviewed for this thesis associated serial litigation with personality or psychological disorders such as narcissism.

If this is correct, Vexatious Litigation Orders, even when they are granted, may at best fix the symptoms, rather than the cause of the problem. As court staff noted, even after being declared vexatious, some litigants were willing and able to remain in the courts by prolonging actions or raising appeals. While the number of "true" vexatious litigants is low, this may be misleading. Because it can be slow and cumbersome to have an order granted, or because they "fly under the radar" there is also, at any time, a number of one-off or "serial" litigants also causing disruption in the courts. It might be argued that, when in force, Vexatious Behaviour Orders should be more flexible and easier to obtain, but whether this would represent a true improvement might depend on the early identification of problem litigants—which may itself depend on judges or parties communicating with each other and between different courts. Due to the legislation's wide remit, it may take some time for judges to determine how best to fashion orders to prevent problematic behaviour. Again, however, this can only address the problem to a limited extent and may not resolve the underlying issues.

⁹⁵² Genn 2013; "Obsessed Litigants—an important but neglected subject"
<https://www.ibanet.org/Document/Default.aspx?DocumentUid=22f47040-65b4>.

The impact that abusive and disruptive litigants can have on court staff is one concern not adequately addressed by the vexatious litigation legislation. All interviewed clerks had dealt with awkward or difficult litigants and many had encountered extreme behaviour such as threats of violence and requiring to call in police, but treated this as almost commonplace or, as one put it, “par for the course.” It seemed that court staff bore much of the brunt of the problematic party litigant’s behaviour, being left to deal with the litigant in the sheriff clerk’s office or after the judge had left the bench without the benefit of the formal confines of court rules and etiquette. While the damage disruptive or vexatious litigants can cause to their opponents in court is often referred to,⁹⁵³ the effect on court staff, both in terms of the additional time they take up and the potential for litigants to be abusive, has been somewhat overlooked. Many members of staff have unpleasant or even frightening experiences with party litigants, but feel that dealing with abusive litigants is just “part of the job.” This may in turn affect staff’s view of party litigants. It has been noted above that staff in one court had a particular problem with party litigants, including issues requiring calls to the police. Of the four court staff focus groups, this group was the only one that—perhaps understandably--did not express a degree of sympathy for party litigants.

6.3 The Judges’ Role and Decision Making

6.3.1 Active/Passive Models

The Scottish civil courts are adversarial by nature, and adversarial processes are often identified as placing SRLs at a greater disadvantage.⁹⁵⁴ The simple procedure can be considered a limited exception to this rule, as its rules place an onus on the judge to establish both the facts and relevant law in the case,⁹⁵⁵ without altering the fundamentally adversarial nature of the process.⁹⁵⁶ In light of the disadvantages that an adversarial process entails for party litigants and

⁹⁵³ See, for example, Genn 2013.

⁹⁵⁴ Section 3.7.3.2.

⁹⁵⁵ Simple Procedure Rules Rule 12.4(2-3).

⁹⁵⁶ Section 4.5.2.

the consideration that, in a party-led procedure, cases cannot be progressed when one or both of the litigants is unaware of the rules and requirements, judges in this study were asked how active or passive their approach typically is in cases involving party litigants as compared to cases involving only solicitors. All responded that they routinely took a more active or interventionist approach when presented with a party litigant.⁹⁵⁷ When asked to provide a number describing their approach on a spectrum, with 1 being very passive and 10 being very active, there was a significant disparity in the numbers assigned when dealing with solicitors as compared to dealing with party litigants.⁹⁵⁸ Examples ranged from “3 to 6-7,”⁹⁵⁹ “4 to 8,”⁹⁶⁰ “3 to 8”⁹⁶¹ and “2 to 8”.⁹⁶² However, as some of these figures suggest, around half of the judges also noted that they are often “proactive” or “interventionist” in cases involving lawyers as well.⁹⁶³ As one judge observed:

“...we are encouraged in general to be proactive in the civil cases, that’s the ways things are at the moment...Proactive—you’re always proactive, and you’re inevitably more proactive in a party litigant situation, either if one is represented or whether both are party litigants.”⁹⁶⁴

Solicitors also agreed that most judges tended to be more “proactive” with party litigants.⁹⁶⁵

Party litigants create increased demands on the role of the judge overall, as they shift from a more passive to a more active role; the judge has to work harder in these cases.⁹⁶⁶ One judge suggested that (as noted in the quotation above) this is an ongoing trend, as judges are increasingly expected to be proactive. This judge attributed the move away from more traditional passive

⁹⁵⁷ An “active role” can translate into a number of forms of intervention or assistance to party litigants, as discussed in Chapter 5.

⁹⁵⁸ Asking for a number was an attempt to establish some basis for comparison, but this is of course subjective and the numbers can represent only an approximation. Some judges preferred to respond with a description rather than a number.

⁹⁵⁹ J4.

⁹⁶⁰ J2.

⁹⁶¹ J9.

⁹⁶² J10.

⁹⁶³ J1, J8, J2, J6.

⁹⁶⁴ J6.

⁹⁶⁵ S3, S4, S6.

⁹⁶⁶ See, for example, J3 and J8.

models both to changes to the rules and a “change of culture”, suggesting that “Old school sheriffs would certainly never have been involved in a discussion, that’s something that’s changed.”⁹⁶⁷ However, as the same judge also noted, judges are neither currently trained as inquisitors nor, despite simple procedure rules requiring the sheriff to make an effort to ascertain if cases can be settled,⁹⁶⁸ are they trained as mediators. Because these “active” roles are not as well defined as the traditional passive role, judges may find it difficult to strike a proper balance:

“And it’s an area I think probably that most sheriffs would find very tricky. Do you sit mute, and say nothing, you know, the tennis court umpire role, or are you active, even if that activity means risking—in fact, nowadays, risking a complaint, not just an appeal, but people might also make a complaint to the judicial office about you, about judicial misconduct.”⁹⁶⁹

“I tend to judge a case when it comes before me and see how far I should be involved in that sense. But you’ve got to remember what your role is in our system, which is—it’s not an inquisitorial system, we have an adversarial system. Until that changes, we shouldn’t go too far.”⁹⁷⁰

There are also limits to how much even the proactive approach can assist party litigants. One judge suggested that even when the judge is more active, party litigants are still unprepared for the nature of the process:

“I don’t think they appreciate that it’s still an adversarial process. I think they think it’s more of an investigative process. That they can just produce all this information and you’ll look at it and maybe ask a few questions. I think they don’t really appreciate that it’s for them to establish anything, other than coming along and saying what you want to say, and being believed or not. I think that’s the main difficulty with it.”⁹⁷¹

6.3.2 Standards

Another important aspect of the judicial approach to party litigants is the baseline standard of legal and procedural knowledge expected of them as compared to a solicitor. In an adversarial system, parties are expected to come

⁹⁶⁷ J6.

⁹⁶⁸ Simple Procedure Rules Rule 12.4(1).

⁹⁶⁹ J2.

⁹⁷⁰ J6.

⁹⁷¹ J8.

to court prepared to present their case in law and conduct the matter in accordance with the established court procedures. Most forms of procedure in Scotland are designed with trained legal professionals rather than lay people in mind. The standard is therefore quite high and unlikely to be met by a lay person with no legal education or training. However, it has been noted previously that, in law, the court is entitled to hold the party litigant to the same high standard as a solicitor or advocate.⁹⁷² Any latitude or assistance is extended at the court's discretion and there is no requirement to expect anything less of the party litigant than the court would expect of a trained legal professional.

Common sense, of course, dictates that party litigants will not have anything approaching a solicitor or advocate's procedural and legal knowledge. It is thus unsurprising that, in practice, judges reported lowering their requirements considerably when dealing with party litigants. While the existing, although paltry, authority⁹⁷³ has been careful not to entitle party litigants to an automatic lowering of standards (or by extension an entitlement to latitude) many judges nonetheless expected the party litigant to bring little or no legal or procedural knowledge to court with them. Thereafter many described a process of assessing the level of the party litigant's knowledge about the law or their case, or of beginning to assess the basis of the case themselves:

"I start from a low base, I proceed from the basis that they don't really understand the legal principles or have any knowledge of them. What I would usually, if I'm having some kind of preliminary discussion with them before a hearing starts, then I would usually try to get them to explain, in non-legal language what they see the issue as being."⁹⁷⁴

"I expect them to know nothing at all. But I wait to see what they'll show me in terms of what they know about the law, but the usual expectation is that they'll know very little."⁹⁷⁵

"I think I approach it assuming that they will know little or nothing of the law. I approach it from that perspective. That's why it's challenging...Sometimes one is surprised that there's some knowledge of the legal issues involved and that's wonderful, that's great. Often there's a

⁹⁷² Section 5.2.

⁹⁷³ Section 5.5.

⁹⁷⁴ J2.

⁹⁷⁵ J4.

kernel or a core element of good law in there, and it just needs to be eked out, but that can take a lot of work.”⁹⁷⁶

Another judge reported that they expected the party litigant to know little if anything of the law, “other than they feel they have been wronged”.⁹⁷⁷ One judge did expect party litigants to have researched court procedures before coming to court, but noted that typically they did not.⁹⁷⁸ Others expressed a similar scepticism towards the notion that party litigants would or could be expected to bring knowledge of the law or procedures to court. One suggested that it was “unfair” to expect party litigants to understand the law;⁹⁷⁹ another noted that while there is some information available online, understanding the process is overwhelming for party litigants.⁹⁸⁰ It is worth noting that these views were supported by the hearings observed, as it was very often readily apparent that the party litigant did not understand or was confused by fundamental issues such as the nature of the case against them or the purpose of that day’s hearing. While party litigants were also often unaware of matters of court etiquette, such as where to stand and how to address the judge, little notice was taken of this by the court. If, for example, the party litigant addressed the sheriff as “Judge” or “Your Honour,” they were not corrected.

On a similar note, it is taken for granted by judges, legal professionals and court staff that they must use plain language, and avoid the use of legal terminology or Latin terms, in communications with party litigants. Judges also expect to explain matters, such as procedural steps to be taken, to party litigants in court in a way that they would not explain to a solicitor. Some also make a point of illustrating these explanations with examples in the hope that this will help the party litigant better understand.⁹⁸¹ As noted above, a judge’s role will almost inevitably be more active in party litigants’ cases. In a number of the hearings observed, party litigants sought advice from the judge, either about the law or simply asking what they should do about their case. In one hearing, a party respondent in an action seeking an Exceptional Attachment Order asked the

⁹⁷⁶ J7.

⁹⁷⁷ J9.

⁹⁷⁸ J3.

⁹⁷⁹ J6.

⁹⁸⁰ J8.

⁹⁸¹ See, for example, J2.

sheriff to explain the meaning of the order; the judge advised only that this could be found in the legislation. Often, however, sheriffs did provide information or advice when requested. In one hearing, a party defender asked the sheriff how he could respond to a motion finding him liable for the expenses of the hearing, and the sheriff advised that he could ask the court to reserve the expenses while he sought legal advice, then duly granting this motion. On other occasions, judges volunteered advice; in one notable example, the judge, after already answering numerous questions for two party defenders who seemed very confused about the nature of the action against them, further noted that the defenders appeared to believe that, because the writ served on them averred that they were in breach of contract, this must be true. The judge thus took pains to remind them several times that they should not assume that the pursuer's averments were necessarily correct.

6.3.3 General Principles and Factors in Judicial Decision making

Although party litigants often create the need for judges to make additional discretionary decisions on questions such as how much latitude to extend to the unrepresented litigant,⁹⁸² there is little legal authority to guide judges as to how these decisions should be made. In fact, judges do not seem to be overly concerned with or even aware of the existing authority.⁹⁸³ When asked what principles they have in mind when making discretionary decisions about extending latitude to party litigants, only one judge referred to the leading case of *Martin Wilson v North Lanarkshire Council*⁹⁸⁴ and only one judge mentioned the Equal Treatment Bench Book and its chapter on party litigants.⁹⁸⁵ However, both of these judges also indicated that their real concern was fairness. This was a common theme amongst judges when asked about the exercise of their discretion relating to party litigants, with many stating that they make these decisions based on the idea of fairness, the interests of justice, and/or the

⁹⁸² Chapter 5.

⁹⁸³ See, for example, J6 and J2; these judges stated explicitly that they did not have any legal authorities in mind at all in these decisions or questioned whether there were any authorities.

⁹⁸⁴ J3.

⁹⁸⁵ J5.

question of prejudice to the other party.⁹⁸⁶ One judge summarised his approach thusly:

“But the general principle I adopt is fairness. Fairness to the party litigant, which means extending them latitude, that’s inevitable. But also fairness to the other side...And that’s the general principle, if there’s any, it’s fairness.”⁹⁸⁷

Other principles also emerged, either alongside or ancillary to the wider question of fairness or the interests of justice. One of these went beyond the objective fairness of a decision to extend to the party litigant’s perception or feelings about the fairness of the decision or the process:

“So you want to avoid the party litigant being disappointed in some sort of lawyer’s technicality. And feeling that they’ve been dealt with unfairly...So the—you do have to be extra fair to the party litigant, but not to the extent of prejudicing the other side.”⁹⁸⁸

Another principle is the idea that it is unfair to hold them to legal rules and procedures that they do not know or understand:

“I mean, to me, it comes back to really the issues of fairness, and if you have a party litigant who genuinely doesn’t understand and who you cannot expect to understand the procedural timetable and the procedural rules, and they’re simply not ready to proceed then in these circumstances I’d be very, very reluctant to find somebody in default.”⁹⁸⁹

In addition to this broader principle, another judge referred to the actual state of knowledge of the individual litigant as a factor:

“I think if I’m being asked to give any kind of latitude, I really want an explanation as to why they haven’t thought about that before now...they’ve maybe been told this before, given previous indication that they need to get that and they still haven’t done it, then I think they just have to pay the price for that and say ‘well, I’m sorry, but this either is clear and you’ve not done it, or you’ve been explained what to do and you’ve not done it’ then that’s, I think the latitude stops then.”⁹⁹⁰

⁹⁸⁶ J1, J4, J2, J6, J3, J9, J8.

⁹⁸⁷ J6.

⁹⁸⁸ J5.

⁹⁸⁹ J2.

⁹⁹⁰ J8.

This suggests that party litigants can be held responsible only for what they *actually* know (not just what they *should* have known). Moreover, the latitude stops only when necessary steps have been explained by the court and the party litigant has failed to act. There is, strictly speaking, no duty on the court to explain the procedure to party litigants or ensure it is clear, although in practice most judges do so.⁹⁹¹ These ideas suggest that there is little onus placed on the party litigant to familiarise himself with the process before he comes to court.

It is interesting to note that the behaviour of the individual litigant was also a factor for some judges, echoing again the idea of the two respective groups of “good” and “bad” party litigants:

“My own position is if it’s a—if a party litigant is behaving in a particularly unreasonable way—would be to take, to give them less slack than the normal party litigant. Most party litigants do not behave in an unreasonable way.”⁹⁹²

Judges suggested that party litigants are more likely to be extended latitude if they appear to be “sincere”⁹⁹³ or to be acting in “good faith.”⁹⁹⁴ The apparent substance of the party litigant’s case was another factor cited, with judges less likely to extend latitude to the party litigant on procedural matters, such as the late lodging of documents, if they considered that the action was likely to be meritless or irrelevant overall.⁹⁹⁵

The form of procedure that the party litigant is involved in also plays a role. Strictly speaking, the rules of the simple procedure afford the judge a wider discretion in how to deal with the case, while the ordinary cause rules prescribe a set form of procedure to which the party litigant must adhere. Although the dispensing power of the judge to relieve parties from failure to comply with the rules is explicit within the ordinary cause rules, judges considered that there was less latitude to be afforded in these cases or that a stricter approach was necessary.⁹⁹⁶

⁹⁹¹ See section 5.3.

⁹⁹² J4.

⁹⁹³ J7; see also J1.

⁹⁹⁴ J2.

⁹⁹⁵ J1, J10, J4.

⁹⁹⁶ J7, J3, J8, J1.

“...I think it’s much more difficult in ordinary cause to give latitude because it is a very clear procedure, it’s a much more structured procedure...”⁹⁹⁷

The preponderance of subjective notions such as fairness and the interests of justice in the decision making process, and other factors that appear to vary between different judges, naturally raises questions of consistency in the process between judges. Both court staff and solicitors observed that different judges took differing approaches to party litigants, with some allowing more leeway than others.⁹⁹⁸ There was also a suggestion that the approach to party litigants may be changing over time. One solicitor raised the idea that older judges and those who had been in office for longer tended to offer less latitude to party litigants in general:

“There are some sheriffs that don’t [offer latitude] but I think they’ve maybe gone a little bit more...But I think mostly I’ve noticed even in the last 5–7 years a change where those sheriffs have perhaps retired and certainly sheriffs I’m dealing with give the party litigants more latitude.”⁹⁹⁹

Other solicitors agreed that judges who had been in office longer may tend to have less patience with party litigants,¹⁰⁰⁰ with one suggesting that this may be accounted for by new judges receiving more training on how to approach party litigants when they take up office.¹⁰⁰¹ This is particularly interesting in light of the suggestion, as discussed above, that there is in general a greater emphasis on judges being more involved or “proactive” in civil cases.

6.3.4 Managing Emotion

Party litigants can, of course, often be expected to be emotionally invested in their cases and may find representing themselves to be an emotional experience. SRLs often feel distressed, vulnerable, or hopeless in the pursuit of their cases.¹⁰⁰² Unlike lawyers, who are expected to maintain a professional distance from the legal problems that bring them (and their clients) to court,

⁹⁹⁷ J8.

⁹⁹⁸ FG1, FG3, S2, S6, S4, S5, S7.

⁹⁹⁹ S5.

¹⁰⁰⁰ S6 and S7.

¹⁰⁰¹ S6.

¹⁰⁰² Sections 3.3.5.1-2.

party litigants are personally involved in the issue as well as the case. One particularly interesting, and somewhat surprising, aspect of the judicial interviews undertaken was how alert judges were to the emotions of party litigants--in fact, there was some element of this in each of the interviews. Some of these emotions, such as worry or distress, were the effect or result of going to court and doing so without a lawyer. Emotion was also recognised as a motivation or driver for the party litigant in coming to (or staying in) court or in the conduct of the case. Judges were not only aware of the emotional issues for party litigants, but also reacted by adjusting their approach or even their decision making process to accommodate or mitigate the party litigant's emotional state.

Turning first to the emotional impact of self-representation and the court process on party litigants, judges were aware both that the issue bringing the party to court was often difficult for the litigant and that litigants were likely to feel stressed or intimidated by coming to court.¹⁰⁰³

“And I suppose party litigants, the emotion quotient in the case is probably higher, that sort of baggage they're bringing with them inevitably, because they've invested time and effort in preparing for it. I suppose, if you're trying to prepare yourself for a completely unknown process—I mean, I often think, what if somebody said to me ‘right, you've got four weeks to prepare yourself to carry out some neurosurgery,’ you'd have to work quite hard, and you'd be pretty stressed for the time you're being asked to do that! So you're almost asking somebody to do that, so they're bound to be stressed.”¹⁰⁰⁴

Judges also noted that party litigants are often keen to ensure that they are able to tell their side of the story or “have their say” in court.¹⁰⁰⁵ In turn, judges adjusted their approach to make them feel comfortable, or ensure that they felt that they had a chance to say what they wish to say and be “heard” by the court.¹⁰⁰⁶ These are not, of course, concerns for judges when parties are represented. Accommodating the party litigant's desire to “have their say” often entails hearing the litigant on matters that are not relevant or related to the

¹⁰⁰³ J10, J3, J8, J5, J6, J2, J4.

¹⁰⁰⁴ J2.

¹⁰⁰⁵ J6, J5, J7.

¹⁰⁰⁶ For example, by allowing the litigant to carry on speaking about irrelevant matters until it becomes repetitive; see J1.

case; one judge said his approach to party litigants is thus to be patient, tolerant, and understanding.¹⁰⁰⁷ Another noted that he will listen to what party litigants have to say until they run out of breath or start repeating themselves:

“When you’ve got to the that point, you can say ‘well I’ve got the point, now let’s just recap on what you’ve said so far, and maybe list the things you think are relevant’ and in that way hopefully you’re getting across to the party litigant that you understood what they say. And if they haven’t understood it, no doubt they say. But it’s most important to them to feel that they’re being listened to and understood.”¹⁰⁰⁸

Although the court observation took place in a primarily procedural court, there was still a great deal of irrelevant information provided by party litigants, who often persisted even after being advised by the judge that the judge could not consider what they were being told. It was particularly common for party litigants in hearings relating to applications for liability orders from the Child Support Agency to go on at length about family law matters unrelated to the application at hand. Although the party litigants were advised by the judge that these matters were not relevant and could not be considered, they typically stopped short of cutting the litigant off.

Judges use other techniques to put party litigants at ease and minimise their discomfort, some of which are quite subtle. For example, the same judge quoted immediately above noted that he made a point of ensuring that party litigants did not feel self conscious about appearing without a lawyer:

“So I might say, ‘So you’re appearing on your own today,’ something like that. Not ‘oh, you’re just here on your own’ or ‘so you don’t have a solicitor?’ I think that might set the wrong tone, so I think it’s important at the outset to set the right tone.”¹⁰⁰⁹

Another judge used this practice to minimise stress for party litigants giving evidence at proof hearings:

“First of all, I don’t put the witness, the party, in the witness box. Simple thing, I just think that it’s putting the party litigant at a disadvantage

¹⁰⁰⁷ J9.

¹⁰⁰⁸ J5; see also J1.

¹⁰⁰⁹ J5.

immediately because they are separated from their papers. And it's just an isolating thing, to put them in the witness box, it seems isolating. I'll generally put the party on oath, undoubtedly that's a given, but I will allow the party to simply sit at the table at the well of the court. I think it puts the party litigant at ease."¹⁰¹⁰

In terms of emotion as a motivating factor for party litigants, judges repeated the famous idea that for party litigants coming to court, "it's not about the money, it's about the principle."¹⁰¹¹ Judges' observations about the motivations of party litigants echoed Moorhead and Sefton's finding¹⁰¹² that SRLs conceptualise coming to court out of a broader desire to seek "justice"¹⁰¹³ or because they felt they had been "wronged"¹⁰¹⁴ rather than for the legal resolution of their dispute. As one judge said, "...they're coming with a wrong that they think has been done to them, in some shape or form, and they think somebody's going to put that right."¹⁰¹⁵ The same judge suggested that this conception of "justice" may be based on wider social influences:

"...if something bad happens to you or something unfair happens to you, you don't always have a remedy. I think society generally has this feeling nowadays that if something wrong happens, they should be able to get redress, but it doesn't always work like that."¹⁰¹⁶

Equally, judges were aware that party litigants driven to court by more emotional motivations, rather than a valid claim in law, were ultimately unlikely to be satisfied by the process. "The problem is that seeking catharsis through legal proceedings is not a good idea," one judge said.¹⁰¹⁷ However, the judge can do little but advise the party litigant of this or attempt to manage their expectations of the process and the remit of the court.¹⁰¹⁸ Another judge even recalled once recommending counselling for an aggrieved party rather than litigation;¹⁰¹⁹ the litigant later wrote to him with thanks, saying that she had

¹⁰¹⁰ J7.

¹⁰¹¹ See, for example, J10.

¹⁰¹² Moorhead and Sefton.

¹⁰¹³ J8, J10, J7.

¹⁰¹⁴ J9, J8, J1, J2.

¹⁰¹⁵ J8.

¹⁰¹⁶ J8.

¹⁰¹⁷ J2.

¹⁰¹⁸ J5, J8, J7, J2.

¹⁰¹⁹ Prior to his appointment as a sheriff, in another judicial office he held.

taken the advice to get counselling and that it had helped her to get her life back on track.¹⁰²⁰

Judges also observed that party litigants will often feel animosity or distrust towards their opponent or the opponent's lawyer,¹⁰²¹ and as a result the usual discussions between parties—often with a view to settlement—do not occur or are not productive:

“...quite often relations between the parties have broken down, they're quite hostile towards each other. So they're not in the right frame of mind to compromise.”¹⁰²²

Putting aside the possibility of settlement, hostility or fear of the other party can also prolong the action, as parties are unable to collaborate to narrow the issues:

“And one thing I do want to mention, because it's struck me so often, is—the hearings are always more cumbersome, and that is for one very good reason and that is that very rarely in cases involving one or more party litigants is there even a possibility of agreeing uncontroversial material. Because what happens is that the party litigants are fearful that they're being drawn into making a concession. They're not, but that's how they see that, and I understand how they may see that.”¹⁰²³

On a similar note, judges suggested that party litigants may be unwilling to enter into discussions because they are too firmly entrenched in their view¹⁰²⁴ or because they are unwilling to compromise.¹⁰²⁵ With this in mind, some judges attempted to address the unwillingness to communicate or consider settlement in court by encouraging parties to communicate, even halting the hearing to do so:¹⁰²⁶

“...and you say ‘well, have you been for a chat to see if we can resolve this?’ and they look at you as if you've got two heads and you say ‘right, on

¹⁰²⁰ J2.

¹⁰²¹ See, for example, J6.

¹⁰²² J10.

¹⁰²³ J2.

¹⁰²⁴ J3.

¹⁰²⁵ J10.

¹⁰²⁶ J2, J10, J7.

you go, go and speak to each other for 10 minutes'. And in quite a lot of cases it works."¹⁰²⁷

All of these responses on the part of judges to the emotional nature of the process for party litigants form another facet of the "active" approach taken to these cases. Even more so than the general decision making principles discussed above, the ideas and practices discussed in this section operate outside of the "law" and what is traditionally thought of as the judicial role, but nonetheless appear to form a notable aspect of the approach to party litigants.

6.3.5 Discussion

Dealing with party litigants in the civil courts requires judges to shift away from their traditional role in a number of respects. Although the civil courts remain, in principle, primarily adversarial, the data suggested that judges routinely take a much more active role in practice, both with represented parties and, to a much greater extent, with party litigants. There is thus an uneasy relationship between the traditional understanding of the civil courts as a firmly adversarial process, and the reality as created by the newer rules of court and practical necessity. Judges clearly take a more active approach with party litigants; in simple procedure cases, they are required to do so. At the same time judges recognise that the system is adversarial and there are limits on how active judges can be before this leads to unfairness or prejudice to the party litigant's opponent. This internal incoherence or ambiguity in law is a problem in itself, but it also raises concerns about how well support and training for judges can keep up with the changing reality in the courts. Judges are in effect required to some extent to make enquiries and mediate with party litigants, but most come from a background in practice where they have trained and worked as adversarial legal practitioners.

Turning to the question of how judges approach the exercise of their discretion in relation to party litigants, what is again most striking is the paucity of traditional legal principles and how often more vague or subjective ideas such as "fairness" are cited. The overall impression created is that judging party

¹⁰²⁷ J2.

litigants is very experiential for judges, and is based to a significant extent on individual considerations and views. There are hints that changes in judicial culture over time—such as a move towards more “proactive” or party litigant-friendly approaches—may be another factor shaping how much latitude party litigants are allowed. This is intriguing and highlights how unmoored policy and practice on self-representation is. It bears repeating again that there is nothing in law that requires the judge to show any latitude to the party litigant, or to do anything other than treat him just as he would a solicitor or advocate.¹⁰²⁸ If there is one single conclusion that can be drawn from this chapter—and this theme will continue into the next chapter as well—it is that judges clearly do feel at least some obligation to allow party litigants leeway or assist them. Because the existing law bears so little resemblance to what actually occurs in the courts, each judge is left to his own devices to determine how best to deal with the numerous challenges party litigants present to the traditional models of judging. Rules of court provide some structure—for example, the simple procedure rules allow for a more active and informal approach than the more prescriptive ordinary cause rules. However, there is something perverse in the idea that an ordinary cause party litigant, facing a much more demanding procedure, should be allowed less latitude than a litigant in the more straightforward simple procedure. While lawyers understand the complexity and diversity of Scottish civil procedures, to the layperson there is little to justify a significantly different approach to party litigants between a claim for £4,999 in the simple procedure and a claim for £5,001 in the ordinary cause.

The emotional element presents further and even more complicated challenges to the judicial role. The prevalence of judges sympathising with party litigants and how they feel, or adjusting their practices based on their feelings, is a reminder that judges are, of course, only human. There is nothing in law that requires them to think about the party litigant’s feelings, and in fact a perfect “passive arbiter” perhaps should not be thinking about whether the litigant is happy with the court process. However, these matters were very clearly on many judge’s minds. In fact, one referred to the desire to give sincere party litigants a good experience.¹⁰²⁹ The ability to put himself in the party litigant’s

¹⁰²⁸ Section 5.2.

¹⁰²⁹ J1.

shoes may be an asset for the judge, for example by settling a case without the need for a proof because parties are encouraged to talk matters out. Equally, however, this facet of the judicial approach to party litigants raises questions. Could this mind set lead judges to be too lenient with party litigants? Is it unfair to the represented party if the judge is viewing the party litigant as distressed or vulnerable from the outset? Does adopting a tolerant and patient posture to irrelevant submissions perpetuate the layperson's notion that the court is a place to come for "justice" or to "have their say" rather than legal dispute resolution?

Is it really part of the judge's role to consider the party litigant's feelings or need for catharsis, rather than dispassionately deciding on the relevant law at hand? In many ways this question addresses the wider issue of how we view the function of the courts and adjudication. Should the courts process disputes quickly and efficiently, or should they provide a service tailored to the needs of litigants as "consumers"?¹⁰³⁰ Even putting aside any prejudice to the party litigant's opponent, is it really better for the judge to allow a party litigant to take up court time—possibly at the party litigant's own expense—to "have his say" on a meritless claim rather than disposing of it quickly? Is it a better outcome if the party litigant thus leaves court poorer but more satisfied because he has been able to speak his mind—or, as suggested by one judge above, is his search for "catharsis" in the court always bound to fail anyway? There are no easy answers to these questions. Despite concerns about party litigants coming to court for emotional rather than legal reasons, to say that some party litigants should be kept out of the courts for their own good smacks unpleasantly of paternalism.

6.4 Conclusion

Much of what has been discussed in this chapter is consistent with the existing literature on SRLs in other jurisdictions. In the absence of clear rules and guidance relating to party litigants, the diversity in the general principles that judges apply when dealing with party litigants can perhaps also be expected.

¹⁰³⁰ See section 3.2.

However, for the most part these principles all add up to the same conclusion: that it is unfair to treat party litigants like solicitors and that latitude must be extended to them. Perhaps most interesting is the awareness of so many judges of the role that emotion plays for the party litigant and how this can influence their approach or even decision making. With all of the principles discussed in this chapter in mind, the next chapter will examine the challenges and issues arising around party litigants in the civil courts, and how the courts deal with these challenges.

Chapter 7: Navigating the Court Process

7.1 Introduction

The general principles set out in the previous chapter guide the judicial approach to party litigants in the court. However, to better understand the position of the party litigant, it is necessary to examine the more granular aspects of the process. There are many facets to a court action and many different stages and elements for a party litigant and for the court to deal with. This chapter discusses various stages and aspects of the civil court process—court procedures, legal matters, evidence—how party litigants approach these aspects of their case, the issues arising, and how the courts deal with these issues. As will be seen throughout this chapter, and in line with the general principles discussed in the last chapter, often the court deals with any problems and issues by extending various forms of latitude or assistance to party litigants. In the latter part of the chapter, other aspects of the party litigant’s experience are considered: expenses, appeals, and the role of court staff in providing advice or assistance.

7.2 Court Procedures

7.2.1 How Well do Party Litigants Cope with Procedural Requirements?

It is clear that party litigants struggled with procedural matters considerably—in fact, to the extent that, as noted above, judges simply did not expect the majority of party litigants to be capable of understanding or navigating the court procedures. As one judge stated,

“But in a very significant number of cases, party litigants don’t seem to have much of a grasp of the procedure. I mean, even the basics in terms of the lodging of documents or intimating witnesses, or even how to get witnesses to court. So I tend to proceed on an assumption that they don’t

really know anything about the procedures other than that they're in court."¹⁰³¹

Judges were thus prepared to offer party litigants a high degree of latitude or assistance on purely procedural matters. Generally this took the form of either excusing late performance of a procedural requirement, continuing the matter to a further hearing to allow the party litigant more time or several chances to comply with a procedural requirement or to comply correctly, or again by lowering standards to accept, for example, court documents in an incorrect format. The judge might also explain in court what the party litigant needs to do, a step that would of course not be taken (or needed) for represented parties.¹⁰³² When the other party was represented, some judges asked the opponent's solicitor to perform procedural requirements that would otherwise have been the party litigant's responsibility. For example, the defender's solicitor may be asked to lodge the record with the court, rather than the pursuer as usual.¹⁰³³ One solicitor even felt that the court expected him to assist the party litigant:

"Just based on my experience, it's especially important to make sure that the other party is made aware of what is going on."¹⁰³⁴ So I feel there's almost an element of the court will expect me as the legally qualified person involved in the dispute to assist to an extent. Sometimes helping—I would go so far as to say helping them to comply with the rules."¹⁰³⁵

Most judges also said that they were slow to grant summary disposals, such as decree by default or summary decree, against party litigants. As one judge said, "So to persuade the court that the person should lose their right either to pursue or defend a case for having failed to take some procedural step, then—I'm not saying it couldn't happen, but it would be pretty extreme."¹⁰³⁶ There is some suggestion that judges may go a step further by not only refusing to grant a motion for a summary disposal, but by discouraging the opponent's solicitor from

¹⁰³¹ J4.

¹⁰³² See, for example, J3 and J5.

¹⁰³³ J4 and J5.

¹⁰³⁴ This sentiment also echoes the discussion in section 6.3.3 about the importance of the state of knowledge of the party litigant; the party litigant must in fact know the rules if he is to be held accountable.

¹⁰³⁵ S3; another solicitor reported sending e-mail reminders to party litigants about court deadlines, S2.

¹⁰³⁶ J2.

making such a motion in the first place. As one judge said, referring to a motion for decree by default: “At that stage I would be pointing out quite strongly to the other party that actually this could be more inconvenient for you if I granted decree today, because the strong likelihood is they’ll come back to court and we’ll start all over again, that’s a wasted trip on your part.”¹⁰³⁷ Solicitors reported hearing these sentiments from judges in court as well. They would refrain from seeking orders such as summary decree that they would have sought if the party had been represented, because it was unlikely to be granted and thus a waste of time. This pre-emption of procedural steps can be viewed as a form of latitude in its own right. It is interesting to consider whether this is beneficial for the party litigant or not—a motion for summary decree, for example, may have the effect of bringing deficiencies in the party’s case to light at an earlier stage, which could be helpful for all parties in the long run.¹⁰³⁸

Perhaps the most prevalent procedural issue is the additional court time required to explain the procedures and requirements to party litigants, an action not necessary when parties are represented. However, one judge did note that solicitors are often given a degree of latitude on lateness and format of court documents.¹⁰³⁹ Some judges expressed feeling under pressure to spend sufficient time explaining matters to party litigants in courts where a number of other parties were in court awaiting their own hearings. Allowing party litigants continuations and additional time to comply with the court procedures also creates delay for both parties, usually in terms of weeks at least, and the need for additional court hearings. Judges were alert to the problem of the inconvenience and additional expense incurred by party litigants’ opponents, but consistently reported that party litigants would get at least one continuation to deal with a procedural failing. One solicitor noted, however, that cases are often dealt with by different sheriffs from one hearing to the next, and matters became even more protracted when party litigants received latitude from one judge and then the same from a different judge at the next hearing:

¹⁰³⁷ J4.

¹⁰³⁸ This could also affect the court records in these cases—where motions for decree are never formally made, they are not recorded and the court record will thus not tell the whole story.

¹⁰³⁹ J4.

“And then the case is continued and in four week’s time it’s a different sheriff, and the sheriff says ‘oh, it’s a party litigant, I’ll give him extra latitude just to be fair’ and it gets quite infuriating because you’re thinking ‘well, actually if it had been the same sheriff dealing with this throughout, they’d have realised that actually I’ve given them the chance the first time and they’ve not taken it, or they’re deliberately causing us problems”.¹⁰⁴⁰

7.2.3 Procedural vs Substantive Matters

Judges also said that party litigants often did not understand the difference between hearings that are procedural in nature, and evidential hearings or proofs. Often party litigants appeared at first or procedural hearings with evidence or believing that they were there to argue their case in full at that hearing:

“And they don’t often appreciate that the first calling of the case is not the evidential hearing and they come in armed to the teeth to argue. And they want to have their say, and it doesn’t matter how many times you tell them ‘I’ll be appointing defences to be lodged, there will be a proof fixed,’ they will insist on talking about their case, they will insist on ventilating in court their issues with the other party.”¹⁰⁴¹

These party litigants are confused and therefore unlikely to be prepared to deal with the true purpose of the hearing: to direct the progress of the case. As other judges noted, they are also likely to be disappointed and dispirited when confronted with the reality of the procedural requirements and the fact that there will be further stages before their case reaches a final determination. One judge described how, to manage party litigants’ expectations, they began hearings by informing them that they will not “dig in” to their case or go in to detail at this stage.¹⁰⁴² As another said,

“...I think I and my colleagues often feel that at the actual court you’re managing disappointment rather in the way that people at the airport make Tannoy announcements or at the desk are managing disappointment...and all they’re doing is staging the delay, and then you feel cheated at the end of it all. I don’t think we’re as bad as that but I do think we’re—you know, the paperwork, the initial procedures, they’re all geared to the first

¹⁰⁴⁰ S5.

¹⁰⁴¹ J6.

¹⁰⁴² J8.

appearance and we've then got to explain that it's going to take longer than that."¹⁰⁴³

As the same judge pointed out, party litigants may become discouraged at this stage and wonder if the process is worth the effort.¹⁰⁴⁴ Some matters, such as contact orders with children, are especially time-sensitive. Without a solicitor to manage his expectations, a first hearing can be a rude awakening for a party litigant.

7.2.4 Participation in Procedural Matters

A less apparent issue with the party litigant's lack of knowledge of the court rules and practices, particularly in the context of an adversarial, party-led system, is that the party litigant is not able to fully participate in court hearings, even those which are purely procedural in nature.¹⁰⁴⁵ When parties are represented at a typical procedural hearing, either each party makes their own motion, or (as often occurs) the procedure has already been agreed by the solicitors and a joint motion or motion of consent is made to move the case to the next stage procedurally. At an Ordinary Cause options hearing, for example, parties will typically ask for a continued options hearing to allow more time to adjust their pleadings, or for a debate or proof hearing to determine all or part of the matter. Usually the judge will grant one of the orders sought.

Party litigants who are not familiar with the procedures—or, as discussed above, are not even aware of the nature of the hearing—are not able to meaningfully engage with this process. This was particularly apparent in the court observation data. In various forms of procedural hearing, party litigants often asked the court to make orders or take procedural steps that were not appropriate to the stage of proceedings—for example, asking for dismissal of the case at the options hearing, or attempting to dispute the debt at a hearing for their sequestration. Frequently party litigants made no motion at all to the court. It was common for the party litigant to say nothing at all in terms of how they wished the case to

¹⁰⁴³ J5.

¹⁰⁴⁴ See also J10.

¹⁰⁴⁵ Proofs and evidential hearings present their own issues and are discussed in more detail below.

proceed, or to simply oppose their opponent's motion without requesting an order of their own. This undermined the usual structure of the process; while in cases involving represented parties the outcome of the hearing was usually one of the orders sought by parties, in cases involving party litigants it was often something else entirely,¹⁰⁴⁶ either *ex proprio motu* or a different order agreed after the judge had discussed matters with parties from the bench.

7.2.5 Discussion

Unsurprisingly, the data gathered was consistent with the existing literature in that it suggested that court procedures are difficult for party litigants to understand and navigate.¹⁰⁴⁷ More interesting is the prevailing view among the judges and lawyers interviewed that there is little substantive effect resulting from purely procedural failings, and there was ample chance for the party litigant to correct any problems. However, further data on the question of how party litigants feel about procedural matters would be useful. Even if failing to understand the procedure does not truly prejudice the party litigant, it may still be a considerable source of stress for them. Procedural formalities may also hinder the party litigant's ability to participate meaningfully in the case and further the impression that they are "outsiders" in the process.

7.3 Substantive Legal Matters and Merits

7.3.1 Pleadings and Court Documents

Some form of written pleadings or documentation will be required in most cases involving party litigants. In the simple procedure, the litigant's claim or defence can be set out in informal terms on the court forms. In other forms of action, strictly speaking, litigants must not only plead a relevant case in law, but do so in a strictly prescribed fashion. Unsurprisingly, the formal and structured requirements of written pleadings and court documents present difficulties for party litigants:

¹⁰⁴⁶ Unsurprisingly, this was a very often some form of continuation.

¹⁰⁴⁷ See section 3.3.4.3.

“I would say quite often in ordinary actions it’s the drafting of documents, because that’s something that’s quite difficult to do if you don’t know what’s required. And there’s not really anywhere you can find guidance on that, if you don’t have the experience...if you’re drafting legal documents it’s quite difficult without the resources that solicitors have to actually draft them correctly.”¹⁰⁴⁸

“I find that when I am going back to it and I am doing it I feel a bit rusty, so I think goodness knows what party litigants must feel like when they’re trying to deal with it and you’re trying to make sure that you’re doing it correctly, making sure you’re getting your points across, making sure you’re responding correctly. If you’re defending an action, that you’re responding correctly, you’re laying out your pleadings, all the tactical issues that come with pleadings. Making sure that you don’t say anything that could lead to a recovery of evidence or a commission and diligence being required, or saying anything that could be potentially misconstrued or misinterpreted. It must be very difficult for a party litigant to do this properly.”¹⁰⁴⁹

Again the court is often placed in the position of offering latitude or assistance to the party litigant in the submission of pleadings. As with procedural matters, the party litigant may be given more time to provide relevant pleadings.¹⁰⁵⁰ One judge described assisting party litigants by setting out the requirements of pleadings in court:

“...I’ll hold up a summons at the first calling of the case, and I’ll say ‘This is a statement of claim, paragraphs 1, 2, 3, 4 and 5. What you must do is answer that with a document--I don’t care what you call it, it may be answers, it may be something else—what your point is in relation to 1, 2, 3, 4 and 5.’”¹⁰⁵¹

Another option is to accept pleadings that do not properly express the party litigant’s case in law “as is” and to then “look behind” the pleadings as presented. One judge noted that he would accept pleadings that do not express the case properly as long as he got the point.¹⁰⁵² Written pleadings and court documents, and particularly defences, were an issue in a number of the ordinary court hearings that were observed. Ordinary cause cases typically call in court first for an options hearing, and at this stage parties are expected to have

¹⁰⁴⁸ S6.

¹⁰⁴⁹ S5; see also S1.

¹⁰⁵⁰ J10.

¹⁰⁵¹ J6.

¹⁰⁵² J9.

completed all adjustment of their pleadings (the initial writ and defences) and to have produced a record. The following summaries of a number of hearings highlight a common problem with different solutions:

Case 1: Options Hearing (Debt Action)

A party litigant defender had lodged a letter rather than defences in the proper form. The pursuer enrolled a motion to continue the case to investigate the basis of the party litigant defender's defence. The sheriff suggested sisting the case instead, which was not opposed and the case was sisted.

Case 2: Continued Options Hearing (Debt Action)

A party litigant defender had been given additional time to lodge defences in the correct format. This had now been done, but the defences were received late. The pursuer did not object to allowing the defences to be lodged although late, but sought further time to adjust to respond to the defences. The sheriff granted a further continued options hearing, noting that although this was not strictly within the rules,¹⁰⁵³ it was the "least worst option."

Case 3: Options Hearing (Debt Action)

The party litigant had lodged defences that were not in the correct form. The pursuer moved the court for an order for revised defences and a continued options hearing, while the party litigant defender moved the court to dismiss the action. After a lengthy hearing, the sheriff continued the case to a further options hearing but did not make an order for revised defences, advising the pursuer that the "gist" of the defender's case was clear enough.

Case 4: Options Hearing (Division and/or Sale)

The party litigant defender's defences were not in the correct form. The pursuer advised the court that they were therefore unsure of the defender's position and thus how to determine future procedure. The pursuer moved for a continued

¹⁰⁵³ The ordinary cause rules allow for only one continuation of an options hearing, although this can effectively be circumvented by asking for the first options hearing to be discharged at the time.

options hearing and a new order for defences in the proper format, which was granted.¹⁰⁵⁴

Case 5: Continued Options Hearing (Debt)

The defender had lodged defences, but the pursuer had lodged a Rule 22.1 Note on the basis that there was no relevant defence disclosed. A debate was assigned.

These examples also illustrate the challenge that the party litigant's pleadings can present to the solicitor acting for the party litigant's opponent, both in terms of how to understand the party litigant's position and how to progress the case with minimal delay.¹⁰⁵⁵ They also illustrate that judges are often not prepared to grant summary decree¹⁰⁵⁶ and the typical procedure, such as fixing a debate, is not suitable to the situation at hand. A debate is intended to determine a point in law, but it is a protracted and complicated procedure to establish that a party litigant has been unable to plead a relevant case in law.

7.3.2 Knowing and Understanding the Law

Perhaps the most obvious problem that party litigants face when attempting to mount a case or defence in the civil courts is their lack of legal knowledge. As noted above, party litigants generally come to court with little understanding of the law, and judges generally do not expect them to have an understanding of the law.¹⁰⁵⁷ As one solicitor noted, party litigants need not only find or access the relevant law, but also interpret the law:

“I think the main reason is that they're not legally qualified, so they're not really familiar with how it works. So they might be reading legislation but they're not understanding it properly and they're interpreting incorrectly, and that can cause a lot of problems.”¹⁰⁵⁸

¹⁰⁵⁴ In another hearing, the defender had lodged a letter instead of a Notice of Intention to Defend and the sheriff had set a by order hearing, then ordering a NID and defences to be lodged.

¹⁰⁵⁵ See, for example, S3.

¹⁰⁵⁶ See section 7.2.1.

¹⁰⁵⁷ See section 6.3.2.

¹⁰⁵⁸ S2.

Knowing the law (for example, by reading a text, statute or case law) and *understanding* the law (having the ability to correctly interpret and apply the law) can thus be viewed as two distinct but closely related challenges for party litigants. As another solicitor noted, a great deal of time and effort is required to acquire these legal skills:

“...the underlying lack of knowledge of the law, and I think that is the fundamental problem. Law students go to law school for upwards of three years, that’s the minimum they’re going to do, and their substantive knowledge is two years, and these are clever, clever students who did well enough in school to get in to law school. But the average party litigant isn’t as well equipped.”¹⁰⁵⁹

As others also noted, it is simply not realistic to expect party litigants to acquire the necessary skills within the timescale of a court action.¹⁰⁶⁰ Without a real knowledge or understanding of the law, how do party litigants then begin to formulate a case or defence? Often the answer appears to lie in the moral notions already discussed. It may be difficult for party litigants to untangle their ideas about fairness or “justice”—ideas that, again as discussed in the last chapter,¹⁰⁶¹ may be motivating them to come to court in the first place—from the need to present a relevant case in law to the court. As one solicitor said, “there’s no point on quoting much case law to a party litigant, because they’ll come around and say ‘well I don’t agree with that, that’s not fair.’”¹⁰⁶² Another solicitor offered this illustrative example:

“I’ve got a divorce going on right now where—this is a great example of party litigant getting it wrong. They think they’re saving money and it’s a divorce case and of course he is saying one thing and she believes morally and ethically that a property is a family home and it’s matrimonial property when it’s not. And she can’t understand the fact that her estranged husband bought a property before he was even in a relationship with her, she moved in to the property and she thinks that’s a family home.”¹⁰⁶³

¹⁰⁵⁹ S7.

¹⁰⁶⁰ See, for example J3.

¹⁰⁶¹ Section 6.3.4.

¹⁰⁶² S7.

¹⁰⁶³ S8.

As the solicitor went on to explain, the problem can be compounded when the party litigant does not understand the relevant law. In this example, the judge and opponent solicitor both tried to explain the law to the party litigant:

“She reads the legislation in the 2006 Act, the matrimonial homes act, when it’s the 1985 Act that covers it...and she’s made a huge hash bash of all this, focused on all the wrong things, researched whatever she’s researched and it’s completely wrong. It’s difficult, and every case is different and has all its own particular difficulties and issues you need to try and resolve with the party litigant, and sometimes that’s easy and people get it, but most of the time they don’t get it because emotionally they’re too involved in the case.”¹⁰⁶⁴

Even when party litigants are made aware of the relevant law, some may set this aside in favour of ideas about what is “right” or “fair”—while the court, of course, can only consider the law.

Another point worth raising about party litigants and their level of knowledge is the matter of how well they are able to assess the value or quantum of their case. In some matters, such as suing for a debt, this is straightforward. However it can be more difficult when the party litigant is seeking damages. Without the necessary legal knowledge, the party litigant has no guidance and may seek what they consider to be fair (for example, seeking replacement value for a damaged item, rather than their actual loss¹⁰⁶⁵) or pluck figures “out of the air”.¹⁰⁶⁶ Determining the true value of the action requires, again, the judge to intervene. In one case, a judge described having to value the loss on a whole list of items for the pursuer in a small claims action—although the pursuer was nonetheless ultimately unsuccessful.¹⁰⁶⁷

A lack of basic understanding of the law often caused difficulties in the hearings observed as well. Party litigants often seemed to not understand the legal aspects of the matter before them, some of which, in fairness, are understandably subtle to a lay person. Actions for sequestration or time to pay applications (both of which were particularly common to find party litigants in during the course of the observation) offer a good example of this. In these

¹⁰⁶⁴ S8.

¹⁰⁶⁵ J7.

¹⁰⁶⁶ J3.

¹⁰⁶⁷ J7.

hearings, the sheriff is very limited in the decisions that can be made; in sequestrations, the legislation provides that the application must be granted unless the debt has been made or an application for a Debt Arrangement scheme has been made.¹⁰⁶⁸ In relation to a time to pay application, instalment decree or open decree are the only potential outcomes. However, it was extremely commonplace to observe party litigants attending these hearings—again, perhaps understandably—seeking to dispute the underlying debt rather than to seek an outcome provided for in the relevant legislation. In law, however, the debt has already been constituted and any arguments about the debt itself are irrelevant. As discussed above in relation to procedural matters, these misunderstandings often left the litigants unprepared to deal with the issues actually at hand and unable to participate effectively in the hearing, and left the judge with little choice but to either grant the application or a continuation.

7.3.3 Gatekeeping

The most prominent consequence of lack of knowledge or understanding of the law is that party litigants are much more likely to bring a case or defence to court that is hopeless or meritless in law. As one judge put it, not having a lawyer means that party litigants have a problem with “seeing the case that isn’t there, so in knowing that you don’t have a case.” At the same time, there is very little “gatekeeping” of the cases of party litigants in the Sheriff courts. Typically, lawyers are generally thought of as gatekeepers of the law, using their expertise to determine if, and how, claims enter the courts.¹⁰⁶⁹ For party litigants, this element is removed and there is no one legally qualified vetting the case or defence before it is presented to the court. The difficulty with this is that Sheriff Courts do not have their own mechanisms to vet or keep out cases that are fundamentally misconceived. While litigants in the Court of Session must have a judge’s approval before a summons is signetted, there is no analogous rule in the Sheriff Court. One judge pointed out this disparity and indicated that, as a result, the sheriff courts feel obliged to warrant virtually

¹⁰⁶⁸ The application can also be continued for up to 6 weeks.

¹⁰⁶⁹ Section 3.4.2.

any writ or application, regardless of how flawed it may be.¹⁰⁷⁰ Another sheriff described a writ that had recently reached his desk as “mince”:

“But anyway, I’ve granted a warrant for service on the defender, because we’re not supposed to consider the merits of the action. It’s up to the defenders to turn up and say ‘look, this action should be dismissed for the following reasons.’”¹⁰⁷¹

Typically initial writs are warranted by court staff, rather than a judge, after establishing that basic procedural criteria are met. However, court staff reported that writs from party litigants may be presented to a judge for approval (as in the example above) if they were uncertain whether to issue a warrant.¹⁰⁷² In one staff focus group, a clerk advised that for a writ to be warranted, checks would be made for:

“...as a minimum, an instance, pursuer and defender, a crave—at least one, what they want—you’re looking for some sort of condescendence, what it’s about. I generally wouldn’t be looking for pleas-in-law. But if I wasn’t entirely sure, I would send it up to the sheriff to ask if they were willing to accept it.”¹⁰⁷³

When asked if judges typically agree to have these writs warranted, another clerk in the same group added:

“They—well, it depends on the sheriff. But my view...is that we’re not really here to check the merits of people’s actions, if people want to raise an ordinary action, fine, the sheriff clerk’s office is just sort of an administrative office, we’ll take—or to an extent, as long as it conforms to the basic requirements—we’ll take anything and it’s up the other side to object to it if they think there’s anything that’s not got a sound legal basis. But I think some sheriffs, well there’s at least one sheriff here that I think is a bit more specific before any—wants things to be right before an action is warranted.”¹⁰⁷⁴

As with all types of pleadings, there is little assistance available for party litigants seeking to raise an action to draft the writ properly. As one clerk observed:

¹⁰⁷⁰ J1.

¹⁰⁷¹ J10.

¹⁰⁷² FG1, F2, FG3, FG4.

¹⁰⁷³ FG3; see also FG1 and FG4.

¹⁰⁷⁴ FG3.

“And of course, your other problem is, a lot of party litigants come up with the expectation that we have forms for absolutely every type of scenario, and of course we don’t. They say they want to raise an initial writ to get custody of their child, all we can do is head them in the right direction for a very basic style for a writ in a Ordinary Cause Rules, but then I have to say to them ‘look, at the end of the day, you have to decide how to frame the document, that is legal advice that we’re not able to help you with.”¹⁰⁷⁵

7.3.4 Assessing and Dealing with the Case

All of the points discussed above begin to illustrate the complexity that the legal aspects of a party litigant’s case present to the court. While lawyers can be expected to set out a case in law clearly and in the proper format, the judge is far less likely to be able to rely on the party litigant’s pleadings as an accurate expression of their case. Due to the party litigant’s lack of knowledge or understanding of the law, it may be that the party litigant does not understand their own legal position, or they may believe that they have a case when they do not. One first step that judges and solicitors turn to is advising party litigants to take legal advice.¹⁰⁷⁶ Judges could be seen advising party litigants to take legal advice often during the course of court observation as well, including suggesting specific agencies, such as Citizen’s Advice Bureaux, that may be able to offer help. Of course, it is not always possible for the party litigant to do so, or they may not wish to take legal advice.

Judges also described offering a degree of leeway or latitude to party litigants on legal matters. When asked about what part of the process challenges party litigants the most, one judge said, “The law can be very challenging, but the courts do cut them loads of slack in relation to the law, if there’s a colourable case hiding in there. That’s more of a challenge for the court.”¹⁰⁷⁷ As this suggests, with this latitude the job of formulating the party litigant’s case in law can be seen to shift to some degree from the litigant to the judge. The judge may thus have to make enquiries to draw out the party litigant’s case:

¹⁰⁷⁵ FG1; see section 7.7.1 for a more detailed look at legal and procedural advice from the clerk’s office.

¹⁰⁷⁶ See, for example, J1, J2, S1, S3, S4, S5.

¹⁰⁷⁷ J4.

“...I think you can get them to supplement it, what they think the case is about, what’s the problem, what’s the nature of the problem? And what’s the solution that they’re looking for?”¹⁰⁷⁸

Another judge described “translating” the position of party litigant respondents in mortgage repossession cases into the relevant defence of reasonableness:

“In those cases I encourage the person to just explain to me in very broad terms why they say I should not be granting judgment against them, try and encourage them to explain. That generally prompts a diversion into irrelevancy, I must say. But with a little gentle steering, it’s not difficult to get to the issue of reasonableness.”¹⁰⁷⁹

Judges may have to establish fundamental aspects of the case for the party litigant:

“Yeah, I think basically I give them quite a bit of leeway with that, because they very rarely come and say ‘this is a case of contract’ or ‘this is such-and-such’. I usually say to them, ‘this comes down to a question of contract’ or, you know, somebody comes and starts quoting a statute, ‘well, you’ve not made a statutory argument in your case so far, so we can’t consider that unless it’s put in, do you want to go down that path, or are you wanting to rely on the common law in relation to that?’”¹⁰⁸⁰

The additional questioning and advising of the party litigant, of course, takes up additional time. Party litigants are also likely to address the court on irrelevant matters;¹⁰⁸¹ as one judge put it, “I think inevitably the lay person will want to start off at the beginning of time.”¹⁰⁸² Time pressures play a significant role in the judge’s ability to deal with the party litigant’s case in law. The typical first calling of a case in a procedural court does not allow time for the additional enquiries that the judge has to make in these cases:

“...but that’s incredibly challenging because you have a court with 100 cases, and hours to do it, and a defender let’s say who is emotionally involved, no doubt out of his comfort zone, and unable to really articulate the nub of the defence. You have to try and just get to it, quickly.”¹⁰⁸³

¹⁰⁷⁸ J2.

¹⁰⁷⁹ J7.

¹⁰⁸⁰ J8.

¹⁰⁸¹ Either because they do not know what is relevant or because they wish, as discussed in section 6.3.4, to “have their say”.

¹⁰⁸² J5.

¹⁰⁸³ J7; see also J3.

A solicitor suggested that a lack of time may prevent early intervention in cases:

“However I think the fundamental problem is what I used to see with small claims and summary cause, which is that a lot of these things can take quite a long time for a sheriff to resolve, to fully understand what’s going on, for both sides to have their say. And one of the biggest challenges is that the courts just don’t have the time or capacity to deal with cases in that way, certainly at an early stage. So they send them off to another hearing on another day.”¹⁰⁸⁴

7.3.5 Discussion

While it is relatively easy to observe that party litigants lack legal knowledge, this really only scratches the surface of the issue. Party litigants must not only know the law, but also must understand the law—a skill that can take years to acquire. Even those party litigants who are able to conduct their own legal research to find the law relevant to their case may misunderstand the meaning and may not be able to correctly apply the law. Judges are often prepared to fill in some of the gaps for party litigants to “translate” their position into a legal position or case in law. However, it is worth noting that, although must judges described this as a form of leeway or latitude, it is perhaps more properly considered a form of assistance. Because the courts are adversarial, the judge need only consider the case pleaded before him. If the litigant does not, for example, plead a case in contract law, the judge strictly speaking need not ask himself whether the litigant has such a case. Looking for the “latent case”,¹⁰⁸⁵ again, requires an active approach on the part of the judge to draw out the party litigant’s position and the relevant facts. Although judges often take a more active approach, the design of the rules and procedures anticipate the more streamlined process of solicitors presenting their cases in law fully formed to the court. To be “fair” to the party litigant, judges thus both have to work outside this process and do so without the proper time the task requires.

A similar disruption to the typical running of the process occurs when party litigants are unable to correctly produce formal written pleadings. Due to the stringent requirements, it is perhaps unrealistic to expect party litigants to draft

¹⁰⁸⁴ S6.

¹⁰⁸⁵ Section 5.3.3.3.

pleadings that comply with the requirements in both form and law. As one solicitor pointed out above, legal professionals have resources such as styles available to them, and even then they can still find written pleadings to be challenging. Even basic guidance, such as a style for defences, is not available in the rules, nor do the rules set out the need for admissions and denials. It seems only natural that many party litigants lodge letters or other incorrect forms of defences and other pleadings, and one hearing after another is wasted as the judge must allow the party litigant time to fix the problem. However, if the party litigant is allowed to simply lodge insufficient pleadings, their opponent is not getting fair notice of the case and is unable to answer it properly. Without pleadings to focus the action, it remains “at large”. The opponent may also not have relevant procedural tools at their disposal. For example, if the party litigant’s defences do not contain the typical admissions and denials, even uncontentious matters must be addressed at proof; if pleas in law are missing or not articulated properly, issues that could have been considered preliminary pleas, to be either insisted upon or repelled, remain in limbo.

While interviewees considered that written pleadings are difficult for party litigants, it is worth noting that this is in the context of *formal* written pleadings—it is not necessarily that party litigants find it more challenging to express themselves in writing, but that they must also conform to the technical and legal requirements in formal pleadings. Even if the requirements for written pleadings were loosened, court hearings giving the judge the opportunity to discuss matters with the party litigant would still play an important role in the judge’s ability to “look behind” the party litigant’s case or question the party litigant to get at what the matter is “really” about.

There is also the question of party litigants’ lack of legal knowledge leading to meritless cases. With little institutionalised gatekeeping, the question of whether or not a flawed writ or claim is kept out of the sheriff courts depends on court practice and the individual clerk or judge. Again, this is a decision that must be made in the absence of rules or guidance. It is worth noting that, at a minimum, a defender will be required to lodge a notice of intention to defend, defences, and a motion for summary decree (if indeed this is granted) to dispose of an action, even if the writ is “mince”. There is also a problem of fair notice.

If, for example, the writ does not contain pleas-in-law, it will be difficult for the defender to establish and answer the pursuer's claim. At the same time, without knowledge of the court process, receiving a warrant to commence an action from the court could reinforce a party litigant's view that they have a legitimate case where there is none. The warranting stage may also currently be a missed opportunity to focus the party litigant's mind on their case in law, or whether they have a case in law at all.

This last issue, the question of whether the party litigant has a case in law at all, gets at the wider conceptual difficulties party litigants have understanding the workings of the law and the remit of the courts. The latter problem, perhaps, is not for the court itself to solve—if lay people develop a belief in the courts as a place to seek “justice” in moral terms rather than legal terms, it is difficult to see what the courts can do to disabuse them of this notion, short of earlier intervention or “gatekeeping” to keep legally meritless cases from progressing too far.

7.4 Evidence

7.4.1 Evidence: General Principles and Procedure

Judges consistently identified evidence and the conduct of a proof hearing as difficult for party litigants, more so than any other single element of the process.¹⁰⁸⁶ Before looking at the particular aspects of the process of conducting a proof and providing evidence, it is important to first note that party litigants may have fundamental misunderstandings about the nature of proof hearings and the court's need for evidence. One judge noted that party litigants often simply fail to understand that they need to bring relevant evidence to court with them at all:

¹⁰⁸⁶ J1, J3, J7, J4, J6, J8, J10.

“You do continually encounter this ‘oh, I could have brought these letters’. So turning up at the proof without actually having ingathered all the evidence that might help them.”¹⁰⁸⁷

This judge suggested that this was due to misconceptions about the process:

“...I think it’s just that they think they should just turn up and tell their story...I think there’s just a sort of general assumption that they are themselves—know all about it, know exactly what happened and know why they should either succeed in their action or succeed in defending it.”¹⁰⁸⁸

Another judge had similar experiences:

“And I think the majority of people that come before the court think that if they’ve written out on a bit of paper all of the aspect of it reflecting their position, they’ve done it. And we’re still trying to fit that into rules of evidence and proof and productions and witnesses, and they don’t seem to—I think it’s a big gulf from them setting out on a piece of paper what they think, all the things they want to say, and then bringing evidence either in the form of witnesses or productions to back that up. I think there’s a gap there that they don’t really understand what’s happening.”¹⁰⁸⁹

Party litigants may misunderstand that the court can only make an evidence-based decision:

“Often, often the party litigant will say ‘well, I didn’t know I had to bring witnesses today’ for example. That will often be said. ‘I didn’t know I had to bring witnesses today’ or ‘I didn’t know I had to lodge that, I’ve got it at home, I’ve got all that, I didn’t know I had to bring all that’...But I think it is probably more fundamental, I think it is a lack of awareness or an ignorance of the need to prove your case. It’s almost as if the party thinks that just by turning up and saying their piece, that will be it.”¹⁰⁹⁰

Another judge made the point that party litigants may be confused by the advertised “informality” of the low-value claims procedures, noting that he had seen parties arriving at a small claims proof express surprised that they were in a court, or that witnesses were expected to give evidence on oath.¹⁰⁹¹ Another problem noted was the need for expert evidence as another area that party

¹⁰⁸⁷ J10.

¹⁰⁸⁸ J10.

¹⁰⁸⁹ J8; see also FG4 for a clerk’s perspective.

¹⁰⁹⁰ J7.

¹⁰⁹¹ J4.

litigants particularly struggle to grasp; litigants often expect to be able to give their own opinion on a matter when expertise is required.¹⁰⁹²

Judges may thus advise party litigants at earlier stages (such as a procedural hearing) about the need for evidence and when they should ensure that they bring evidence to court,¹⁰⁹³ although one noted that this is not always effective.¹⁰⁹⁴

For party litigants who are prepared to fulfil the evidential requirements necessary to present their case, there are also procedural requirements and rules of evidence to be complied with:

“They can run into difficulties pretty quickly if for example a party litigant simply has not understood that they have to lodge documentary productions, or that they haven’t understood that they’ve got to intimate them or make copies available both to their opponent and to the court, or sometimes bring witnesses to speak to these documents if they’re not agreed. All of these kind of nuts and bolts issues mean that very quickly you can run into difficulties and these are, in my experience, significant impediments to making progress in cases involving party litigants.”¹⁰⁹⁵

Late lodging of productions was a recurring theme. One solicitor identified “the little black folder” of documents as the first thing that came to mind when thinking about party litigants, “because they always come to court with lots of documents that they haven’t lodged.”¹⁰⁹⁶ Another solicitor noted, as noted above, that those who do lodge productions often don’t appreciate the need for a witness to speak to productions that haven’t been agreed:

“...but sometimes they don’t even appreciate that, if you’re defending an action, and you’re at proof for example, they are required to give evidence. And they don’t understand what it means if you refuse to do that. They don’t understand what it means when the sheriff is then trying to explain to them that if they refuse to give evidence, then they can’t rely on any of the productions, because they haven’t led evidence on them. And they don’t understand why they can’t rely upon the productions if they’re refusing to give evidence.”¹⁰⁹⁷

¹⁰⁹² J7, J10, J4.

¹⁰⁹³ J8, J7, J3, J4, J9.

¹⁰⁹⁴ See, for example, J3.

¹⁰⁹⁵ J2; see also J7, J6, J8.

¹⁰⁹⁶ S1.

¹⁰⁹⁷ S2.

As with other procedural matters, there is some scope for latitude or assistance from the courts in respect of failings relating to the rules of evidence. On practical matters, such the requirement to produce copies of productions, the sheriff clerk's office is often called on to assist by making the copies, often on the morning of the hearing.¹⁰⁹⁸ Court officers may also assist by helping to organise or set out productions at the proof.¹⁰⁹⁹ On procedural matters, judges can extend latitude to the party litigant by allowing the late lodging of productions; one judge noted that he would frequently allow productions lodged even on the morning of a proof.¹¹⁰⁰ Another judge's approach was to allow late evidence at the proof under reservation of its competency.¹¹⁰¹ However, when the party litigant fails to come to proof with witnesses or productions entirely, there is little the court can do to assist:

“There's nothing to be done. There's nothing the sheriff can do. The sheriff can't conduct or create evidence, we can only decide the case on the evidence in front of us.”¹¹⁰²

This creates a dilemma for the judge. Allowing the party litigant more time to ingather evidence at the proof stage—the latest stage of the case, when the other party will have prepared his own evidence and witnesses (often at some expense)—is undesirable, but if the proof proceeds the party litigant's case is likely to be doomed to fail.¹¹⁰³ Clerks in one court noted that when party litigants come to a proof hearing unprepared the judges “just have to deal with it on the basis they've got it really.”¹¹⁰⁴

7.4.2 Examination of Witnesses

The examination of witnesses presents another huge challenge for party litigants. Party litigants may be called upon to examine their own witnesses, to

¹⁰⁹⁸ FG1, FG4.

¹⁰⁹⁹ FG4.

¹¹⁰⁰ J7; see also J10.

¹¹⁰¹ J2.

¹¹⁰² J7.

¹¹⁰³ See section 5.4, J7, J4.

¹¹⁰⁴ FG4; the clerks also noted that many party litigants were unaware of what a “proof hearing” is even after it had been assigned in their case.

cross-examine their opponent's witnesses, or to be a witness themselves. The latter places the party litigant in an unusual position of playing the role of both "lawyer" and witness. Although one judge observed that party litigants giving their own evidence often do not know where to start or how to provide basic information,¹¹⁰⁵ another judge noted that, with some questioning, "...generally I'm pretty impressed by the way in which the story often just comes out, and you can just take a pretty full note of everything."¹¹⁰⁶ Judges were more likely to single out examination and cross-examination of witnesses as a problem, and agreed that party litigants are rarely able to do this correctly:

"The rules of examination, the rules of cross-examination, the rules of re-examination. They have incredible difficulty with that. Dealing with witnesses is probably the worst, in the sense that they have the greatest difficulty dealing with witnesses. The taking of evidence is a very, very skilled task."¹¹⁰⁷

One judge described examination of witnesses by party litigants as "totally chaotic":

"...because they just don't know what they are doing. They just make statements. And you don't really know what the purpose—how to lead evidence from a witness, how to cross examine."¹¹⁰⁸

Another judge had a similar view:

"Party litigants are also very poor at leading evidence from their own witnesses. Generally very poor at it, because of course the concept of the non-leading question is a difficult one to grasp at the best of times for lawyers. And also the party litigant will generally fall into the trap of making submissions or statements, either to the sheriff or just by declaiming in general or making statements to the witness, really putting submissions to the witness, rather than asking questions. And I can't think of how many times I've had to just intervene, to say 'Remember, what you have to do now is you ask questions of this witness, now is not the time for you to be making submissions to me or statements.' But it's a difficult distinction to draw. I think that's very difficult to understand for a non-legally qualified person."¹¹⁰⁹

¹¹⁰⁵ J6.

¹¹⁰⁶ J7.

¹¹⁰⁷ J6.

¹¹⁰⁸ J8.

¹¹⁰⁹ J7.

It is perhaps a testament to the universally gloomy view that judges expressed of party litigants' examination skills that their response to the problem was the most consistent of any issue considered in this chapter, and indeed the thesis as a whole. All ten of the judge interviewed indicated that they actively assist with questioning of witnesses in cases involving party litigants. This assistance can take a number of different forms, including questioning the party litigant to draw out their case¹¹¹⁰ or questioning both parties to get a better understanding of the dispute.¹¹¹¹

"So what I've tended to do more is just sort of take that over a bit and maybe put the pursuer or defender on oath, if they want to be on oath, and then just ask questions to get to what they want to—you know, to focus it. And what I did yesterday with one, once we'd had a chapter, then we'd have a break, and I'd ask the defender if he had anything arising out of that particular chapter and try and get—but even then it's difficult, because they just rant."¹¹¹²

The judge may also question the witnesses for the party litigant:

"My practice is to almost take over the questioning. I always tell the party litigant what they are supposed to be doing, but in my experience they're almost incapable of asking questions. They just start giving evidence. So it depends, obviously some are better than others. So I tell them what they're supposed to be doing, and let them have a shot at it. But if they're not succeeding, then I tend to take over."¹¹¹³

One judge described asking their own questions of party litigants or witnesses as well as "translating" what the party litigant wishes to ask into an admissible question:

"So I will often then say something like 'well, I think what you want to ask the witness is this' and I will try to translate the issue into a question or series of questions. Well, that is very difficult, it's really very difficult. And exhausting! But it's often difficult to translate in effect a big blurb of emotion-laden accusation into some kind of sensible question. So that's what I would try to do. That's another form of latitude. I would never think of rephrasing a represented party's question."¹¹¹⁴

¹¹¹⁰ J1, J6, J5.

¹¹¹¹ See also J3.

¹¹¹² J8.

¹¹¹³ J10; see also J6, J9.

¹¹¹⁴ J7.

Although noting that cross-examination by party litigants is “very poorly done often,” the same judge drew an interesting distinction between assisting in examination and cross-examination that was not noted by any of the other judges:

“...I think cross examination of a witness by a judge can too easily be misinterpreted as partisanship. If I start questioning and challenging the reliability of one party’s witnesses, I just suddenly look partial, I think. I’ll ask some questions, invariably will ask some questions, but it’s not a full cross-examination though by any means.”¹¹¹⁵

There is also the issue of relevance within the party litigant’s evidence and examination of witnesses. As noted earlier, party litigants tend to raise irrelevant matters in court and judges often allow them to “have their say” to at least some extent.¹¹¹⁶ This form of latitude can extend to the giving of evidence as well; one judge said, “...in terms of relevance of questioning, for example, I would be pretty relaxed about that.”¹¹¹⁷ Another judge described a similar approach: “I think I would treat things as pretty much at large, and say let’s gather the evidence and then we can worry about what’s relevant after that.”¹¹¹⁸ The party litigant will thus be allowed to raise irrelevant matters--which, in the context of a proof hearing, could include matters that have not been introduced in the pleadings, or matters that are entirely irrelevant to the case in any event--or may ask leading questions, which are otherwise not permitted.¹¹¹⁹ However, as one solicitor described, this creates challenges for the opponent of a party litigant, for example when a party litigant cross-examines their client’s witness:

“I had originally intended to make, anticipating that he would ask questions that he was not allowed to ask or in a way that he was not allowed to ask them—I would object the first couple times just to make the point to the sheriff that I was taking objection but I would not continue to do that. And I think the sheriff in the instance knew what it was that I was doing and did make a comment that I didn’t require to intervene on too many occasions and he would record or not record the evidence as appropriate.”¹¹²⁰

¹¹¹⁵ J7.

¹¹¹⁶ See section 5.3.1., 6.3.4.

¹¹¹⁷ J4.

¹¹¹⁸ J2.

¹¹¹⁹ J4.

¹¹²⁰ S4.

7.4.3 Discussion

What makes the topic of proof hearings and the giving of evidence for party litigants interesting is that it is, in a sense, very simple. Interviewees were very clear that most party litigants find it very difficult (or, according to some, impossible) to comply with the court's requirements. Perhaps more importantly, many do not comprehend the court's need for evidence in the first place. While the court can and does offer latitude or help to some extent, particularly in the questioning process, there are definite limits on how far this can go. The judge cannot create evidence out of thin air or bring witnesses to court if the party litigant does not. Thus evidence both presents some of the biggest conceptual or practical impediments for the party litigant and is the hardest issue for the court to address. It is little wonder that so many judges recognized evidence as the biggest obstacle for party litigants.

"Chaotic" is perhaps the most apt term to describe the giving of evidence when party litigants are involved, as it frequently represents a complete disruption of how an adversarial system is intended to function. Typically, of course, a solicitor chooses, often strategically, which questions to ask, or not to ask, of the witnesses. Improper or leading questions are not allowed, and a solicitor knows not to introduce irrelevant matters, or objection will be made if he steps outside the rules. Only relevant evidence, provided to each party with fair notice, is ultimately heard by the judge. If, as in many party litigant cases, the judge asks all or some of the questions, he shapes the evidence he will later consider. Unlike a solicitor examining his own witnesses, the judge does not have prior knowledge of the facts and how the questions will be answered. If the party litigant is allowed to give their evidence "at large" or on irrelevant matters, the resulting body of evidence is not restricted, as it usually is, by the rules of evidence and principles of fair notice. The judge must instead self-filter the evidence to ensure that he considers only relevant and admissible evidence. While this is something that judges are perfectly capable of doing, it may also create an element of confusion, particularly for the party litigant, who may not understand whether particular parts of their evidence or submissions were or were not a factor in the judge's decision.

7.5 Expenses

7.5.1 The Indemnity System

The Scottish civil courts operate on an indemnity system for expenses, where the successful party in the action will usually have expenses paid by the opponent. In principle, it is thus in each party's interest not to raise a specious action or defence and to progress through the case as quickly as possible, thus curtailing both their own lawyer's fees and their potential liability for the other party's expenses.¹¹²¹ Expenses play an important role as a deterrent to unnecessary or prolonged procedure in the courts, or alternately as a remedy for prejudice caused by one party to another:

“...sometimes where a party litigant appears against a represented party, and the represented party is being severely prejudiced by this delay or whatever it is on the part of the party litigant, or by the procedure that has been adopted, you can obviously make an award of expenses against the party litigant, and that will be sufficient to deal with the prejudice, if I could put it that way.”¹¹²²

However, as the judge quoted above went on to say, “where party litigants are involved, the question of expenses seems to fade into the background, because they're not relevant”.¹¹²³ When asked about remedying prejudice to a represented party by awarding expenses due to a failing or delay on a party litigant's part, one judge did reply that he would apply the same criteria to party litigant as to represented parties, but others indicated that awarding expenses would be uncommon.¹¹²⁴ Another judge indicated he would be unlikely to “punish” a party litigant with an adverse award of expenses.¹¹²⁵ Although a number of hearings observed during the court observation for this thesis were

¹¹²¹ See section 4.5.4.

¹¹²² J6; see also J1, J4, J2.

¹¹²³ J6.

¹¹²⁴ J3.

¹¹²⁵ J2.

continued or discharged due to errors by party litigants, including one proof,¹¹²⁶ no award of expenses was made, even when expenses were sought by the represented party.¹¹²⁷

Solicitors, however, expressed a keen awareness of the expenses and costs involved in actions with party litigants. All those interviewed indicated that expenses for their clients are always or often higher in actions involving party litigants as compared to represented parties.¹¹²⁸ This could be because additional time is required to explain matters and communicate with a party litigant,¹¹²⁹ because of delays or wasted hearings when a party litigant was unprepared,¹¹³⁰ or even because a case that would typically be settled or abandoned entirely if the party was represented instead proceeds to a full hearing.¹¹³¹ The solicitor himself may even bear some of the additional cost; one solicitor noted that some of the extra time needed to deal with a party litigant could fairly not be charged to their client, and so the time was “written off” without payment for the solicitor.¹¹³² Expenses thus create an “inherent difficulty” when party litigants are involved:

“But again why should party litigants have to bear the additional costs that they incur? Why should my client, on one view, be able to recover all that additional cost from them because they were confused and they didn’t realise what the law was.”¹¹³³

In more practical terms, an award of expenses may not ultimately lead to recovery of the costs to the represented client. In ordinary cause cases, this could be because the actual cost to the client exceeds what is allowed in terms

¹¹²⁶ Typically when parties are represented the party occasioning a late discharge of a proof would be found liable in the expenses occasioned by the discharge, or would agree to pay the expenses.

¹¹²⁷ This does not mean that the party litigant will not ultimately be responsible for the expenses, assuming that they are unsuccessful and are found liable for the expenses of the cause as a whole.

¹¹²⁸ S1, S2, S3, S4, S5, S6, S7. (Another solicitor, S8, was primarily involved in forms of action where parties are legally aided.)

¹¹²⁹ See, for example, S6, S7.

¹¹³⁰ S5.

¹¹³¹ S4.

¹¹³² S7.

¹¹³³ S7.

of judicial expenses.¹¹³⁴ One solicitor estimated that what could be awarded by the court typically covered only a third of the actual cost.¹¹³⁵ In the simple procedure, the represented party will not be able to recover their expenses because costs are either not awarded or are capped at a low level to discourage representation.¹¹³⁶ This can create a real disparity when one party is represented (and thus running up costs that cannot be recovered) and the other is not. One solicitor recalled thus advising a client with a party litigant as an opponent to represent himself in the proof, “because it made them more equal.” On a similar note, another solicitor suggested that some party litigants could even try to use the represented party’s costs to their advantage:

“But I would say that there have definitely been occasions where I’ve thought—in particular, there has been a case or two when I’ve wondered if the party litigant had an eye on the fact that further delays, more hearings, more procedure, is simply to increase the bill for the party on the other side. And that’s where you can get into real—you’d be really concerned because there could be real prejudice for a party if the party litigant was as cynical as that.”¹¹³⁷

An even more fundamental problem in the recovery of expenses is the party litigant’s means to pay. As one solicitor said:

“My advice [to the client] is that when we’ve got a party litigant on the other side, unless we’ve got a reason to think that they’re doing it for some other reason, my advice to my client would be that there’s a pretty good chance that the reason that they’re acting for themselves is that they can’t afford representation, so it’s likely to be difficult to enforce an award of expenses... You could also end up in a situation where you might say, actually, I guess that could start to impact on whether my client thinks it’s worth pursuing a case if they were the pursuer or defending the case if they were the defender. Because if, ultimately, win or lose, they’re going to be out of pocket, they need to think carefully about...whether or not actually the financial cost is going to be worthwhile.”¹¹³⁸

One option for the court, at least in principle, would be to make an order for caution against the party litigant. With an order for caution, a litigant is required to consign a sum of money with the court to ensure that he will be able

¹¹³⁴ S1, S6.

¹¹³⁵ S1.

¹¹³⁶ With certain exceptions; see section 4.5.2., Simple Procedure Rules Part 14.

¹¹³⁷ S3.

¹¹³⁸ S3; see also S2, J9.

to meet an award of expenses for his opponent if he is unsuccessful. However, the judges interviewed indicated that they had not done so and/or would be hesitant to make such an order.¹¹³⁹

7.5.2 Discussion

The indemnity system of expenses is another aspect of the process that is disrupted when party litigants enter the fray. The data collected for this thesis did not examine questions of expenses in depth, but still a number of interesting points were raised. While further research involving party litigants is needed to properly understand the position, there was little to suggest that expenses act as a deterrent for party litigants in the way they do for represented parties. This could perhaps be because party litigants do not have their own legal expenses, are not aware of their potential liability for their opponent's expenses, or are simply convinced that they will certainly be successful. It is worth noting that the indemnity system takes the place, to some extent, of the "gatekeeping" of claims. For the most part, as discussed above, any claim or defence can be raised with the understanding that, if it is groundless, it will be repelled by the other party who can then claim his expenses. In practice, any potential liability for expenses may not deter a party litigant for the reasons noted above and the costs are left with the represented party.

There is then the difficulty that, even when successful, a represented opponent of a party litigant—who has perhaps incurred even greater costs than usual because of the extra time needed to deal with the party litigant—is often unable to collect all or part of the expenses. This is a real problem, because at least in principle the courts still proceed on the assumption that expenses follow success, and that prejudice experienced by the represented opponent will ultimately be remedied by an award of expenses. Instead, it seems, the opponent (or even his solicitor) may well end up bearing the extra costs, effectively subsidising the extra time and effort occasioned by the party litigant's need or desire to self-represent. It is not hard to see why solicitors, and of course their clients, would consider this to be unfair.

¹¹³⁹ See, for example, J2, J4, J3.

7.6 Appeals

7.6.1 The Appeals Process

It has often been suggested that party litigants are over-represented in the appeals process.¹¹⁴⁰ While again there are no figures available to prove or disprove this point, the data gathered for this thesis suggests that there may be a propensity among lay people to appeal based on misunderstandings and misconceptions about the appeal process. A recurring theme is the idea that party litigants very often believe that an appeal is a re-hearing or a chance to introduce new evidence that they did not present at first instance. Party litigants are also unaware, as one clerk explained, of the fact that appeals are restricted to a point of law:

“The difficulty is trying to explain to a party litigant that an appeal has got to be on a point of law. And trying to explain to them what a point of law is. And if they say ‘well, I was late’ or didn’t turn up, that’s not—and it’s trying to get that across to them. And of course they think they’re entitled to appeal. And it’s trying to make that clear to them.”¹¹⁴¹

A solicitor echoed the idea that party litigants do not understand that appeals are limited in scope, and not a “do over” of the case as party litigants expect:

“I mean party litigants are known for, they defend actions and then they’ll insist on appealing when they’re unsuccessful. With the grounds of appeal, they just don’t understand the reasons that they’re allowed to appeal. They think just because they’re not happy with the decision, then that’s it. As if they’re wanting a second bite at the cherry, just before the Sheriff Principal, now the Sheriff Appeals Court. What they don’t understand is that you can only be appealing on a point of law, as opposed to them just not being happy with the decision that court may have issued.”¹¹⁴²

One clerk with extensive appeals experience observed that party litigants simply failed to grasp the nature of the appeals court:

¹¹⁴⁰ See, for example, Sheriff Principal Stephen “The Sheriff Court—The Future” 2 December 2014,

http://www.ssclibrary.co.uk/pdf/SPStephen_SSCLecture_021214.pdf.

¹¹⁴¹ FG2.

¹¹⁴² S2.

“The amount of time I spent telling people that it’s not a re-hearing, it’s not going back over the evidence, it’s a submission-based court and it’s on points of law, you should have authorities, precedent cases and things like that. But a lot of the time, I must say, it was lost on them. They didn’t understand.”¹¹⁴³

A party litigant may also be more likely to appeal because they do not understand the court’s decision and feel it is unfair, and one judge suggested that this can perhaps be addressed by better communicating the court’s reasoning to the litigant:

“...maybe I’m prone to saying a wee bit more than I strictly need to, but then I think you’ve got to explain and show that you’ve been fair, explain your reasons. It may stave off an appeal, just a practical thing...”¹¹⁴⁴

While party litigants are likely to find it difficult to present a case at first instance, arguing the legal elements of an appeal is even more challenging. If the litigant does not understand the nature of the appeal process, they will be ill-equipped to argue the appeal properly:

“I would say, thinking about it, I can’t imagine that even 25% of them were successful in their appeals. And I’m not saying that was because their cases didn’t have merit, they may have had merit, they just weren’t able to competently get across why the sheriff had erred.”¹¹⁴⁵

A lack of understanding of the appeal process can also lead party litigants to make and then abandon an appeal as the true requirements become clear¹¹⁴⁶ or to repeatedly appeal procedural decisions made while the case is still in progress at first instance.¹¹⁴⁷ The latter is considered to be characteristic of difficult or “serial” litigants.¹¹⁴⁸

7.6.2 Discussion

¹¹⁴³ CS1.

¹¹⁴⁴ J5.

¹¹⁴⁵ CS1.

¹¹⁴⁶ CS1, J3.

¹¹⁴⁷ J1, J7; typically these decisions require leave to appeal, which can then be refused by the judge and the appeal goes no further.

¹¹⁴⁸ See section 6.2.3.

Although only limited data on the subject of appeals was gathered for this thesis, it does appear to support the idea that party litigants may be over-represented in the appeals process. As already noted,¹¹⁴⁹ existing case law suggests that party litigants have difficulty arguing appeal points, an unsurprising result when litigants raise appeals with the misconception that they will get a “re-hearing” and not because they are prepared to argue that the judge at first instance erred in law. Establishing that the judge erred in law will be difficult for a party litigant, given that they do not have the necessary legal knowledge.

The Courts Reform (Scotland) Act 2014 is intended to reform the appeals system in the civil courts, creating the new Sheriff Appeal Court and curtailing the ability of litigants to appeal directly to the Court of Session. This is intended to ensure that appeals are heard at the “right level” and that only cases on a genuine point of law are heard at the Court of Session.¹¹⁵⁰ While this benefits the court service as a whole, it does little to improve the position of party litigants. (Nor, in fairness, is it necessarily intended to.) There is still not a great deal of “gatekeeping” in the appeal process as a whole. This is perhaps unfortunate, as so many party litigants are coming to the appeal court with fundamental misconceptions, leading inevitably to disappointment and wasted time and expense.

7.7 Court Staff and the Advice Available from the Court

7.7.1 The Role of Court Staff and the Legal/Procedural Divide

Court staff and information from the court are an important resource for party litigants. Staff take in and process court documents, act as clerks of court or bar officers, and assist court users by telephone, in writing, and at public counters.¹¹⁵¹ Judges were aware of court staff as a resource for party litigants to

¹¹⁴⁹ Sections 5.3.3.2 and 5.5.

¹¹⁵⁰ See, for example, Sheriff Principal Stephen “The Sheriff Court—The Future” *supra* at note 1140.

¹¹⁵¹ FG, FG2, FG3, FG4.

provide procedural advice, particularly on court timetables, but not to provide advice on the substantive merits of the litigant's case or give other forms of legal advice.¹¹⁵² The nebulous nature of this "legal/procedural" distinction (sometimes framed as "information" vs "advice") has been noted in other jurisdictions¹¹⁵³ and the court staff interviewed consistently identified this as a problem. Some aspects of the distinction are relatively clear: when asked to explain their understanding of the difference between legal and procedural advice, court staff explained that they could tell a party litigant what procedure to use, but not how; they could tell them what form to fill out, but not tell them what to write on the form.¹¹⁵⁴ However, clerks also described the legal/procedural distinction as a "fine line"¹¹⁵⁵ rife with "grey areas":¹¹⁵⁶

"I find it difficult to distinguish between procedural and legal advice, and I'm writing to [party litigants] quite often. I spend five times as long writing the letters as I normally would, because you realise that could be legal advice, or procedural advice. But you just spend ages minding your p's and q's about what you can and can't tell them."¹¹⁵⁷

The grey areas between legal and procedural matters can include relatively basic but important aspects of a party litigant's case, such as jurisdiction,¹¹⁵⁸ when and how to serve documents,¹¹⁵⁹ and the legal identity of the opponent being named in the party litigant's action:

"There's definitely a grey area, and even with the starting point of jurisdiction, you'll quite often get people at the counter who'll say—you'll ask them the question, you know, are you raising it against an individual or a company and they'll explain the situation to you and say 'what do you think?.' You've always got to try and kind of put—'well, it's your decision, if you raise it as such-and such' but there's definitely a grey area."¹¹⁶⁰

¹¹⁵² J6, J3, J4, J10, J2.

¹¹⁵³ See section 3.5.2.1.

¹¹⁵⁴ FG1, FG2, FG3, FG4.

¹¹⁵⁵ FG3.

¹¹⁵⁶ FG1.

¹¹⁵⁷ FG2.

¹¹⁵⁸ FG3.

¹¹⁵⁹ FG1.

¹¹⁶⁰ FG3.

Advising party litigants on procedure can also require the clerk to interpret legislation when the rules are ambiguous or unclear, potentially crossing the line into legal advice.¹¹⁶¹

Although clerks were very aware that their role is to provide procedural advice only, some nonetheless provide assistance to party litigants despite knowing that it oversteps the legal/procedural divide. They may feel sorry for the party litigant,¹¹⁶² or wish to prevent the “back and forth”¹¹⁶³ of a party litigant lodging documents only to have them returned, which in turn creates more work for court staff:

“And sometimes as well, you feel in a way to help yourself and your colleagues, you want to give them that bit more of information, because—to make it easier when something does come in, that is going to have been done correctly. If you don’t give that wee bit more of advice, then it’s maybe going to get bounced back and forward, sending it back, no it’s not right, come back and forth. So sometimes to actually assist ourselves, it can be advantageous to go that wee bit of extra mile just to give them a wee bit extra information to make sure that what they are going to do next will be correct.”¹¹⁶⁴

Another clerk added:

“Because if we weren’t to give out certain types of legal advice, nothing would happen. As far as party litigants are concerned, the whole place would grind to a halt.”¹¹⁶⁵

However, clerks were also keenly aware that there can be consequences for proving legal advice or assistance, using terms like “it would come back to bite me,”¹¹⁶⁶ “I can get in trouble,”¹¹⁶⁷ “feels like you’re covering your back a lot of the time,”¹¹⁶⁸ and “I’m trying to cover myself.”¹¹⁶⁹ Clerks were concerned that advice to the party litigant can be misinterpreted, or that the court staff will be

¹¹⁶¹ FG2.

¹¹⁶² FG1.

¹¹⁶³ FG1, FG3.

¹¹⁶⁴ FG1.

¹¹⁶⁵ FG1.

¹¹⁶⁶ FG2.

¹¹⁶⁷ FG1.

¹¹⁶⁸ FG3.

¹¹⁶⁹ FG1.

held responsible for any problems with the party litigant's case,¹¹⁷⁰ as illustrated by this exchange between court staff at one court:

Court Staff 1: "But if I said, 'but you know'—and it has happened—'I think you should do this' and it goes all wrong for them---"

Court Staff 2: "Then it becomes 'you told me.'"

Court Staff 1: "'I got told by the sheriff clerk to do this.' I mean, how many times? I see it in court all the time. 'I was told by the sheriff clerk'. And you turn around to the sheriff and go 'No. No he wasn't.'"

Court Staff 2: "And it is difficult, because you want to be helpful."¹¹⁷¹

Other clerks also expressed the wish that they could be more helpful to party litigants;¹¹⁷² as one said, "So sometimes you feel as if you are always saying, 'I can't help you,' you're being a wee bit obstructive, but that's just the way it goes."¹¹⁷³

7.7.2 Party Litigants' Expectations vs Reality

A consistent theme in discussions with court staff was the idea that party litigants' expectations exceed the information and assistance that clerks are able to provide them. Party litigants often begin the process expecting that clerks can provide them with legal advice or advise them on the merits of their case.¹¹⁷⁴ Instead, clerks are not only not permitted to provide legal advice, but are also not trained or qualified to do so:

Court Staff 1: "I personally think that they seem to think that we have all the answers, that we are legally qualified, probably, within the office. But you've got to constantly tell them that. And they just see us as knowing so much more and being able to answer all their questions."

Court Staff 2: "I think they think that we'll tell them when we see the papers if they'll be successful, for instance, and we can't really tell them

¹¹⁷⁰ FG1, FG2, FG3.

¹¹⁷¹ FG3.

¹¹⁷² FG1, FG3, FG4.

¹¹⁷³ FG1. Some solicitors felt that court staff could be more helpful; see S3 and S5.

¹¹⁷⁴ FG1, FG2, FG3, FG4.

anything in that terms, but they seem to think that we'll be able to provide that."

Court Staff 3: "Seems to be a belief that if you're on the other side of the counter, you have all the answers."¹¹⁷⁵

Clerks also reported that party litigants routinely expect court staff to provide forms for all types of action,¹¹⁷⁶ or where forms are available for clerks to complete the forms for the party litigant.¹¹⁷⁷ In addition to expecting legal advice,¹¹⁷⁸ party litigants demonstrate more fundamental misunderstandings of the court's role. The role of the clerk is to administer the courts and provide procedural information on request, but party litigants often appear to believe that clerks and the court will take an active role to assist them in the process.¹¹⁷⁹ One clerk summarised the "official line" on the respective duties of the court and of litigants:

"The official line would be that anybody who raises or defends an action should entirely know what their responsibilities are, but in the reality of it very little of them do know what their responsibilities are and what the responsibility of the court is."¹¹⁸⁰

Another clerk expressed a similar view:

"If they're taking out a small claim, they need to read up on how to take out a small claim. And how to deal with that. Because it's not down to the court staff to keep them right."¹¹⁸¹

However, court staff felt that many party litigants do expect clerks to "keep them right" in the process, while in fact court staff do not take such an active role.¹¹⁸² This can lead to problems if party litigants believe that they do not need to learn the procedures because the court will "keep them right" or tell

¹¹⁷⁵ FG2.

¹¹⁷⁶ FG1.

¹¹⁷⁷ FG1, FG2.

¹¹⁷⁸ It is worth noting that court staff felt that solicitors also frequently asked clerks for what amounted to legal advice, or procedural advice that the solicitor should be expected to know; FG1, FG3.

¹¹⁷⁹ FG1, FG2, FG3, FG4.

¹¹⁸⁰ FG1.

¹¹⁸¹ FG4.

¹¹⁸² FG1, FG2, FG3, FG4.

them all they need to know.¹¹⁸³ A clerk illustrated this point using the example of timescales:

“It’s on the warrant, but if they don’t adhere to the timescale, 9 times out of 10 it will certainly be them turning around and saying ‘well, the court never told me of this’ but then, as I said, it’s not our responsibility to do so.”¹¹⁸⁴

Clerks reported that party litigants also expect them to assist in the litigant’s decision making about their case or to be “led every step of the way,¹¹⁸⁵” which again exceeds the clerk’s remit and requires them to offer legal advice.¹¹⁸⁶ A clerk suggested that there is a resulting “shock factor” for party litigants “that the court doesn’t hold their hand the whole way through.”¹¹⁸⁷

Another expectation from some party litigants is that the court will provide extensive amounts of information that court staff do not have the ability or time to provide. One clerk said that party litigants wish to be taken through the “full gamut”¹¹⁸⁸ of possibilities in their case, but this is not possible or practical:

“They just expect to be told everything from A to Z, all the options just explained, displayed, but it’s not possible because there are so many options, the case can go in many ways, there are so many possibilities and explaining that from the outset is just impossible, because it just confuses people, especially if someone’s a party litigant, a total layman, it’s not going to have any effect on them anyway.”¹¹⁸⁹

Party litigants may also wish to tell clerks the “whole story” of the case at the public counter or on the phone, but clerks often simply do not have the time to hear everything the party litigant may wish to say, much of which is irrelevant to

¹¹⁸³ FG1, FG2, FG3, FG4.

¹¹⁸⁴ FG1. This was indeed observed in the court observation for the thesis, with party litigants often explaining failures by saying in one way or another that the court had not told them what to do or had provided incorrect advice, or, asking if they would receive letters advising them of the outcome or future calling dates of hearings they attended.

¹¹⁸⁵ FG1.

¹¹⁸⁶ FG1, FG4.

¹¹⁸⁷ FG1.

¹¹⁸⁸ FG2.

¹¹⁸⁹ FG1. Clerks thus prefer to provide guidance “step by step”; see FG1, FG4.

the clerk's job.¹¹⁹⁰ "The thing is, they *want* to tell you," a clerk said, but, as another added, "And it's, at what point do I cut them off?"¹¹⁹¹

On a final note, the role—or lack thereof—of the court in the enforcement of a decree is also commonly misunderstood by party litigants. It is the responsibility of the litigant to enforce a decree, usually by engaging sheriff officers,¹¹⁹² but party litigants often believe that the court will collect any money due on their behalf or even pay the litigant directly as soon as decree has been passed.¹¹⁹³ As clerks in one court pointed out, the party litigant may therefore not consider the question of how likely they are actually recover the sums they are seeking until after the process is complete:

Court Staff 1: "And I had one gentleman who'd been at court having been successful with his claim, come back down and ask me to give him his £500 or whatever. He said, 'The claim was in my favour, so I'm just down to get my £500.'"

Court Staff 2: "A lot of them don't understand it's not going to happen like that. [*another agrees*] They're still going to have to carry on to get their money."

Court Staff 1: "Even if you're successful, that's not the end of it by any means. I would say nearly all party litigants don't accept that."

Court Staff 2: "There was someone in here yesterday, and they had got an award for money, and I said 'Do you think you'll get it?' and they're like, 'I don't think so.' So even to make people aware of that in the first—to make sure that the person has got the funds to pay you, at the end of the day."¹¹⁹⁴

7.7.3 Written Guidance and Referral

Another issue raised by clerks is that some party litigants do not make use of written information and guidance available from the court. Court staff typically praised the quality of guidance notes where they are available, for example for

¹¹⁹⁰ FG1, FG3, FG4.

¹¹⁹¹ FG3.

¹¹⁹² And paying the sheriff officer's fees, which the successful litigant will try to recoup from the other party.

¹¹⁹³ FG1, FG2, FG3.

¹¹⁹⁴ FG3.

low-value claims.¹¹⁹⁵ They observed that while some party litigants do make use of court guidance and information and come to court at least attempting to be prepared, a notable proportion of party litigants do not.¹¹⁹⁶ As noted above, some party litigants expect to be told what to do by court staff, or may prefer to speak to court staff rather than reading letters or guidance. One clerk said “...they just don’t read anything. Well, I think they prefer to call us rather than reading guidance notes or covering letters...”¹¹⁹⁷ If the litigant does not read court guidance or letters, they are likely to make mistakes or miss deadlines:

Court Staff 1: “It’s also the fact of, we get a lot of defenders and that saying ‘but you never told me that, I had to do this on the form, I had to respond by such-and-such date.’”

Court Staff 2: “Well, yeah, but it says, in black and white.”

Court Staff 1: “Again, it’s because you don’t read, you don’t read the letters.”

While not using court guidance and information may be related to the expectation that the court will “keep them right” discussed earlier, it is also possible that party litigants may find the guidance difficult to use or too lengthy.¹¹⁹⁸ However, it is interesting to note that the resources that court staff use to assist litigants are the same guidance and rules that are publicly available for party litigants to access themselves.¹¹⁹⁹ While clerks have the benefit of experience and training, they do not have access to additional information that party litigants do not.

Because court staff are unable to provide legal advice, another role they play for party litigants is referring them on to agencies like Citizen’s Advice Bureaux who are able to assist on legal matters. All staff reported that they refer party litigants to advice agencies when presented with questions on legal matters, or simply when it appears that the litigant is in need of advice.¹²⁰⁰ However, there are sometimes problems with referrals between the courts and advice agencies.

¹¹⁹⁵ FG1, FG3, FG4.

¹¹⁹⁶ FG1, FG2, FG3, FG4; see also J8.

¹¹⁹⁷ FG1.

¹¹⁹⁸ FG3, FG4.

¹¹⁹⁹ FG1, FG3.

¹²⁰⁰ FG1, FG2, FG3, FG4.

One clerk suggested that advice agencies sometimes provided incorrect procedural advice to party litigants, which would then have to be corrected by the sheriff clerk's office.¹²⁰¹ Advice agencies referring party litigants to the court, or back to the court, for services that the court cannot provide (such as assisting in the completion of forms) was a common complaint.¹²⁰²

“...but we quite often get folk at the counter ‘yeah, I’ve been to Citizen’s Advice and they’ve told me just to come here and you’ll help me do everything.’”¹²⁰³

At times court staff have to refer party litigants back to advice agencies for the help they have just been sent to the court for, potentially causing confusion or aggravation for the party litigant. Advice agencies also occasionally provide procedural advice to party litigants that is incorrect, again leading to frustration when the party litigant comes back to the court only to be told that they need to correct the mistake.¹²⁰⁴

7.7.4 Discussion

Perhaps the most important issue to emerge from discussions with court staff is the gulf between what party litigants want and expect from clerks and what clerks are actually able to provide to party litigants. These expectations seem to have a real impact for party litigants, as they may fail to appreciate the need to do their own research or even to read the guidance or information that is provided by the court. Others may not read the guidance because they do not wish to or are unable to do so. Overall, clerks generally appeared to feel that many party litigants seek to rely too heavily on the court in the conduct of their cases, and perhaps more importantly that party litigants did not take sufficient responsibility for their own cases. There is an interesting contrast here with the views of judges, many of whom did not expect party litigants to know the law or procedures, or even felt that it was unfair to expect them to know.¹²⁰⁵ Court

¹²⁰¹ FG4.

¹²⁰² FG1, FG3, FG4.

¹²⁰³ FG3.

¹²⁰⁴ FG4.

¹²⁰⁵ Section 5.2.

staff, while often sympathetic to party litigants,¹²⁰⁶ were more likely to expect party litigants to take ownership of their case and educate themselves on the court process.¹²⁰⁷

However, clerks felt that rather than taking responsibility for their case, many party litigants instead do not even make use of the guidance and information that is available. The idea that party litigants may not make use of guidance is troubling, as even the best guidance that the court can produce is useless if party litigants do not read it and the simplest procedures do not assist if the litigant does not make an effort to learn them. This is a problem for the court as well, because, as seen throughout this chapter, the less the party litigant knows the more disruptive it is for all parties, and court then has to respond to the gaps in the party litigant's knowledge.

The problem of referrals between advice agencies and the court appears to cause unnecessary grief for all parties. There is the danger that party litigants will fall victim to “referral fatigue”¹²⁰⁸ and simply stop seeking help at all. A better understanding of the role of advice agencies and the court and how they can interact could go a long way to fixing this problem.

7.8 Conclusion

This chapter builds on a theme emerging in the previous chapter: many of the issues arising around party litigants in the courts are rooted in fundamental misconceptions that many lay people have about the role and function of the courts. It is not necessarily sufficient to say only that party litigants do not know the law, or that they are not legally qualified. The problems run even deeper: many do not understand essential aspects of the process such as the need for a relevant case in law and that they must provide evidence to prove their case. All of this sits alongside their emotional involvement in the case, which can make it difficult to objectively analyse their position and their options.

¹²⁰⁶ Section 6.2.2.

¹²⁰⁷ Section 7.7.2.

¹²⁰⁸ Genn, *Paths to Justice Scotland*.

What is also evident from this chapter, however, is that the party litigant is afforded a significant degree of latitude in the process, if not assistance. The presence of a party litigant in an action completely disrupts the usual flow of the process. The judge must either extend latitude or assistance to the party litigant, or see the process grind to a standstill. The judge could treat the party litigant the same as a solicitor—inevitably leading to failure for the party litigant—but, as set out in the last chapter, this is clearly regarded by judges as unfair and not in the interests of justice.¹²⁰⁹ But how successful are these measures at being fair? Do they really provide access to the courts or access to justice for party litigants? What about their opponents? These questions are considered in the next chapter, along with views of how judges, solicitors and court staff believe that the system could be improved.

¹²⁰⁹ See section 6.3.2.

Chapter 8: Access to the Courts for Party Litigants and their Opponents

8.1 Introduction

The previous chapters in this part of the thesis have demonstrated that party litigants can get a great deal of assistance from the court, or even from their opponent's solicitor, in the conduct of their case. There is an emphasis on ensuring "fairness" to the party litigant in light of their unrepresented status and lack of legal knowledge. But how effective is this assistance? Are party litigants still disadvantaged because they do not have a lawyer, and to what extent? Do they have effective access to the courts? This chapter begins by addressing a particular issue that may affect access to the courts, the "capacity gap" that some litigants face when attempting to represent themselves. The next section of this chapter will consider how successfully party litigants present their cases to the court and the impact of any efforts to assist them. The last section of the chapter will consider what judges, solicitors, and court staff think can or should be done to provide the best possible access for party litigants, or minimise any problems that party litigants can cause to their opponents or the courts. All of this, of course, has to be viewed against the wider background of access to justice for all parties. It is worth reiterating¹²¹⁰ that this thesis is concerned primarily with access to justice in the form of access to the courts, although of course there is inevitably overlap between access to the courts and access to justice more broadly, and this will be discussed as well.

8.2 The "Capacity Gap"

8.2.1 The Issue of Capacity

¹²¹⁰ See section 1.2.

Before considering more generally how well party litigants as a group are able to access the courts, a preliminary issue to consider is what can be termed the “capacity gap” affecting some self-representing litigants in the civil courts. By definition, virtually all party litigants lack legal knowledge and training, but some have particular issues that further interfere with their ability to present or defend a case in the courts. As discussed in Chapter 4, there are few restrictions on self-representation in Scots law; one of these is that the litigant must have legal capacity.¹²¹¹ However, “capacity” in legal terms is quite a low bar to meet. Individuals are presumed to have legal capacity unless proven otherwise, typically after they have been made subject to an order under the Adults with Incapacity (Scotland) Act 2000. A litigant may thus be considered to have the capacity to self-represent—and, if they are unable to afford a lawyer, effectively be forced to self-represent—even if they lack essential capabilities such as the ability to read and write or have a learning disability.¹²¹² Party litigants may also have mental health difficulties or other disabilities that can hinder their ability to represent themselves effectively.¹²¹³ The idea that some party litigants have mental health or personality problems was a recurring theme in the interviews conducted for this thesis,¹²¹⁴ although of course this is purely speculative. What is significant is that judges and solicitors sometimes have to proceed in cases despite having real concerns about a party litigant’s mental health or ability to understand the process.

It is interesting to note that, in a number of cases observed for this thesis, party litigants with various significant capacity issues were represented in their hearings by friends or family members acting as lay representatives. These included a son representing a disabled father too ill to come to court, a party litigant being represented by his carer, a son translating for a parent who did not speak English, and a lay representative acting for a party litigant who indicated that he could not read or write. However, there is no guarantee that all litigants with these issues will be able to find someone willing to assist them.

¹²¹¹ See section 4.2.2.

¹²¹² J5, J2, J1, J3, S5, FG1.

¹²¹³ J1, S5, J5.

¹²¹⁴ J1, J2, J3, J4, J5, J8.

8.2.2 Discussion

Party litigants are a varied and diverse group and it is only natural that some will be more educated, intelligent or capable than others.¹²¹⁵ However, the idea that an individual is allowed—or, again, effectively forced—to self-represent when they lack basic skills such as the ability to read and write is troubling. How can an illiterate litigant, or a litigant who cannot speak English,¹²¹⁶ fully participate in the court process? Equally, when judges or solicitors feel that a litigant is clearly suffering from mental health difficulties, does that not suggest that the litigant may not be in the right state of mind to make decisions in their case? The legal presumption applying today comes from a time when one lacked capacity only when they were “insane”,¹²¹⁷ while today our understanding of mental health has moved on considerably and is much more nuanced. However, while the current capacity threshold for self-representation may be too low, it is not easy to determine where exactly to draw the line. And while many party litigants would undoubtedly prefer not to have to represent themselves in court when they lack basic skills, precluding party litigants who are, for example, illiterate or suffering from mental health problems (putting aside for the moment the question of how this is to be determined) again raises the problem of paternalism and restricting the freedom of the individual to conduct his case as he sees fit.

8.3 The Effect of Self-representation

8.3.1 Measuring Success

Putting aside any particular difficulties that a party litigant may have, it seems inevitable that not having a lawyer will affect their ability to conduct their case. However, pinpointing the impact of self-representation is notoriously

¹²¹⁵ Although, as Trinder *et al* found, this does not necessarily mean that they will be more successful as SRLs; see section 3.3.5.

¹²¹⁶ While a translator is supplied at the court’s expense for those litigants who know to ask for it (a facility that some clerks think can be abused; see FG2) this is of course for court hearings only—the litigant must still be able to read and understand court papers, try to investigate the law, and seek advice without speaking the language.

¹²¹⁷ Section 4.2.2.

difficult.¹²¹⁸ For this thesis, judges were asked how well they thought party litigants were able to present or defend a case, and to what extent the outcome of their cases are affected by not having a lawyer. Unsurprisingly, this was not easy for many to answer. One judge pointed out the problem of measuring success in the outcome of these cases: in housing cases, for example, delaying an eviction can be considered a measure of success, while in other actions a party litigant may run up his opponent's cost until the opponent simply gives up.¹²¹⁹ This outcome may be considered a success for the party litigant, but not justice.¹²²⁰ Other judges noted that most civil court cases settle, and success is often not a matter of "winning" the case, but rather whether a favourable agreement has been reached. Party litigants may not understand the law relating to their case and thus may not be able to do negotiate a favourable settlement without a lawyer:¹²²¹

"But I'm sure there's cases where a solicitor could have gotten them a better deal or a much earlier settlement, because they didn't know the strength or weakness of their own case—the negotiating argument or skills."¹²²²

It is also difficult to measure the impact of self-representation because the cases of party litigants may be more likely to be fundamentally misconceived.¹²²³ This is, of course, itself a result of not having a lawyer or legal advice, but if a party litigant's case is entirely without merit there is never really any question of success, and there is no way to properly isolate the effect of self-representation on the inevitable outcome.

8.3.2 How well do Party Litigants Present or Defend their Cases?

Insofar as judges could speak to how well party litigants can present their cases and how outcomes are affected, responses were fairly evenly split between those who felt that party litigants fared poorly and that self-representation had

¹²¹⁸ Section 3.3.7.

¹²¹⁹ J9.

¹²²⁰ J9.

¹²²¹ J2, J10.

¹²²² J4.

¹²²³ J1, J2, J3.

a negative impact¹²²⁴ and those who considered that some party litigants were not always disadvantaged, taking into account assistance from the court.¹²²⁵ The former group, clearly, had a gloomier view how well party litigants can do without a lawyer:

“I can’t put a percentage on it, but they are inevitably less successful then they would be if they were represented. I suppose I’m speculating to some extent, because you don’t know what the lawyer would have done had they been represented. But they are less successful, there is no question about that. I think it does affect the outcome.”¹²²⁶

Other judges spoke of party litigants being at a disadvantage,¹²²⁷ doing themselves a disservice trying to self-represent in complicated cases,¹²²⁸ or even being destined for virtually inevitable failure.¹²²⁹ While the views of the other group of judges were not quite as pessimistic, this does not mean that they considered that party litigants were as successful as their represented counterparts, but rather that some were capable enough to conduct their case effectively or that assistance from the court could lead to a good outcome in some cases. Even these views were therefore heavily qualified. One judge noted that in some cases the court process itself may not disadvantage party litigants, but a party litigant could still have achieved a better outcome (again, such as an earlier or more favourable settlement) with the benefit of legal advice.¹²³⁰ Another judge had a similar view and also noted the value of legal advice:

“I’d like to think [not having a lawyer] doesn’t affect the outcome, if they’ve got a colourable case, that shouldn’t affect the outcome if they’ve got a colourable case. Where I think they lose out in particular in not having a lawyer is in seeing the case that isn’t there, so in knowing you don’t actually have a case. Or knowing that your position is comparatively weak or strong in terms of negotiating power...”¹²³¹

¹²²⁴ J6, J8, J1, J7, J3.

¹²²⁵ J9, J10, J5, J4, J2.

¹²²⁶ J6.

¹²²⁷ J7.

¹²²⁸ J3.

¹²²⁹ J1.

¹²³⁰ J2, see also J4.

¹²³¹ J4.

This judge felt that the “right” outcome was reached in most cases, but noted that additional pitfalls and concerns arise in party litigant’s cases that could influence the result:

“And then you would like to think that, in the majority of cases, you reached the right decision, and hopefully there aren’t instances where you just fall out, you think they are very disruptive, and in some way the judgment’s found wanting because you’ve lost the place, or perhaps been unfair and overlooked something, or not been able to—maybe made an assumption and not been alert to, I’ve not asked the right question as it were.”¹²³²

These observations also reinforce just how active and vigilant the judge feels he must be to deal with a party litigant’s case.

It is worth noting that, while they were not asked directly about how well party litigants fare without lawyers, solicitors and court staff¹²³³ predominantly expressed negative views about how successful party litigants are in most cases. Solicitors tended to be particularly focused on the lack of legal merit in the cases of many party litigants rather than the process itself.¹²³⁴

8.3.3 The Impact of Self-representation on the Party Litigant’s Opponent

Many of the consequences that facing a party litigant in court can have on a represented opponent have been discussed in previous chapters. As noted earlier, a represented opponent will often incur additional delays and expenses, which they may be unable to recover even if successful, as a result of a party litigant’s inexperience and the additional time and effort needed to extend latitude to him.¹²³⁵ Solicitors often expressed a sense that this latitude or special treatment afforded to party litigants was unfair to their clients:

¹²³² J5.

¹²³³ Solicitors were not asked this question directly because they have experience only with the party litigants they have acted against (and, of course, potentially a natural bias towards the need for a lawyer) while court staff’s work is concerned only with the procedural elements of cases.

¹²³⁴ S1, S7, S8, S3, S4, S5.

¹²³⁵ See sections 7.2, 7.3 and 7.4.

“...I certainly have felt in the past that it has been unfair to my client that they have had to go to the trouble of incurring costs and spending money, sometimes a lot of money, to ensure that they are—obviously they get advice on running the case in terms of strategy and a lot of time can be spent complying with procedural rules et cetera, it can seem unfair that they are effectively penalised, it would seem, for that and they’re not treated equally you could say.”¹²³⁶

“Because it does all add up and I think it’s really unfair. And I don’t think there’s a balance. I think—and I appreciate that the courts, they’re not allowed to hinder anyone’s access to justice and the rest of it—but I don’t think that there is enough there to make a reasonable balance between the two.”¹²³⁷

Another solicitor echoed these sentiments and added an interesting point about the businesses and companies as opponents of party litigants:

“But it does create more cost to the client and more inconvenience, because they want things resolved just like any litigant does, they want to resolve it as soon as possible with minimum expense...Then quite often people forget that even in large organisations, it’s a individual who’s dealing with it...And there’s still a personal element to that. Quite often people forget that, ‘Oh, it’s just X plc and what do they care?’ but sometimes there’s a human element too in terms of there’s still someone who you have to report it back to and they’ve got to report back to somebody else to explain why things are going a certain way. And that can often create personal difficulty with that person, which makes it tricky.”¹²³⁸

In the last chapter, it was noted that a solicitor might advise a client to represent himself instead to “equalise” their costs against a party litigant.¹²³⁹

Another solicitor described giving similar advice, suggesting to a client that they would be better off taking advantage of the latitude extended to party litigants:

“...I said to him, ‘Listen, you’re actually better off doing it yourself because you’ll get away with a lot more and if you say these certain things in what you’re asking for and what you want you will do far better because you’ll get more slack from the sheriff.’ It was [Sheriff] who was presiding over the case and she bends over backwards for party litigants.”¹²⁴⁰

¹²³⁶ S3.

¹²³⁷ S2.

¹²³⁸ S5.

¹²³⁹ Section 7.5.1.

¹²⁴⁰ S8. This brings to mind to concerns about “ghostwriting” discussed in section 3.5.2.3.

When party litigants take up additional time in court, that can impact not only their opponent, but also others waiting in court for their cases to be heard. This includes other solicitors waiting for their cases to call, who in turn must bill their own clients for the additional time they have had to spend waiting.¹²⁴¹ A solicitor described a case involving multiple party litigants all wishing to “have their say” at each hearing and at great length: “And that impacted on me, but it also impacts the other agents who are sitting and waiting for their case to call, because everything gets held up because of that particular case.”¹²⁴²

8.3.4 Discussion

The judges interviewed for this thesis found it very difficult to offer an assessment of party litigants’ abilities or outcomes. This is unsurprising, because again party litigants are a varied group with varied cases. The correct (and unsatisfying) answer as to how well party litigants are able to access the civil court process is inevitably “it depends”. However, the judges, solicitors and court staff interviewed acknowledged that the majority of party litigants face at least some level of disadvantage as compared to their represented counterparts; the court observation data supported this view as well.¹²⁴³ It is not so much a question of if party litigants are disadvantaged, but rather of degree—and of the extent to which this can be overcome with latitude from the court. In the view of some, the detriment is quite significant and a party litigant has little chance of a good outcome. On the other hand, there is a sense that the process is also unfair to a represented opponent, who must deal with additional expense and inconvenience for the party litigant’s mistakes while he is himself “playing by the rules”.

Even those judges who do think that party litigants have a chance to be successful are also aware that self-representation cannot take the place of qualified representation and legal advice. Sometimes much of the value of a lawyer is in having a trusted advisor to tell you when you do or do not have a valid case. What judges know, while many party litigants do not, is that the

¹²⁴¹ S5.

¹²⁴² S7.

¹²⁴³ See, for example, sections 7.2.4 and 7.3.1.

services of a lawyer are not just carried out in the courtroom, but also in the tactics and negotiation that occur outside of courtroom. This is part of what makes the overall disadvantage to the party litigant so difficult to quantify or qualify. It is also what blurs the idea of “access to the courts” or “access to justice” in relation to party litigants. Taking as an example the two scenarios most commonly identified, can it be said that a party litigant who brings a meritless case to the courts and inevitably loses, or a litigant who pursues a case that could have been more favourably settled, has had access to the courts? Particularly with all of the assistance that a party litigant receives from the court, it is difficult to say that he has not. If you consider instead the question of whether the same litigant has had access to justice, it becomes much harder to answer.

8.4 Party Litigants: Improving Access and Preventing Disruption

8.4.1 Introduction

On one hand, if party litigants are at a disadvantage, what can be done to improve their position? On the other hand, given the delays and extra expense that can be incurred by the court and their opponents, what can be done to reduce the disruption that party litigants can cause in the courts? The judges interviewed for this thesis were asked what could or should be done to provide party litigants with the best possible access to the courts, and what can be done to minimise the problems that can be caused to other parties. Because their perspective is based on acting for their client, the party litigant’s opponent, solicitors were asked only the latter question. However, what is interesting about the responses given by both judges and solicitors was how often the answers to both questions were one and the same: measures that could help party litigants would also minimise disruption, and vice versa. It is also interesting to note that the body of responses tended to fall neatly into the divisions discussed in Chapter 3.¹²⁴⁴ For a significant group of respondents, the answer (and sometimes the only answer) to the issues encountered by party

¹²⁴⁴ See section 3.4.

litigants is to provide them with lawyers. Others took the route of suggesting varying degrees of systemic change, both within the court itself and in wider public policy matters.

8.4.2 “More Lawyers”

Many suggestions from interviewees centred on methods of making lawyers available to party litigants, such as legal aid or requiring individuals to maintain legal expense cover insurance.¹²⁴⁵ One judge said,

“...purely on a selfish basis I think legal aid should just be made more widely available. So that you don’t have to have a party litigant. To the extent that it’s legal aid that brings some people to court as party litigants, I think that’s unfortunate.”¹²⁴⁶

However, as the same judge pointed out, legal aid is not a proportionate option for lower-value claims: “...I’m not suggesting that legal aid should be available for people who want to sue for £100. It just wouldn’t be justified.”¹²⁴⁷

Others suggested that legal representation should not only be available, but required for litigants.¹²⁴⁸ One judge suggested court-appointed representation in certain cases:

“What I would like to be able to do is for the court to direct a solicitor to represent parties...in the civil sphere, for the sake of expediency, saving money, saving disruption, I’d be all for giving power to the sheriff to direct, in appropriate cases, a party litigant to be represented—and for that representative to be ‘unsackable.’”¹²⁴⁹

A solicitor echoed that suggestion, and added that alternately there should be a requirement for party litigants to take some form of legal advice:

¹²⁴⁵ J1, J6, J10, S7, S1, J8, J5.

¹²⁴⁶ J10.

¹²⁴⁷ J10.

¹²⁴⁸ S1, S2, J6.

¹²⁴⁹ J6.

“Firstly I think there should be a system where party litigants are required to take advice, either from solicitors or lay representatives, and demonstrate that they have done it.”¹²⁵⁰

8.4.3 Other Sources of Advice and Lay Representation

Interviewees also suggested that party litigants could receive more assistance from advice agencies such as Shelter and Citizen’s Advice Bureaux, and in-court advice from either these advice agencies or the sheriff clerk’s office.¹²⁵¹ Student legal clinics were also cited as a potential resource for party litigants that in turn provide valuable experience for students.¹²⁵²

One judge proposed expanding the ability of lay representatives or “McKenzie friends” to assist party litigants:

“...that is of some help, I have to say, if there is someone in court that can help them like a lay representative or a McKenzie friend, yes, that is helpful...And maybe, just maybe there could be some scope for giving them greater scope to represent a party litigant—although that’s a matter which is difficult, because they’re not trained lawyers, the real answer is to provide them with lawyers.”¹²⁵³

Lay representatives received a decidedly mixed reception from other judges and solicitors. Most lay representatives from advice agencies are considered to be helpful,¹²⁵⁴ while those who are friends or family members of the litigant are more likely to be less helpful or even difficult.¹²⁵⁵ A solicitor suggested that because lay representatives are typically not “legally minded” they may “double confuse issues.”¹²⁵⁶ Another solicitor had a similar view:

“But I haven’t found in most instances that a lay representative has contributed a great deal more than might be the case with a party litigant who was relatively confident in their position. If anything a lay representative can sometimes be more stalwart in their defence than the

¹²⁵⁰ S2.

¹²⁵¹ J8, S4, S3, S7, S5.

¹²⁵² J8, S7.

¹²⁵³ J6.

¹²⁵⁴ J3, J6,

¹²⁵⁵ J10, S7, S5, S2.

¹²⁵⁶ S8.

individual would, I think because of the personal relationship that might exist between them.”¹²⁵⁷

This is an interesting observation, as it hints again at the role of emotion and how it can hinder the party litigant or even his representative. The best representation for a litigant is not only one who has legal knowledge, but who can also introduce the emotional distance necessary to best handle the case.

It is worth noting that, while court observation can only provide a snapshot, the cases observed for this thesis presented a similar outlook on lay representation. These hearings primarily involved the “friends and family” variety of lay representatives. As noted above, lay representatives appeared in a number of cases with litigants in need of essential forms of assistance, and in those circumstances the party litigant would appear to be better off than they would have been on their own. In other cases, particularly when the lay representative appeared without the party litigant, there were difficulties. In a few cases the lay representative appeared confused about the process and fundamental aspects of the case, or was unable to provide essential information to the court. In one example, it was not entirely clear that the lay representative, a family member, had actually been authorised to act on the absent litigant’s behalf. In another case, a writ, drafted by the party litigant’s lay representative, was held to be incompetent; the case was dismissed with a finding of expenses against the party litigant.

8.4.4 Self Help: Simplifying Procedures and Guidance/Education

Simplified or user-friendly court procedures, plain language, and better guidance were all popular ideas both to assist party litigants and minimise disruption in the courts.¹²⁵⁸ Generally interviewees did not make specific suggestions as to how this could be achieved, but the recently introduced simple procedure was viewed as a step in the right direction. One judge praised the party litigant-friendly format of the simple procedure rules and recommended that the same principles could be applied to other procedures:

¹²⁵⁷ S4.

¹²⁵⁸ J9, J5, J4, J2, S5, S3, S6.

“So I would hope that some of that work would spill into perhaps mainstream actions and family actions. The rules have to be more accessible to maintain the myth of access to justice at a time when financial strictures sometimes hinder that.”¹²⁵⁹

In addition to simplifying procedures, one judge suggested that the threshold for the simple procedure should be raised considerably, from £5,000 to £50,000, to make more cases accessible to party litigants.¹²⁶⁰ Better forms of guidance from the court, such as a handbook for party litigants¹²⁶¹ or a letter from the court setting out the procedure¹²⁶² were identified as potentially helpful. However, a clerk in a role dealing with particularly complex matters described his efforts to obtain better guidance for party litigants as a challenge:

“I’ve often asked whether I can get some sort of section on the Scottish Courts website that could cater to party litigants and just have a little info pack...But so far I’ve not had a chance and to do that Communications Department want to get involved in that and I think they’re wanting to make it into plain English. And it just seems like quite a large undertaking for myself, who is operational at the moment. It seems like it would have to be heavily involved with the policy and legislation branch and all I wanted to do was help the party litigants.”¹²⁶³

Some ideas about guidance or education for party litigants extended to offering information on more practical or even conceptual matters, such as ensuring that party litigants are aware of the need to bring evidence to court¹²⁶⁴ or teaching them not to expect that every wrong can lead to legal remedy.¹²⁶⁵ Educating party litigants about the law and the legal aspects of making a case, however, was generally not recommended or thought to be impractical. One judge dismissed the idea by saying that party litigants will not be able to understand the law or how to give evidence.¹²⁶⁶ Another judge said that while more information about procedural matters would help,

“...the problem is that beyond that, even if somebody can read the rules, that still leaves issues of the substantive law, that still leaves issues about

¹²⁵⁹ J5.

¹²⁶⁰ J9.

¹²⁶¹ S3.

¹²⁶² J5.

¹²⁶³ Citation not given as it would tend to identify the interviewee.

¹²⁶⁴ J7.

¹²⁶⁵ J8; see also S8.

¹²⁶⁶ J3, see also S7, S3.

evidence and leaves issues about practices. So there's still quite a big gap there, I'm not immediately clear how somebody could be given all that information in a digestible way, that would really significantly assist.”¹²⁶⁷

8.4.5 Other Suggestions

Judges praised in-court mediation services where they are available and suggested that better access to these services make dealing with party litigant cases easier,¹²⁶⁸ or even that mediation should be mandatory before an action can be commenced.¹²⁶⁹ A screening process for new party litigant cases was also floated as a suggestion to keep meritless cases out of the courts.¹²⁷⁰ Solicitors put forth a handful of other options aimed primarily at minimising disruption or additional expense for their client, such as maintaining continuity of the same judge in a party litigant's action to allow for better case management,¹²⁷¹ and using orders for caution to ensure that expenses can be paid if the party litigant is unsuccessful.¹²⁷² Some ideas, such as allowing submissions in writing,¹²⁷³ or conducting court business by e-mail,¹²⁷⁴ were recommended to avoid the need for costly court appearances.

One solicitor felt that there was little that could be done to minimise the impact of party litigants on their opponent:

“...because they are allowed in the court and as long as they are allowed in the court there's going to be prejudice to the party they're up against. So I think there is very little that can be done to minimise the impact, as long as they're allowed to represent themselves.”¹²⁷⁵

8.4.6 Discussion

¹²⁶⁷ J2.

¹²⁶⁸ J6, J2, J10,

¹²⁶⁹ J6.

¹²⁷⁰ J1, J2.

¹²⁷¹ S5.

¹²⁷² S2.

¹²⁷³ S2.

¹²⁷⁴ S5.

¹²⁷⁵ S1.

The ideas put forth by judges and solicitors to improve access for party litigants and minimise their impact mirror many of the options discussed in the existing literature. As in the existing literature, there are many opinions ranging from preventing self-representation in the courts altogether to extending self-help assistance to party litigants. The former option, along with similar ideas such as forcing litigants to attend mediation, does not necessarily sit well with the open-door policy the courts have had for party litigants for the entirety of the Scottish court's history, or with our understanding of access to self-representation as an exercise of personal autonomy.¹²⁷⁶ However, these ideas are also not without precedent; representation is required in many continental European courts and litigants in the UK employment tribunals are required to at least attempt early conciliation of their claims.

The biggest problem with most of these options, of course, is cost. As much as so many would like to see legal aid extended to more litigants, they also acknowledged that budgetary constraints make it unlikely that this will occur anytime soon. Advice agencies are a less costly option, but again expanding their offerings to more litigants comes at a cost, and the assistance they can offer is limited. It is interesting to note that the two options that are potentially the least costly—simplifying procedures and extending access to lay representation—are also those that have made the most progress in the last few years. The simple procedure has been introduced to offer more user-friendly rules to party litigants and the rules allowing for lay representation have been steadily expanded. It is still unclear just how helpful lay representatives, particularly “friends and family” representatives, can be to party litigants and thus uncertain whether expanding their powers in court will be beneficial or potentially problematic. And while simpler procedures can make for a smoother process, in practice there may be less substantive effect for party litigants, simply because party litigants already receive so much help with court procedures. The main beneficiary of changes in procedure may be the court itself, but making for less disruption for the court is also a worthwhile aim.

¹²⁷⁶ Section 3.4.1.

8.5 Conclusion

This chapter has attempted to address some of the questions around access to the courts and access to justice for party litigants, but there are no easy answers to these complicated questions. It is clear that self-representation can have an often negative impact on many of the parties involved. Mitigating that impact comes at its own cost, both financially and potentially ethically. The next chapter will summarise the conclusions of the thesis as a whole and, using these conclusions, attempt to discern how best to address the issues raised in these previous chapters.

Chapter 9: Conclusion

9.1 Introduction

At the heart of the issue of self-representation in civil matters is the notion that the Scottish civil court process is simply not intended to be used by self-representing litigants. As one judge said,

“But it’s that sort of thing, disruption in the process itself, by not understanding the process. And that calls into question the whole process involving party litigants, actually, and if for example we have cases where there are party litigants, it may be that the whole process we’re adopting is just not fit for purpose.”¹²⁷⁷

This disconnect between the realities of the demands of the process and the abilities of most party litigants informs many of the answers to the research questions posed at the beginning of this thesis. Chapters 4 and 5 set out the law relating to self-representation in Scotland. Chapter 7 discussed in detail the issues arising with party litigants in various aspects of the process, such as procedural or legal matters, and found that judges have to use a number of techniques and adjustments to the overall process to accommodate party litigants. Some of the principles and factors that judges apply were discussed in Chapter 6 as well as Chapter 7, although overall most decisions appear to come down to questions of “fairness” or the “interests of justice.” This chapter will consider many of these issues in more detail, but first some of the most fundamental conclusions of the thesis are set out below:

1. There is in law an open-door approach to self-representation in the civil courts.
2. However, the process is designed for lawyers and most procedures make no accommodation for party litigants.

¹²⁷⁷ J6.

3. In practice, judicial discretion is used to ameliorate this paradox, although there is little guidance in legal authority or “soft law” as to how precisely discretion should be exercised.
4. Party litigants often expect more assistance from the courts than the rules allow for and often do not take responsibility for their obligations as set out in the law and rules.
5. Although the standard of relevance and legal and procedural knowledge that can be required of all litigants is high in law, judges almost invariably apply far lower standards to party litigants.
6. Many judges feel obligated to take a more active approach and intervene in party litigants’ cases.
7. A sense of fairness and justice, but also perceptions of party litigants’ emotions and their feelings about the process motivates judges to act.
8. The adversarial nature of the process creates a knowledge gap in the process that must be filled, often by the judge or at times by an opponent solicitor.

Many of these conclusions, and other issues discussed below, confirm in the Scottish context the findings of prior research on self-representation in other jurisdictions that civil courts are inimical to SRLs and that SRLs often disrupt the typical function and adversarial nature of the process. As was discussed in chapter 3, in terms of party litigants and the “who, why and what” there has been a significant amount of research, in comparison to Scotland, carried out in England and Wales and other English-speaking common law jurisdictions. In particular, it was noted that SRLs may have a number of reasons, often financial, for self-representing, that they often encounter difficulties with the procedural, legal, and evidential aspects of the process, and that they often find the process bewildering and stressful. In the main, the research conducted for this study, as much as is possible, appears to generally confirm the conclusions reached by those such as Moorhead and Sefton, Trinder *et al*, Macfarlane and Knowlton *et al*. Establishing that these conclusions apply in Scotland is

worthwhile in itself. However, the Scottish civil legal system is unique and distinct even from other jurisdictions within the United Kingdom. Some of these conclusions, although relevant and informed by wider research into self-representation, are thus particular to the Scottish experience and Scottish civil process, and therefore valuable to the legal system, policy makers and population of Scotland serviced by the Scottish courts.

Although this particular study asked different questions and adopted in places a different methodology, it can be said, with relative confidence, that the data gathered for this study does not suggest any significant divergence or contradiction emerging in the Scottish experience of party litigants from the general experience presented in the existing literature from other jurisdictions such as England and Wales. However, this study does not, and was not intended to, examine matters such as the feelings and experiences of party litigants relating to the process of self-representing. It should be emphasised that there would be value in conducting research in Scotland similar to that carried out in other jurisdictions with a view to conclusively determining issues such as how Scottish SRLs experience self-representation in the civil courts and how this may relate to the existing literature elsewhere.

9.2 The “Law in Books”

9.2.1 The Substantive Law

As this thesis has demonstrated, Scots law as it relates to the party litigant is a study in contrasts. This is seen perhaps most prominently in the two fundamental assumptions underlying the treatment of self-representation. First, that the law provides an open door for unrepresented litigants to access the court directly and make any type of case they wish without legal advice or representation; and secondly, that most of the civil court process is designed for lawyers and requires a high level of skill and training to navigate. This creates a fundamental tension even before the details of the process are considered. Furthermore, the law provides that the system is adversarial and that courts are thus entitled to hold party litigants to the very same high standards as solicitors.

Again, this creates a natural tension, as a party-led process cannot progress when one or more of the parties lack the knowledge necessary to take the necessary actions and make decisions in his case. However, for the most part, these contradicting notions are as far as most of the “law in books” takes us. As discussed in Chapter 4, despite the court’s open door policy, the law and procedures do little (with only a few exceptions, such as the simple procedure) to acknowledge the needs of party litigants or address the difficulties that can arise. Where party litigants are mentioned in the law or rules, it is usually instead to restrict them—for example, in matters such as serving documents or regulating access to lay support or representation. The court procedures, apart from the simple procedure and “DIY” divorce, make no concession for unrepresented litigants. It is well-known that SRLs require latitude or assistance from the courts due to their lack of legal knowledge, but there is no general entitlement to be afforded latitude or other “rights” to be found in the law or rules, and access to other forms of help such as lay assistance are restricted. The sources of law discussed in Chapter 4 are thus notable more for what is *not* there, leading to the ultimate conclusion that the position of the party litigant is dictated not by the law and rules, but largely by the operation of judicial discretion.

9.2.2 The “Case Law”

With so little set out in the law and rules and so much thus left to judicial discretion, one might expect to find a well-developed body of case law on the decisions that judges are called upon to make in their handling of party litigants and issues that they raise in court. The review of the case law set out in Chapter 5 demonstrates that, while the available judgments relating to party litigants’ cases—which surely represent only the tip of the iceberg—provide a useful illustration of the types of decisions judges are called upon to make, there are very few firm pronouncements of legal principle and thus little authoritative guidance to be found. One of the few guiding principles is that courts are entitled to hold party litigants to the same high standards as solicitors and advocates.¹²⁷⁸ Although *Wilson* represents the leading case on the question of latitude, it provides authority for no more than the proposition that a judge *can*

¹²⁷⁸ Section 5.2.2.

offer latitude to a party litigant due to their unrepresented status provided it does not prejudice the other party. This is a principle that was effectively already made out in the case law, which offers a number of examples of judges offering party litigants a wide berth to “have their say” in the form of *Moore* latitude as well assistance or latitude on procedural matters, “looking behind” pleadings and finding the “latent case.” The case law on the matter of when to allow adjournment or continuation of a party litigant’s case is comparatively well developed, but still leaves much to the individual judge to determine.

As noted earlier, there are arguments to be made in favour of using judicial discretion to manage unrepresented litigants in the courts, as each party litigant and case presents a unique challenge and restrictions on how they are dealt with could lead to unfairness. But it is perhaps unfortunate that it is not clear whether the current emphasis on judicial discretion is deliberate, or just fails to acknowledge party litigants and thus leaves it to judges on the “front line” to deal with the issues as they encounter them. These are, as the ETBB notes, difficult issues and it is no simple task to balance the desire for fairness for the party litigant and the need to be fair to his opponent and, in an adversarial system, maintain the neutrality of the court. It is thus curious that courts have been so hesitant to set out at least some form of guiding principles. Attempts elsewhere to provide guidance, such as the ETBB, are hindered by the lack of authoritative case law and direction within the law itself; the ETBB is able to raise issues, but not provide firm guidance for judges because there is none to be found in the law itself.

As with Chapter 4, the ultimate conclusion to be drawn from the case law reviewed in Chapter 5 is that it is perhaps most notable for what is missing. While it is instructive on the decisions required of the courts and their outcomes—the *what* and *how*—the *why* of these decisions is notably elusive. There is, as noted earlier, a distinct lack of reference to legal authority or the judge’s reasoning in these cases. It has been suggested that this can be attributed in part to the difficulty that party litigants will encounter making arguments in an adversarial system—judges are often unable to properly determine a case on its legal merits because the party litigant is ill-equipped to make an argument that they can uphold, and they can only go so far in looking

for a “latent case.”¹²⁷⁹ The case law, while instructive in some areas, does not represent a true line of legal authority on the treatment of party litigants.

9.3 The “Law in Action”

It is worth noting that, while the law and rules set out in Chapter 4 offered little real perspective on the operation of the law in practice, the case law in Chapter 5 did align with some of the empirical findings. For example, the idea raised by the case law that judges often feel obliged to offer party litigants numerous “chances” to remedy procedural failings or deficiencies in pleadings was borne out by both judicial and solicitor interviews, as well as numerous examples in the court observation. More subtle themes in the case law, such as the problem of party litigants’ expectations that the court will take a more active role in the proceedings and the resulting difficulties caused by the common failure of party litigants to take responsibility for their case also came through in the empirical study. This is particularly interesting because one would not necessarily expect to find this sort of information in a judgment, which typically sets out only the decision in law. However, if there is no other conclusion to be drawn from this thesis, it is that the law and the process do not operate as they usually would in cases involving party litigants.

In other areas, the “law in action” proved to bear little resemblance to the “law in books.” Perhaps the most glaring contradiction is in the standard party litigants are held to: although the law is quite clear that there is no right for a party litigant to be treated any differently than a solicitor, judges almost invariably lowered the standard and many expected the party litigant to have little or no knowledge of the law or process. Others even felt it was unreasonable or unfair to expect the party litigant to understand the law.¹²⁸⁰ This may in large part be based on their experiences on the bench: as set out in Chapter 7, judges reported that it is commonplace for party litigants to encounter difficulties in all aspects of the process, and judges are often making adjustments and decisions to account for this. For example, all judges reported altering their approach on the bench by using plain language and offering

¹²⁷⁹ Section 5.5.

¹²⁸⁰ Section 6.3.2.

explanations and advice to party litigants. Equally, while the law is careful not to create an entitlement to latitude or allowance for party litigants, it was clear that in practice extending latitude was the rule rather than the exception, and some judges appeared to feel obligated to extend allowance or even assistance to the party litigant. Many judges reported having a set of tactics (such as providing early advice on matters such as evidence) designed to minimise the difficulties they anticipated encountering with party litigants. While the rules of procedure do not make provision for the needs of party litigants, judges—and at times opponent solicitors—attempt to fill in the gaps.

As noted earlier, there is little reference to legal authority relating to party litigants in the case law, and the empirical research for this thesis suggests that the reason for this may be quite straightforward: judges are not considering legal authorities (such as there are) or principles when making these decisions, but rather relying on their conceptions of “fairness” or the “interests of justice.”¹²⁸¹ Slightly more surprising is the influence of the judge’s ideas, about the party litigant’s emotions or perceptions of the process, on their conduct of the case or their decision making process.¹²⁸² As noted earlier, these ideas operate outwith the principles traditionally understood to drive the civil court process, but appear to nonetheless be a significant consideration for many judges. What is less clear is whether this can be attributed to the individual judge, developments in judicial culture and increased “consumer focus” in the courts¹²⁸³ or whether these principles have developed to fill the vacuum left by the substantive law.

While the civil court system remains adversarial in principle, it is difficult to draw any other conclusion from the empirical research other than that this is not the case in practice with party litigants. Again the tensions that party litigants bring to the civil court system are highlighted, as judges clearly felt that the need to be fair to party litigants was at odds with the desire to remain neutral or passive.¹²⁸⁴ When party litigants enter the civil court process without the knowledge required to navigate it properly, this creates a vacuum that must be

¹²⁸¹ Section 6.3.3.

¹²⁸² Section 6.3.4.

¹²⁸³ Section 6.3.5.

¹²⁸⁴ Sections 6.3.1, 6.3.3.

filled, or the process will grind to a halt. The adversarial court process is a “closed system”: the need for expertise does not disappear, but can only be shifted or redistributed. The value of the hypothetical lawyer’s expertise does not entirely disappear. Currently, for the most part, the knowledge gap is filled by judges, sometimes with assistance from a represented opponent’s solicitor. Although the case law emphasises that there is no right to assistance or a less adversarial process for the party litigant—while also offering numerous examples of this occurring-- judges reported that they were inevitably more active or interventionist in party litigants’ cases. Overall, one of the most important findings of the thesis is that the issues created by self-representation in the courts are currently being dealt with not by the law or rules but rather by the exercise of judicial discretion at the “front line.” While this may minimise to some extent the impact of self-representation in the short term, this approach can also ultimately obscure the real questions raised about whether the system at present offers real access to the courts or just the appearance of access to unrepresented litigants.

9.4 Conclusion

The paradox of the party litigant in the Scottish civil courts is that unrepresented litigants loom so large in the courtroom anecdote, while the law and rules continue to largely turn a blind eye to them. At times it seems almost as if there is a fear that acknowledging party litigants will increase their numbers or attract more to self-represent. Although there are a number of potential responses to the issues raised by SRLs in the courts—from “more lawyers” solutions, such as expanded access to legal aid, to simplified court procedures or online dispute resolution—it is suggested that these must be considered alongside the overarching omissions and contradictions in the law itself. To some extent, the lack of law or rules relating to party litigants can again be accounted for by the lack of clear public policy aims in relation to self-representation in Scotland. The Report of the Scottish Civil Court Review¹²⁸⁵ reveals opposing viewpoints on how party litigants should be addressed: on the one hand, they should have access to justice, while on the other hand they must

¹²⁸⁵ Chapter 11.

be prevented from causing disruption.¹²⁸⁶ The Scottish legal system is left with conflicting objectives and no real direction.

More recently, the Scottish Civil Justice Council's "The New Rules: First Report"¹²⁸⁷ on the reform of Scottish Civil Procedure makes little mention of party litigants at all. There appears to be only one reference to unrepresented litigants in the entire document, and then just to note that processes should not be entirely online because unrepresented litigants may still need access to paper forms.¹²⁸⁸ In fairness, many of the aims of the rules reform project, such as simpler and more streamlined rules, will benefit both party litigants and represented parties. However, there is still no clue as to how, or if, the future rules intend to address the needs of party litigants. Given that an entire chapter in the SCCR was devoted to self-representing litigants, albeit it may have raised more questions than answers, this is a strange omission. It does not bode well for reform of the civil court rules and the processes that are now often disrupted when party litigants enter the courtroom.¹²⁸⁹ It seems that this can only continue to happen if the particular problems and needs of party litigants are not acknowledged. However, if views about the current rise in self-representation and predictions that it will continue are to be believed, the problem will not stay in the shadows for long. In England and Wales, slashing legal aid created a virtual "big bang" of litigants in person in their courts, with which the courts are still struggling to come to terms. In Scotland, our relatively low, if rising, number of party litigants gives us the luxury of time to first fashion a much-needed policy on access to the courts for SRLs, and then find the best way to implement it.

A consistent policy would also be beneficial to address some of the issues and difficulties raised throughout this thesis. Overall this thesis observes that at present judges, court staff and often even opponent solicitors are extending themselves beyond the established remit of their respective roles to make the process as "fair" as possible for party litigants. The party litigant also finds

¹²⁸⁶ Section 1.2.

¹²⁸⁷ <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/the-new-civil-procedure-rules---first-report-and-annex.pdf?sfvrsn=2>.

¹²⁸⁸ *Ibid*, 8.29.

¹²⁸⁹ Section 7.8.

himself making his own efforts in an unfamiliar and often intimidating role. However, despite all that is done outwith the usual operation of the process to make it fair and accessible for party litigants, most interviewees still consider that the party litigant is disadvantaged, if not doomed to fail.¹²⁹⁰ It may be that that, because the law says so little about the party litigant, these efforts occur on the fringes of the process and thus go unseen. It is hoped that this thesis brings to light both these issues and the efforts being made to address them, and that this contributes to finding ways to move forward in this complex facet of the civil justice system in Scotland.

¹²⁹⁰ Section 8.3.2.

Appendices

Appendix A: Court Observation Pro forma

COURT OBSERVATION

KEYWORDS:

DATE:

CASE NAME:

REF IF KNOWN:

TYPE OF ACTION:

PL: DEFENDER

TODAY'S HEARING:

PM:

DM:

ORDER:

NOTES/COMMENTS:

Appendix B: Court Observation Log

Week One

10:05am—11:35am (1 hr 30 mins)

1 sequestration party defender and 3 party defenders in ordinary cause options hearings

10:05am—11:10am (1 hr 5 mins)

2 sequestration cases involving party defenders, both with lay representatives
1 ordinary cause case with party litigant defender

Week Two

10:05am—11:00am (55 mins)

4 sequestrations with party litigant respondents, one with lay rep/support
1 summary application (banning order) with party respondent

Week Three

10:10am—11:15am (1 hour, 5 mins)

1 party pursuer in ordinary action (reduction), 1 party pursuer in summary application

10:00am—12:30pm (2 hrs 30 mins, including break)

1 party litigant respondent in a sequestration, 1 defender in TTPA, 1 defender in a minute for committal (summary application), 1 defender in ordinary action, 1 pursuer in a summary application

Week Four

10:00am—1.05pm (Ordinary Court)

2:00pm—3:05pm (Additional Afternoon Hearing) (4 hrs 10 mins)

2 party litigant defenders in ordinary action, 1 party defender in a summary application, 1 party pursuer in a summary application, 1 party pursuer in ordinary action (lay rep appeared but refused right of audience)

10:00am—1:00pm, 2:00pm—3:00pm (4 hours)

1 party defender in a summary application, 1 party defender in sequestrations, 1 lay rep for defender in a sequestration, 3 party defenders in ordinary actions

Week Five

10:00am—1:30pm (3 hrs 30 mins)

1 party pursuer in ordinary action w/lay rep, 3 party defenders in ordinary action, 3 party defenders in sequestrations, 1 party defender in summary application

10:00am—12:10pm (2 hours, 10 minutes)

1 party defender in a sequestration, 1 party pursuer in an ordinary action, 5 party defenders in summary applications, 1 party defender in an ordinary action

Week Six

10:00am—11:40am (1 hour, 40 mins)

1 party defender in a sequestration w/lay rep, 2 party defenders in ordinary cause actions, 1 party defender in a summary application

10:00am—10:40am (40 mins)

2 party defenders in sequestrations, 1 party defender in summary application, 1 party pursuer in ordinary action

Week Seven

10:00am—12noon (2 hours)

1 party defender in a sequestration, 1 party pursuer in ordinary action, 1 party pursuer in summary application

Week Eight

10:00am—1:10pm, 2:10pm—3pm (4 hours)

2 sequestrations with party defenders of which 1 with lay rep, 2 party defenders in summary applications, 2 party defenders in same ordinary action

10am—12noon (2 hours)

6 party defenders in sequestrations (2 with lay reps, 1 with party present and one without), 7 party defenders in ordinary actions (2 of which TTP applications), 1 party defender in summary application

Week Nine

10am–12:50pm (2 hours 50 minutes)

4 party defenders in summary applications, 1 party defender in ordinary action

10am–12noon (2 hours)

1 party defender in a sequestration, 3 party defenders in ordinary actions, 1 lay rep with party pursuers in a summary application, 2 party pursuers (no appearance) in ordinary action, 1 party defender in summary application (no appearance)

Totals:

Party Litigant hearings: 89

Pursuers: 13

Defenders: 76

Lay Reps: 12 (+2 not permitted to appear)

Of Which:

Sequestrations: 27 respondents

Ordinary Cause Actions: 37; 29 defenders, 8 pursuers

Summary Applications: 25; 20 defenders, 5 pursuers

Total Court Time: 34 hours 20 mins

Appendix C: Sheriff Interview Questions

The core questions asked at each interview, unless already addressed, appear in bold; other questions asked if time allowed or according to the content of the rest of the interview. Prompts/follow up questions appear in italics.

1. Can you tell me the first 2 or three words that come to your mind when you think about party litigants in the civil courts?

2. How often do you encounter party litigants in civil cases?
 - a. Are they more often pursuer or defender?
 - b. Type of case?
 - c. Do you think their numbers are increasing? Why?

3. What standard of legal knowledge do you require of party litigants?
What about knowledge of the court process/procedures?

4. Do you have a standard approach when dealing with party litigants? How is it different from solicitors? *(eg, using “plain English”, explaining matters)*.
What about if both parties are unrepresented?

5. Latitude or Assistance for Party Litigants: Does the sheriff have a positive duty towards the party litigant? *What is your typical approach in these areas, and where are the lines for too much or too little?*
 - a. Legal Matters and Relevance *(eg, “looking behind” pleadings, allowing arguments not presented in the correct legal terminology)*

 - b. Procedural Matters *(eg allowing documents to be lodged late or in an incorrect format)*

 - c. Evidential Matters: *(eg questioning witnesses or giving own evidence, introducing evidence out of time)*

 - d. Delays *(allowing additional time or missing hearing)?*

- e. What factors or principles do you take into account when you are asked to exercise discretion in a case involving a party litigant? What about legal authorities?
6. In cases where a party litigant is causing difficulties (eg by pursuing a meritless case, delays, not following procedures) what can the sheriff do?
7. In your experience with party litigants, have you been asked to grant or granted any of the following order? If so, how often/how common are these orders?
- a. Decree by default? *If multiple, what is the most common reason?*
 - b. Summary decree?
 - c. An order for caution?
 - d. An award of expenses against a party litigant for a particular hearing? (*Eg, if a motion is incompetent, or for amendment procedure*)
 - e. An award of expenses to the party litigant?
 - f. A hearing under certification? *Not a peremptory diet Eg when a party fails to attend a hearing*
8. How do you interpret what a party litigant is asking for in court, if they do not make a formal motion in the usual way?
9. At what point, if any, should the Sheriff interrupt if a party litigant has strayed into irrelevant matters in court?
10. Where 1 is “completely passive” and 10 is “completely [?] active,” how would you characterise the role of the Sheriff in the Scottish civil courts? Does that number change at all in cases in which one of the parties is unrepresented?
11. Do you typically suggest that party litigants should take legal advice, or refer them to advice agencies or other bodies that may be able to help? When is it appropriate to suggest that the litigant should take advice?

12. What do you expect from opponent solicitors when the other party is unrepresented? *Should they give procedural advice, guide in court?*

13. In your experience, how well do party litigants usually communicate with their opponent during the progress of the case?

a. How does communication affect the progress of the case in court?

b. Settlement? *(Does this impact the role of the Sheriff, eg taking extra steps to see if a case can be settled?)*

14. What is the role of court staff when a litigant is not represented? *(Should they “keep them right?” How far does can this extend? Are they a “go-between” for the Sheriff and the litigant?)*

15. What, if anything, is the role of the capacity of the individual in the decision making process? *For example, if a litigant appears to be particularly well-informed and well-spoken, or on the other hand is clearly out of his or her depth?*

a. How is this assessed?

b. *Have you ever encountered a party litigant who you believed may have lacked the capacity to self-represent altogether (eg, due to mental health issues? How did you deal with this?*

16. How well do most laypeople understand the law? *Do they usually understand issues once they are explained?* What is different about the way that legal professionals approach legal principles, as compared to lay people?

17. How successfully are most party litigants able to present their case or defence? *To what extent do you think that not having a lawyer affects the ultimate outcome they achieve?*

18. What aspects of the process challenge party litigants the most?

19. How proportionate is the system currently in place in respect of party litigants? *Does it reflect a proper balance between the need for fairness and efficiency in the court, and the party litigant's access to justice?*

20. What could [should?] be done to provide party litigants with the best access to the courts possible?

21. What could [should?] be done to minimise any problems party litigants in the civil courts may cause?

22. Is there anything else you'd like to add? Or any question that I should have asked?

Appendix D: Court Staff Focus Group Questions

1. Who is present, their role and experience
2. Can you give me some of your general impressions of party litigants in the civil courts in one or two words?
3. What do you do for party litigants? Are there any additional steps you usually take in your job when you know a litigant doesn't have a solicitor? *(Besides what is prescribed in the rules/practice)*
4. Compared to represented parties, do party litigants take up more of your time? *How? (in person at the counter, dealing with docs and other matters)*
5. What is the difference between procedural and legal advice?
 - a. *How do you explain this to party litigants?*
 - b. *Do they usually understand once it is explained to them?*
 - c. *What do you do when asked for information or advice you can't provide? (eg refer to CAB?)*
6. What do party litigants usually expect from the court and court staff? *(Active duty? Keeping them right?)* Are their expectations usually realistic?
7. How well are party litigants usually able to conduct their own cases? What are their biggest challenges?
8. How "joined up" are the court staff and the sheriffs? Do the sheriffs know/understand what you do or can do for party litigants?

If time allows

Has a party litigant ever been difficult or abusive towards you? *(Show of hands? How so/What happened?)* Have you ever received thanks or positive comments?

Has a party litigant ever made a complaint about you, or a complaint to you about a colleague? *(Show of hands? What was the complaint and how was it resolved?)*

How do you usually communicate with party litigants? *(eg phone, mail, email, in person?) Follow up on face to face vs remote communication?*

Appendix E: Solicitor Interview Questions

1. Can you tell me your name and a little bit about your experience?
2. What are the first three words that come to your mind when you are thinking about party litigants in the civil courts?
3. In addition to small claims/new simple procedure, where do you encounter party litigants most often?
4. Do party litigants conduct cases in a different way from solicitors? Are there aspects of conducting litigation that they find particularly difficult?
5. What, if anything, do you do differently with a party litigant on the other side as compared to a solicitor? How do you approach matters when they are misguided about the law or make procedural errors? (Procedurally and/or between parties?)
6. How do the courts approach party litigants, as compared to represented litigants and their solicitors? What are your perceptions of any latitude or assistance they may be offered?
7. If and when courts extend latitude or assistance to party litigants, they often have to weigh this against the question of fairness or prejudice to their opponents. (Is this correct?) What are your thoughts on how courts tend to consider this?
8. Is/how is communication with party litigants different? How do you deal with this or what is the impact?
9. Do you find that your clients incur extra expense in cases involving party litigants? Where there has been a decree and/or award of expenses, are they usually able to recover the money in practice?

10. What do you think could be done to minimise the impact PLs can have on their opponents or the court?

11. Any other questions I should have asked?

Appendix F: Ethics Committee Approval Form

Application Approved
Ethics Committee for Non-Clinical Research Involving Human Subjects

Staff Research Ethics Application ☐ Postgraduate Student Research
Ethics Application ☒ x

Application Details

Application Number: 400150054

Applicant's Name: Halle Turner

Project Title: Party Litigants in the Scottish Civil Courts

Application Status: **Approved**

Start Date of Approval: 05/12/15

End Date of Approval of Research Project: 01/10/17

Please retain this notification for future reference. If you have any enquiries please email socsci-ethics@glasgow.ac.uk.

Appendix G: Consent Form for Interviewees



College of Social
Sciences

Consent Form

Title of Project: Party Litigants in the Scottish Civil Courts

Name of Researcher: Halle Turner

Supervisors: Professor Tom Mullen and Mr Stephen Bogle

I confirm that I have read and understood the Plain Language Statement/Participant Information Sheet for the above study and have had the opportunity to ask questions.

I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.

I consent / do not consent (delete as applicable) to interviews being audio-recorded. I acknowledge that copies of transcripts will be returned to participants for verification and that no direct quotes will be used without my express permission.

I acknowledge that participants will remain anonymous and will not be referred to by name in the finished work.

I understand that the data collected from this research will be stored securely with my personal details removed and agree for it to be held as set out in the Plain Language Statement.

I agree to take part in this research study ☐

I do not agree to take part in this research study ☐

Name of Participant Signature

Date

Name of Researcher Signature

.....

Date

Appendix H: Participant Information Sheet



University
of Glasgow

College of Social
Sciences

Party Litigants in the Scottish Civil Courts

Researcher: Halle Turner, PhD Candidate at the University of Glasgow
(h.turner.1@research.gla.ac.uk)

Supervisors: Professor Tom Mullen and Mr Stephen Bogle

You are being invited to take part in a research study. You have been asked to participate in this study because you hold office as a Sheriff [/because of your professional as a solicitor/because you are a member of staff in the Sheriff Clerk's office]. Before you decide it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask us if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part.

Thank you for reading this.

The purpose of this research is to gain a better understanding of unrepresented or "party" litigants in the Scottish civil courts. Participation in the study is voluntary and will entail an interview of approximately one hour [half an hour/attending a focus group from approximately half an hour]. [Focus group only: Up to five other members of staff in similar roles (including civil counter staff and clerks of court) will also be present at the focus group.] You may withdraw from participating in this study at any time. With your permission, the interview will be recorded.

Your name and any personal details will not appear in the study once it has been completed. Identifying details for each participant will be stored electronically with password protection.

Please note that assurances on confidentiality will be strictly adhered to unless evidence of wrongdoing or potential harm is uncovered. In such cases the University may be obliged to contact relevant statutory bodies/agencies.

The data collected will appear in a PhD thesis. Any direct quotes from participants will be used only with express permission. The personal information of participants, including names and any identifying information, will be destroyed upon completion of the project. The research data itself will be held for 10 years after the completion of the project.

This research is funded in part by a grant from the Clark Foundation for Legal Education.

This project has been considered and approved by the College of Social Sciences Research Ethics Committee

Further information and to make any complaint, please contact the College of Social Sciences Ethics Officer, **Dr Muir Houston**, email: Muir.Houston@glasgow.ac.uk

Appendix I: Interview Coding

Sheriffs/Solicitors

Adversarial/Inquisitorial
 Appeals
 Assistance
 Communication
 Court Staff/Assistance
 Disruption/Aggression
 Emotional Needs of PLs
 Expectations
 Expenses
 Evidence
 Formality
 Gatekeeping
 Knowledge Level of PLs
 Language/Plain Language
 Latitude—Legal/Relevance
 Latitude--Principles
 Latitude—Procedural
 Latitude—Evidential
 Relevance
 Relevance/Procedural
 Role of Court
 Serial or Vexatious Litigants
 Settlement
 Solicitors
 Suggestions
 Summary Disposal/Caution
 Time Issues/Lack of Time
 Typologies
 Typologies—“Good” and “Bad” PLs

Court Staff

Active vs Passive/Expectations

Advice--Accountability
Advice Uptake (or lack thereof)
Appeals
Availability/Accessibility of Advice
Difficult or Aggressive Litigants
Fees
Language/Plain Language
Legal Procedural Divide
L-P Deviations
Points of Access and Gatekeeping
Post Decree
Referral [*to other agencies*]
Serial or Vexatious Litigants
Solicitors
Time/Lack of Time

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Note: all websites are as accessed 1 November 2017

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