Aiding the Plight of Self Represented Litigants: Admission to the Magistrates Court

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Although parties to civil litigation have the right to appear personally to present their case, the occasions when this right is exercised have increased and the resultant effect upon the judicial system has become significant. This paper examines the reasons why persons become self-represented, the difficulties they may face and the issues they may cause. The paper considers the concept that future practitioners should have the option of being admitted to the Magistrates Court before being admitted to the Supreme Court. The result would be the provision of affordable representation as well as the opportunity for junior practitioners to gain experience and develop litigation skills. The overall outcome would be the attainment of justice for those who otherwise would be unable to use the court system.

1. Introduction

This paper examines the proposition that future legal practitioners should have the option of being admitted to the lower jurisdiction of the Magistrates Court[1] prior to being admitted to the Supreme Court. A future practitioner who has an opportunity to gain experience and develop his or her skills in a more forgiving jurisdiction could become a better practitioner. Also by allowing parties[2] engaging in civil litigation within the Magistrates Court the opportunity to seek advice and representation at a lower cost, matters could be processed more effectively. At present, as self-represented litigants are not guided by any professional ethical obligations,[3] they have no incentive to conduct their matters efficiently.

While the ultimate aim of courts is the attainment of justice, [4] the legal system has become overly complex.[5] Whereas persons have the right to represent themselves, on several occasions, courts have commented on their lack of ability and the problems they cause. Justice Davies remarked:

> The question of how to cope with [the plight of the unrepresented litigant] is the greatest single challenge for the civil justice system at the present time … cases in which one or more of the litigants is self-represented generally take much longer both in preparation and court time and require considerable patience and interpersonal skills from registry staff and judges.[6]

2. The Legal Framework of Western Australia

The Western Australian civil justice system is an adversarial one where it is the role and responsibility of each party to put their case before the court in the best manner possible. In

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[1] To become a 'Magistrates Court Practitioner.'

[2] Who would have otherwise elected to be self-represented.

[3] For example, Disclosure to the court, to avoid the abuse of the court process, to not corrupt the administration of justice and to conduct cases efficiently and expeditiously. See Justice Nicholson, 'Australian Experience with Self-represented Litigants' (2003) 77 *Australian Law Journal* 820 or Justice David Ipp 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63 [65].

[4] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 [154] (Dawson, Gaudron and McHugh JJ).

[5] Chief Justice Wayne Martin, 'Improving Access to Justice through the Procedures, Structures & Administration of the Courts' (Speech delivered at the Australian Lawyers Alliance State Conference, Novotel Langley Hotel Perth, 21 August 2009).

[6] Justice G L Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (2003) 12 *Journal of Judicial Administration* 155, and *Cachia v Hanes* (1994) 179 CLR 403 [415] (Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

the ordinary course of civil litigation, it is considered that a party[7] to proceedings should have the right to represent their own case.[8] The court relies[9] upon lawyers[10] to 'manage their client's case and present it in a manner that is articulate, succinct and fair to the other party.'[11]

The Magistrates Court, although the lowest jurisdiction in Western Australia, is extremely important. As Chief Justice Wayne Martin recently noted, magistrates make up about half of the judiciary of the State and more Western Australians come into contact with the Magistrates Court than with the other courts of the State.[12]

The *Magistrates Court (Civil Proceedings) Act 2004*, section 44(4) allows the magistrate to use judicial discretion to regulate proceedings[13] and supervise[14] the conduct of those appearing before the Court. Leave may be granted for non-lawyers to appear on behalf of a party in exceptional circumstances.[15] The term 'exceptional circumstances' creates a presumption against the proposition and places the onus on the party seeking leave to show that exceptional circumstances exist.[16] The Act, however, is silent on the criteria that establish exceptional circumstances. Initiating a civil claim relying on a successful leave application therefore creates a significant risk to the party.

Persons may become a self-represented litigant due to[17]:

- Jurisdiction (Statutory);
- Access to Legal Representation (Financial Limitations);
- Lawyers refusing to act (Lawyers Choice);[18]
- Decision (Personal Choice).

Often the cost of seeking legal advice at the current rates[19] outweighs the value of such advice in this jurisdiction depending on the size of the claim. Chief Justice Wayne Martin

[7] Unless the party has been ruled as vexatious under the *Vexatious Proceedings Restriction Act 2002* (WA).
[8] *Collins (aka Hass) v R* (1975) 133 CLR 120 [120] (Barwick CJ, Stephen, Mason and Jacobs JJ), *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 [438] (Lord Wilberforce) regarding the principle of disclosure of documents. *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 44.
[9] Justice David Ipp 'Lawyers' Duties to the Court' (1998) *114 Law Quarterly Review* 63.
[10] *McInnes v R* (1979) 143 CLR 575 [592-593] (Murphy J). Murphy J referring to the words of Sutherland J in *Powell v. Alabama* after referring to the Blackstone-Coke Controversy.
[11] Catherine Cashen, 'Legal Aid and Unrepresented Litigants: A Registrar's Perspective by Registrar Catherine Cashen, Family Court of Australia' (Paper presented at Third National Conference Family Court of Australia, Hotel Sofitel Melbourne, 20 - 24 October 1998).
[12] Chief Justice Wayne Martin , 'Magistrates' Society Dinner Speech' (Speech delivered at the Magistrates' Society Dinner, Acqua Viva Restaurant Nedlands, 16 November 2012).
[13] *O'Toole v Scott* [1965] AC 939.
[14] *Meyers v Elman* [1940] AC 282 [319] (Lord Wright).
[15] *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 44.
[16] M*cKeon v Knapton* [2009] WADC 170 [158] (Sweeney DCJ), *AWA v Independent News Auckland Ltd* [1996] 2 NZLR 184 [186] (Hammond J), *R v Kelly (Attorney-General's Reference No 53 of 1998)* [1999] 2 All ER 13 [20] (Lord Bingham).
[17] From: Department of the Attorney General, *Equality Before the Law Bench Book (WA)* (Department of the Attorney General 2009) pt 8.1.4.
[18] Some parties are unable to speak English or to communicate well or sufficiently logically, or have been told by lawyers that their case has no merit, but believe that it does have merit or alternatively been considered by lawyers to be in some way too difficult.
[19] See *Legal Practitioners (Magistrates Court) (Civil) Determination 2012.*

stated in bold terms that the hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians.[20]

The *Bench Book*[21] provides a list of considerable barriers that self-represented litigants may face in presenting their case, which includes:

1. Lack of preparation;
2. Lack of legal skills and knowledge of the substantive law, procedural requirements and legal terminology;
3. Lack of advocacy skills necessary to prove their case;[22]
4. Lack of objectivity and emotional detachment from the issue which also results in an increased chance that the litigation will be frivolous or vexatious.

The problems caused by self-represented litigants extend beyond the court room to the registry office[23] and judge's chambers. Self-represented litigants:

1. Often lodge irrelevant material;
2. Fail to understand procedural issues or follow advice in relation to them;
3. Fail to understand the distinction between legal advice and advice on progress.

Justice Hall commented on this matter recently:

> The appellant was sent a copy of the judgment …. Over the following five hours she sent 20 emails to my Associate. …..they contained the appellant's views of the judgment and a tirade of personal abuse expressed in the foulest possible language...[24]

3. The Concept

Currently law students and pre-admitted law graduates are not permitted to appear in the Magistrates Court unless leave is sought.[25] Although they may be working for a law firm as a lay associate, they are still unable to appear in front of the Court.[26] Furthermore if the leave application is successful, that person is technically not permitted to seek payment for the court appearance.[27]

The proposition suggested here is that future legal practitioners should have the option of being admitted to the Magistrates Court by the regulating body[28] prior to being admitted as a full practitioner of the Supreme Court. The effect of this would be the provision of a cheaper legal service, which is more accessible to clients whilst assisting the Court. The use of a

[20] Chief Justice Wayne Martin, 'Creating a Just Future by Improving Access to Justice' (Speech delivered at the Community Legal Centres Association WA Annual Conference 2012, Northbridge, 24 October 2012).
[21] Department of the Attorney General, *Equality before the Law Bench Book (WA)* (Department of the Attorney General 2009) pt 8.1.5.
[22] See *Neil v Nott* (1994) 68 ALJR 509 [511]. A frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy.
[23] See Justice Nicholson, 'Australian Experience with Self-represented Litigants' (2003) 77 *Australian Law Journal* 820.
[24] *Van Lieshout v City of Fremantle* [No 2] [2013] WASC 176 (S) [2] (Hall J).
[25] *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 44.
[26] *Legal Profession Act 2008* (WA) s12.
[27] *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 44(4).
[28] The *Legal Profession Act* has no intention of protecting the financial interests of the legal profession as an entity. It is however interested in ensuring community safety by properly regulating legal practice to ensure tight control of its integrity and professionalism. See Western Australia, *Hansard*, Assembly, 25 February 2003, 4592b – 4601 (S. E Walker).

semi-qualified adviser/advocate appears a better option for a client than seeking no advice at all.

4. The Benefits of an Agent in Litigation

In order to replace what is lost when a lawyer does not represent a litigant, two options exist:

1. Allow the litigant to use an agent;
2. Enrich the litigant's knowledge and skills through the provision of information and training.

There are three areas of weakness that the self-represented litigant must remedy: namely knowledge and preparation, advocacy and the issue of objectivity and emotional detachment.

4.1 Knowledge and Preparation (Pre-Trial)

Self-represented litigants lack the legal skills and knowledge of the substantive law, procedural requirements and legal terminology in order to manage and prepare their case pre-trial.

Addressing the issue of providing information to self- represented litigants,[29] knowledge of the law and the civil procedure processes appears far too complex to put into a relevant document that can be absorbed and comprehended by a lay person and read in a short period of time.

The book *How to Run Your Own Court Case*[30] professes to provide a 'Practical guide to representing yourself in Australian courts and tribunals.' However much of the information in it can only be understood by someone with a legal background and reading the book does not improve a person's litigation skills.

Although a 'Magistrates Court Practitioner' may lack knowledge in comparison to a Supreme Court Practitioner, she/he should have greater knowledge than the lay self-represented litigant and be in a better position to know what is required during the preparation phase and should be in a better position to consider and tackle the issues that will need to be addressed.

4.2 Advocacy

Self-represented litigants often lack the skills to present and prove their case adequately and to behave in a suitable manner during court sittings. Justice Hall recently criticised the advocacy style of such a litigant:

> The appellant was not assisted by her own advocacy. Her submissions consisted largely of political rhetoric and were short on legal substance. She sought to support her arguments by extensive references to the Bible. She confidently expressed her own views of the law and scorned all contrary views. She was immoderate both in tone and content. She made wild, unsubstantiated and scandalous allegations of dishonesty and corruption. She attempted to bully the court by threatening to publish her allegations on the internet. She was discourteous both to the court and to the representatives of the respondent. None of this has deflected me from the task of determining whether this appeal should succeed.[31]

[29] Chief Justice Wayne Martin , 'Improving Access to Justice through the Procedures, Structures & Administration of the Courts' (Speech delivered at the Australian Lawyers Alliance State Conference, Novotel Langley Hotel Perth, 21 August 2009).

[30] Nadine Behan, *How to Run Your Own Court Case [Non Criminal Cases]* (University of New South Wales Press, 2009).

[31] *Van Lieshout v City of Fremantle* [No 2] [2013] WASC 176 [32] (Hall J).

The learning curve of advocacy is a continuum. The law education programs in this state have seen a significant shift in the development of advocacy education programs.[32] By utilising the Magistrates Court practitioner's acquired skills, the case could be heard more efficiently, therefore freeing up the Court's limited resources.

4.3 Lack of Objectivity and Emotional Detachment

As Justice Murphy noted in *McInnes v R:*

> . . . an unrepresented accused is always at a disadvantage not merely because they might lack sufficient knowledge or skills but because they cannot assess their case with the same dispassionate objectivity as the Crown.[33]

The party's ability to judge the prejudicial and probative value of evidence is a significant issue that must be tackled. It is clear that litigation is a stressful occurrence for the parties in litigation and such stress often affects a party's judgement and performance when drafting documents or analysing evidence. The best way to remedy this issue is to allow the litigant to use an advocate as it is against human nature to emotionally detach oneself from a traumatic event.

The party's ability to seek the perspective of an independent person, who is not emotionally attached to the issue, is highly significant. The concept of legal privilege is a concept upon which the profession depends and legal privilege still extends to those who do not have a practicing certificate as it is based on the relationship between the two parties.[34]

5. Proposal

The National Competition Policy Review (1998) and the Legal Profession Advisory Council (1999) believe that 'non-lawyers should be licensed to perform legal work.' [35] In 2000, the Legal Profession Advisory Council stated that it would support the reservation of legal work to qualified lawyers as being in the public interest, but went on to say that they believed that legal work or services by unqualified people should also be properly regulated.[36]

5.1 Admission

The enforcement system of legal ethics is spread between regulatory bodies and the courts. To regulate admission to the Magistrates Court as proposed, a person would have to satisfy the Legal Practice Board that they meet certain criteria.[37] Once admitted to the Magistrates Court, they would have a paramount duty to the Court as an officer of that Court.[38]

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[32] Such as those of the College of Law. Mooting education programs have also been established at a number of Universities including Murdoch University, the University of Western Australia and Notre Dame University. There are also a number of mooting competitions being run by the student law school societies.

[33] *McInnes v R* (1979) 143 CLR 575 [590] (Murphy J).

[34] See *Commonwealth v Vance* (2005) 158 ACTR 47 regarding employees of the Defence Department.

[35] Steve Mark - Legal Services Commissioner (NSW) 'What is Legal Work? - A Regulators View' (Paper presented at the LAWASIA Down Under 2005 Conference, Queensland 20 -24 March 2005).

[36] Ibid.

[37] eg. to be of good fame and character, to be competent, demonstrate that they recognise an ethical dimension of their work and the use of legal privilege and understand that they are subject to sanctions for unsatisfactory conduct.

[38] Justice Kenneth Martin, 'Between the Devil and the Deep Blue Sea: Conflict between the Duty to the Client and the Court' (Speech delivered at the Bar Association of Queensland Annual Conference, Queensland, 4 March 2012).

5.2 Statutory Improvement

In any case, the *Magistrates Court (Civil Proceedings) Act 2004*, section 44 should be updated to provide specifics of what the criteria are when seeking leave. A suggested wording could be:

> Leave may be granted only if:
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> (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
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> (b) it would be unfair not to allow the person to be represented because the person is unable to represent themself effectively; or
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> (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.[39]

This is aligned to the Court's duty to ensure that cases are dealt with efficiently, economically and expeditiously and that the Court's judicial and administrative resources are used as efficiently as possible.[40]

6. Conclusion

The legal environment has changed significantly whereby admitted lawyers are generally no longer involved in small matters. It is these small matters that formerly allowed young lawyers the opportunity to develop their litigation skills. The suggestion that law students near the end of their courses be able to practise in the Magistrates Court before being admitted to practise in a higher court appears sensible and ought to be examined.

Currently, Magistrates Court resources in particular are being wasted by self-represented litigants. One of the barriers to the provision of justice is that many people simply cannot access suitable legal advice in order to use the court system. It would appear that the provision of cheaper or free legal advice may resolve this issue. While many firms offer pro-bono services, in reality pro-bono accounts are simply offset by paying clients and such services do not meet the growing demand for legal services, especially in the Magistrates Courts.

If a person were admitted to the Magistrates Court Roll, they could also be paid. While the concept of payment may complicate the issue, it may be possible that Magistrates Court practitioners only receive payment by donation or according to a considerably reduced scale of fees. The amount of resources currently being wasted on self-represented litigants appears to be so great that the ability or not of a Magistrates Court practitioner to receive benefits or remuneration should not be the focus of the proposal.

As Chief Justice Sir Gerard Brennan stated:

> Members of the legal profession must keep their minds open to the possibility that other changes, urged today, will in due course come to be seen as beneficial to the ultimate objective of practicing lawyers, which is to ensure that as many people as possible secure accurate advice and competent representation.[41]

[39] From *Fair Work Act 2009* (CTH) s 596.
[40] *Magistrates Court (Civil Proceedings) Act 2004* s 13.
[41] Chief Justice Sir Gerard Brennan, 'Occasional Address to Law Graduation Ceremony' (Speech delivered at the Law Graduation Ceremony, University of Queensland, 4 June 1996).