DO-IT-YOURSELF LAW:
Access to justice and the challenge of self-representation

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Introduction

On 18 February 2008, in divorce proceedings in the High Court in London Ms Heather Mills (wife of Sir Paul McCartney, former model and TV personality) was awarded £24.3 million of Sir Paul McCartney's fortune as compared with the £125 million that she originally claimed. During the six days of the High Court hearing Ms Mills represented herself. The parties wrangled over the extent of Sir Paul's fortune, how much money Ms Mills had brought into the relationship and who had and hadn't behaved unreasonably. At the end of the hearing, Mr Justice Bennett concluded that Sir Paul had been a truthful witness who had shown understandable signs of frustration during the course of the proceedings, while Ms Mills was prone to exaggeration and make-belief. He said: "The husband's evidence was, in my judgment, balanced. He expressed himself moderately though at times with justifiable irritation, if not anger. He was consistent, accurate and honest. But I regret to have to say I cannot say the same about the wife's evidence. Having watched and listened to her give evidence, having studied the documents, and having given in her favour every allowance for the enormous strain she must have been under (and in conducting her own case) I am driven to the conclusion that much of her evidence, both written and oral, was not just inconsistent and inaccurate but also less than candid. Overall she was a less than impressive witness."

At the close of the proceedings, Ms Mills walked calmly across the court and poured a jug of water over the head of Sir Paul's solicitor, divorce law specialist Fiona Shakleton (now Baroness Shakleton). After the hearing, on the steps of the Royal Courts of Justice, Heather Mills gave an impromptu press conference. Scornful of the process she had just been through and of the legal system itself, she declared that she regretted nothing about having represented herself and encouraged others to do the same: "Do it yourself, be a litigant in person - the courts don't want me to say this.... The judge already had his whole statement written up before we did our submissions. He just read it out. These people are in a club. They want to stay together. They don't want to see a litigant in person do well…. What I'd like to say, being a campaigning girl, is…..if you're going through a divorce …you can be a litigant in person. It's not easy, but just make sure you do all your research, save yourselves a fortune. …Do it yourself, be a litigant in person, the power of one - the Law Courts do not want me to say this."[1] One of the reporters on the steps asked: 'Do you regret representing yourself?' Ms Mills replied: 'No, I don't regret representing myself. I'm just glad it's over.'

Heather Mills was an unusually high-visibility example of a litigant in person (or 'self-representing litigants' [SRL]), but at another level her situation and approach was not exceptional and to some extent mundane: a warring husband and wife; entrenched differences of view about the division of

[1] Although Heather Mills represented herself at the hearing, she had previously been advised by the law firm, Mishcon de Reya. She said the move had saved her £600,000. She didn't want to pay this and thought that by representing herself she would save the cost of trial.

property; ill-feeling; taunts and accusations being thrown around. She was merely one very public instance of a long-standing phenomenon in English courts and tribunals – that of self-representing litigants. We were not particularly surprised by the case and although Heather Mills' decision to represent herself was noted, it was hardly remarkable. However, it is clear that the experience was not wholly positive for her. She did not come across well in court and did not provide the court with the evidence it needed. In the end, she was awarded far less than she had claimed or might have received.

Other high profile examples include the notorious 'McLibel' case in which McDonald's issued libel writs against 5 Green Peace activists after they published leaflets in 1989 accusing McDonald's of encouraging litter, mistreating animals and workers, and destroying rain forests. The activists were told to retract and apologise or prove in court that the claims were true. Three of the five crumpled and retracted, but Helen Steel and David Morris decided to defend themselves. Without legal aid (excluded from defamation cases) and with no personal resources they conducted their defence largely without legal assistance. The full libel trial started in the High Court in London in 1994. Transcripts of the trial ran to 20,000 pages; there were about 40,000 pages of documentary evidence and some 130 witnesses gave evidence. On 13 March 1995, 'McLibel' became the longest ever British libel trial; on 11 December 1995, it became the longest civil case in British history and on 1 November 1996, it became the longest trial of any kind in English history. The trial ended in 1997 after 313 days. Steel and Morris were ordered to pay McDonald's £40,000 which they have never done and McDonald's paid a legal bill somewhere in the order of £10m. The cost to the taxpayer has not been estimated.

We are used to hearing about such cases when, from time to time, unusual examples have hit the headlines. But there is a more ordinary and serious side to the issue of self-representation that has been attracting increasing attention in recent years in England and Wales and jurisdictions around the world from Hong Kong and Australia to the USA and Canada. In England & Wales (note that I do not include Scotland here) this concern is set to intensify from April 2013 when irrevocable changes to our 60 year old legal aid scheme come into force under the snappily named Legal Aid and Sentencing of Offenders Act 2012 (at least they didn't include Access to Justice in the title which is the recent practice for anything designed to inhibit or reduce Access to Justice!). Anticipating this change, the Civil Justice Council recently produced a thoughtful report entitled *Access to Justice for Litigants in Person* which warns of an influx of self-representing parties to the courts unable to find advice and advocacy for their disputes. While the tone of the report is resigned and realistic about future funding for advice and representation for low income groups (and having been a member of it I can't criticise), in providing a menu of practical measures that might be taken to ameliorate the situation, it clearly signalled the complexities of the problem and the considerable access to justice challenge posed by self-representing parties in a common law adversarial system. One year on and with only months before the Legal Aid changes take effect, this seems like a timely moment to discuss issues that are worthy of some serious reflection. I have been interested in self-representing parties for a long time. It is 25 years since I carried out research on the impact of representation in tribunal cases and since then I have spent a great deal of time in courts and tribunals observing judges, and watching and talking to parties in court and tribunal waiting rooms.

But serious reflection and debate about SRLs is hindered by a surprising shortage of the most basic evidence. We lack reliable information that would help to track how many SRLs appear in different courts and tribunals; in which kinds of cases; whether they are most often claimants or defendants; and whether they are one-off or repeat litigants. As a result, the information gap is filled with anecdote and atrocity stories. Most judges, prompted to discuss the challenge of self-representing parties, will recount wearily tales of tenacious repeat litigants who turn up in court with plastic bags full of documents written in green ink. Too frequently, these experiences dominate discussion of what is a multifaceted issue. But, as I hope to demonstrate this evening, it is critical that we understand the phenomenon of self-representation and that we properly distinguish different categories self-representing parties when we are considering how to facilitate access to justice for those who genuinely need it and when we are worrying about the necessity to control or block behaviour that has crossed a line between legitimate and acceptable use of legal proceedings into dysfunctional abuse of legal process. In doing so I will discuss what we do know about SRLs, the challenges they face, the likely impact of legal aid changes, and what can realistically be done to improve effective access to justice for those who are unable to secure legal advice and representation.

The Right to Self-Representation

To start at the beginning, we need to establish how parties come to represent themselves[2] and why? SRLs are generally defined as people who conduct legal proceedings either wholly or in part without legal advice. Although SRLs often tend to be lumped together, there are many different varieties and configurations and many motivations for initiating or defending proceedings without advice and/or representation. For example, individual citizens may self-represent, but so do small and medium sized businesses. And self-representing parties include those who are bringing actions as a matter of choice and those who are the subject of legal action being taken against them.

The entitlement of citizens to proceed in this way stems from a relatively long-standing principle of English Law [contained in Acts of Parliament] that adult citizens involved in legal proceedings have an unqualified right to represent themselves during those proceedings and, if necessary, in court[3]. Everyone is entitled to litigate their own case in person. There is no formal requirement that litigants obtain legal representation and the court has no power to impose it on them. Regardless of whether the litigant has the financial means to hire a lawyer, or the capacity to conduct litigation effectively, he or she is entitled to proceed in person. Although this principle operates in other common law

[2] This section draws heavily on an excellent unpublished PhD thesis by Rabea Assy entitled *The Right to Litigate in Person*, University College Oxford, 2011. See also Assy's article, 'Revisiting the right to self-representation in civil proceedings', *Civil Justice Quarterly,* 2011.

[3] See the Legal Services Act 2007 Schedule 3 paras 1 and 2 (replacing ss 27 and 28 of the Courts and Legal Service Act 1990). Corporations can now appear through an authorised employee, but they are required to obtain judicial permission: CPR 39.6 (in the past, however, they were required to act through legal representation only; see *Charles P Kinnel & Co Ltd v Harding Wace & Co* [1918] 1 KB 405). This thesis describes the right to self-representation as 'unqualified', 'absolute' or 'near absolute' in the sense that a litigant has unfettered freedom to choose whether to proceed in person or through counsel, and that such freedom is afforded in all cases, irrespective of complexity, and to all litigants, irrespective of professional competence. Children and other protected parties, however, must have a litigation friend to conduct proceedings on their behalf: CPR Pt 21.

jurisdictions[4] - and in England we rather take it as axiomatic - it is not the case everywhere. For example, in Germany there is no right to self-representation. Instead, there is a contrary requirement that parties to legal proceedings in anything other than the most simple courts must be legally represented. This is an interesting point of contrast, which might be worth exploring further.[5]

The right to self-representation is so familiar to us that we rarely reflect on it, although we might intuit its purpose. 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, so that a person going to court has the right to choose whether to address a court directly in order to progress or defend their case rather than to have an intermediary put the case for them. More usually, however, we would be likely to say that the right to self-represent is about access to justice. Indeed, we might think that the right to self-representation is the ultimate expression of access to justice; that every citizen – no matter what their means or position in society - has the right of access to the court and to be heard by a judge in pursuit or defence of their legal rights. We might think that this right to self-representation is a positive feature of our justice system and something that supports the operation of the rule of law. As Lord Diplock expressed the right in the Bremer case in 1981[6]:

> "Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access…. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice."

But this access to justice argument is problematic requiring some scrutiny. The right to self-representation offers theoretical access to the courts for litigants which may be illusory and, at the same time, the right generates potentially negative effects and costs. So the flip side of the absolute "right to self-representation" is that it is difficult to prevent claimants and defendants from persisting unrepresented with actions, no matter how complex the proceedings nor how much trouble their choice might create for themselves, their opponent, the court and the justice system in general. In discussing the phenomenon of self-representation, then, we need to consider both the access to justice implications and the costs to justice implications. This requires a little more investigation and analysis of the issues.

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[4] In the United States, a right to self-representation is guaranteed in Federal legislation, namely in 28 USC s 1654, which reproduces section 35 of the Judiciary Act of 1789. Whether such a right is constitutional remains unclear. See the discussion in chapter 2. In Hong Kong, a right to self-representation is guaranteed by Rules of the High Court Order 5 rule 6.

[5] See Section 78 of the German Code of Civil Procedure (ZPO): "78(1) The parties to disputes before the regional courts (Landgerichte, LG) and the higher regional courts (Oberlandesgerichte, OLG) must be represented by an attorney. Where, based on section 8 of the Introductory Law of the Courts Constitution Act (Einführungsgesetz zum Gerichtsverfassungsgesetz), a Land has established a supreme court for its territory, the parties to a dispute must likewise be represented by an attorney before this court as well. In proceedings before the Federal Court of Justice (Bundesgerichtshof, BGH), the parties to the dispute must be represented by an attorney admitted to practice before said court. See also Marianne Roth, 'Towards procedural economy: reduction of duration and costs of civil litigation in Germany, *Civil Justice Quarterly*, 2001, p102.

[6] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*, [1981] AC 909, 977(Lord Diplock) ('*Bremer*').

Who are the SRLs?

So a preliminary question is: Who are the self-representing litigants and why are they self-representing? As I have already remarked, despite longstanding bubbling concern about increasing numbers of unrepresented litigants in the courts there is a surprisingly slim corpus of research in the UK (or indeed elsewhere) that helps us understand their prevalence, motivations, objectives or reasons for appearing without representation. But for the purposes of this evening's discussion it is important to distinguish two broad categories of SRLs - although it has to be said that the line between the two categories is porous and an SRL who starts in the first category may gradually transform into a member of the second.

The first category - and in the imagination of most people who are not judges the paradigm example of a self-representing party - is the one-off litigant in person: 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. Typically they may have tried and been unable to secure advice and or representation; or they may have had some advice and not been able to afford representation; or they may have had access to legal aid which is now exhausted. The matter is important enough for them to take the step of appearing in legal proceedings without legal support. This is the category that I want to concentrate on this evening and I will come back to it shortly. But before doing so it is necessary to consider the second very difficult category which is probably relatively small, but because of the challenges it presents to our legal system, distracts minds and discussion, and rather overwhelms the attention of the judiciary.

Vexatious litigants

This second broad category probably comprises a mixture of serial, persistent and ultimately what is termed 'vexatious litigants' involving repeated or relentless litigation that is largely or ultimately without merit. The phenomenon of vexatious or troublesome litigation is not new. As one commentator remarks 'the courts have battled with both the ingenuity and pertinacity of such litigants' since Elizabethan times when it was found necessary to take measures to "avoid trifling and frivolous suits in law in Her Majesties court in Westminster."[7]

Although legal scholars have not devoted much attention to the topic, a few psychiatrists have spent some time analysing the behaviour of vexatious or persistent litigants. A relatively recent article[8] describes different varieties of "querulous" behaviour (from the Latin for plaintive murmuring) – involving the unusually persistent pursuit of a personal grievance in a manner seriously damaging to the individual's economic, social, and personal interests, and disruptive to the functioning of the courts and other agencies attempting to resolve the claims. Querulous litigants comprise three distinct categories which present with a relatively common constellation of behaviours that may, or MAY NOT be manifestations of mental disorder. These are: unusually persistent complainers; indefatigable litigators; and vexatious litigants.

[7] Simon Smith. (1989) 'Vexatious Litigants and their Judicial Control–The Victorian Experience', *Monash University Law Review,* 15: 48–67, p 49, quoting Holdsworth.

[8] Paul E. Mullen and Grant Lester, 'Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour, *Behavioral Sciences and the Law*, 24: 333–349 (2006)

Reviewing individuals referred to their clinics – evidently extreme examples of all categories – the authors found that those who used the courts extensively often appeared as unrepresented litigants because they had exhausted their funds or the patience of lawyers, and sometimes because they believed that nobody else could be trusted to properly present their case. A common pattern was an individual who had been the victim of some injustice, but was ultimately led into a devastating social decline by the quest for justice – to right the wrong done to them. The distinction between querulous and difficult people is that *difficult* people will pursue claims filled with a sense of being victimized and refuse to contemplate any but their own version of events - but will, in the end, settle for the best deal they can extract. Querulousness, on the other hand, involves not just persistence, but a totally disproportionate investment of time and resources in grievances that grow steadily from the mundane to the grandiose, and whose settlement requires not just apology, reparation, and/or compensation but retribution and personal vindication. To this extent they will inevitably be frustrated because they are seeking remedies that the courts are unable to offer. In trying to understand how apparently normal people become querulous litigants, it is suggested that people have different vulnerabilities. Some people with low pre-existing vulnerability may, because of some life event and the severity of the provocation, be precipitated into querulousness while, at the other extreme, are those where querulousness is imminent and requires only a modest stimulus to initiate. Before becoming embroiled in the pursuit of grievances many of the cases studied for the research involved people who were functioning individuals, with families and friends and without obvious antisocial traits. They did, however, share some characteristics that potentially made them vulnerable to querulousness: personalities with obsessional traits, self-absorption, and more than the usual levels of sensitivity and self-reference. Some had limited social networks, were in marriages lacking intimacy, and were people who felt their true abilities had never been adequately recognized. In sum, "rigid, disappointed people short on trust, and long on self-importance."

The Personal Support Unit in the Royal Courts of Justice which provides assistance to unrepresented parties estimates that around 1/3 of its 3000 annual caseload of clients have some form of mental health issue.[9] We cannot know what proportion of people demonstrating abnormal behaviour has been driven to this state by litigation. But whether abnormally persistent or vexatious litigants should have our sympathy or opprobrium, it cannot be denied that they present a significant challenge to the courts and place a strain on judicial and court resources.[10]

Since the mid-nineteenth century the courts have taken active steps to restrain various types of activities regarded as repetitive, frivolous, without merit, or pernicious.[11] The first legislation to control vexatious litigants was the Vexatious Actions Act 1896. It is generally argued[12] that the genesis of that Act can be traced back to the activities of Mr Alexander Chaffers who over a period of some 30 years filed 48 proceedings against a number of leading people--including the Prince of Wales, the Archbishop of Canterbury, the Speaker of the House of Commons, Lord Chancellors and

[9] PSU Annual Report for 2010-11.

[10] For a sympathetic reading of vexatious litigants and a rather tenuous suggestion that SRLs from minority ethnic backgrounds are disproportionately classified as vexatious, see Didi Herman, 'Hopeless Cases: Race, Racism And The 'Vexatious Litigant'', *International Journal of Law in Context*, (2012), 8:1 pp. 27–46.

[11] Moorhead, R. (2003) 'Access or Aggravation: Litigants in Person, McKenzie Friends and Lay Representation', *Civil Justice Quarterly* 22: 133–55.

[12] Michael Taggart, 'Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896', 2004, *Cambridge Law Journal*, 656.

many judges. Apparently he was only successful on one occasion. Costs were regularly awarded against him when he lost, but he never paid a penny. The determined Mr Chaffers was the first person declared habitually vexatious under the Act the result being that he lost the right to start future litigation without judicial permission. The Act deemed the conduct of Mr Chaffers and his like to be an abuse of process which caused a waste of the time and resources of the courts, as well as potential harm to the subjects of his attentions. [An account of his behaviour at the start of his career demonstrates clearly early signs of querulous tendencies.[13]] This legislation has been exported around the world.

Today, legal behaviour judged vexatious continues to be regulated by common law and statute. A person defined as vexatious will be prevented from issuing proceedings without leave of the court. The Attorney General has the power[14] to apply to the High Court for an order to restrict a person who repeatedly makes court applications which the court holds to be without merit (normally at least five or six). [Two judges including one from the Court of Appeal hear applications. Such orders may be either for a specified period of time or indefinite, and may apply to civil proceedings, criminal proceedings or both.]

It has been suggested that changes to civil procedure since the Woolf reforms in 1999 have made it easier for litigants to harry the courts with suits that have little merit. Certainly, the number of vexatious litigants is rising rapidly as, we suspect, is the number of litigants in person. The list of those declared habitually vexatious in the UK (published by the Ministry of Justice) currently has nearly 200 names (190). The earliest listed name was in 1955 and the most recent was Simon Edwards in 2010. But almost one-third (58) have been listed since 2000. [Vast majority are men] In that year, in a case concerning the fallout from relationship breakdown and contact issues, Lord Bingham defined vexatious litigation and distinguished it from habitual and persistent litigation.[15] He said the hallmark of vexatious proceedings, is that it "has little or no basis in law; that whatever the intention of the proceeding, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant…. The hallmark of persistent and habitual litigious activity by contrast seems to be that "the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action… automatically challenges every adverse decision on appeal; and…refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop.'[16]

There has been particular concern at the rise in SRLs and habitual litigants turning up in the Court of Appeal, and this dates back at least to the mid-1990s.[17] In 2004 the Master of the Rolls reported that there had been a *"significant increase of obsessive litigants determined to leave no procedural*

[13] Ibid
[14] Section 42 of the Senior Courts Act 1981 (previously the Supreme Court Act)
[15] AG v Barker [2000] 1 FLR 759
[16] AG v. Barker [2000] 1FLR 759, para. 19-22.
[17] A special working group on Litigants in Person in the Court of Appeal published a report in 1995 that led to greater support being provided by the RCJ CAB. Otton, Lord Justice (1995), *Interim Report Of The Working Party Established by the Judges' Council into Litigants in Person in The Royal Courts of Justice London* (RCJ, London).

stone unturned, regardless of whether they have any arguable ground of appeal. Nearly 40% of all who apply for permission to appeal are litigants in person, of whom only one tenth can demonstrate that they have arguable grounds of appeal. Yet each of them is entitled to an oral permission hearing. Each hearing takes about half an hour."

After the case of Bhamjee in 2003[18] (involving a litigant who had made repeated applications to the court) the Court of Appeal experimented with a new procedure for identifying and blocking PTAs deemed to be Totally Without Merit (TWM). I was involved in evaluating the experiment which showed that more than two-thirds (68%) of oral PTA hearings involving SRLs were TWM.[19] The most common cases involving SRLs were immigration and asylum; employment appeals; general procedure; and landlord, tenant and possession. I vividly remember sitting in court watching one oral hearing of a PTA application involving a persistent SRL. The Court of Appeal judge was there, solicitor for the respondent local authority was there, and counsel for the respondent was there - everyone clutching enormous, tabbed binders of papers - but the SRL did not appear. Nonetheless, the SRL's application was duly considered by those in the court. It seemed to me, sitting in the well of the court, the most extraordinary waste of public money - and the time of a distinguished judge.[20]

These cases present genuine difficulties for the courts, and effective measures to manage them should be pursued - particularly in finding ways to identify and close down potentially troublesome litigation at an early stage. But the need to deal with this category of self-representing litigants should not divert attention from the very real and growing challenges facing the courts in relation to the first category of ordinary litigants grappling with legal problems and disputes.

So what do we know about the first much larger, if less troublesome, category of "normal" SRLS? The answer is not very much (and possibly less than we know about vexatious litigation). No systematic data about SRLs are collected or kept by courts or tribunals. The largest English research study of SRLs in courts, conducted in 2005, provides some estimate of their number.[21] Looking at 2,500 first instance civil and family cases (excluding Court of Appeal cases and small claims) Moorhead and Sefton found that unrepresented litigants were common, particularly in family cases. Most adoption (75%) and divorce (69%) cases involved one or more adult unrepresented litigants. Almost half (48%) of the Children Act and injunction (47%) cases involved adult unrepresented litigants, as did just under a third (31%) of ancillary relief cases. For most case types unrepresented litigants were more likely to be defending than bringing the claim. It was relatively uncommon for both sides to be unrepresented, but in divorce cases one-quarter involved unrepresented parties on both sides. Civil cases had high levels of non-representation, particularly among those defending actions; some 85% of individual defendants in County Court cases and 52% of High Court defendants

[18] Ismail Abdullah Bhamjee V David Forsdick And Others (No 2) [2003] EWCA Civ 1113

[19] Hazel Genn and Lauren Gray, *Court of Appeal Permission to Appeal Shadow Exercise: Preliminary Results*, June 2004, Court of Appeal, Unpublished.

[20] Under the Civil Procedure Rules the Court has better control of PTAs deemed to be TDM although no statistics are kept regarding how many PTAs are refused as TWM. This allows a PTA to be refused without a hearing and marked as being TWM - totally without merit and as a consequence the appellant will not be permitted to renew the application and have it reconsidered at an oral hearing. This rule was originally added to the CPR in 2006 (SI 2006/1689).Where an application is refused as TWM that fact must be recorded and the court must consider whether to impose a civil restraint order: CPR 52.10(6).

[21] Moorhead and Sefton 2005

were unrepresented at some stage during their case. This suggests that thousands of people go unrepresented every year in matters that can lead to insolvency, penury, and homelessness.

Other research[22] studies show, unsurprisingly, that SRLs have less money and are likely to be less well educated than those who receive representation. They are also likely to be younger.[23] In family proceedings, men are more likely to be unrepresented than women. Research also tells us that while there is more than one reason for litigants appearing unrepresented, money generally heads the list. Studies in different parts of the world consistently show that the cost of legal advice and declining availability of legal aid are problematic and this is particularly so in family cases.[24] Interviews with SRLs and court staff show that, leaving aside difficult or obsessive litigants and some who have particularly negative views of the legal profession, few individuals are unrepresented by choice and that cost of legal advice and an inability to access free advice are the primary reasons for non-representation.

If the number of self-representing litigants is relatively large (and apparently rising), what do we know about how they fare in terms of access to justice? Or to put it another way, to what extent is the "right" or opportunity to self-represent a genuine access to justice benefit? Many forests have been felled in pursuit of providing definitions of access to justice, but it is reasonable to assume that essential elements include, knowledge of rights and responsibilities; knowledge of systems for redress (both formal and informal); the ability to access those systems; and the ability to participate effectively in order to achieve a just outcome on the basis of rules or legal principles in accordance with the rule of law. In discussion about SRLs the concept of effective participation is particularly important and has been considered by the European Court of Human Rights in the Airey case.[25] The question was whether Mrs Airey had been denied access to the court because she could not afford representation and could not get legal aid. The Irish Government argued that because she was free to represent herself, she did have access to the court. Although the ECHR held that the purpose of the Convention was to guarantee rights that are "practical and effective" rather than "theoretical or illusory", particularly in relation to access to the courts, nonetheless legal aid in civil proceedings is not generally a requirement of access to justice. SRLs must navigate alone the complexities of the substantive law and procedure of the civil justice system. This presents obstacles for the litigants, their opponents and the judges called upon to deliver fair hearings and reach a just decision. These difficulties arise, at least in part from the nature of the common law adversary system.

The English Common Law Adversary System.

The essential characteristic of English common law court procedure is its adversarial nature. Lawyers appearing as advocates before the court present, as persuasively as they can, the law and the facts of the case as seen from the standpoint of their client's interest. They present their cases and challenge their opponent before a judge who is essentially neutral and largely passive. It has been argued that "out of the sharp clash of proofs presented by adversaries in a highly structured

[22] Ministry of Justice, Litigants in person: a literature review, Research Summary 2/11, MOJ 2011

[23] Beck, C.J.A., Walsh, M.E., Ballard, R.H., Holtzworth-Munroe, A., Applegate, A.G. and Putz, J.W. (2010) 'Divorce mediation with and without legal representation: a focus on intimate partner violence and abuse'. *Family Court Review*, Volume 48, Number 4; Dewar, J., Smith, B.W. and Banks, C. (2000) *Litigants in person in the Family Court of Australia*. Family Court of Australia Research Report No. 20.

[24] The absence of no-win/no-fee opportunities in family cases contributes to the problem.

[25] Airey v Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305

forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable to both the parties and to society."[26]

The image of the adversary trial is very familiar and its drama has provided material for countless television series and films. A brief historical diversion, however, reveals that the commitment to adversarial procedure dates back only to the 18th and 19th Centuries. Indeed, it may be a surprise to learn that a litigant's right not merely to self-represent, but to give evidence in court at all only dates from the middle of the 19th Century. Before that time, parties to litigation were barred from giving evidence on the ground that their interest in the outcome of the litigation made their evidence inherently unreliable.[27] Court proceedings gradually transformed in the 18th and 19th centuries with a changing role for judges and a maturing legal profession and during this time procedures developed to accommodate adversarial presentation and testing of evidence from a range of witnesses, including the parties to the dispute.[28].

A key element in adversarial theory is the neutral and passive judge. [Neutrality and passivity are not the same thing. [29]] It is said that the purpose of the judge's passivity is to guard against the danger that he might prematurely commit himself to one version of the facts and fail to appreciate the value of all the evidence; in other words, to stop the judge from pre-judging and jumping to conclusions. In this way adversary presentation is seen as an effective way of combatting the natural human tendency to judge too swiftly those things that are familiar. This is the psychological process known as confirmation bias by which we tend to hear and fit evidence to our pre-existing beliefs, instead of letting our beliefs be formed by the evidence. [A variant is the tendency to make up our minds very quickly, on the basis of a very small amount of evidence, and then fit the rest of the evidence to that initial hypothesis.] The effect of counsels' opposing arguments in adversarial proceedings is to "hold the case in suspension between two opposing interpretations. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances."[30]

In this way we see that representation and a passive judge are central elements in classic adversarial procedure. The legal philosopher Lon Fuller argues[31] that the integrity of the adjudicative process itself depends on the participation of an advocate. Where a party is unrepresented, without the assistance of partisan advocacy the judge is required to undertake not only his own role but also that of representative for one or both litigants. Fuller argues that to do this the judge will need to develop the most effective statement of a party's case and then, resuming his role as neutral arbiter,

[26] Stephan Landsman, 'A Brief Survey Of The Development Of The Adversary System', 44 *Ohio St L J* 713, 1983
[27] Assy 2011 p? Unpublished DPhil Thesis, Landsman 1983 p733 and footnote ? quoting Holdsworth
[28] Ibid p714
[29] R Zorza, '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) 17 Georgetown Journal of Legal Ethics 423, 428; R Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 Social and Legal Studies 405, 406; William Lucy, 'The Possibility of Impartiality', *Oxford Journal of Legal Studies*, Vol. 25 No 1 (2005) 3-31.
[30] Landsman Ibid, p?
[31] Fuller and Randall, 'Professional Responsibility: Report of the Joint Conference', 44 *American Bar Association Journal*, 1160 (1958)

be ready to reject the product of his best mental efforts. Fuller concludes famously: "The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once."[32] Fuller thus argues that it would be impossible for a judge to be impartial towards the presentation of a case in which he himself had taken part. This purist view of the role of the judge creates part of the complications involved in considering how best to improve the ability of self-representing litigants to succeed with cases that have merit, which I will discuss shortly.

Challenges for SRLs

But on the other side of the bench, how do SRLs manage? This is what I refer to as the "'have you brought your bundle" problem? Here the challenges for litigants are considerable. The law is often complex, legal procedure arcane, and legal professionals have their own culture, vocabulary and practices. The Civil Justice Council Report on SRLs justifies its preference for the term 'self-represented litigants' because, they say, the language 'does not imply a deficiency in the fact of self-representation'. This statement is frankly more optimistic than accurate for many self-representing parties. In advising parties and arguing cases, lawyers and other skilled advocates enable the relevant law and facts to be identified and debated so that outcomes are more legally accurate than those achieved when people without legal qualifications try to represent themselves. SRLs whose cases have merit might often lose because they do not know how to communicate those merits effectively in the terms and through the means that courts and judges understand. A meta-analysis of studies of representation in ordinary lower court and administrative tribunal litigation in the USA concluded that giving more people access to legal representation would radically change the outcomes of adjudicated civil cases. The potential impact was notable when lawyers' work was compared to that of non-lawyer advocates and, apparently, "spectacular" when compared to lay people's attempts at self-representation.[33] Lawyers' potential impact was found to be substantial even in fields of law that lawyers themselves did not perceive to be particularly complex.[34]

Although English research on how SRLs cope with court and tribunal proceedings is rather limited, one or two studies provide insights into the challenges for the litigant, their opponent, and the court. My own study of the outcome of appeals in four tribunals in 1989 concluded that represented parties were significantly more likely to win their appeal than unrepresented parties. This is because the best representatives understand the law and complex regulations, they investigate cases, they collect evidence, and they advocate effectively on their client's behalf.[35] In a similar study I did some 20 years later comparing the experiences of white and minority ethnic tribunal applicants, I concluded that although tribunals worked hard to help unrepresented parties, and on the whole did a good job, the differences in appellants' ability to self-represent were so marked that tribunal judges could not realistically be expected to compensate entirely and that there are cases where an advocate is not merely helpful, but is necessary to the requirements of procedural fairness."[36]

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[32] Ibid p

[33] Rebecca Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes*, American Bar Foundation, October 2012.

[34] Ibid. p41

[35] H. Genn & Y. Genn, *Effectiveness of Representation in Tribunals,* Lord Chancellor's Department, 1989, p113.

[36] Genn et al, *Tribunals for Diverse Users*, DCA Research Series, 1/06, January 2006.

These types of findings have been replicated in studies conducted in courts and tribunals in the UK, Australia and Hong Kong. They conclude that SRLs have difficulty in understanding substantive law and court procedure. Although they may have a good understanding of their case and concerns, they are not always able to distinguish which issues are LEGALLY relevant, which aspects of their factual situation are germane to the legal issues, and what constitutes appropriate evidence. They may have trouble articulating their case, and in maintaining any degree of objectivity. They may be overwhelmed by the procedural and oral demands of the courtroom and find it hard to understand the purpose of questions.

Some critics argue that the continuing opacity of law and legal procedure is maintained by a legal profession keen to make work for itself. But it has to be said that at least since the end of the 19th there have been repeated attempts to simplify court procedure (Judicature Acts; Woolf Reforms; removal of Latin; simplification of rules of court) and that these processes of reform have been led by well-intentioned judges and lawyers.

What then are the likely effects of changes to Legal Aid?

For over 60 years England has enjoyed a relatively comprehensive and generous scheme of legal aid for civil and criminal cases. The very existence of the legal aid system is acknowledgement of the need for representation and of the challenges for parties embarking on litigation just outlined. Recognising that effective access to justice requires legal advice and representation, the Legal Aid Act 1949 was promoted with very wide objectives. These were explained at the time to the House of Lords as providing: Legal advice for those of slender means and resources, so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right. The establishment and development of our legal aid system was a manifestation of Government commitment to the ideal of equal access to justice and recognition that access is central to the operation of the rule of law. Substantive legal rights are of little value to citizens if they lack the awareness, capacity, facilities or wherewithal to recognise, or enforce these rights or to participate effectively in the justice system.

Since the mid-1980s successive governments have reviewed, revised, reorganized and re-shaped the legal aid system. The rhetoric accompanying these various changes has always been interesting, if unedifying. The 1980-1990s Thatcher/Mackay era warned of a demand-led system out of hand, permeated with perverse incentives. The Blair/Irvine era warned of a legal aid system that was more about creating fat cat lawyers than a benefit to the poor. Their solution was to cap expenditure and prioritise areas of legal need. The Cameron/Clarke era, accompanied by global financial crisis, transforms the language of legal aid from 'access to justice' to 'incitement to litigate'. In November 2010 Ken Clarke announced his proposals for changes to the provision of legal aid. While suggesting no significant modification to the reach of *criminal* legal aid, he presented a dramatic cutting-down of the scope of *civil and family* legal aid, losing support for advice and representation for, among other things, employment disputes, private family law, immigration, welfare benefits, education and housing cases. In presenting these proposals, it was argued that the measures were needed to "stop the encroachment of unnecessary litigation into society". Despite a considerable fight by politicians, the legal profession, the advice sector and even some senior members of the judiciary, the legal aid proposals obtained Royal Assent in May 2012. The removal of most civil cases from the legal aid system has been accomplished – wreaking what seems to me to

be an irrevocable change to our legal aid system and to concepts of access to civil justice. The equality impact assessment accompanying the MoJ's proposals for reducing the scope of legal aid contained an acknowledgement that the changes will have a disproportionate impact on women, ethnic minorities and people with disabilities.

Aside from the direct loss for citizens of support for advice and representation there will be a broader impact on the advice sector as both local authority funding and legal aid funding are reduced or removed. This will mean a cutting back of services and, in some cases, the closure of advice centres.

So what will be the impact of these changes on litigants and potential litigants? In its recent report on SRLS the Civil Justice Council warns us that all informed predictions are that the reductions and changes to legal aid will result in an increase in the number of SRLs on a considerable scale. They say that such litigants will be the rule rather than the exception and where there is not an increase, the reason will be that individuals have abandoned any hope of securing their rights or resolving disputes, being resigned to accepting that the civil justice system is not open to them. Damage done to the structure and resources of the advice sector will take away routes to accessible early advice.

The Lord Chief Justice has recently entered the debate. In his press conference last month at the start of the Legal Year he warned that there has already been a "significant increase" in the number of litigants in person and that they are only going to increase with the legal aid cuts next year. He said the growing number of cases with litigants in person on both sides was slowing down the courts. And the phenomenon seems to be spreading. In 2011 the Personal Support Unit at the RCJ saw a 36 per cent increase over the previous year in SRLs. More than half of the PSU clients at the RCJ are from an ethnic minority and a third do not have English as their first language. The PSU's specialist family unit experienced a 35 per cent increase in the number of clients in first quarter of 2011. They comment that they are "supporting more and more men, many of whom report that they are struggling to keep up maintenance payments, and more and more cases where both sides are without lawyers." The PSU is also providing a service to an increasing number of clients at other courts and tribunals in London, most importantly Court of Protection cases where decisions are made about the property, financial affairs and personal welfare of people deemed to lack the mental capacity to make decisions for themselves.

If this likely to be the impact on potential litigants, what will be the impact on the judiciary? In its response to the legal aid changes, the Council of Circuit Judges argued that the reductions in Civil Legal Aid will inevitably mean a significant rise in the numbers of SRLs using the courts. They predict that this will *"certainly take up much more court time, not simply at final hearings, but in case management hearings, with it being rarely possible to have telephone hearings and in which judges could no longer expect to have draft orders agreed between the parties. Such hearings will take more time as judges will have to explore and identify issues with the LIPs and explain what the court will expect in preparation for trials."*[37]

[37] Council of Circuit Judges Response to MOJ Consultation Paper on Legal Aid

The predictions from the judiciary about the impact of legal aid changes in family cases are dire. A senior family judge forecasts that from 1 April 2013 there will be an exponential growth in SRLs, which is likely to double the number of hearings before District Judges. Without input from lawyers, he says, the judge faces two warring litigants. He has no information. There has been no preparation. He will need to have a hearing to elicit information before he can make a decision. There will also be handling difficulties. Should he allow a SRL to cross-examine the other party? He argues that judges will have to change their approach – to take a more investigative approach. But judges are not trained to do that. He says: "We are not just talking about children's cases but financial remedies as well. Even well educated people can't do the financial stuff. The duty of full and frank disclosure only works because lawyers are involved." "In that respect", he remarks, "Heather Mills was actually quite a typical SRL. She had taken up an entrenched position and although she was a public figure, in a private sense most SRLs do the same." Another concern is that in family cases lawyers deal with some of the emotional flak and with SRLs judges won't have that protection. Remember the jug of water that Heather Mills tipped over Fiona Shakleton's head. It could have been something worse.

There is also a sense among the judiciary that while there are more SRLs in all legal areas, there is also an increase in determined SRLs. As a judge recently commented, "They make constant applications; they flood the offices with documents; it can tip over into obsession. Even if they are acting in good faith they can't distinguish between what's important and what isn't and they don't know what they are doing. No matter how hard a judge tries he can't know if he is doing justice without someone doing the work for you. Judges are going to have to become a true inquisition. It makes the job of the judge less attractive. It is not a pleasant challenge. SRLs are often distressed and aggrieved and District Judges work in very close quarters with little protection.

If these are the predictions, what then can realistically be done? In its report on SRLs the CJC concluded that the minimum core needs to deliver any kind of access to justice for SRLs are: information, advice, access to early professional help, simplification and demystification of court procedures. Responsibility for delivering these minimum needs are distributed variously among the judiciary, court staff, lawyers, the advice sector and non-lawyer assistance including organizations like the PSU, McKenzie friends and law students. This holistic approach must be correct – attack the problem from all sides. But delivering access to justice for SRLs is a tall order. SRLs need to have some understanding of the law and they need to handle procedure and advocate their case effectively in an unfamiliar context. There is now no alternative to adjusting the adversarial process and re-visiting the role of the judge. But how is that to be done?

The Judiciary

Judges are identified as critical players in the new world of SRLs. The CJC report says that judges must recognize the challenges for self-represented litigants, understand the need for early assistance and take a lead in improving the accessibility of judicial proceedings for SRLs. So can they do more? In principle they can, but judges have not historically taken the 'enabling' approach common in administrative tribunals. The job of enabling the user to advocate their case and to compensate for lack of representation, where necessary, is formidable. English studies of courts and tribunals have revealed the difficulties for the judiciary in dealing with unrepresented parties and the uncertainty that many judges feel about the boundaries of legitimate assistance. Anxiety about

the "limits" of judicial intervention exposes the problem inherent within the modern adversarial legal system of reconciling responsiveness to the needs of users with traditional conceptions of judicial neutrality and passivity. There is ambivalence about the extent to which it is reasonable and appropriate to "enter the arena"[38] or "lean over the bench" [39] to assist a party without representation. Individual judges, increasingly faced with SRLs in court, grapple with finding their own personal balance. Inevitably, this varies from judge to judge and from case to case, the problem being particularly acute when a judge faces an imbalance of representation. During his recent press conference the Lord Chief Justice explained that with a self-represented litigant "the judge actually has to help one of the litigants and say, 'Well, maybe you should take this point', or, 'Maybe what you are trying to say is this'. That presents a great difficulty, because the person who is represented is sitting there thinking, 'Well, whose side is the judge on? The judge is on the side of the self-represented litigant'. Lord Judge continued: "So this is an extremely delicate balance, to make sure that the self-represented litigant is getting justice and doing justice to his own case, without simultaneously upsetting, and understandably upsetting, the litigant who is represented into thinking the judge has made up his mind against them."

There are divergent views about what leeway to give SRLS. Two cases demonstrate this well. In the McLibel appeal hearing, the Court of Appeal approved of the fact that the trial judge had shown the defendants "considerable latitude" in the way they presented their case and, in particular, in the extent to which he often allowed them to cross-examine witnesses at great length. The trial judge helped the SRLs by reformulating questions for witnesses and by not insisting on the usual procedural formalities, such as limiting the case to that pleaded. In its own judgment, the Court of Appeal took note of the need to safeguard the applicants from their lack of legal skill. It conducted its own research to supplement the submissions made by Steel and Morris and allowed them to introduce the defence of fair comment at the appeal stage, even though they failed to raise it at first instance.

In contrast, the Court of Appeal earlier this month took a tougher line in relation to an SRL who had missed a deadline – albeit with a SRL who seems to have been rather persistent.[40] Accepting that there might be facts and circumstances in relation to a litigant in person that might be taken into account if they missed a deadline, in Lord Justice Kay's judgment, those factors would only operate "close to the margins."[41] He said that an opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person." In Lord Justice Kay's view, the trial judge had had gone too far in making allowances for a litigant in person.

These two cases, demonstrating different judicial approaches, probably reflect the sympathy of the bench with the respective unrepresented parties. But discussion about principled approaches and the development of more consistent practice among the judiciary is urgently needed, as well as the development of new skills. This is a case for judicial initiative and ought to be a significant training opportunity for the Judicial College. But with the length of courses being cut in order to meet

[38] Genn and Genn (1989) op cit.
[39] See most recently Moorhead and Sefton (2005), *Litigants in Person: Unrepresented Litigants in First Instance Proceedings,* DCA Research Series 2/05.
[40] Tinkler & Anor v Elliott [2012] EWCA Civ 1289
[41] Ibid. Para 32.

budgetary constraints, it is unclear how much resource the College will be able to devote to helping the courts' judiciary adapt to a more active, inquisitive and enabling approach in court. Nor is it clear what priority this will be given among competing areas of judicial training needs. There are opportunities to learn from the experience of District Judges who have the greatest court experience of handling unrepresented parties in small claims, and also from the Tribunals Service, which has a successful tradition of training judges to develop an 'enabling' approach in dealing with unrepresented parties. This seems to me to be something that should be high on the judicial training agenda, but will the resources be made available to do it? Lady Hale pithily summed up the issue last year in a relatively controversial lecture considering the impact of changes to legal aid:

> "The problem, as I see it, is that in order to avoid spending money on lawyers you have to be prepared to spend money on the decision-makers – give them the right training, the right expertise, the right resources, and the right premises to be able to do the job."[42]

As well as modifying the approach and skills of the judiciary, there is a longer-term project involving changes to court procedure and the complexity of substantive law. It has been accepted in the USA that simplifying substantive law and procedure can reduce the need for comprehensive legal advice and assistance, and can create the potential for information systems to overcome some of the problems facing some unrepresented litigants.[43] The more complicated the substantive law, procedures and forms, the more help unrepresented litigants will need.[44] The CJC report addresses this question and envisages the possibility of offering SRLs a different type of judicial dispute resolution forum. Again, there may be lessons to be learned from small claims and tribunals proceedings, but this is something that requires considerable analysis and research and may, in the end, only offer possibilities for the factually and legally less complex cases.

Finally, what is to be done about advice and representation? There is a wide range of self-represented litigants and a wide range of cases. Some SRLs with well-targeted information and advice and well-trained judges will be in a reasonable position to attempt to vindicate their legal rights. The CJC recommendations place considerable emphasis on improving the quality and availability of information to SRLs and this is to be welcomed. The excellent new 'Going to Court' nutshell guides produced by the CAB in the RCJ in response to the CJC recommendations will undoubtedly be helpful to confident, literate SRLs. But that is only a section of potential litigants and in any case, rather tellingly, both leaflets end with a disclaimer that says: "The law is complicated. It is always best to get advice. This guide is not meant as a substitute for legal advice." And it is true that where SRLs have had information from the web, from forms, and hand-outs, they cannot be deemed by the court to have received skilled advice about the existence and merits of their potential claims or defences, or to have had the benefit of advice as to various courses of action.[45] Most people contemplating involvement in legal proceedings need skilled advice and many

[42] Lady Hale, Equal Access To Justice In The Big Society, Sir Henry Hodge Memorial Lecture 2011, http://soundoffforjustice.org/wp-content/uploads/downloads/2011/07/Henry-Hodge-lecture-FINAL.pdf
[43] John M. Greacen, *Resources to Assist Self-Represented Litigants: A Fifty-State Review of the "State of the Art"*, National Edition, Michigan State Bar Foundation, June, 2011.
[44] Engler, "And Justice for All--Including the Unrepresented Poor" (1999) 67 Fordham L. Rev. 1987, 2028-2043
[45] Ibid.

ultimately need representation because of the complexity of the factual or legal issues involved in their cases, or because of their lack of the basic skills needed to present their cases to a court.

How, then, is early constructive advice and representation to be offered in a climate of scarce legal aid? Advice agencies and lawyers through their pro bono activities already contribute a considerable amount of support to SRLs. The challenge in the future will be to maintain and, if possible, enhance supply and improve co-ordination. In particular, there is a need to provide more early advice on the merits of cases in order to give realistic guidance to those with weak cases and to help those with strong cases to prepare. University Law Schools represent an important additional source of advice and advocacy for SRLs and many students are involved in clinical legal programmes. Law students demonstrate an enormous enthusiasm and energy for assisting litigants unable to secure legal advice and representation. This energy is to be admired and harnessed. But speaking from my own experience of developing an access to justice centre at UCL, it is not straightforward to set up such programmes. It requires determination, skilled supervision and resources. There are opportunities here for philanthropic support.

In the end, however, the pro bono activities of lawyers, advice agencies and university legal clinics can only seek to ameliorate what will inevitably be a deterioration in effective access to justice. We are moving into a new era of diminished support for citizens seeking to vindicate or defend their rights. To a significant extent we are following in the footsteps of other jurisdictions that have historically provided modest or minimal provision for access to justice. This is regrettable. The English legal system in the twentieth century had a well-deserved reputation around the world for its quality and its underpinning values of equal access to accurate judicial determination on the merits. In the absence of legal aid and reduced advice services what will happen to those seeking access to courts whose purpose is to serve all members of the public in the peaceful resolution of disputes? How can we make our procedures more accessible and maintain the quality and values that have characterised our system of justice? It is critical to address this challenge or face the prospect that increasingly citizens with justified legal claims will abandon their rights and relinquish the courts to querulous litigants. Or, more worryingly, perhaps they will turn to the types of self-help that the public justice system was designed to replace. As Eduardo Couture reminded us:

The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities.[46]

There are no simple solutions. Preserving access and delivering justice for SRLs will take imagination and determination. The innovation that comes from necessity can have a transformational potential Let us hope that that is the case for the courts and judiciary of England.

AFTERWORD

For me there is a clear link between Lord Atkin and my topic this evening. One of Lord Atkin's most famous decisions – the case of Donoghue v Stephenson involving the famous snail in the ginger-beer bottle, ice cream and gastro enteritis – concerned a woman May Donoghue who had no resources to bring her case to court. The link that I see is less about the wonder of Lord Atkin's speech in the Lords and more about the journey that brought May Donoghue to the House of Lords and the access

[46] Eduardo J. Couture, 'The Nature Of The Judicial Process', Tulane Law Review, 25 (1950), 1–28, 7.

to justice principles which have run through this lecture. May Donoghue's journey from Paisley in Scotland to the House of Lords in London was not an easy one. A divorced woman of slender means not only did she have to find a lawyer willing to act for her without payment, but she had also to declare herself a pauper in order to avoid being liable for her opponent's costs were she to lose at trial. Her petition to be allowed to appear in *forma pauperis* was supported by an affidavit in which she swore, "I am very poor. I am not worth five pounds in all the world." Attached was a certificate of poverty signed by the minister and two elders of her church. On March 17, 1931, her petition came from committee to the assembled House, consisting of the Lord Chancellor, Lord Sankey, the Duke of Wellington, two bishops, two marquesses, twenty-four earls, sixteen viscounts, and eighty-eight barons, among them Lord Atkin of Aberdovey.[47] I am not sure that May Donoghue's case would have made it to the Supreme Court today. It was certainly not a situation in which she would have been able to proceed as a SRL.

[47] Mrs Donoghue's Journey' Justice Martin R. Taylor reproduced at:
http://www.scottishlawreports.org.uk/resources/dvs/mrs-donoghue-journey.html