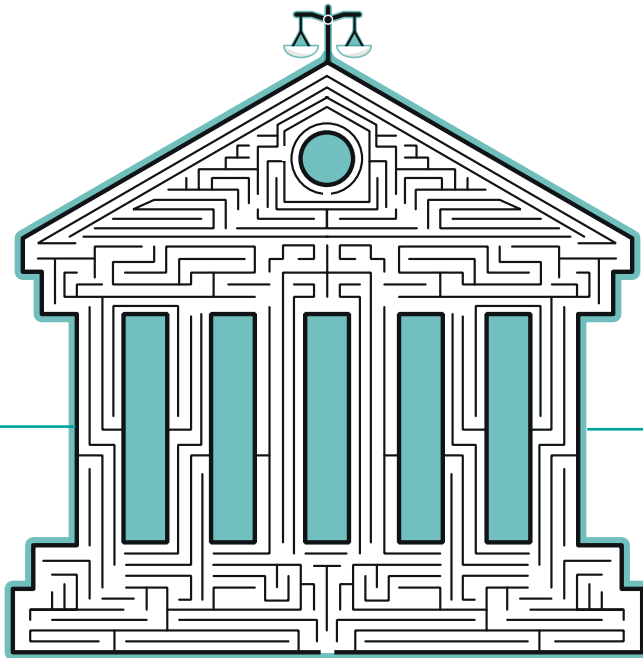


Litigants in person in Northern Ireland: barriers to legal participation

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Briefing Paper 2:
What's it like to go to court without a lawyer?

LIPNI study overview

The Litigants in Person in Northern Ireland study looked at people who were involved in civil or family proceedings without representation by a lawyer. They are known as litigants in person (LIPs). The study was interested in people who had taken a legal route to solve an issue, and not those who were involved in mediation or other types of dispute resolution.

Civil and family law in Northern Ireland is similar to that of England and Wales; Scotland has a different legal system. Legal Aid is available in all parts of the United Kingdom, but is more limited in England and Wales than in Northern Ireland or Scotland. The similarities between the Northern Ireland legal system and other legal systems like England and Wales mean that this research will be relevant to all of these legal systems. The difficulty for LIPs in Northern Ireland is that there are still some differences in the law in Northern Ireland that LIPs may need to know about.

The study investigated the experiences of litigants in person (LIPs) to assess their access to justice rights. This examined the right of LIPs to a fair trial. It also tested a model of providing advice on legal procedures to LIPs to see whether it was effective. From September 2016 to August 2017, data from people who took part in the research study were collected in civil and family courts in Northern Ireland.

The participants included:

- 179 LIPs: 49 women, 126 men; 3 couples and 1 group counted as one LIP each.
- 13 members of the judiciary
- 7 legal representatives
- 11 members of Northern Ireland Courts and Tribunals Service
- 5 Court Children's Officers
- 3 people who act as McKenzie Friends

The data were interviews from all participants and court room observations. LIPs also completed a questionnaire about their experiences of self-representing and their demographic background. These qualitative and quantitative data were analysed and the results are presented in the main report and the summary report, available at:

www.ulster.ac.uk/litigantsinperson

There are five briefing papers which summarise the research study :

1. Litigants in person and access to justice

2. What's it like to go to court without a lawyer?

3. Can litigants in person participate in court proceedings?

4. A model of procedural advice

5. Improving the experience of going to court without a lawyer

What's it like going to court without a lawyer?

Introduction

LIPNI Briefing Paper 2 is a short description of what it is like to go to court in a civil or family case in Northern Ireland without a lawyer. It describes why people go to court without a lawyer, what they do to prepare and manage their cases and what it is like to run their cases alone. In Briefing Paper 3 on 'Can litigants in person participate in court proceedings?' we explain how these experiences can act as barriers for litigants in person (LIPs) to block their ability to participate effectively, which can threaten their right to a fair trial.

LIPs in the system

When we were interviewing and observing LIPs, we did not form the impression of a 'typical LIP'. The men and women we met came from a wide range of backgrounds and had a wide range of abilities. The biographical information they gave us in our questionnaire also indicated that there is no typical LIP. This told us that any service that deals face to face with LIPs has to be flexible to meet the needs of all sorts of people.

LIPs' response to the court system was often bewilderment, frustration, discontent – sometimes developing into a sense of unfairness. It is important to note that these frustrations were less prominent or completely absent in the business areas which have been adapted for people to litigate in person: Undefended Divorce and Bankruptcy. The level and availability of advice and support in these areas is much greater. This told us that other parts of the system need to change to accommodate LIPs.

Why do people go to court without a lawyer?

There were a wide range of different reasons for self-representation. Everyone had their own reasons, often complex and multi-layered. We categorised the main reasons as financial and out of personal choice. Within these two categories, there were further layers of reasoning. Often LIPs' reasons were a mixture of these.

Financial

Most of the people we spoke to referred to the cost, affordability or value of having

a lawyer. Many of them thought they would be better off with a lawyer and said they would prefer to be represented. Many LIPs had asked for help from a lawyer, some people who could not afford to pay for a legal representative but were struggling in their case would benefit from some form of legal assistance to avoid disadvantaging their case through lack of expertise.

Unaffordable

Many of the LIPs we spoke to said they did not qualify for legal aid but did not feel able to afford the cost of hiring a solicitor. They felt caught in the middle. Others could afford to pay the fees, but prioritised other household expenditure for things like running a car, or things for their children. A number of LIPs had had legal representation but had run out of money.

Value for money

Some LIPs could afford to pay for representation but looked at the service they had received previously and could not see the value of it. Others felt they were getting nowhere despite the costs or could not see what value a legal representative brought to their case.

Personal choice

Some LIPs had chosen to act alone. Either they had been deterred from instructing a solicitor based on prior experience or they felt capable of running the case alone.

Dissatisfaction with previous legal representation

Some LIPs felt they were getting nowhere with their case when they had been represented or their legal representative did not take their views into consideration. Some felt ill-informed about their case and even excluded from it. Others had experienced what they regarded as poor service, or they had developed distrust in the lawyer-client relationship. Other LIPs reported they believed their lawyer had made errors in their case, such as missing filing deadlines and errors in settlement documents that made them unenforceable.

Know the case better than anyone else

These LIPs did not believe a legal representative would be able to master the facts of the case as well as they could or would not care as much about their case.

A straight-forward matter

These LIPs felt the case was so straight-forward that there was no need for a legal representative. This was a common reason among LIPs in Undefended Divorce and Bankruptcy cases.

Have nothing to hide

These LIPs felt they had done nothing wrong or had nothing to hide so they could simply explain their situation to the judge and there was no need for a legal representative. Some recognised this was a naïve approach, but others were not aware of the difference between a legal translation of a situation and what they saw as the ‘truth.’

Having a negative experience with legal professionals in the past was a strong deterrent to obtaining legal representation for some LIPs. This suggested to us that some legal professionals may need to provide further explanation about the work they do, transparency about fees and attentiveness to their clients to promote representation in future matters.

Court actors’ views on LIPs’ reasons

Many court actors (the judges, the lawyers, court staff, children’s court officers and McKenzie Friends) divided LIPs according to whether they were unrepresented out of choice or necessity. They tended to see LIPs who chose to self-represent as better prepared, more determined, more able but also more likely to abuse the system or be difficult in some way. Worryingly, a small number of court actors, including some judges, felt these ‘by choice’ LIPs should be treated differently and be given no accommodation for being unrepresented. This view threatens the individual’s right to self-representation and to participate effectively. Briefing Paper 3 provides more detail on the types of barriers LIPs faced in participating effectively in their court proceedings.

How do LIPs prepare and run their cases?

Whether making an application for a legal claim or responding to one, we found many of the LIPs in the study made great efforts to prepare their case. Again, there was a great variety and depth of activities depending on the requirements of the case or the individual LIP's determination and ability.

Information and support

It was difficult for LIPs in business areas other than Bankruptcy or Undefended Divorce to find the information and help they needed about their case or how to self-represent. They tried many different sources but there is no dedicated advice service or website for LIPs in Northern Ireland. They had no means of knowing whether the advice or information could be trusted unless it came from a reputable source, such as the court service. The court service staff were able to guide them to the forms they needed or answer other queries, but were not able to help them to fill in the forms or give them advice on how to run the case. Court staff were happy to help LIPs but they are limited in what they can do to help because they have to maintain their neutral position as administrators of the justice system and cannot act like a legal adviser. Their role was often misunderstood by LIPs which sometimes added to LIPs' frustration at not being given more help. This meant LIPs were progressing their cases often not knowing what they had to do or what was expected of them. As one LIP in a family case said:

“Because there's no booklet or anything out there, you just don't know what you're meant to be doing. I'm just trying my very best and learning from my mistakes but it's not a good way to be operating.”

The court service website was reported as being confusing and difficult to navigate by LIPs. Many court actors were unaware of the difficulty of accessing information.

Completing paperwork

Some LIPs reported they were able to prepare their paperwork (for example, affidavits, or application forms) but did not know whether it was adequate or appropriate. Some worried that they had not completed the paperwork correctly. Court actors, on the other hand, reported that LIPs were often unfocused in their statements or affidavits and wrote down everything just in case it was relevant.

Unfocused and over-long written submissions were a source of frustration for many court actors, as reported by this lawyer:

“I think they prepare their cases very well, but they don’t have the legal nuances to know how to prepare their cases, and to know what the court is looking for. So, usually, you’re dealing with a lot of irrelevant information that you have to wade through.”

Understanding of law and procedure

In most cases, the LIPs were aware of how limited their understanding of the law and procedure was. They often prepared for a court hearing only to be presented in court with something new that they did not understand or had not prepared for. They often did not know how to translate their situation into a legal argument or how the court would assess the strength of their claim.

Contacting the other side

Often LIPs had not been in contact with the legal representative for the other party prior to the court appearance. Many LIPs told us that they did not know how to do this or even that they could. In family cases, out-of-court agreements are encouraged, with any agreement then put before the judge who checks it with all parties. These out-of-court discussions often take place between the legal representatives when both parties are represented. When one party is a LIP, it often does not take place at all. LIPs told us they were wary of the other party’s legal representative and did not want to talk to them. We heard from lawyers that they often avoided contacting LIPs because they had had difficult exchanges with individual LIPs in the past. This was often where the LIPs were unable to distance themselves from their emotions and act in a neutral, objective manner when negotiating. This told us that LIPs are blocked from using out of court negotiations as a means of solving their dispute because they do not or cannot behave like lawyers. They are at a disadvantage because the current procedure does not take into account their lack of expertise or emotional investment in their case.

Expectations of duration of proceedings

LIPs often expressed surprise at how long their proceedings were taking. They had little idea of what to expect and that the process would progress slowly through multiple stages. Often they found this slow progress a source of frustration.

What's it like in court as a LIP?

Location and time of hearing

LIPs did not know where to go in the court building and were guided by security staff when it was not obvious where they had to go. LIPs were told to come to court for a particular time, which they thought was the time their case would be heard. They were unaware that there was no time-slot for their case. Sitting outside in the waiting area, they would not know how long they had to wait, and, in some courts, they would not know if the people in court knew they were outside waiting. Long waits in uncertainty was a cause of anxiety for some LIPs. This told us that the court system does not accommodate LIPs who do not have permission to wait inside a family court or are not familiar with court room protocols.

The LIPs will have received a letter from the court about their first appearance and then dates for future court appearances will be agreed in court. We found LIPs often did not realise they were supposed to take note of future dates or actions ordered by the judge.

Accompaniment in court

There was no consistent approach to granting permission for someone to accompany a LIP in court or what they could do for the LIP. Some LIPs only wanted moral support, but others wanted more help, such as note-taking or help with talking to the judge. A McKenzie Friend is an in-court support person who is given permission by the judge to accompany the LIP in court, but only very rarely is given permission to speak to the judge. Many of the LIPs who had a McKenzie Friend said they found their company very reassuring. However, the method of obtaining permission to enter the court was not consistent between judges. Also, there was no way for LIPs to know whether they were receiving sound advice or a good service from a McKenzie Friend.

In the court room

When a LIP in a family case was called into the court room, the judge would usually ask all of the legal representatives waiting to bring up their cases to leave the room. This reassured the LIPs that their case would be heard only by the people involved in the case and the court. However, clearing the court was not consistent practice, and some LIPs had to deal with their case in front of the gathered lawyers.

Many judges were able to put the LIPs at their ease. They questioned the LIPs directly to get to the facts about the case which they needed to help them to make a decision, and they often provided explanations of legal terms or procedure. However, this was not consistent practice in all courts. Some judges used a 'sink or swim' approach, providing little assistance, which made it difficult for LIPs to do justice to their case. Even judges who were aware of LIPs' lack of legal knowledge would use common terms, such as 'pass the case', not realising the terms were not understood by LIPs. These inconsistent approaches were important because judges have a duty to make sure there is an equality of arms between the two sides in the case, which requires the judge to make sure LIPs understand the proceedings and have an equal opportunity to present their case. The differences in approach by judges meant that not all LIPs were given equal opportunities to present their case.

Most LIPs understood their court hearing, but sometimes their confidence was misplaced. They rarely made any notes during the hearing and some LIPs left the court unaware they had been directed to do something by the judge. Some judges took pains to make sure the LIP had understood, but this was not consistent.

LIPs who were absent

We found that when LIPs were not present at their hearing, the case would usually be adjourned. However, on a number of occasions, matters were discussed in the absence of the LIP. This raises concern because the LIP was unable to participate in the discussion and would not know what was discussed. Because the LIP had no lawyer to relay what happened in court, the judge would either ask the lawyer for the other party, the Court Children's Officer or the court office to inform the LIP of developments. There is no systematic way of informing LIPs or contacting them.

The lack of consistency in how LIPs are dealt with in court told us that practice should be made more consistent and sensitive to the LIPs' lack of legal training.

The impact of these experiences is explored in Briefing Paper 3 to explain the barriers to participation faced by LIPs.

What is it like to self-represent?

When we asked LIPs about how they felt about self-representing, their responses were varied, including not being affected by it, anxiety, confusion and feeling distraught. Their emotional investment in their cases often meant they could not

distance their feelings from the case and were unable to act dispassionately.

Many LIPs felt they were coping with self-representation and were confident they were doing a good job. However, it appeared to the researchers that some of these LIPs were over-confident or unaware they were not coping as well as they thought. For some LIPs, any confidence drained away the longer their case took. The LIPs in lengthy cases spoke about their frustration, exhaustion, despair and sometimes rage.

Mental health

Other research has shown that people tend to be anxious and under stress when they are dealing with a legal problem, whether they have representation or not.¹ So it would not be surprising if the LIPs in the study felt the pressure too. We asked them to complete a standardised screening instrument called the General Health Questionnaire 12 (GHQ-12).² It provides a measurement of general mental health and well-being using a 12-point scale where a score of 4 or more indicates possible mental ill-health. The percentage of the Northern Ireland population scoring 4 or more was 17% when measured by the Health Survey in 2016/17.³ The percentage of LIPs in the sample scoring 4 or more was 59%. This high proportion is in line with other studies that have measured the GHQ-12 of people involved in legal issues. The significance of this high proportion is that when people are represented, they are protected from some of the stresses of litigation because the lawyer carries the case and can manage their clients' expectations and reassure them. This is not the case for the LIPs. In addition, the role played by a lawyer to act as a shield or buffer between their client and the court is also missing, so the court is exposed to the LIP's emotional distress.

The court proceedings are designed in a such a way that the litigant's emotional investment in the case or mental ill-health are managed by the legal representatives. It is difficult for LIPs to achieve emotional detachment or manage their state of mind on their own, which makes it very difficult to fit within the expected norm. This tells us that the norm does not consider LIPs as ordinary people who are dealing with a legal matter without any emotional buffer.

Finally, many LIPs reported to us that they felt they had been dealt with fairly by the judge, but many were suspicious of the established relationships between lawyers and the judge, and the system made them feel like an outsider or a nuisance. This contributed to suspicions of a lack of fairness in the system.

Conclusion

While many LIPs negotiated their way through the system, many faced difficulties related to finding information and getting help. Some adaptations in court helped LIPs to function in court, but the support was not applied consistently. They were unable to emotionally detach themselves from their cases and many were in poor mental health. The court norm expects LIPs to behave as if they were trained lawyers when they clearly are not. Their right to be there compels changes in the system that accommodate their lack of training and expertise. Briefing Paper 3 explains how these problems act as barriers for LIPs in accessing the right to a fair trial, by blocking their ability to participate effectively in court proceedings.

Full report available at :

www.ulster.ac.uk/litigantsinperson

¹ Pleasence, P. and Balmer, N.J. (2009) 'Mental health and the experience of social problems involving rights: Findings from the United Kingdom and New Zealand,' *Psychiatry, Psychology and Law*, 16(1), pp123-140.

² GHQ-12 is the shortest version of the GHQ inventory suite produced by the commercial assessment company GL Assessment.

³ Department of Health (NI) (2017) *Health Survey (NI) First Results 2016/17*. Information Analysis Directorate, October 2017. Available at: <https://www.health-ni.gov.uk/publications/health-survey-northern-ireland-first-results-201617>

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