

DSBA PARCHMENT ARTICLE

Years ago, I wrote to *The Irish Times* fulminating about the prevalence of dog droppings upon the pavements of Dublin. The late Kevin Feeney SC (this was prior to his appointment to the High Court bench), a renowned wit, raised the matter with me:

KF: *"I hear you wrote to The Irish Times about dog droppings!"*

Me: *"I did".*

KF: *"Are you for them or against them?!"*

Thus, Kevin demonstrated, with a deft satiric touch, how anyone who speaks publicly about a given topic must be prepared to accept that his or her comments will often not be understood in the manner intended. So, it is with some trepidation that I venture to speak about lay litigants in civil litigation matters and the sheer numbers of them involved in cases of almost every possible description. Lay litigants and their supporters (known as McKenzie Friends) are now a substantial feature of the courts landscape. Our seriously under-resourced and over-stretched courts system is ill-suited to their needs. What can be done to assist matters? I also think that we have to ask the question: Why are there now so many lay litigants?

When I speak with English colleagues, they are invariably surprised that most Irish personal (as opposed to commercial) civil litigation is undertaken by lawyers on a 'no foal / no fee' basis. If the claimant has a case that has any reasonable prospect of success, then he or she will invariably find a solicitor and counsel willing to act in the matter on this basis. This arrangement is tried and tested, and is not champertous. It is the only viable alternative to the effective non-existence of civil legal aid for such matters. 'No foal/no fee' work is, in my opinion, not *pro bono* work in any real sense although it is sometimes held out as such.

I understand that the number of practising solicitors in Ireland is now circa 10,000. The latest edition of the Law Directory is so bulky that it could cause serious injury if flung at a colleague!

There is an ever-increasing number of solicitors and barristers chasing an apparently ever-decreasing supply of work. This means that a very sizeable percentage of persons with a sound case (be they claimants or defendants) will have a reasonable prospect of obtaining representation on a 'no foal / no fee' basis. In other words, the litigation is going to cost them nothing, or very little. The lawyers will carry the costs of running the case, the solicitors regularly funding the claimant's outlays, often to the tune of several thousand euros. Prospective litigants who do not have sustainable cases will find it hard to obtain 'no foal/no fee' legal representation. The market is delivering to them a message which is undoubtedly harsh, but nevertheless realistic. I long ago came to the conclusion that the viability of any legal business depends as much on the cases that one turns away as the cases that one agrees to act in. Time and again I find myself saying "No" to potential clients who have no case whatsoever and, something that really vexes me, who have occasionally been referred to me by colleagues who would rather not give the necessary frank advice. I think that there are few greater discourtesies to a colleague than this type of referral. I suspect that many rejected cases are being run before the courts by lay litigants.

I have always been struck by the hospitality which is, correctly, enjoyed by lay litigants before the courts. For as long as anybody can remember, the courts and courts staff have been extraordinarily patient with and helpful to lay litigants. Even the most trying, misguided and vexatious lay litigants have had the benefit of almost boundless courtesy and respect. And rightly so. Everybody is entitled, within reason, to prosecute or defend their own cause and to freely access the courts for the purpose of vindicating their rights. It is only in the most exceptional cases that the courts will, upon request, and with great reluctance, impose *Isaac Wunder* orders requiring serial litigants to desist from issuing litigation unless they first obtain permission from the court to do so.

The ease with which civil litigation can be commenced and the kindness shown to lay litigants by the judiciary over the years has had unintended consequences. The courts have become swamped with lay litigants and their McKenzie Friends. In relation to the latter, it is notable that the Court of Appeal, the High Court and the Circuit Court have had to issue practice

directions in an effort to stop non-lawyers conducting cases on behalf of 'clients' and, specifically, forbidding from acting as McKenzie Friends former solicitors who have been struck off the Roll of Solicitors for professional misconduct and former barristers who have been disbarred for the same reason.

What can be done about this state of affairs? Perhaps the establishment of a division in each court, which deals specifically with claims which are driven or defended by lay litigants, with customised Courts Service support? The Bar Council's recent submission to the Review Group on the Administration of Civil Justice contains some excellent suggestions as to how lay litigants and their McKenzie Friends might be better assisted to the benefit of all concerned. I know that the Law Society of Ireland will also be putting forward submissions to the Review Group (or perhaps has already done so?) addressing this general topic.