TAKING SELF-REPRESENTED LITIGANTS SERIOUSLY

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Introduction

The right of a litigant to appear in person is fundamental. A litigant's dignity and personal autonomy is protected by the fact that he or she is personally entitled to choose how to run his or her case. Further, this right ensures that justice can be afforded to all; it allows litigants who would otherwise be unable or unwilling to incur the expense of legal representation to vindicate their rights by appearing for themselves.[1] It is unsurprising, therefore, that the Court of Appeal has stated that a "natural person of sufficient age and capacity cannot be denied the right to present his case in person".[2]

Yet, in many cases, the cumulative effect of our legal system leads to a denial of this proposition. Underlying our rules of procedure is the normative assumption that litigants ought to be represented; the litigant who comes to court without a lawyer is deficient.[3] Indeed, rather than a right to self-represent, the reality is that in many cases there is a quasi-obligation of professional legal assistance.[4] Not only the rules of the court but also the culture that pervades the curial process presume that the proper users of the system are legal professionals, judges, and bureaucrats, and it is these actors who, by virtue of their control of the system, have shaped the structure of civil justice to a form that is most

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[1] *Cachia v Hanes* (1991) 23 NSWLR 304 (NSWCA) at 317 per Handley JA.

[2] *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 312.

[3] D Webb, "The Right Not to Have a Lawyer" (Paper presented to the Confidence in the Courts Conference, Canberra, Australia, 9–11 February 2007) at 5–6 ["The Right Not to Have a Lawyer"].

[4] Ibid.

convenient to themselves.[5] The rules of the court, the role of the judge, and the pervasive culture of adversarialism, marginalise the litigant away from the centre of the litigation process and, instead, ensure that the system best accommodates its most experienced users.[6] This institutional bias perhaps explains the fallacious assumption that a large proportion of self-represented litigants are vexatious, and the complaint that too much of the court's time is exhausted catering to these litigants' needs.[7] In short, the institution of the courts has not been designed to accommodate self-represented litigants; indeed, it discourages them.[8]

This is all the more troubling because, with few exceptions, judges, commentators, and legal researchers around the world perceive that a great number of civil litigants are now proceeding *pro se*.[9] What some have labelled the "*Pro Se* Phenomenon" has been, since the mid-1990s, the subject of much discussion and comment from academics, judges, law commissions, and bar associations.[10] And while comparable jurisdictions worldwide have done much to cater to this growing class of court user, New Zealand's response has been slow, at best.

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[5] Ibid, at 1; R Engler, "And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks" (1997) 67 Fordham L Rev 1987 at 1988–1989 ["Justice for All"].

[6] Webb, The Right Not to Have a Lawyer, above n 3, at 3. See also T W Church *A Consumer's Perspective on the Courts* (prepared for the AIJA 1990) cited in J Baldwin, "Raising the Small Claims Limit" in A Zuckerman and R Cranston (eds) *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, Oxford, 1995) at 192.

[7] Webb, The Right Not to Have a Lawyer, above n 3, at 6–7.

[8] Ibid, at 7.

[9] For the only New Zealand research on this topic see M Smith, E Banbury and Su Wuen Ong *Self Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (prepared for the Ministry of Justice 2009)

[10] See e.g. L Bloom and H Hershkoff, "Federal Courts, Magistrate Judges, and the Pro Se Plaintiff" (2002) 16 Notre Dame JL Ethics & Pub Pol'y 475; Hon J Stanoch, "Working with Pro Se Litigants: The Minnesota Experience" (1998) 24 Wm Mitchell L Rev 297; R Engler, "And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks" (1997) 67 Fordham L Rev 1987 ["Justice for All"]; T Buxton, "Foreign Solutions to the US Pro Se Phenomenon" (2002) 34 Case W Res J Int'l L 104; D Swank Esq, "The Pro Se Phenomenon" (2005) 19 BYU J Pub L 373; J Shaw "Self Represented Litigants" (Address to the conference dinner of the Consumer, Trader and Tenancy Tribunal, Sydney, 20 November 2003); Family Court of Australia *Self-Represented Litigants—A Challenge: Project Report* (May 2003), Rt Hon Lord Woolf *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 119 ["*Interim Report*"].

This article thus proposes three reforms that will go some way to vindicating a litigant's right to self-represent. Part II articulates a clear set of guidelines for judges adjudicating claims involving *pro se* litigants, one that will draw on a number formulations in use in comparable jurisdictions overseas. In particular, this part will examine the way in which judges should apply rules of procedure designed to govern those with legal training. Then, in Part III, the article will examine what obligations should be imposed on lawyers who oppose the self-represented. To do this, first, it will show how such obligations do not represent an undesirable derogation from the lawyer's key duty of partisanship owed to his or her client. Finally, Part IV will argue for the reversal of the current rule that precludes the award of costs to litigants in person. Before continuing, it should be noted that while much of the discussion will be relevant in the context of unrepresented criminal defendants, the focus of this paper will be on unrepresented litigants within the civil jurisdiction.

A.The Role of the Judge in Adjudicating Pro Se Claims[11]

Under the Common Law model, it is the parties, not the judge, who run litigation. The Court is expected to remain detached and passive: a stance that would not only preserve the Court's impartiality but also save it from falling into error.[12] Thus, the English judge whose decision was appealed (by both parties) because of his excessive interruption was asked quietly to resign; a "poignant case", in the words of Lord Denning, "for he was able and intelligent – but he asked too many questions".[13] Yet, equally, the task of the judicial officer is to ensure a fair hearing for the parties.[14] Achieving this will require all the

[11] The term *pro se* litigant derives from Latin, meaning for oneself, or on one's own behalf. In this paper it will be used more or less interchangeably with unrepresented litigant, self-represented litigant, lay litigant, and litigant in person. Some jurisdictions in the Western United States also use the term *pro pers*, shorthand for the phrase *pro persona*—meaning for one's own person. See J Goldschmidt, "Judicial Assistance to Self-Represented Parties: Lessons from the Canadian Experience" (2006) American Bar Association <http://www.abanet.org/judicialethics/ resources/Judicial_assistance.pdf> at 1.

[12] N Andrews *Principles of Civil Procedure* (Sweet and Maxwell, London, 1994), at 33–35.

[13] Lord A Denning *The Due Process of Law* (Butterworths, London, 1980), at 58–62 cited in ibid, at 42–43.

[14] R Albrecht *et al* "Judicial Techniques for Cases Involving Self-Represented Litigants" (2003) 42(1) The Judges' Journal 16, at 16.

relevant and admissible information to be before the court,[15] which, in turn, may demand judicial intervention to assist a self-represented litigant adduce evidence in support of his or her position.[16] The conflict of these two principles led inevitably to great uncertainty as to the proper role of the judge when confronted with unrepresented litigants. Most often judicial passivity won out over offering great assistance, illustrating, perhaps, many judges' general discomfort in cases where parties were unrepresented, as too the fear that accommodating such litigants could make by-passing lawyers a more attractive tactical choice.[17] Underlying a number of these decisions was the belief that those litigants foolish enough to attempt self-representation should bear the consequences of this choice.[18]

Yet, as cognisance of the *pro se* phenomenon has spread, so too has greater judicial accommodation of self-represented litigants.[19] Thus, by at least the first few years of the new millennium, courts in a number of Common Law jurisdictions were consistently acknowledging that judges owed some sort of duty of assistance.[20] In Canada, for example, there is now an explicit obligation on judges reasonably to assist self-represented parties.[21] While one cannot say New Zealand courts have acknowledged such a duty in as many words, the sum total of the jurisprudence in this area suggests strongly that in this country the same applies.[22] Certainly, a judge who offered no help to a *pro se* litigant would risk vigorous scrutiny of his or her judgment by an appellate court. In 2000, the High Court was able to refer to "the invariable practice of this Court to lend whatever assistance can be given to a

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[15] *Davies v Eli Lilley & Co* [1987] 1 WLR 428 (EWCA), at 431 per Sir John Donaldson MR.
[16] Albrecht *et al,* above n 14, at 16.
[17] Engler, Justice for All, above n 5, at 2015.
[18] Albrecht *et al*, above n 14, at 42.
[19] R Engler, "Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role" (2008) 22 Notre Dame JL Ethics & Pub Pol'y 368, at 372 ["Ethics in Transition"].
[20] For Australia, see *Johnson v Johnson* (1997) 139 FLR 384 (FamCA); for Canada, see e.g. *Coleman v Pateman Farms Ltd* (2001) 156 Man R (2d) 144. See also *Manitoba (Director of Child and Family Services) v AJ* 247 DLR (4th) 490: "It is generally recognized that the court should provide some assistance to an unrepresented litigant" (at [32] per Scott CJM); for the United States, see e.g. *Gamet v Blanchard* (2001) 91 Cal App 4d 1276 and the discussion in Engler, Ethics in Transition, above n 19.
[21] Goldschmidt, above n 11, at 13 citing *Manitoba (Director of Child and Family Services) v AJ* 247 DLR (4th) 490.
[22] See the authorities noted below at n 27

litigant in person",[23] although the requirement that the judge break, to some extent, from the traditional passive role in such cases had been noted at least as early as *Daemar v Gilliand* in 1979.[24] Behind this change in approach lies the argument that passivity and impartiality were not commensurate; that is, if a judge did not assist a self-represented party then he or she would be partial to that litigant's opponent, thus frustrating the Court's promise of fairness and substantive justice.[25] Deviation from the rules and procedure designed for use by advocates was necessary to give an unrepresented litigant a fair and meaningful hearing.[26]

While examples of judges assisting *pro se* litigants are not difficult to locate,[27] the legitimate boundaries of this assistance are far more difficult to define.[28] While the level of help that a judge must provide will vary from case to case and litigant to litigant,[29] without clear guidelines, the more likely a judge's sympathy or otherwise towards the unrepresented party will determine how much or how little he or she will intervene.[30] This approach is undesirably uncertain. Further, a judicial officer's natural tendency to err on the side of caution may deprive a *pro se* litigant of help that would have fallen inside promulgated rules of legitimate assistance. Finally, a clearly-drafted code of accepted practice will make it easier for litigants to seek remedies if they are deprived certain accommodation to which they are entitled. Below, this article will give guidelines that should direct a judge's approach to a case involving one or more self-represented parties. In doing so, it will draw on similar bodies of rules overseas, including the principles articulated by the Family Court of Australia in

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[23] *Prakash v Auckland District Law Society* [2000] NZAR 667 (HC) at [15].
[24] [1979] 2 NZLR 7 (SC) at 12–13 per McMullin J: "The Court may be obliged from time to time to interrupt or give directions so as to keep a litigant [in person] to the confines of his case."
[25] Engler, Ethics in Transition, above n 19, at 385.
[26] Goldschmidt, above n 11, at 11
[27] In New Zealand, see e.g. *Birkenfeld v Kendall & Anor* [2008] NZCA 531; *Balich v Commissioner of Inland Revenue* HC Auckland CIV-2006-404-306, 4 April 2007; *Sadler v Van Nes* HC Auckland CIV-2003-404-3236, 8 February 2004.
[28] Note that the Family Court website does contain some guidelines for judges and court staff facing unrepresented parties; however, their status as law is unclear and little reference to their use could be found.
[29] C Gray *Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants* (prepared for the American Judicature Society 2005).
[30] Engler, Justice for All, above 5, at 2015.

Re F[31], the Proposed Protocol of the *Pro Se* Implementation Committee of the Minnesota Conference of Chief Judges ("Minnesota Proposed Protocol"),[32] and a proposed best practice manual drafted by the American Judicature Society.[33]

1. Introducing the Pro Se Litigant to the Trial Process

The first step a judge should take is to ensure that the self-represented party understands that he or she is entitled to be represented by a lawyer but wishes, regardless, to proceed *pro se*.[34] In the Canadian province of Alberta, at the start of any case where it is relevant to do so, a trial judge will give that litigant what is known as a *Hardy* warning.[35] This comprises the following:[36]

> The trial judge will try to identify the classes of jeopardy faced by the particular litigant in the particular trial … [and] will explain that a person's interests are always better served when they are represented by a lawyer. If the person does not have enough money to hire a lawyer, the judge will identify the services available in the community from Legal Aid or Student Legal Services….

Similarly, the judge should highlight the hurdles and difficulties a *pro se* litigant will face in representing him- or herself. If it is apparent that the party wishes to continue unrepresented, then the judge should explain the decorum and etiquette that will be required within the courtroom. Pertinently, perhaps, litigants should be told that the depiction of courtroom proceedings in most television programmes and films bears little resemblance to the way the proceeding will be conducted.[37] This part of the proceedings can be framed as a bargain. The judge can explain that special assistance will be offered to the litigant because of his or her *pro se* status; however, in return, the litigant

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[31] *Re F* (2001) 161 FLR 189 (FamCA).
[32] Reprinted in Albrecht *et al*, above n 14, at 18 ["Minnesota Proposed Protocol"]. See also Stanoch, above n 10.
[33] See Gray, above n 29.
[34] Minnesota Proposed Protocol, above n 32, at [1].
[35] From the case of *R v Hardy* (1990) 111 AR 377 (AlbQB) affd *R v Hardy* (1991) 120 AR 151 (AlbCA).
[36] *Karach v Karach*; *Connors v Connors* (1995) 177 AR 100, at [19] (AlbQB) quoted in Alberta Law Reform Institute *Alberta Rules of Court Project: Self Represented Litigants—Consultation Memorandum No 12.18* (2005), at 32.
[37] Gray, above n 29, at 52 (Proposed Best Practice Rule 10).

will be expected to behave with the courtesy and decorum required by the Court.

The trial process should then be explained clearly to the litigant.[38] The Minnesota Proposed Protocol sets out how this may be done:[39]

> I will hear both sides in this matter. First I will listen to what the Petitioner wants me to know about this case and then I will listen to what the Respondent wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence.

Similarly, the judge should describe simply but fully the key elements of the case in the current proceeding, which party must prove what elements, and the kind of evidence that a party may present—including restrictions on hearsay or irrelevant evidence.[40] In all exchanges, the judge must endeavour to eschew the specialist legal terms, jargon, and abbreviations, which commonly pepper the communications of legal professionals. The careless use of such language has the potential to confuse or mislead a party without a lawyer to translate.[41]

2. Judicial Assistance: What Is and Is Not Allowed

This paper has already discussed the difficulty for judges in deciding what assistance they may permissibly supply to a litigant in person. As we have noted already, also, in Canada, judges are obligated to offer certain assistance to a *pro se* litigant. This extends to ensuring that the trial process is explained (in the manner discussed above), and that a self-represented litigant has a fair opportunity to present his or her case as best as he or she is able.[42] To this end, a judge must identify the salient points of law and procedure for the lay litigant so long as it does not amount to advising on the nuances and subtleties of an extremely complicated area.[43] Further, as far as fairness requires, there is a

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[38] *Re F* (2001) 161 FLR 189, at [253] (Rearticulating the principles in *Johnson v Johnson* (1997) 139 FLR 384 (FamCA)).
[39] Minnesota Proposed Protocol, above n 32, at [2].
[40] Ibid, at [3]–[6].
[41] Gray, above n 29, at 19.
[42] Goldschmidt, above n 11, at 17.
[43] Ibid.

requirement that the judge engage in active participation in questioning during the presentation of a self-represented litigant's case.[44] Such questioning, however, must not cross the line into advocacy.[45] Thus, a judge may ask questions that develop and clarify the issues in contention; that clarify the litigant's own questions and a witness's response to them; and that, importantly, elicit material facts.[46] But, where possible, these questions should be directed at obtaining general information.[47] For example, rather than asking directly whether a certain fact is one thing or another, a judge may iterate his understanding of the lay litigant's case and ask for correction of that iteration if it does not reflect the message that the litigant has attempted to convey. Questioning will become impermissible advocacy where it is conducted in a way that explicitly or implicitly makes comment on the merits of the case or the credibility of a witness.[48] In this regard, a judge must take care that his or her language, tone, and disposition, remain objective and neutral.[49]

3. Relaxing Procedural Requirements

Most jurisdictions, New Zealand included, have recognised that the courts should afford the pleadings of self-represented litigants a liberal and lenient construction.[50] The court may want to extend this leniency to the procedure followed in the courtroom, relaxing the rules that would usually apply and accepting a degree of informality to proceedings to the extent that such a course does not imperil the requirement of natural justice.[51] Thus, so long as the parties consent, the rules governing the means by which evidence may be presented in court or those that require a party to establish a foundation before introducing certain evidence may be waived.[52] Indeed, as such rules

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[44] Ibid.
[45] Minnesota Proposed Protocol, above n 32, at [9].
[46] Gray, above n 29, at 34. See also *Re F* (2001) 161 FLR 189, at [253]. For similar comments in relation to a criminal case see *Gorrie v Police* HC Timaru CRI-2005-476-000009, 28 April 2006.
[47] Minnesota Proposed Protocol, above n 32, at [9].
[48] Gray, above n 29, at 34–35.
[49] Ibid.
[50] See e.g. *Sadler v Van Nes* HC Auckland CIV-2003-404-3236, 8 February 2004; *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534; *Hughes v Rowe* (1980) 449 US 5.
[51] Albrecht *et al*, above n 14, at 46.
[52] Ibid.

generally seek to shield jurors from misleading, prejudicial, or confusing information, and in civil trials they will often be superfluous to the determination of the case.[53] Albrecht *et al* suggest that a judge should attempt to make the represented party's counsel see the benefit of such an informal procedure.[54] Failing this, their further, somewhat pragmatic suggestion, is that the judge should explain to counsel that if the proceeding were to continue under the formal rules of evidence, then it would be that counsel's task to explain the basis for any objections made—with sufficient detail to allow the self-represented party to correct the flaw in his or her approach.[55] Again, however, such measures must have limits. It will be impermissible to bend the rules of procedure if doing so fails to give effect to the existing law or prejudices the represented party.[56] Similarly, liberal construction of pleadings cannot be extended to the redrafting of pleadings entirely or suggesting that a case would have a far better chance of success if it were cast as one cause of action rather than another. [57] The court cannot and must not trample upon the rights of those litigants who have employed a legal representative.

4. Controlling Frivolous Litigation

One cannot ignore the fact that a small number of lay litigants already burden the legal system by prosecuting frivolous or vexatious claims.[58] Judicial accommodation of the type described above may serve to encourage this, and members of the judiciary should rightly be proactive in preventing such litigants misusing the court's time.[59] Strike out and summary judgment procedures offer opposing litigants the ability to dispatch frivolous claims expediently, and there is no reason to deny such applications where a lay litigant's claim is not merely deficient in form, but also patently devoid of substance. Judges should also be aware that s 8 of the Evidence Act 2006 allows evidence to be excluded if its probative value is outweighed by the risk that the

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[53] Gray, above n 29, at 37.
[54] Albrecht *et al*, above n 14, at 47.
[55] Ibid.
[56] Goldschmidt, above n 11, at 19.
[57] Ibid, at 19 and 40. See also *Cashin v Craddock* [1876] 3 Ch D 376 (EWCA) at 376–377.
[58] Engler, Justice for All, above n 5, at 2027.
[59] Hon Justice Nicholson AO, "Can Courts Cope with Self-Represented Litigants" (2005) 8 FJLR 139 at 147–148.

evidence will needlessly prolong the proceeding. This may serve as a useful tool to control proceedings that risk spiralling quickly out of control. Having the Attorney-General declare a particular litigant vexatious is a further option open to the court under s 88B of the Judicature Act 1908; yet, at present, the practicability of this is questionable as the threshold for making such an order is incredibly high,[60] and the number of orders made very low.[61] Recently, however, in *Bhamjee v Forstick (No 2)* the English Court of Appeal has encouraged courts to take a far more active approach in controlling vexatious litigants.[62] It also empowered all courts within the civil jurisdiction to restrain a litigant's ability to pursue an action; an order made by the Court's own motion; or the application of an opposing party.[63] Lawmakers have since incorporated this change into the English rules of civil procedure.[64] One could legitimately regard an approach along similar lines to be the inevitable quid pro quo for the judicial leniency that a vexatious lay litigant may seek to exploit.

B. Lawyers' Obligations

The ethical rules governing lawyer interaction with unrepresented parties should be redrawn to better facilitate these litigants' use of the legal system. Yet, the legal profession has traditionally offered stiff resistance to such reform.[65] The American Bar Association, ("ABA") for one, rejected a proposed ethical standard that would have prevented lawyers from "unfairly exploiting" a lay litigant's ignorance of the law and "procur[ing] an unconscionable result". The rule that the ABA ultimately approved prohibited lawyers only from implying that they were disinterested; if a misunderstanding arose over the nature of the lawyer's role, he or she were to make "reasonable efforts" to correct it.[66] Deborah Rhode writes that these "minimal" obligations have

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[60] "[A]n unusual step, justifiable only in extraordinary circumstances and where there is a properly established evidential basis for doing so." McGechan on Procedure (online looseleaf ed, Brookers) at J88B.04(1).

[61] Crown Law Office *Report of the Crown Law Office for the Year Ending 30 June 2000* (2000) at 6.

[62] [2003] EWCA Civ 1113. Bhamjee was, in fact, a litigant in person.

[63] Ibid, at [38]–[52].

[64] Civil Procedure Rules (Eng and Wal), r 3.11 and Practice Direction 3C.

[65] D Rhode *Access to Justice* (Oxford University Press {USA}, New York, 2004) at 15 ["*Access to Justice*"].

[66] Ibid, at 15–16.

proven wholly inadequate to militate against overreaching behaviour. In her view, counsel for the stronger-positioned litigants in tenancy, consumer, and family law, disputes have frequently misled unrepresented litigants into surrendering important rights and accepting inadequate settlements. Further, as many lay litigants are unable to prove that they were misinformed, or to afford a further lawsuit, such conduct most often goes unsanctioned and unremedied.[67]

This is not to suggest that the problem in this country is on the same scale. Nevertheless, the ethical rules in this area do warrant examination. The Law Commission has noted that New Zealand has "explicit rules for lawyers facing unrepresented parties in Court disputes".[68] To an extent, this, at the time, was true. Rule 7.01 of the (now superseded) Rules of Professional Conduct for Barristers and Solicitors was the following:[69]

> A practitioner, when acting for a client in a matter where the other party is acting in person, should treat the other party with courtesy and fairness.

This is a good start; yet, this is not "explicit rules for lawyers facing unrepresented parties"—it is one rule that explicitly refers to dealings with lay litigants, but, passed this, lays out only a general obligation. In any case, the Conduct and Client Care Rules came into effect on 1 August 2008. The relevant sections are now the following:[70]

> **Chapter 12: Third Parties**
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> 12. A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.
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> 12.1 When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice.

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[67] Ibid, at 16.
[68] Law Commission, *Dispute Resolution in the Family Court* (NZLC R82, March 2003) at 192.
[69] New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* (7th edn, 2008).
[70] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, ch 12.

This change provokes concern for several reasons. First, it cannot be said now that there are rules that deal explicitly with self-represented parties; rather, these provisions apply to a lawyer's dealings with any person he or she may encounter in the course of practice. Second, perhaps derivative of this, the obligation to act with fairness has not been reproduced. One could argue that the requirement to act with integrity continues the obligation; yet, while integrity may extend to not misleading a lay litigant deliberately, it certainly would not prescribe offering any sort of accommodation to a litigant because of his or her *pro se* status, over and above that which would be given to a certificated practitioner. This suspicion is confirmed by r 12.1, which imposes the only duty on a lawyer in this situation: to inform the lay litigant of the right to take legal advice. A duty of integrity owed to all third parties is certainly not equal to a specific duty to act fairly towards a person without representation. Given this, some might consider the new ethical rules a derogation from the duties practitioners previously owed to litigants in person. It is worth noting that an earlier draft of the rules did include specific provisions relating to self-represented litigants—including obligations of fairness and a duty to inform such parties of defects in the form of their proceedings if to do so would be to expedite proceedings and was consistent with the lawyer's duty to his or her own client.[71]

Without greater duties on lawyers to help self-represented litigants, these litigants will continue to forfeit important rights. Yet, the problem with imposing these is seen to be the inevitable conflict that will arise in relation to a lawyer's duty to his or her client. When it comes to describing this duty, Lord Brougham's statement in *The Trial of Queen Caroline* is oft repeated and seen to be foundational: "… an advocate in the discharge of his duty knows but one person in all the world and that person is his client".[72] Any assistance counsel may offer to an opposing litigant in person would seemingly run roughshod over the obligation to advance the client's interests zealously and without

[71] New Zealand Law Society *Discussion Draft: Rules of Conduct and Client Care for Lawyers* (2007) r 12.1.

[72] *The Whole Proceedings on the Trial of Her Majesty, Caroline Amelia Elizabeth, Queen of England, for "Adulterous Intercourse" with Bartolomeo Bergami, Vol II* (John Fairburn, London, 1820) 2. See further, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, ch 6.

moral judgement.

Critiques of this duty of partisanship are well known, and can be noted but briefly here. The justification for the rule is twofold: first, the adversarial clash between opposing advocates is regarded as the best way of discovering the truth of a litigated dispute; second, supplying a zealous advocate is seen as the best means to protect individual freedoms.[73] Yet, as David Luban has argued, both these arguments unravel upon any serious scrutiny.[74] The argument from truth is based on a very much idealised picture of the adversarial contest where each litigant has equality of arms. Factors such as cost, advocate skill, and the frailty and prejudices of human judges and juries, are conspicuously absent—all of which contribute to an elicited "truth" that is likely to favour one or other party.[75] As for the rights-based argument, it may well be justified in criminal trials: individuals whose personal liberty is imperilled deserve a zealous advocate without divided loyalties to the state.[76] However, while some civil cases—litigation between large corporations and individual litigants, perhaps—may similarly justify a partisan approach by the weaker party's advocate, away from the criminal context, only a small number of cases raise concerns about a similar abuse of power.[77] In short, for our purposes at least, Lord Brougham's edict should not be considered an unimpeachable rule of practitioner ethics.

What must not be forgotten either is that this duty is subject to the overriding responsibilities advocates owe as officers of the Court, which, on some occasions, may require them to act to the possible disadvantage of a client.[78] This will be relevant when a counsel's opposition is unrepresented. For example, as in any other case, the

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[73] D Rhode *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, New York, 2000) at 53 ["*In the Interests of Justice*"].

[74] See D Luban, "Twenty Theses on Adversarial Ethics" in H Stacy and M Lavarch (eds) *Beyond the Adversarial System* (The Federation Press, Sydney, 1999). See also Rhode, *In the Interests of Justice*, above n 73, at 53–66.

[75] Luban, above n 74, at 143–145.

[76] Ibid, at 141–142.

[77] Ibid, at 142–143. See also Rhode, *In the Interests of Justice*, above n 73, at 54–55.

[78] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r13: "The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer."

court will expect counsel to make it fully aware of authority favourable to the case of a litigant in person, which the litigant in person has failed to cite.[79] One can hardly dispute either that part of this overriding duty is to maintain the effectiveness of the justice system.[80] Indeed, some commentators have taken this further and argued that a lawyer's duty is to maintain the justice and integrity of the legal system, even against client interests.[81] Regardless, an advocate's duty to the Court and to the administration of justice offers ample justification for ethical rules that obligate lawyers to accommodate, in some ways, those litigants who oppose them and represent themselves.

If practitioners must suffer some ethical obligations, the next question is to their scope. One suggestion has been to hold advocates to the same standard as those governing *ex parte* applications.[82] Here, the applicant has an obligation to place all relevant material fully and fairly before the court, whether or not the material favours the applicant's case.[83] While such an obligation may be a little too onerous, at the very least a practitioner must treat an opposing *pro se* litigant fairly with regard to the difficulties that beset self-representation. This will encapsulate a number of different elements. Practitioners should be barred from exploiting a lay litigant's ignorance or unfamiliarity with the law and (in line with the duty owed to opposing counsel) from taking advantage of obvious mistakes.[84] In England, for example, the Solicitors' Code of Conduct has a wide-ranging prohibition on taking advantage of other people for a lawyer's or any other person's benefit.[85] The commentary to this rule stresses its relevance to dealings with unrepresented parties.[86] While, certainly, an advocate should take all steps reasonably open to him or her to advance a client's case, it must

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[79] Australian Institute of Judicial Administration *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) at 9.
[80] D Webb, "Why Should Poor People Get Free Lawyers?" 28 (1998) VUWLR 65 at 76 ["Free Lawyers"].
[81] See e.g C Parker *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, Oxford, 1999) and Rhode, *In the Interests of Justice*, above n 73.
[82] Rhode, *Access to Justice*, above n 65, at 1816.
[83] See *Automatic Parking Coupons Ltd v Time Ticket International Ltd* (1996) 10 PRNZ 538 (HC).
[84] D Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, Lexis Nexis NZ, Wellington, 2006), at 487 ["*Ethics, Professional Responsibility and the Lawyer*"].
[85] Solicitors' Code of Conduct 2007 (Eng and Wal), r 10
[86] Solicitors' Code of Conduct 2007 (Eng and Wal), Guidance to Rule 10.

be considered unacceptable to complicate needlessly proceedings or make superfluous demands (such as extensive discovery) upon the *pro se* litigant, simply to make it more difficult for that litigant to further his or her claim. Similarly, a lawyer should not use unnecessary technical language or other means of obfuscation simply with the intent to confuse.[87]

While lawyers may forcefully advance reasons why an opposing party should settle a dispute, undue pressure to settle must be considered unacceptable.[88] In the New South Wales case of *Novotny v Cropley*, the Court equated undue pressure with "as a matter of practical reality, a real and definite tendency to interfere with the course of justice".[89] In this enquiry, the particular vulnerability of a party was a material consideration, and thus it was relevant to that case that a firm of solicitors sent the letter in question to a litigant without representation.[90] Note that the claim here was that the particular solicitor was guilty of contempt, the common law having well established that it is contempt to use unreasonable means to dissuade a litigant from prosecuting or defending a claim.[91] The above dictum therefore represents an absolute minimum standard, albeit a useful one, in the quest to articulate an ethical code. Finally, if a self-represented party does agree to settle a dispute, a practitioner should allow that party a further opportunity to seek legal, or other independent, advice on the terms of settlement, and, before concluding the agreement, should confirm the self-represented party's understanding and note this on the settlement document.[92] Above all, the code of professional responsibility must explicitly confront the issue. Without specific reference to the way practitioners should approach *pro se* litigants, the risk is that the import and development of these rules will be ignored.

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[87] Webb, *Ethics, Professional Responsibility and the Lawyer,* above n 84, at 495; see also The New South Wales Bar Association *Guidelines for Barristers on Dealing with Self-Represented Litigants* (2001), at [61].

[88] G Dal Pont *Lawyers' Professional Responsibility* (3rd ed, Lawbook Co, New South Wales, 2006), at 496 ["*Professional Responsibility*"].

[89] [2005] NSWCA 26 at [10].

[90] Ibid.

[91] *Attorney General v Times Newspapers Ltd* [1974] AC 273 (HL). The claim in *Novotny v Cropley* failed for the simple reason that the pressured party continued with his appeal in the face of exhortations that it was hopeless and should be withdrawn.

[92] The Law Society of New South Wales, *Guidelines for Solicitors Dealing with Self-Represented Parties* (2006) at 2.

C. Costs for Self-Represented Litigants

If a party is successful in a case brought to trial in this country, generally it may recover some of the cost of bringing the action from the losing party.[93] This rule, however, does not apply to a litigant in person: the courts have consistently held that only in an exceptional case will a court make an order for costs in one's favour.[94] A lay litigant is entitled, however, to "reasonable disbursements", in the Court's discretion.[95] Generally cited in support of this proposition is the 1884 case of *London Scottish Benefit Society v Chorley*,[96] which involved two solicitors who successfully defended a claim in person. In deciding that the solicitors acting in person could recover not only disbursements but also costs, Brett MR stated:[97]

> When an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him: the remuneration to the solicitor is money paid out of pocket. He has to pay the fees of the court, that is money paid out of pocket; but for loss of time the law will not indemnify him.

While it is the above passage that is usually quoted, Lord Justice Bowen's judgment also articulates an underlying reason for the rule:[98]

> Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured.

It should be noted that the reasoning on this point was *obiter dicta*—the question was not whether a litigant in person should recover costs, but whether an exception to the rule that one could not so claim should be

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[93] See High Court Rules, r 14.2.
[94] See *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA); *Lysnar v National Bank of NZ Ltd (No 2)* [1935] NZLR 557 (CA); *Re G J Mannix Ltd* [1984] 1 NZLR 309; *Jagwar Holdings Ltd v Julian* (1992) 6 PRNZ 496; *Parsonage Hill Wine Co Ltd v Laurenson* [1997] DCR 940; *Gottschalk v Everiss* HC Auckland CIV 2006-404-2728, 3 August 2007; *Coleman v Robertson* HC Auckland CIV 2007-404-7448, 14 May 2008.
[95] *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA).
[96] (1884) 13 QBD 872 (CA) ["*Chorley*"].
[97] Ibid, at 875.
[98] Ibid, at 877.

made for solicitors acting on their own account. Nevertheless, the English Court of Appeal adopted this reasoning with minimal discussion in *Buckland v Watts,* nearly 90 years later.[99] New Zealand courts first applied the rule in 1935.[100]

Yet, soon after the decision in *Buckland v Watts* (in fact, the only English decision directly on point), the English position was reversed by the enactment of the Litigants in Person (Costs and Expenses) Act 1975. This Act allows the Court to award costs in favour of successful lay litigants so long as the sum does not exceed two-thirds of the amount that would have been allowed had a legal representative been employed.[101] In practice, the level of remuneration is generally very low: upon enactment, compensation for a lay litigant's own time and effort was set at a nominal £9.25 per hour, a figure that the English parliament has not since increased.[102]

In the debate of the legislation in the House of Commons, the reason for the change was clearly explained:[103]

> It is to be hoped—and this advice is always given—that no one embarks lightly upon litigation and that no one undertakes litigation except as a last resort. If, however, a person is forced into it and chooses to represent himself he should not be out of pocket if he is successful.

Similarly, those who moved the Bill sought to remove the somewhat embarrassing anomaly, created by the Court of Appeal in *Chorley,* which allowed solicitors acting in person to recover, while all other lay litigants could not.[104] In other Commonwealth jurisdictions, however, this approach found little traction. The High Court of Australia, for

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[99] [1970] 1 QB 27 (CA). The decision in *Chorley* was also applied in *H Tolputt & Co Ltd v Mole* [1911] 1 KB 87 (DC); 1 KB 836 (CA) where a solicitor litigant in person drew up a bill of costs, submitted it to himself for taxation in his capacity as registrar of the county court, and then disallowed certain items.

[100] *Lysnar v National Bank of NZ Ltd (No 2)* [1935] NZLR 557 (CA).

[101] Rules of Civil Procedure (UK), r 48.6(2).

[102] M Zander *Cases and Materials on the English Legal System* (10th ed, Cambridge University Press, Cambridge, 2007) at 589.

[103] (25 April 1975) 890 GBPD, HC, 1925.

[104] (25 April 1975) 890 GBPD, HC, *1926*.

example, prominently discussed this question in *Cachia v Hanes*.[105] Here the majority decided that while the exception for solicitor litigants in person was unconvincing, the logical solution was to remove this exception—not to make the exception the rule.[106] It noted further that those litigants who engaged advocates to represent them would also suffer considerable loss of time and trouble as well as the cost of procuring professional help. To allow litigants in person to recover for their lost time would be to stitch an inequality into the law against litigants who were represented.[107] The majority was thus content to uphold the rule in *Chorley* for Australia. In doing so, it remarked that it would be "disregarding the obvious" not to recognise the great burden these litigants imposed upon the Court.[108]

The minority, in contrast, echoed the vigorous dissenting judgment of President Kirby (as he then was), on this issue, in the New South Wales Court of Appeal.[109] In his Honour's view, while, indeed, a lay litigant's time could be spent incompetently and inefficiently in preparing his or her case, this consideration should go to the level of compensation to be awarded and should not prohibit recovery altogether.[110] Similarly, his Honour saw no reason to assume lay litigants' costs could not be quantified.[111] Finally, citing the International Covenant on Civil and Political Rights, Kirby P was of the opinion that to deny costs in these circumstances would be repugnant to the right of all persons to be equal before a court of law.[112] Nevertheless, the majority decision of the High Court remains the guiding authority in Australia, and, indeed, was cited extensively by our Court of Appeal in *Re Collier* when

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[105] (1994) 120 ALR 385.
[106] Ibid, at 389 (per Mason CJ, Brennan, Deane, Dawson, and McHugh JJ).
[107] Ibid, at 391.
[108] Ibid.
[109] *Cachia v Hanes* (1991) 23 NSWLR 304. In fact, the NSWCA had originally declined the application to hear argument on whether a court could award a litigant in person "loss-of-earnings" expenses, holding that they had conclusively answered this in the negative in the earlier case of *Cachia v Isaacs (No 2)* 23 March 1989 NSWCA. However, Kirby P (as he then was), who had been the lone dissenting voice in the earlier case, opined that the original grant of appeal had been too narrow, and allowed argument on this point. As a result, the majority felt it necessary to make limited remarks on the issue.
[110] Ibid, at 310.
[111] Ibid, at 311.
[112] Ibid, at 312. In this argument he found support from *McBeth v Governors of Dalhousie College and University* (1986) 26 DLR (4th) 321, a case decided under s 15 of Canadian Charter of Rights and Freedoms by the Nova Scotia Supreme Court, Appeal Divison.

reiterating this conclusion for New Zealand.[113] The Court of Appeal's primary concern seems to be the trouble with which expenses could be calculated; yet, like the High Court of Australia, it also iterated that given the policy implications of such a change, the decision should be reserved for parliamentary intervention.[114] As one small concession, however, the Court held that it might allow an award in exceptional circumstances—such as where a case was brought "without hope of any personal gain or advantage, but purely out of the concern for the welfare of the general public".[115]

The current position precluding the recovery of costs by successful self-represented litigants is unsatisfactory and should be reversed. Paying costs indemnifies the other party for the lost time and expense inevitably brought by court proceedings;[116] indeed, this has been the traditional justification for the Court making such awards.[117] Fixing the cost of litigation to the unsuccessful party encourages efficient litigation, as generally a party will only litigate where the cost of litigation is outweighed by the value of the judgment it expects to receive.[118] It provokes a party to assess carefully the strength of his or her claim with the knowledge that, should the claim fail, he or she will be liable for not only his or her costs but also those of the successful party.[119] This indemnity principle is used as justification for the rule precluding the award of costs to lay litigants (but allowing disbursements) as their self-representation does not come at an actual cost;[120] rather, it is an *opportunity* cost—the loss of their own personal time—something for which the law does not compensate a party, regardless of whether it is represented or not.[121] Further, as the

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[113] [1996] 2 NZLR 438.
[114] Ibid, at 441.
[115] Ibid. See further *Re Inspirational Homes Ltd* [1997] 3 NZLR 438 (HC).
[116] Rules Committee *Discussion Paper: The Award of Costs to Lay Litigants* (2001) at 9–10.
[117] See *Harold v Smith* (1860) 5 H & N 381 at 385: "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them."
[118] J Wilson, "Attorney Fees and the Decision to Commence Litigation: Analysis, Comparison and an Application to the Shareholders' Derivative Action" (1985) 5 Windsor Yearbook of Access to Justice 142 at 149–151.
[119] G Dal Pont *The Law of Costs* (LexisNexis Butterworths, Australia, 2003), at 214 ["*The Law of Costs*"].
[120] *Cachia v Hanes (*1994) 120 ALR 385 at 389.
[121] Rules Committee, above n 116, 9 citing ibid.

majority of the High Court recognised in *Cachia v Hanes*, a costs award (in the absence of special circumstances) will never completely indemnify a successful litigant.[122] This represents a concession to the interest of access to justice as full indemnity by the unsuccessful party would raise the potential cost of litigation and preclude some parties from bringing meritorious claims.[123] In this respect, it is argued that confining reimbursement to actual costs, not opportunity costs, is a realistic way to quantify the limited indemnity costs offer.[124] Yet, the partial indemnity argument should act for self-represented litigants, rather than against them. If built within the rationale for awarding costs is a concession to the need to not deter good claims, then surely this interest must prevail over the desire for a neat taxonomy. In New Zealand, where the presumption that a party will recover only two-thirds of its reasonable costs formalises this limited indemnity and explicitly acknowledges the access to justice principle,[125] this argument is particularly strong. And as the deterrent effect of our system of costs increases when the value at stake in a claim is small (as the proportionate expense of legal fees will be greater)[126] this danger is acute given the comparatively low-value actions lay litigants most frequently bring.[127]

The Court's ability to award costs can serve other objectives as well. For most of the 20th century, the Canadian position mirrored that of Australia and New Zealand. Yet, in the 1995 case of *Skidmore v Blackmore,*[128] the British Columbia Court of Appeal overruled an earlier decision of its own and held that there were good reasons to allow costs to self-represented litigants.[129] It held also that the Court could

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[122] *Cachia v Hanes (*1994) 120 ALR 385 at 391.
[123] Ibid.
[124] Rules Committee, above n 116, at 10–11
[125] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 at [9]–[10].
[126] Wilson, above 118, at 152.
[127] Indeed, the majority of the High Court in *Cachia v Hanes,* at 392, noted that the non-award of costs must operate as a deterrent to come to court in person, but declined to express a view on whether this consideration should win out. Since this decision, the Australian Law Reform Commission has recommended that a lay litigant should be able to recover not only disbursements but also the costs for work reasonably necessary to prepare and conduct his or her case. See Dal Pont, *The Law of Costs,* above n 119, at 227 citing ALRC 75 at 177.
[128] (1995) 122 DLR (4th) 330 (BCCA).
[129] R Flannigan, "Costs for Self-Represented Litigants: Principles, Interests and Agendas" 33 The Advocates' Quarterly (2007) 463 at 447.

most likely effect such a change to the law.[130] In delivering the unanimous judgment, Cumming JA described as "outdated" the view that a court awarded costs solely to indemnify against the cost of litigation.[131] In his Honour's view, they also serve to "deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation".[132] Other Canadian courts have seized on this reasoning[133] to the extent that almost every Canadian jurisdiction now allows self-represented litigants to receive compensation for their time.[134] These measures are regarded as part of the judiciary's overall responsibility to ensure effective case management.[135] In essence, these further grounds for awarding costs are simply specific instances of the efficiency rationale—the threat of their award reduces the chance that a party will bring an irresponsible claim (or that it will bring an otherwise good claim in an irresponsible manner).[136] What they illustrate, however, is that denying costs because of a distinction between actual and opportunity costs is too simple. Looking at the reason for the rule, preventing lay litigants from claiming costs based on this alone does not give effect to the policy considerations that should underpin making such an award. The notion of costs as an indemnity should not be applied so narrowly that it defeats the purpose for which it was elaborated.[137] Further, at a more fundamental level, it is simply unfair to hold these litigants liable for costs to which they, themselves, are not entitled.[138]

The next argument commonly raised is the difficulty of quantification. However, as Kirby P noted in *Cachia v Hanes,*[139] while it may be difficult

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[130] Ibid.
[131] *Skidmore v Blackmore,* above n 128, at [28].
[132] Ibid, at [37].
[133] See e.g. *Fong v Chan* (1999) 181 DLR (4th) 614 (OCA); *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371; *1465778 Ontario Inc v 1122077 Ontario Ltd* (2006) 275 DLR (4th) 321 (OCA).
[134] Alberta Law Reform Institute, above n 36, at 72.
[135] Fisher J *Costs: Changes to the High Court Rules* (paper presented to the Auckland District Law Society, 22 November 1999) at 4.
[136] Rules Committee, above n 116, at 13.
[137] Dal Pont, above n 119, at 220 citing *Environment Protection Authority v Taylor Woodrow (Australia) Pty Ltd (No 2)* (1997) 97 LGERA 368, at 384 (LEC).
[138] Flannigan, above n 129, at 468 citing *Shillingford v Dalbridge Group Inc* [2000] 5 WWR 103 (Alb QB).
[139] (1991) 23 NSWLR 304.

to quantify the value of the time a lay litigant takes to prepare his or her case, and while this time may not be used in the most efficient way, these considerations surely should go towards the question of how much the award should be, not whether an award should be made at all. In any case, this argument seems odd, or at least unpersuasive, in the face of English legislation that for over 30 years has offered a workable calculation. The Canadians have circumvented this problem simply by making an order that the registrar determine what those costs should be, as is the case with a successful represented litigant.[140] Moreover, for some time the New Zealand approach has been to award costs on a scale determined by the complexity and significance of the litigation at issue.[141] The Court assesses costs on this scale objectively. The question is not how long it actually took to prepare a case for trial—this is irrelevant. Rather, the measure is how long it *should* have taken.[142] There seems no logical reason why the costs that a court may award to parties representing themselves cannot be included in this scale. Indeed, in the recent case of *Lincoln v Police*, the High Court found a successful challenge to the police's interpretation of the Arms Act 1983 not to reach the exceptional circumstances required to award costs to a litigant in person.[143] Nevertheless, acknowledging the applicant's assistance to the Court, Justice Mallon suggested that allowing him to recover a proportion of his costs (charged at an hourly rate) as a disbursement *in the form of an expert's expense* would be an appropriate exercise of the Court's general discretion to award costs on this basis.[144] This was despite her Honour's recognition that the applicant had not paid or incurred an expense in his representation and thus the time he incurred and the cost to him did not quite fit within the relevant definition.[145] This approach most likely assured a fair result in the particular case, but it cannot gloss over that what her Honour ordered here was costs, suggesting that the current rule sits uncomfortably with our present procedural mores. Allowing a small, even arbitrary, daily recovery rate for lay litigants, to be adjusted in light of continuing study and the Court's experience, would be a simple first step towards a substantial improvement on the current situation. Of course, the principles that

[140] Dal Pont, *The Law of Costs,* above n 119, at 228.
[141] Fisher J, above n 135, at 2.
[142] J Turner, "Civil Procedure" [2002] NZ Law Rev 185 at 189.
[143] HC, Hamilton, CIV-2009-454-473, 12 May 2010 at [5].
[144] Ibid, at [6].
[145] Ibid.

underpin such awards can be formulated to mitigate fears that lay litigants will be put at an unjustified advantage in what costs they may claim.[146]

Conclusion

In a system designed for legal professionals, those who cannot or choose not to procure such representation find that their ability to obtain a meaningful determination of their rights and obligations is severely impaired. The role of our justice system as the ultimate arbiter of entitlement demands the shaping of its institutions to suit this class of litigants better. On this basis, this paper has advocated a number of reforms. The role of judges, when confronted with lay litigants, should be guided by clear principles that acknowledge the duty of the court to ensure a fair trial for those who come before it. Similarly, specific ethical rules to govern legal practitioners should be drafted in a way that reflects the obligation lawyers owe, as officers of the Court, to the administration of justice and to the community. Finally, recognising the inequity of precluding *pro se* litigants from claiming some recompense for their loss of time in arguing a successful claim, the current rule that prohibits costs to such litigants must be reversed.

[146] In both England and Canada, for example, the costs awarded cannot exceed those that a litigant could have claimed had he or she paid for professional representation.