

Leaving Emotion Out: Litigants in Person and Emotion in New Zealand Civil Courts

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Abstract

Litigants in person (LiPs) receive the message that emotion should be “left out” of New Zealand courtrooms. This is a confusing and impossible goal. This paper draws on two empirical studies and argues that the exhortation to leave emotion out is multi-layered, referring to behaving and thinking like a lawyer, including a focus on the commercial or transactional elements of disputes, rather than on other aspects that are important to litigants. This is often not possible for LiPs and it can reduce their sense of procedural justice and result in the omission of legally relevant material. Judges can respond to LiPs who violate the emotion regime by allowing LiPs to explain aspects of the dispute that are salient to them. We need to consider how the civil courts can allow more space for litigants to tell stories, rather than focusing only on the commercial or transactional aspects of disputes.

Key words

Emotion; judging; litigants in person; self-represented litigants; civil justice

Resumen

Los litigantes autorrepresentados de Nueva Zelanda reciben el mensaje de que las emociones deben “quedarse fuera” del juzgado. Se trata de un objetivo imposible de lograr. Utilizando material de dos estudios empíricos, este artículo argumenta que la exhortación a desprenderse de las emociones tiene muchas capas, referidas a comportarse y pensar como un abogado, incluyendo la atención dada a los elementos comerciales o transaccionales de una disputa más que a otros aspectos importantes para los litigantes. Las partes que se representan a sí mismas no pueden cumplir ese mandato, y su sentido de justicia procedimental puede verse reducida y resultar en la omisión de material jurídicamente relevante. Los jueces pueden permitir a los autorrepresentados explicar aspectos de la disputa que les parecen destacables. Debemos considerar cómo los juzgados de lo civil pueden dejar que los litigantes cuenten historias en lugar de centrarse sólo en los aspectos comerciales o transaccionales.

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Palabras clave

Emociones; juzgar; litigantes en persona; litigantes autorrepresentados; justicia civil

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1. Introduction

What place does emotion have in a New Zealand civil court dispute? Those who appear without a lawyer – litigants in person (LiPs) – often believe that emotion must be “left out” or “kept out” of the courtroom. Emotion clearly does, however, have a role in court, both as a rhetorical device and sometimes even as an element of various actions. LiPs must decode this confusing message themselves as they do not have a lawyer to extract the “law-relevant facts” and package them for “legal consumption” (Maroney 2016, p. 5). This paper considers what the professional actors – the lawyers and judges – mean by this concept of “leaving emotion out” and what effect this message has, both on the LiPs themselves, and on judicial interactions with the LiPs.

As the paper considers both what the professional actors mean by keeping emotion out and how LiPs interpret this, it does not wade into the difficult territory of defining emotion (Maroney 2006). Instead it explores the meaning this term has for the participants in the court process, both what is defined as emotion and therefore to be kept out of court, and the norms for managing or displaying emotion. In doing so, it seeks to shed light on what lawyers and judges mean by this supposed blanket ban on emotion and explores the ban’s effects.

The method section briefly explains the source material for the paper – two empirical studies of New Zealand courts. The next section of the paper considers how LiPs receive the message that emotion should be kept out of court and what judges and lawyers mean by this. The final sections examine the effect that the message has on LiPs and their attempts to conform, as well as the judicial reactions when LiPs fail to do so.

2. Method

This paper draws on two empirical studies conducted in the New Zealand civil courts from 2012 to 2017: (1) a study of the experience of litigating in person in the High Court and District Courts (2012-2014) (LiP Study); and (2) a study of the pace of civil litigation in the High Court (2016-2017) (Pace Study).¹ The studies used various empirical methods to explore their respective research questions, which were not directly related to emotion. For the purposes of this paper the material drawn on is:

1. Observations of court hearings, including interviews with the observed unrepresented litigants (LiP Study) (observations and interviews with 10 case study participants and a further 24 interviews with LiPs);
2. Interviews with District and High Court judges (Pace Study and LiP Study) (21 interviews);
3. Interviews with lawyers who represent clients in the District or High Courts (LiP Study and Pace Study) (20 interviews and eight focus groups with 31 lawyers);
4. Interviews with court staff in the District and High Courts (LiP Study and Pace Study) (25 interviews).

The author carried out all the observations and most of the interviews drawn on in this paper. A research assistant carried out some of the focus groups with lawyers and all of the court staff interviews in the Pace Study. Interviews were semi-structured and lasted 30-60 minutes, focus groups were 60 minutes. All the interviews were transcribed and then analysed in NVivo. Emotion was not directly interrogated during the interviews but was developed and explored as a theme during analysis. A code for “emotional responses” was created, with sub-nodes of “negative” and “positive”, as well as a number of specific emotions under these headings where the participants named the emotion e.g. anger, fear, satisfaction. A further code for “emotion” as a concept was also added to capture passages where the participants

¹ Both studies were financially supported by the New Zealand Law Foundation.

directly discussed emotion as a concept and their ideas about its role. During analysis, queries were run to explore intersections between these emotion codes and other codes unrelated to emotion.

This article focusses on how lawyers, judges, and LiPs explain their perceptions of the role of emotion in court and how these interpretations affect the information that the court receives. Before turning to the role of emotion, it is useful to understand the context of the courts in the studies.

Judges of both the District and High Courts must have practiced as lawyers for at least seven years and are appointed by Governor-General as permanent judges (District Courts Act 2016, s 16; Senior Courts Act 2016). The District Court, which includes the Family Court, hears a range of disputes including family property, care of children, and general civil disputes with (at the time of the studies) a quantum between \$20,000 and \$200,000. In 2016, the number of general civil claims is low only 687 new defended cases nationally – compared to the Family Court, which received almost 60,000 new filings (Courts of New Zealand 2016). There is thought to be an increasing number of LiPs in New Zealand (Winkelmann 2014). In the District Court, LiPs are common in general civil disputes as the amounts at stake often do not justify the expense of counsel. Family Court cases in the District Court have specific rules, some of which prohibit the use of a lawyer at early stages of the proceedings and therefore LiP numbers are high in at least some types of proceedings (Henaghan and Nicholson 2014).

At the time of the studies, the High Court heard civil claims over \$200,000. It received 2,602 new cases in 2016. LiPs are uncommon in defended civil High Court cases but there are thought to be higher numbers of LiPs in appeals, bankruptcy and liquidation proceedings (Toy-Cronin *et al.* 2017). It is against this background that we now turn to examine the role of emotion in these courts, and LiPs' interpretations of its role.

3. Litigants' attempts to learn the courts' emotional regime

LiPs entering a courtroom, and the legal system as a whole, can liken it to entering a strange country:

The court system is for many a foreign land and the notion of bringing proceedings without legal representation can be compared to the fearful prospect of being stranded in a foreign land unable to speak the language, and without the money needed to find your way home. (Winkelmann 2014, p. 239)

Felstiner and Sarat use similar imagery when they discuss client-lawyer interactions as that of two cultures “[m]aking a landfall in the treacherous waters of each other’s world” (Felstiner and Sarat 1992, p. 1455). Some participants in the LiP Study also used this metaphor when describing litigation in person:

It is almost like they are speaking another language. (LiP)

The court process is stressful and foreign to [LiPs]. (Lawyer)

I try to speak their language. (Judge)

The features of this foreign land are contrary to most LiPs' everyday experiences (and indeed, the experiences of the general public at large). These features include specific rules about turn-taking, forms of address (e.g. calling a judge “Sir” or “Your Honour”), physical proximity due to specific seating positions in the courtroom with no movement allowed around the court, eye contact (e.g. litigants should look at the judge rather than addressing their adversary when making an argument), specific forms of language and technical terminology, and prescribed dress including counsel wearing gowns in the High Court. LiPs need to navigate all of these rules and norms, and as for any traveller, they can be confusing and difficult to interpret.

Further to these conventions, this foreign land also has its own “emotional regime”. This is “the set of feeling and display rules, and discourse(s) about emotions that are

dominant in a specific social setting/organization/society" (Bergman Blix and Wettergren 2016, p. 32). While the details of the court's emotional regime may not be well known to visitors in this foreign environment, discourse about judicial emotion is part of popular culture and is deeply entrenched. Emotion in judging is dominated by what Maroney refers to as the "persistent cultural script of judicial dispassion":

Insistence on emotionless judging – that is, on judicial dispassion – is a cultural script of unusual longevity and potency. Thomas Hobbes declared in the mid-1600s that the ideal judge is divested 'of all fear [], anger, hatred, love, and compassion' (...). Then and now, to call a judge emotional is a stinging insult, signifying a failure of discipline, impartiality, and reason. (Maroney 2011, pp. 630-631)

It is perhaps this deeply entrenched idea that influenced many of the LiPs in the LiP Study, who referred to the need to "keep emotion out" of their cases. Influences from popular culture or from interactions with judges, court staff, and lawyers had led many of them to believe emotion had no place in court:

Lawyers struggle with emotion (...). They don't do emotions – the court doesn't do emotions – and unfortunately it was horrendously emotional for me (...). It's just, just sort of leave the emotions out of it. I never really got it directly told to me but I – I guess it took a while for me to realise and it was awful, it was awfully emotional. (Family Court LiP)

I've dealt with the courts before and I know you are expected to be polite, courteous and professional and I still am professional. I never get emotional. (Experienced High Court LiP)

I've got a friend who is an accountant, she qualified as an accountant, she is in management, so she has helped me a lot, she says she won't do the emotional stuff. She'll proofread it, and give me some tips, she says take the emotion out of it. (Family Court LiP)

Some lawyers also referred directly to the idea of removing emotion from court proceedings:

Obviously you care about your client and care about the outcome but there is a limited care if you like. It is a dispassionate thing for you and you are trying to deal with it objectively. That is one aspect. So you take the emotional aspect out of it. (Lawyer)

Another lawyer, discussing the "lousy quality" of affidavit evidence being filed, said the problem was that lawyers were not editing out "all the submission and argument and emotion".

While the LiPs had picked up on this idea that emotion does not belong within the domain of law, an idea shared by lawyers as well, this leaves two questions: what do legal professionals mean by this concept? What are the implications of this message?

3.1. Understanding what emotion gets left out

The idea of leaving emotion out draws on a conception of emotion being the binary opposite of reason. In this tradition, "mental phenomena are divided up as 'rational' cognitive and 'irrational' emotional faculties" (Gendron and Barrett 2019, in this issue). Emotions are conceived of as "occasional, intense, unpredictable moods that interfere with a steady state of rationality" (Bandes and Blumenthal 2012, p. 164) Emotions are to be "left out" because they are seen as distracting –something that leads us astray – and should, therefore, be exorcised from decision making as the enemy of objectivity and neutrality (Grossi 2015). As one lawyer said, illustrating this point:

The lawyer has a big advantage – you get the sane head, remove the emotion from the dispute. You don't get that as a self-represented litigant, it clouds your judgment. (Lawyer)

There is an entrenched cultural idea of law as a rational pursuit free from emotion: "The suppression of emotion and personal feelings is a key attribute of traditional

conceptions of the profession" (Roach Anleu and Mack 2005, p. 599). This applies both to lawyers, who equate "emotional detachment" with "rational competence" (Harris 2002, p. 571), and to judges, where emotion is conceived as "irrational, disorderly, impulsive and personal", and at odds with the dispassion and impartiality that are core judicial values (Roach Anleu and Mack 2013, pp. 329-330).

While this popular conception of the divide between emotion and reason continues to hold sway, research demonstrates it is a false divide: "According to appraisal theorists, emotion and cognition are mostly inseparable. Few emotional experiences occur without cognition, and few thoughts are completely free of emotion" (Ellsworth and Dougherty 2016, p. 21). Emotion is an important part of all human activity, including the courtroom: "Emotion reflects reasons, motivates action, enables reason, and is educable" (Maroney 2011, p. 632).

Furthermore, emotion is directly relevant to a number of areas of civil litigation, for example: emotional distress is an element of non-pecuniary damages in tort cases, emotional harm is relevant to care of children proceedings, and emotional involvement is relevant to determining unconscionable conduct and undue influence in contract law. Even where emotion is not a direct element, lawyers and judges routinely use emotional displays in furtherance of specific goals in court. For example, barristers use emotional displays to "impress the audience", being the jury, judge or their own client (Harris 2002, pp. 568-570), and sentencing judges use emotion to achieve responses from defendants, for example displays of grumpiness to expedite proceedings (Tata 2007, pp. 431-432). As Maroney succinctly pointed out: emotion is used for persuasive effect by lawyers who "employ the tools of persuasive rhetoric. No lesser mind than Aristotle taught us that emotion is central to rhetoric, and certainly that is true in the courtroom" (Maroney 2016, p. 5).

Given that the courtroom is not entirely devoid of emotion, what do lawyers and judges mean when they refer to leaving emotion out?

3.1.1. Behaving like a lawyer as leaving emotion out

Leaving emotion out can sometimes refer to rules around appropriate displays of emotion in court. Crying or a display of anger would both be incidents where LiPs failed to appropriately regulate the display of emotion to remain within the emotional regime of the court. It might also include the failure to regulate the emotion of fear, which reduces LiPs' ability to effectively engage with the court. A McKenzie Friend,² discussing care of children proceedings, said:

[The judges] seem to rush things. When people are already upset at the prospect of losing their kids and trying to fight to get them back, I just find that because the Lawyer for Child³ and [Government] lawyer are emotionally detached from the issue, they can spout it all out rather quickly. I find it rather difficult to watch self-litigants struggle to get the words out, because they are already fearful of the lawyers or saying the wrong thing or something that might be misconstrued.

This failure to efficiently and effectively state their case to the judge is a factor that several judges also mentioned. What is being referred to here is not so much the emotion but the behavioural response to that emotion. Mack and Roach Anleu (2019, in this issue) summarise what consensus exists on emotions, and quoting Gross, say: "emotions are typically elicited by specific events and give rise to behavioral response tendencies relevant to these events". The event of appearing in the foreign environment of the court to discuss a matter of deep personal import is likely to trigger fear and anxiety, which may in turn elicit behavioural responses of difficulty

² A "McKenzie friend" is a lay advisor who sits beside the LiP in court. The McKenzie friend is able to assist the litigant with advice and support but they may not speak on the litigant's behalf except in special circumstances. The term originates from the UK case *McKenzie v McKenzie* [1970] 3 All ER 1034.

³ A "lawyer for child" is a lawyer appointed during Family Court proceedings to provide independent representation for the child and promote the child's welfare and best interests. Section 9B of the Family Court Act 1980 prescribes the role.

articulating a point. The idea of leaving emotion out in this context is therefore minimising inappropriate behavioural responses to the experience of emotion.

3.1.2. Thinking like a lawyer as leaving emotion out

Minimising displays of emotion, or inappropriate behavioural responses to emotion, is one aspect of “keeping emotion out”. However, LiPs’ behaviours that lawyers and judges more commonly identified as “emotional” were failures to engage in law’s particular style of fact selection and reasoning. This included giving the court too much detail on legally relevant points and pursuing legally irrelevant points. It also referred to the way in which this material was presented, including the use of inflammatory language, conclusory statements, and attribution of motive. In addition to style, it also included content; LiPs who wanted to air issues or seek remedies for issues outside of law’s domain were labelled “too emotional” or “too emotionally involved”.

a) Detail, irrelevance, and scandalising the court

A common complaint from lawyers and judges was that LiPs produced highly detailed, but not necessarily legally relevant, written material. This type of detail made the LiPs’ documents difficult and time consuming to understand. This was often attributed to emotional involvement in the case. One lawyer explained that he was very cautious about discussing a case with a LiP because LiPs are “emotionally involved” and this would lead to a long and detailed exchange:

If you wanted to have an exchange of correspondence about something, you’d have that exchange with a lawyer and it would be brief and to the point. You have it with a self-represented litigant and inevitably what you’d get in response would be emotional stuff – and they have a right to be emotional about their case – but it wouldn’t be relevant to the particular point I’d be writing about.

This problem with providing too much detail and irrelevant material was raised repeatedly by study participants. For example:

It will be 11pm at night and here is another email from this person [a LiP] and it is so damn long you can’t read it. It is incredible really. It just shows the level of commitment and emotional engagement that they’ve got with their issues or whatever it is they are pursuing. (Court Staff)

... they can’t actually identify what the real point is because they’ve got this mass of detail in their head and they think everyone has to understand that mass of detail. (High Court Judge)

The large amount of content is attributed to, at least in part, the LiPs’ emotional engagement with the issues.

While this was a common complaint, that LiPs burden the court with too much detail, a less recognised effect is that they may omit detail. The fact that all the detail is “in their head” can sometimes lead LiPs to assume that the court must already know that detail as well. This interchange from a High Court case, where the LiP was arguing that the opposing party’s introduction to their brief of evidence should be struck out, is illustrative:

Judge: Why is this introduction any different from yours?

LiP: Well, we know it all anyway.

Judge: Well, I don’t!

LiP: Fair enough, I’ll accept that.

Another example of LiPs omitting details was provided by a lawyer who acted as Lawyer for Child. She said that LiPs would sometimes tell her relevant information but then not include it in their affidavit, because having told someone they assumed the court then “knew it”. These are examples that contradict the typical portrayal of a LiP as over-inclusive of detail; they sometimes omit relevant legal details.

The large amount of content, included because of its emotional importance to the litigant, rather than its legal relevance, sometimes meant documents contained inadmissible allegations: “[Some LiPs] produce documentation that will be outrageous or scandalous” (Court staff). A Judge considered that strong emotion might be inevitable in a personal dispute but considered it still needed to be kept out of court: “this court is not helped by a whole lot of inflammatory material; that needs to be kept in the counselling arena”.

These failings in LiPs’ documents – excessive detail, irrelevance, scandalising the court – can be seen by legal professionals as driven, at least in part, by “emotional” involvement. But what does being “emotionally involved” actually mean? One interpretation is that they are suggesting strong emotions – fear and anger, for example – are driving the behaviour of telling the court about every detail and including scandalous allegations against the opposing party. Another interpretation is that lawyers regard legal reasoning as rational and therefore – following the traditional emotion-reason binary – any divergence from this type of reasoning is “emotional”. A failure to sift through a case for legally relevant details is a failure to engage in the very specific type of legal reasoning that is core to law school curricula. Legal reasoning is what Mertz calls “a very particular, culturally laden kind of thinking and talking” that lawyers are trained to perform (Mertz 2007, p. 98). Lawyers however tend to think of learning legal reasoning as a general improvement in reasoning, “a sharpening of thought (...) implying that it involves a honing of general analytic ability” (Mertz, 2007, p. 98). Lawyers do not, therefore, recognise the very particular type of thought that they engage in. Instead it is considered as simply “analytical” or “rational”. Then, drawing on the emotion-reason binary, any departure from this type of reasoning is considered “emotional”. The message that emotion should be “left out” can then be seen as shorthand for “thinking like a lawyer”. In turn, this then is shorthand for engaging in a professionally specific “discursive practice” that bears little relationship to the “norms and conventions that many members of our society (...) use to solve conflicts and moral dilemmas” (Mertz 2007, p. 99).

b) Law’s domain

While being “emotional” may be shorthand for failing to engage in legal reasoning, it may also reference raising matters that lie outside law’s domain. Law recognises as important some elements of a dispute and considers other aspects outside its domain. Recall, for example, the Judge who said that some matters need “to be kept in the counselling arena”. Lawyers, Relis argues, predominantly understand civil litigation in purely in financial terms. Lawyers “reframe litigants’ dispute experiences, feelings, and extralegal aims to fit into legally cognizable compartments suitable for processing within the legal system” (Relis 2009, p. 16). A lawyer in her study starkly illustrates this emphasis on the financial aspects of disputes: “But I tell clients that investing in a malpractice case is no different from investing in the stock market. It’s all about money, and you should look at it that way” (Relis 2009, p. 53).

Litigants, however, may take quite a different view of the purpose of civil justice. This is demonstrated by a study Hadfield conducted, which examined 9/11 victims’ and families’ responses to a Government compensation package. Hadfield sought to explain why victims and families were very slow taking up the economically generous offer to settle the claims, which included a bar on any litigation. Hadfield found that litigants wanted to use litigation to unearth information, to seek accountability and an authoritative public judgment about wrongdoing, and wanted to do something to promote change (Hadfield 2008). The responses of the 9/11 families, Hadfield concludes:

... throws into sharp relief a fundamental rift between the dominant way in which legal actors frame the goals of litigation and the way those who find themselves in a position of pursuing potential litigation in response to loss see the institution. (Hadfield 2008, p. 674)

While, as Relis found, a recurrent theme for plaintiffs is “‘It’s not about the money’” (Relis 2009, p. 42), the court system is very focused on the financial aspects of disputes.

When this divide between the professional actors’ and the litigants’ views of litigation are considered, the further meaning of leaving “emotion out” becomes clearer. Labelling something “emotional” is a means of referring to a matter that is outside the court’s focus on transactional or commercial elements of a dispute. A few LiPs seemed to have decoded this aspect of keeping emotion out:

I didn’t get caught up in all the emotive stuff. I kept my focus on the property settlement and the finance of the company only. I didn’t get caught up in the mudslinging and the adversarial stuff like ‘I’m no good as a mother and everything I said was wrong’. I kept my focus. That was how I was leading the way. (Family Court LiP)

Another LiP identified this tendency in law to reduce a dispute to something that can be commoditised and traded, although with critique:

It is awful isn’t it because this little person that you are trying to protect they start feeling like they are a piece of furniture, like they are being treated like that. It’s really horrible, it feels like it becomes a fight over a possession and it’s not, it is a little person. (Family Court LiP)

Under this model of civil justice where financial elements are emphasised, civil disputes become an exercise in calculating the likely financial implications of continuing to engage in a dispute. This cost-benefit analysis focuses on securing the most economically advantageous outcomes. There is little room in such a model for argument about details that are legally irrelevant or that do not directly contribute towards the goal of a resolution in accordance with the best financially advantageous outcome. Failure to engage with the civil process in this manner is labelled “emotional”, as this court staff member’s comment illustrates:

Self-represented litigants definitely add another challenge to the whole process (...) they carry such emotion that it’s really difficult to get them to just understand that a lot of these things are just process, and if they follow the process then we would get to the end game, but there’s kind of a fight everywhere. (Court staff)

“Carrying emotion” is given as the explanation for this failure of LiPs to focus this cost-benefit analysis and simply proceed through the process to resolution, “the end game”.

Locating this emphasis on financial aspects of civil disputes within its historical context can, however, be illuminating. In other periods, scholars have suggested that the emotional dimensions of civil disputes could sometimes be given more prominence and that emotional regimes in court are both culturally and historically situated (Schnädelbach, forthcoming 2019; this issue).⁴ For example, Daniel Lord Smail concludes that the people of thirteenth and fourteenth century Marseille used the civil courts to air emotion publicly:

Emotions can have few legal, political, or social consequences if they remain unexpressed. The law courts were successful as a marketplace for the transaction of emotions, I have argued, because they provided a public stage on which to advertise and publicize hatreds, humiliations, and social sanctions. Litigation was a performance designed to convey a message to an audience. (Smail 2003, p. 243)

Similarly, “W.J. Jones wrote of the ‘cathartic’ role of the sixteenth-century court of chancery as a legal space concerned more ‘to cleanse the conscience of the wrongdoer rather than to safeguard the excess interests of the wronged’” (Bailey and Knight 2017, p. 123). Schnädelbach discusses how the expectations placed on German judges changed around the turn of the twentieth century when the idea of juristic rationality was challenged by a movement that encouraged judges to engage

⁴ See also Bosma 2018 for change in emotional expression over the history of criminal disputes.

with litigants as individuals (Schnädelbach 2019). These are all examples that illustrate that our current emphasis on the financial or transactional issues in a dispute are culturally and historically specific, rather than a “natural” state.

In New Zealand, as in other common law jurisdictions, the explanation for the current focus in civil justice likely lies with the emphasis on efficiency (Toy-Cronin *et al.* 2017). The District and High Courts’ Rules state that, as an overriding principle, case disposition must be not only “just” but also “speedy and inexpensive” (District Court Rules, 2014, r 1.3; High Court Rules, 2016, r 1.2). This is an expression of proportionate justice, where “a limit is now placed on the amount of resources individuals in the state can properly expend in securing substantive justice in any particular case” (Sorabji 2014, p. 3). The emphasis on proportionate justice is a departure from a previous emphasis on substantive justice, where the focus is on a correct determination of the legal case. Substantive justice remains a goal, but its pursuit is to be weighed with the pursuit of speed and efficiency. This is summed up by a High Court Judge in the Pace Study, discussing factors that speed up a case:

The more commercial the parties, the more distant if you like from the emotion of the detail of it, the easier, very often, more detached. Because people see it in brutally commercial terms they don’t cling to the principles as in a family situation of say dad having let us all down.

The judge is referring to maintaining distance from the “emotion of the detail” (i.e. the ability to select legally relevant facts) and looking at it in “brutally commercial terms”, not “clinging to principle” (i.e. concentrating on law’s domain, the financial aspects). The Judge says doing this is “easier”, which in the context of that discussion on pace likely meant “faster” (i.e. efficiently), although it could also refer to emotion work. Excluding “emotion”, therefore, can be interpreted as an expression for using both using legal reasoning and maintaining focus on commercial and transactional elements of a dispute, and doing so efficiently. In an environment where efficiency is valued, maintaining a focus on commercial elements is considered superior to goals such as airing emotion or cleansing one’s conscience, goals that may have been emphasised at other moments in history.

3.2. What are the results of the litigant’s perception?

Having unpicked what lawyers and judges mean by keeping emotion out, the next issue to consider is the effects upon litigants who tried to conform to this norm. What did they make of the coded references – stated as leaving emotion out – referring to the need to behave and think like a lawyer? Three effects can be noted: a sense that the court had not heard all the salient detail and therefore a reduction in sense of procedural justice; omission of relevant but “emotional” material; and, a realisation that without a lawyer, the litigant could not hope to conform to the emotional regime of the court.

3.2.1. Procedural justice

One effect of LiPs believing that emotion has no place in law, is a reduction in the sense that the LiP has been “heard”, an important aspect of procedural justice. Several theorists have demonstrated that law transforms litigants’ stories from a narrative a lay person would recognise to a particular type of legal narrative (Felstiner *et al.* 1980, Conley and O’Barr 1990, Mertz 2007). This includes excising parts of the narrative which are considered legally irrelevant including, as discussed, material considered emotional. In undertaking this transformation, the lack of acknowledgement of these aspects of the dispute has the potential to alienate LiPs, failing to account for the need for litigants to tell their story and to do so in a way that is meaningful to them (Felstiner and Sarat 1986). Procedural justice theory suggests that “people feel more fairly treated if they are allowed to participate in the resolution of their problems or conflicts” and that they are “primarily interested in presenting their perspective and sharing in the discussion of conflicts that affect

them" (often referred to as "the voice effect") (Tyler 2012). Without this opportunity for voice, LiPs may have a reduced sense of procedural justice.

There was evidence in interviews with LiPs that they felt their voice in the proceedings had been restricted. As the Family Court LiP quoted above observed, the litigation is "so emotional... horrendously emotional for me" but she felt the court had no place for that emotion, as she said, "courts don't do emotion". A lawyer, who had been a party to litigation, said that when he was in the role of litigant he had filed overlong affidavits because he was so "emotionally involved" in his case. Despite having legal training, and therefore understanding legal tests for relevance, he included irrelevant material: "There were vast amounts of stuff in there [the affidavit] which was irrelevant, but it did actually tell the story". He contrasted his affidavit to one that his barrister had recently prepared for one of his clients: "That was the way it should have been done: nice, very simple, to the point, minimalist – vastly better than all the crap that I insisted on having put in". While this lawyer is reflecting that the affidavits "should" have been presented in a manner consistent with legal style, note the reference to why the "crap" was included in the affidavits: "it did actually tell the story".

Litigants participating in dispute resolution through presenting their perspective is one of the factors that creates a sense of fairness for litigants (Tyler 2012). This is important, not only for the immediate sense of procedural justice, but also because people decide how much to defer to an authority, and whether to follow its decisions, primarily by making judgments about the fairness of its process (Tyler 2006). The imperative to keep emotion out therefore has the potential to diminish procedural fairness and thus the legitimacy of the court.

3.2.2. Omission of material

LiPs are well-known for being overly detailed and providing irrelevant information to the court, as has been discussed. There was some evidence, however, that LiPs who believed emotion was supposed to "stay out" of the courts were sometimes under-inclusive with information, rather than over-inclusive. Unable to distinguish between emotional but legally relevant content, and emotional but legally irrelevant content, they omitted material if it seemed "too emotional". This was not the only reason information was omitted. As discussed previously, information was omitted because LiPs assumed that the judge and lawyers already knew information even though it was not in the court documents. Alternatively, they simply did not know what information to include and therefore wrote a general narrative focusing on issues that were the most important to them. However, there was some evidence that a belief that emotion should stay out of court also influenced decisions to leave out relevant material, for example, an application for a protection order could quite correctly include a statement: "I fear for my life", as long as it is supported by salient facts. One LiP suggested he had left out information about his fears for his children's welfare in a care of children dispute because he did not want to be seen as "emotional". This could however have been relevant information. One District Court staff member said she would read an affidavit and know that the person, who might really need the order, would not get it:

They'd be putting in stuff about 'aunty said this and somebody else said that' (...) nothing about the violence, nothing about how long it has been going on, how long the relationship has been (...) they can write a lot, but not actually say what we are looking for.

Even if there is a legal basis for an order, the judge cannot grant it if the information has not been put before the court.

It is not clear how widespread this effect is. LiPs have difficulty discerning legal relevance because they have not been trained in the specific methods of legal reasoning. The supposed blanket ban on emotion adds a further layer of complexity

in their task of determining what material to put before the court and this can lead to omissions of relevant material.

3.2.3. Realisation that conforming was not possible

Some litigants thought they had decoded what was meant by the idea of “keeping emotion out”. They were, however, sometimes disappointed to find they had misinterpreted the meaning as this interchange illustrates:

(LiP2 and observer conversing before going into the court hearing. LiP1 interrupts to ask LiP2 a question).

LiP1: I want to say I was just really pissed off with whole thing.

LiP2: Well you can say that, just don't use 'pissed off'.

LiP2 (to observer): I just keep to the facts in the brief and leave the emotion out. I've prepared [all the] briefs and they are mostly just fact, only a little emotion and that was just at the end.

(LiPs and observer go into courtroom).

Opposing counsel (making a submission to the Judge that the whole briefs should be inadmissible): 'It is all irrelevant Your Honour. It is emotive and pejorative language'.

Other LiPs who thought they had decoded the emotion regime, expected they would therefore be within its boundaries in court, only to find that this was not possible. One reason for this was that the temptations to express emotion beyond what the regime allowed were too great. For example, a LiP, discussing his approaching trial, considered he had reached a state of emotional detachment:

It has been an interesting experiment in becoming detached and dispassionate about your own case. And I've got to that point, slowly but surely and I'm pleased about that because it is very helpful to how I conduct the case.

Once he had been through the trial, however, he considered that this state of detachment had been an illusion. He said he was continually tempted, and gave in to the temptation, to state his case when cross-examining witnesses: “It is difficult when you are emotionally attached to the case, or not detached, to follow the stilted ‘ask questions, don't make statements’”. This suggests that legal style of presentation, perhaps unsurprisingly, is difficult to master. It also suggests that litigants want to tell their story, as discussed previously, rather than being restricted by legal presentation. Similarly, LiPs preparing affidavit evidence – even when they understood the material was legally irrelevant – succumbed to the temptation to respond to every allegation and untruth. This was because they wanted the court to have their version of events, rather than be restricted by the rules of relevance.

The second reason that litigants who understood the emotional regime were still unable to conform was that they realised the same rules did not apply to them. LiPs do not just have to behave like a lawyer but actually have more restrictive rules than a lawyer. Lawyers, as discussed, often use displays of emotion to make a point. However, because of the LiP's role as a party to the proceeding, using an emotional display the way a lawyer might was not possible without raising questions about their own character. The LiP instructed a lawyer for the final hearing:

I took a lawyer in for that just to finish it off, just to speak a bit more aggressively in court, because in court, when you are self-represented, you can't speak aggressively. Alright? You can't thump your fist on the bench and start saying 'These allegations are ridiculous and false, and no, I don't have anger issues'. You can't do that, but your lawyer can.

Lawyers in New Zealand are not generally given to fist thumping displays, but can use emotion to some degree, and perhaps more than a LiP. If LiPs display emotion – anger, grief, frustration – they can be labelled “emotional”. This, as discussed, invokes the emotion-reason binary and positions them as unreasonable. They may even be viewed as dangerous, particularly if the emotion is strongly expressed, and

court security called to monitor behaviour and protect against the ever present fear of a “collapse of the social order of the court” (Rock 1993, Mulcahy 2010). LiPs, by presenting their own cases, are in full view of the court, whereas lawyers can provide a screen between the court and litigant, presenting a version of the client that appears rational and non-threatening. As a LiP who had employed a lawyer explained:

[My lawyer] was in some ways like a bodyguard, like a [pop star] bodyguard. He stops the person who is a little bit delinquent, or a little bit impassioned, from getting into trouble, if that makes sense. It is really stupid, it shouldn't be like that. I have an immaculate police record, I'm a fully registered [professional] and I – I get all those things – all my integrity and stuff is called into question by [the opposing party's] lawyer (...). When I employed [my former lawyer] it is like I dropped behind the barrier and he, ah, diverts attention from me to the issue – keeps the focus on the issue.

These LiPs recognised, in retrospect at least, that a lawyer could serve a screening function while also providing access to a larger range of rhetorical tools than they would be permitted to exercise. While some LiPs were simply unable to decode the emotion regime of the court, others had some success but were unable to conform, even though they realised the risks associated with appearing “emotional” in front of the court.

4. Judicial responses to violations of the emotional regime

Even when LiPs attempt to conform to the emotional regime of the court – or the specific emotional regime expected of LiPs – they are not always successful. When LiPs violate the emotional regime this calls for a response from the judge. The judge is left to manage the “raw emotions” of the LiP (Roach Anleu and Mack 2005, p. 607), and may have to perform extra work managing their own emotions, for example in displaying patience and courtesy (Roach Anleu and Mack 2013). This work is “an essential component of enabling court users to experience the legal process as fair, impartial, and legitimate” (Roach Anleu and Mack 2005, p. 607).

Where LiPs did not present their case in a way that showed mastery of “thinking like a lawyer” – for example, detailing irrelevant legally irrelevant facts – judges were aware of the need to allow litigants time to state their case so that they felt they had the opportunity to be heard. Judges were particularly concerned about procedural justice both because of awareness that this was an important aspect of justice, but also because of the “lore” that one judge described: that failing to give LiPs procedural justice might create persistent (and eventually vexatious) litigants. Judges referred to a management strategy of letting litigants talk, in order to both ascertain what the case was about (and so secure substantive justice goals) and to give the litigants a sense of being heard. They also spent time explaining ground rules, procedure, and gave guidance to LiPs with the aim of ensuring both substantive and procedural justice. These techniques however have a price: they reduce speed, and increase costs to both the court and the opposing party.

Techniques that assisted with speed and efficiency risked compromising the LiP's sense of procedural justice. These techniques included moving LiPs to the end of the list or altering turn-taking, although Mack and Roach Anleu argue that in certain contexts standing down cases to the end of the list can be successfully used to create a sense of procedural fairness and meet the court's efficiency goals (Mack and Roach Anleu 2007). The more subtle techniques for encouraging speed, for example sighing or asking how long a part of the case was expected to take, risked both a sense of procedural justice and substantive justice. A High Court LiP, for example, said he thought the Judge had “cut the trial short”. When I challenged him, reminding him the Judge had said repeatedly that he should take as long as he needed, he said the Judge “didn't really mean it”. He had perhaps picked up on the Judge's displays of

impatience during the trial including sighing and suggestions that some of his material was unnecessary.

Where LiPs failed to follow the display rules for emotion in the court, judges showed different levels of competence or comfort in addressing the situation. In the District Court, judges have more contact with lay people, either as LiPs or witnesses, and a higher volume of cases, so do more work managing emotion (their own and others) (Roach Anleu and Mack 2013). The higher court judges usually need to do this work less, so the presence of LiPs requires them to perform additional work to which they are not so accustomed. For example, a High Court Judge described a competent LiP taking a case on appeal and struggled to articulate what made the case difficult to hear:

She had prepared excellent submissions (...). She knew her way around the Act (...). It was just that she had been so closely involved in it. It was about children and maintenance and things. She herself was getting you know, very – quite emotionally involved in it. It just made the hearing – well maybe that is what they get all the time in the Family Court, but it is just not quite what we are used to here.

The aspect of the LiP here being “emotionally involved” does not seem to relate to failing to think like a lawyer (the Judge was clear the LiP was competent). It may not even have been a failure to act like a lawyer. While not articulated, it may be that the unaccustomed “emotion work” that the Judge was required to do was troubling to her. Instead of dealing with a lawyer, the judge had to discuss the case with the person directly affected by the decision and to engage in unfamiliar forms of emotion work to manage and control that interaction.

While this work is demanding on judges, if it is not performed, it can undermine the sense of procedural justice, and potentially negatively impact upon substantive justice. If the LiP receives the message that matters of emotional import are outside the court’s domain, there is a risk the LiP will omit these matters, even though they might in fact be legally relevant.

5. Conclusion

The use of the shorthand phrase “keep emotion out” confuses LiPs who attempt and often fail to conform. It is, of course, an impossible goal given emotion cannot and should not be kept out of court. Instead, what is being encouraged is for LiPs to behave like lawyers and use legal reasoning i.e. conform to the specific emotional regime of the court. When LiPs are unable to achieve this difficult task, they are labelled “emotional”. This in turn reduces their ability to be fully heard in courts that pride themselves on rational, detached reasoning.

Labelling LiPs as “emotional” also invokes the “sedimented history and social practice” (Seuffert 1999, p. 218) of seeing LiPs as “mad”. LiPs are a recent phenomenon in New Zealand:

You didn’t come to court [20 years ago] without a lawyer unless you were some kind of mad person and everyone here would have said ‘She is that mad person, she acts for herself and she’s mad’. It was completely outrageous [to litigate in person]. (Toy-Cronin 2016, p. 751)

LiPs are cast as “too emotional” by legal actors but this could be reinterpreted as LiPs straining against what law can deliver and revealing its inadequacies to address the matters that are most important to people. The limited room that is left for people to tell the court the information that is most important to them is highlighted by the lawyer who knew the rules of legal argument but still included irrelevant material because it “told the story”. We therefore need to consider if law should create more space for telling stories in the courtroom, allowing more than the commercial or transactional nature of disputes to be aired.

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