The tenor of the lecture was the value of the historical method to the work of a judge in these islands where the system of law is a customary one, borne out of judicial precedent, which Lord Sumption spoke of intriguingly as the legal implications of a very large number of tiny human stories. He drew a distinction between the codified law of other countries and the study of common law, describing the latter as an intensely historical process; questions of law may not be answered without consideration of what earlier generations of judges have thought and said about the issues.

The talk reflected Lord Sumption's view of the importance of history in shaping the present and the value of using historical perspective to inform decisions. Illustrating the point with recent case law, he set an example in the area of statutory construction. How, historically, legislation came about, in response to what perceived mischief, may provide the key to whether a rule is inapplicable or redundant, and even where that information is not definitive it will aid understanding. He enthused about the study of history, the perusal of learned academic works and social sources such as grants of pardon, as well as the novels of the likes of Jane Austen and Anthony Trollope as providing useful insight into the social mores of their day.

Judges, in common with all others, have of course only limited personal experience; some might say that judges are particularly limited in life experience terms, but that may be to underestimate the value of vicarious experience in adding breadth, and how a knowledge of history, in particular social custom and the development of human societies, contributes much to the understanding of those things that we cannot experience personally, making for a better judge.

The whole was entertaining and thought-provoking in equal measure – the full lecture is now available here on the Supreme Court website. It is a stimulating read for anyone, but particularly those whose responsibility includes legal or quasi-judicial decision-making of all kinds, whether via the assessment of evidence or through interpretation of the law.

Paula Gray is a judge in the Upper Tribunal (Administrative Appeals Chamber) *Back to contents*

The need to coordinate LIP initiatives

Litigants in person By **Sarah Asplin**

In their article in the Winter 2015/16 issue of *Tribunals*, Upper Tribunal Judge Paula Gray and Tribunal Judge Melanie Lewis describe the work that I was asked to undertake by the Master of the Rolls early in 2015, with the broad aim of considering litigants in person (LIPs) from a judicial perspective. My approach to this task has been to work with a small group of judges on a number of initiatives intended to assist judges, court staff and LIPs in ensuring proper access to justice in a case where an LIP is involved. I remain very grateful to Mr Justice Knowles and District Judge Chris Lethem, the other two core members of the group, for their continuing help in attempting to coordinate some of the judicial initiatives taking place across England and Wales in relation to LIPs. We have covered a broad range of topics over the past two years while retaining a flexible approach to our programme of work. This article is intended to give you a flavour of that work.

Annual forum

The immediate impetus behind the Master of the Rolls's request and the creation of the group came from the Civil Justice Council's (CJC's) third annual forum on LIPs in December 2014. That event takes place at the end of each year and has become the centrepiece of the CJC's work in the area. It brings together people from the very wide range of bodies – judges, civil servants, lawyers, advice and *pro bono* sectors, academics – with an interest in ensuring access to justice for those parties without legal representation. That year, it had become clear that there was a great deal of good work being done in centres across England and Wales, but that the time had come to try and harmonise and

promote those initiatives across the country. Its purpose therefore is to coordinate and streamline judicial efforts in relation to LIPs across the country.

Professional guidance

The work of the group has included encouraging the Law Society, Bar Council and CILEX to produce joint guidance to lawyers facing LIPs in the civil courts and tribunals – including a discussion of the relationship between the client's interest and the interests of the administration of justice, and the tricky question of the extent to which a lawyer can properly provide assistance to a litigant in person.[1]

McKenzie Friends

It is perhaps also worth mentioning one concurrent piece of work that I was asked to undertake by the Judicial Executive Board at around the same time in relation to McKenzie Friends. Here, I had the benefit of considerable additional and expert help from Mr Justice Cobb, Judge Karen Walden-Smith and Judge Rachel Karp in starting to consider the vexed question of 'professional' McKenzie Friends. The anecdotal evidence available to us had given a clear indication that judges felt a great deal of concern about the vulnerability of LIPs to a number of McKenzie Friends who were either charging over the odds for their services, or had their own agenda to push. The outline research conducted by that group, and the discussions that it held were reflected in the recommendations it made to the Judicial Executive Board, and which helped that body put together last year's consultation on the subject.

Judicial training

Turning back to the work of the group, another project, and the focus of this short article, has been the series of training modules that the group has produced in conjunction with the Judicial College on managing a hearing when one or more parties are unrepresented, work that has been ably and energetically taken forward by Judge Graham Robinson. The need for the training stemmed from the coming into force of a new Rule 3.1A of the Civil Procedure Rules for the civil courts in October 2015 – itself as the result of the group's encouragement. That Rule emphasises the court's duty to adopt such procedure as it considers appropriate to further the overriding objective when one or more LIPs is involved in a case, and that this might include 'ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined' and 'putting, or causing to be put, to the witness such questions as may appear to the court to be proper'.

Many judges are confident when it comes to managing a hearing involving an LIP; others feel uncertain and shy of stepping 'too far' into the arena.

At the same time, and in our informal research and conversations with colleagues, we were hearing of different approaches to the question of how far, and the ways in which, a judge should intervene in court when hearing a case involving one or more LIPs. In that light, we thought it was important to explore the real ramifications of CPR 3.1A and to encourage debate among judges.

Many judges are confident when it comes to managing a hearing involving an LIP; others feel uncertain and shy of stepping 'too far' into the arena. There are, of course, a huge range of different sets of circumstances where a question of law or asking questions of witnesses arise. It occurred to us that some of the (again, informal) discussions that we had had in this way with the judges we met and worked with might be usefully prompted and repeated in small groups in courtrooms and tribunals across the country by a short series of e-learning films designed to present a set of circumstances – those most commonly encountered by judges in the civil and family jurisdictions – and followed by a short list of questions around which that discussion might be based.

Podcast

Our ideas on what those modules might encompass went through various stages. While we continue to encourage judges to view the modules as part of a small group discussion, we also wanted to be able to produce something that

an individual judge could watch alone. Our 'Eureka moment' came when the suggestion was made that we might include a podcast of such a discussion with each module for that purpose, and the feedback to the training has given a strong indication that this part of the training is particularly valued by judges.

Contents

The first two modules were launched on the Judicial College's LMS in May and July 2016. One looks at the role a judge might play when a legal defence is available to a defendant of which they are unaware and is therefore not pleaded – in this case relating to the Limitation Act. The other touches on the judge's role in describing to the claimant the need for specific evidence in pursuing their claim – in this case involving a dog bite, evidence of the dog's aggressive tendencies – something that even the most basic legal advice would have encompassed.

Plans are afoot for two further modules, focusing on how control of a highly emotional case where only one party has legal representation (taking a family case as the example) and when and how a judge might question a witness on behalf of an unrepresented party. We would also like to include a module giving the view of the litigant on the process they have just undergone – though ideas on the form this might take are still at a very early stage.

Audience

The modules are aimed at judges at all levels who hear civil or family cases. While they might be thought to have particular relevance to the newly appointed or part-time judge, they are meant to give a rare opportunity for even the more experienced judge to consider their approach to such cases, and to have the opportunity to hear about the approach of their colleagues. There is no doubt that our best training resource as judges are our own colleagues. Readers of this journal might consider these modules to have a wider audience – for lay members of tribunals, for example, many of whom will be highly expert in their field but may not have developed these particular skills.

Thanks!

In their insightful article touched on earlier, Melanie and Paula pointed out that it was simplistic and inaccurate to describe a tribunal judge as practised in conducting an inquisitorial hearing, and a court judge in hearing an adversarial case. They were absolutely right to point out that the approach of the judge depends far more on the nature of the case than the forum in which it is held, and that all judges need to be able to ask relevant questions of witnesses when necessary. At the end of that article they did stress, however, the importance of tribunal judges striving 'to assist in answering this complex question with useful scenarios for discussion out of which may be derived some helpful guidance . . .'

We have had the benefit of the advice of a group of tribunals judges and district judges, including Melanie and Paula, during the course of this project and remain grateful to them all for their thoughtful and expert advice.

Sarah Asplin sits in the Chancery Division of the High Court *Back to contents*

Recent publications

External links By **Adrian Stokes**

This section lists recent publications of interest to readers of *Tribunals* with a very short description of each (where this is not obvious from the title) and a link to the actual document. It is not intended to be a comprehensive list but is intended to bring to the attention of readers some publications of interest but which they might have missed. It also gives a number of useful links.