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[2014] NZLJ 326

The rise and evolution of the *McKenzie* friend

Shane Campbell, Christchurch considers what the role is and what it should be

Self-represented litigants have an ability to create difficulties at almost all phases of litigation and for all other people involved, be it court staff, counsel or the bench. It is therefore generally accepted that assistance to such people in litigation is beneficial. One form in which that assistance commonly manifests is the *McKenzie* friend. This paper intends to traverse the role of the McKenzie friend in New Zealand and elsewhere and seek to draw threads of common application governing their involvement in litigation.

It is well known that McKenzie friends derive their name from the decision of the English Court of Appeal in *McKenzie v McKenzie* [1971] P 33 (CA). However, the concept has its origin in *Collier v Hicks* (1831) 2 B & Ad 663, a case decided some 140 years earlier where Lord Tenterden CJ stated (at 669):

> Every litigant is entitled to have the assistance of a friend nearby and that friend is entitled to assist the litigant by prompting him, making notes or suggestions, giving advice, and suggesting ways in which the litigant can cross-examine the witnesses.

The purpose of this brief paper is to provide an overview of the general law relating to McKenzie friends. It is not specific to criminal or civil law, or any particular proceedings (such as in the Family Court). While different cases may require slightly different application of the principles, it is contended that what follows is of broad application.

THE ROLE

Put simply, the term McKenzie friend is a genericism used to refer to a person who seeks to assist another in the conduct of their litigation (*C v M* [1996] NZFLR 106 at 108). Such persons are also commonly referred to as lay assistants. A good practical formulation of the role in New Zealand is to be found in the judgment of Hardie Boys J in *Mihaka v Police* [1981] 1 NZLR 54 where the following memorandum of the Chief District Court Judge was approved on appeal:

> In my view this would permit an unqualified person acting as a friend of a litigant to:
>
> (a) sit beside him in Court;
> (b) to take notes;
> (c) oo quietly make suggestions to the litigant and give advice;
> (d) to propose questions and submissions to the litigant who may put the same;
> (e) should the litigant be a dumb person then to put the questions on the litigants behalf;
> (f) the friend should not be permitted to address the Court by way of making submissions or asking questions.

Hardie Boys J then commented on these six paragraphs as follows:

> The conclusion to the memorandum prepared by the Chief District Court Judge sets out in paras (a) to (d) the extent of the right of a litigant to the assistance of a "friend in Court". Paragraph (e) adds an example of a circumstance in which the discretion should properly be exercised. Whilst para (f) is no doubt practical advice of a general kind, it should not be read -- and I am sure was not intended to be read -- as imposing a limitation on the discretion which Justices have to permit the friend to take a more active part if in the circumstances of the case they think that appropriate.

An excellent essay of the law relating to rights of audience of *McKenzie* friends in England is found in the High Court decision in *Re N (a Child) (McKenzie Friends: Rights of Audience)* [2008] EWHC 2042 (Fam), [2008] 1 WLR 2743. The leading cases were there cited (see for example *D v S (Rights of Audience* [1997] 1 FLR 724; *Clarkson v Gilbert (Rights of Audience)* [2000] 2 FLR 839; *Paragon Finance Plc v Noueiri (Practice Note)* [2001]

EWCA Civ 1402, [2001] 1 WLR 2357) and the following statement of principle at [38]-[40], [42]:

> The starting point is that a McKenzie friend does not, as such, have a right of audience and, as Clarke LJ put it, that the court can exercise its discretion to grant a McKenzie friend a right of audience... Moreover, as Peter Gibson LJ said in *Mensah v Islington London Borough Council* CAT 2384 of 2000 at para [56] ... the court should be "very slow" to grant a McKenzie friend a right of audience.
>
> But this is not to say that, as a general principle, such an order can be made only in 'exceptional' circumstances...
>
> ...
>
> At the end of the day one has to remember that, as Lord Woolfe CJ put it (at para [17]), "The overriding objective is that the courts should do justice."

Re O (children) [2005] EWCA Civ 759 deals more specifically with McKenzie friends. In that decision the authorities dating back to the 1971 decision from which the McKenzie friend takes their name were canvassed (see *R v Leicester City Justices, ex p Barrow* [1991] 2 QB 260 at 288; *Re G* [1999] 2 FLR 59; *Re H* [1997] 3 FCR 618; *Re M* [1999] 1 FCR 703; *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751; *Re H* [2001] EWCA Civ 1444, [2002] 1 FLR 39). By canvassing the authorities, the Court in *Re O* was able to draw two main conclusions (at [67]). They are:

(1) that the presumption in favour of the litigant being allowed the assistance of a McKenzie friend is a strong one; and
(2) that such a request should not be refused without good reason...".

The Court engages in a further useful discussion at [124]-[131] where the observation was made that a Court can refuse to permit the assistance of a McKenzie friend in furtherance of its regulatory jurisdiction.

As to the position of the McKenzie friend under Scots law, the decision of the Outer House of the Court of Session in *Patricia Anderson Petitioner* 2008 SCLR 59, which focuses primarily on rights of audience, is of interest. For an overview of the position in the Republic of Ireland see *K v K* [2010] IEHC 417 and *RD v McGuinness* [1999] 2 IR 411. Neither of these jurisdictions are considered here in any detail.

Australia

Perhaps conveniently, the role of the McKenzie friend was recently the subject of consideration by the Supreme Court of Western Australia in *Pennicuik v City of Gosnells* [2011] WASC 63. The discussion there was centred on whether the appellant should be permitted the assistance of a McKenzie friend. The first case there cited was *Smith v R* (1985) 159 CLR 532 in which Gibbs CJ stated at 534:

> The question of whether an accused person should be allowed to have a "McKenzie friend" present at his trial is very much a matter of practice and procedure, and within the discretion of the trial judge to decide." It would be far too absolute to say that an application to have a "McKenzie friend" should always be refused. All the circumstances of the case must be considered in deciding upon the application. However, when the accused has been offered legal aid but has refused it and nevertheless desires to have a barrister appear as a "McKenzie friend", it would be understandable if the judge regarded his application with some scepticism.

The Court then cited (at [12]-[13]) *Schagen v R* (1993) 65 A Crim R 500 where Malcolm CJ at 501 effectively repeated the sentiments above in *Smith v R* and added that the circumstances in which such a person would be permitted to address the Court would be exceptional. The role of the McKenzie friend and the limitations placed thereon were also discussed by Lindenmayer J in *Watson v Watson* [2001] FamCA 1740, (2001) 166 FLR 229 in the family law context. *Watson v Watson* confirms and emphasises that the McKenzie friend role does not extend to advocacy (citing *KT v KJ and TH* (2000) 156 FLR 451 at 453-454 (full bench)).

The Australian cases dealing with a non-practitioner appearing on behalf of a party to the litigation in the Superior Courts of Australia were comprehensively reviewed in *Damjanovic v Maley* [2002] NSWCA 230, (2002) 55 NSWLR 149, (2002) 195 ALR 256 at [69]-[86]. These paragraphs are too lengthy to replicate verbatim in this article, but provide an excellent basis from which the assessment as to whether a right of audience should be granted to a non-practitioner ought to proceed.

In the New Zealand decision *R v Hill* [2004 2 NZLR 145 (CA) (discussed below) it was observed that the difficulties associated with McKenzie friends have led some states of Australia to refuse to permit such assistance save for exceptional circumstances (*R v Smith* [1982] 2 NSWLR 608; *Livesy v New South Wales Bar Association* [1982] 2 NSWLR 231; *R v Burke* (1991) 56 A Crim R 242; *Smith v R* (1985) 71 ALR 631 at 634. See also *R v Burke* [1993] 1 Qd R 166).

New Zealand

Perhaps the leading authority on McKenzie friends in New Zealand is the decision of the Court of Appeal in *R v Hill*. In that case the Court confirmed (at [48]) by reference to *Mihaka v Police* [1981] 1 NZLR 54 that McKenzie friends are permitted in New Zealand, though they are not permitted to address the court. Though this inability to address the court is seemingly unequivocal in *R v Hill*, it is clear that it has become a practice in New Zealand to permit some lay advocacy. This is the position in England and Australia, and even Hong Kong in exceptional circumstances (see *Lobo v Kripalani* [1998] 2 HKLRD 325 at 328). It is thus clear that New Zealand courts are seized of the ability to grant a right of audience to lay assistants where it is considered necessary. However, such a right should be reserved for exceptional cases.

R v Hill further confirmed (at [49]) that deliberate refusal of legal representation may result in refusal or restriction of access to a McKenzie friend (citing *R v Mitchell* (1992) 9 CRNZ 537 at 542). Moreover, while not having to decide the issue the Court did express what might be described as some reticence when contemplating the notion of a barrister or solicitor acting as a McKenzie friend (at [50]-[52]). It was said there are "obvious difficulties" in this respect concerning, *inter alia*, legal privilege, duties to the client/accused as compared with duties to the Court, liability to the client/accused and what control the Court might have over such professional McKenzie friends (at [52]). In *Farquhar v Police* HC Dunedin CRI-2011-412-1, 8 April 2011 it was stated (at [22]-[23]) that there is no absolute or automatic right to the assistance of a McKenzie friend and that a demonstration of reasonable skill by the litigant themselves may have the effect of disentitling them from such assistance on the basis that it would be unnecessary.

Whether a McKenzie friend will be permitted in any given case is a matter to be decided by the presiding judge as a matter of discretion (*C v M* [1996] NZFLR 106). However, such judicial discretion should be exercised in accordance with the formulation indicated in *O'Toole v Scott* [1965] 2 All ER 240:

> It can be exercised either on general grounds common to many cases or on a special ground arising in a particular case. Its exercise should not be confined to cases where there is a strict necessity: it should be regarded as proper for a magistrate to exercise the discretion in order to secure or promote convenience and expedition and efficiency in the administration of justice.

As stated above, it seems to be that it is a fairly common practice in New Zealand courts for McKenzie friends to step outside their traditional bounds and act as an advocate, or at least an iteration thereof (see for example *R v McKinnon* CA240/04, 4 May 2005; *Thompson v Police* HC Auckland CRI-2005-404-57, 3 June 2005; *Hemara v Superintendent, Wanganui Prison* HC Wellington CIV-2004-483-388, 13 December 2004). This is an undesirable practice that should be followed only in exceptional circumstances.

As a final observation, it is noted that where a litigant seeks the assistance of a McKenzie friend, the latter may be required by the presiding judge to sign an undertaking concerning, among other things, confidentiality (*LAT v GAL* FC Hastings FAM-2004-020-64, 4 October 2006 at [8] and [13]). *LAT v GAL* was decided in the Family Court, but there is no reason to suppose the principle is not of wider application. This is particularly so given that the McKenzie friend only remains in that role at the leisure of the Court.

DRAWING THE THREADS

Standing back and looking at the position in the round, it is submitted that the following threads can be drawn:

(i) whether a McKenzie friend will be permitted to assist a litigant is at the discretion of the court pursuant to the inherent jurisdiction to regulate its proceedings (*Mihaka v Police* and *R v Hill*);
(ii) such discretion will be exercised judicially, in accordance with the formulation set down in *O'Toole v Scott*;
(iii) where a McKenzie friend is permitted to act, the role should almost always be confined to the formulation set down in *Collier v Hicks* and *Mihaka v Police*;
(iv) as a matter of course a litigant will ordinarily be permitted the assistance of a McKenzie friend, subject to, *inter alia*, the following caveats:
    (a) where a litigant could reasonably avail themselves of legal assistance through the

legal aid system, a failure to do so will result in an application for the assistance of a McKenzie friend to be viewed with some scepticism. In criminal proceedings therefore there will often be little justification for a litigant seeking such assistance (*R v Mitchell*);

(b) The right to a McKenzie friend is neither automatic or absolute, and a demonstration by the litigant that they are capable may render unnecessary such assistance (*Farquhar v Police*);

(c) the Court is able to prescribe limits to, and clearly define, the role of a McKenzie friend;

(d) an application for a practitioner to act as a McKenzie friend is likely to be looked upon unfavourably by the Court; practitioners should not acquiesce to acting in such a role due to the difficulties, ethical, professional and otherwise, that might arise (*R v Hill*);

(v) a right of audience will only be granted to McKenzie friends in the most exceptional of circumstances, where, above all else, the interests of justice necessitate such intervention. As to when a right of audience may be necessary, the Australian decision *Damjanovic v Maley* provides helpful guidance;

(vi) a McKenzie friend may be required to sign an undertaking before being permitted to assume the role, covering, inter alia, confidentiality (*LAT v GAL*).[ ]

1 of 1 DOCUMENT: CaseBase Journal Articles

A friend in deed - and in Court

[1991] NZLJ 377

Cases considered by this article
Annotations: All Cases**Sort by:** Judgment Date (Latest First)

Annotation	Case Name	Citations	Court	Date	CaseBase
See	R v Leicester City Justices; Ex parte Barrow	[1991] 2 QB 260; [1991] 3 All ER 935; [1991] 3 WLR 368	EWCACiv	25/7/1991	CaseBase Entry
See	GJ Mannix Ltd, Re	[1984] 1 NZLR 309; (1984) 2 NZCLC 99,095	NZCA	18/4/1984	CaseBase Entry
See	Mihaka v Police	[1981] 1 NZLR 54	NZHC	17/12/1980	CaseBase Entry
See	McKenzie v McKenzie	[1971] P 33; [1970] 3 All ER 1034; [1970] 3 WLR 472	EWCACiv	12/6/1970	CaseBase Entry
See	O'Toole v Scott	[1965] AC 939; [1966] ALR 821; (1965) 39 ALJR 15; (1965) 65 SR (NSW) 113; (1965) 82 WN (Pt 2) (NSW) 342; [1965] 2 All ER 240; [1965] 2 WLR 1160	UKPC	5/4/1965	CaseBase Entry
See	Collier v Hicks	(1831) 2 B & Ad 663; (1831) 109 ER 1290	-		CaseBase Entry
See	Mercy v Person Unknown	[1974] EG 279	-		CaseBase Entry