JUDICIARY OF BERMUDA

EQUAL TREATMENT BENCH BOOK

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"*Ours is an age of rising expectations, when the citizen demands more than ever before and is continually ready to remark how far short of the ideal are many features of his life.*"
(The Pitt Report, 1977)

"As people grow ever less willing to accept the demands of authority, the judiciary, like other public institutions, will be subjected to a growing amount of critical analysis"
(David Pannick, 'Judges', 1987)

"*Deciding in accordance with the law, within reasonable time, and in accordance with the processes mandated by law, is only one part of the judicial task. Justice must also be delivered in a responsive manner, one that takes account of the social context, and the different perspectives of those who seek it.*"
(Beverley McLachlin PC, 2004)

"*Over the past few years there has been much activity across the region in the area of judicial reform. This heightened activity is grounded in the acknowledgement that in order to achieve sustainable development and stability, comprehensive judicial reform is a critical element in this process. It entails a modern and responsive legal framework and a well-functioning judiciary to interpret and enforce the laws in an equitable and efficient manner*"
(Sir Dennis Byron, '*Justice Reform and Emancipation: Lessons and Legacy*', 2016)

Introduction

This Bench Book is designed to help Bermudian judges to fulfil their judicial oath by giving, so far as is humanly possible, the fullest recognition of all litigants' right to equal treatment under the law. The term "judge" is used here to include Court of Appeal judges, Supreme Court judges and Magistrates (whether sitting as such or when chairing special court panels).

It is heavily influenced by the corresponding Bench Book adopted by the Judiciary of England and Wales to which publication the Bermuda Judiciary is greatly indebted.

1. Equality and Justice

Key points

Equal access to justice

- Most people find an appearance before courts to be a daunting experience.
- People who have difficulty coping with the language, procedures or facilities of courts are equally entitled to fairness and justice.

Inequality

- People who are socially and economically disadvantaged in society may assume that they will be at a disadvantage when they appear before a court or tribunal.
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- Those at a particular disadvantage may include people from minority ethnic communities, those from minority faith communities, individuals with disabilities (physical or mental), women, children, those whose sexual orientation is not heterosexual, and those who through poverty or any other reason are socially or economically excluded.

- Just because someone remains silent does not mean that they necessarily understand, or that they feel they have been adequately understood. They may simply feel too intimidated, too inadequate or too inarticulate to speak up.
- Ensuring fairness and equality of opportunity may mean providing special or different treatment.

Judgecraft

- Effective communication is the bedrock of the legal process – everyone involved in proceedings must understand and be understood or the process of law will be seriously impeded. Judicial office-holders must reduce the impact of misunderstandings in communication.

- Unless all parties to proceedings accurately understand the material put before them, and the meaning of the questions asked and answers given during the course of the proceedings, the process of law is at best seriously impeded and at worst thrown seriously off course.

Discrimination

- Discrimination must not be permitted, whether direct or indirect. Recognising and curbing our prejudices is essential to prevent erroneous assumptions being made about the credibility of those with backgrounds different from our own.

- Most people ‘read’ behaviour in terms of their own familiar cultural conventions and in doing so can often misunderstand. Ethnocentrism – the use of one’s own taken-for-granted cultural assumptions to (mis)interpret other people’s behaviour – is a common human failing.

The appearance of justice

How do the courts appear to those who use these services?

No surveys have been carried out in Bermuda to objectively assess how court users feel about the delivery of court services. However there is credible informal data which suggests that conducting hearings involving litigants in person invariably presents particular challenges, particularly when

the cases involve emotive family relationships or property, or consumer or employment matters with unequal power relations between the disputing parties.

Whilst some degree of structure and formality is required at all hearings, as judicial office-holders we should repeatedly ask ourselves whether the needs of the court or tribunal are taking priority over the needs of the people who appear before us. Is it fair and just that they always have to cope with our court or tribunal rather than us with them?

Disadvantages of individuals

Disadvantage must not be allowed to become an obstacle to the attainment of justice. The particular needs and issues faced by diff e rent groups who experience disadvantage in society are dealt with in detail in the principal chapters of this Bench Book. This introductory chapter considers the general judgecraft responsibilities that are owed to all who come before the courts.

Achieving justice

Identifying situations in which an individual may be at a disadvantage because of some personal attribute of no direct relevance to the proceedings and taking the appropriate steps to ensure that there is no consequent obstacle to achieving justice is an important skill. This is all part of the art of judgecraft that may be performed during case management. Part of that skill lies in identifying situations of disadvantage at an early stage, and discreetly dealing with them without prejudicing other parties. They can arise at any time and in any type of case.

- Considering what the needs of unrepresented parties are is a useful starting point – they should not be seen as a problem for the court. Whilst it may be desirable that skilled representation is available, there are many reasons why parties appear without representation (see Chapter 1.3 later). In the absence of an advocate (but even where one is present) the court must communicate effectively with the party and pay due regard to their case.

- The ability to communicate effectively is not restricted to the parties in the case. As judicial office-holders we need to develop an awareness of ‘where people are coming from’. Being aware of a litigant’s background, culture, special needs and concerns, and the potential impact of those things on a party or a witness’ evidence or perceptions, will enable more effective communication. This applies to all who appear before courts; including witnesses, advocates, the court staff – and even members of the public who may inappropriately seek to intervene in the process of justice.

- Sensitive appraisal of the situation and effective communication by the judicial office-holder is as important as the imposition of discipline backed by the force of the law. It may be best to give people the benefit of the doubt if their intervention is well-intentioned. To ensure a fair hearing the proceedings should be managed so as to identify any likely difficulties and importantly to find ways around them. This is a continuous task throughout the course of the proceedings because needs can and often do change as the result of, for example, tiredness or distress.

Perceptions of justice

It is a fundamental concept that ‘justice must not only be done but be seen to be done’. This imposes positive obligations on judicial office-holders. It is no longer a question of what lawyers or

those administering justice perceive – if a hearing is seen as having been unfair by those involved, directly or indirectly, or the public at large, then it has not been satisfactory:

> *"Judges wield huge power over the rest of society. We therefore have a special responsibility to ensure that there can be no possible reasons to think us prejudiced and this entails a positive responsibility to demonstrate our fairness.*

Lord Irvine of Lairg, Lord Chancellor (of England & Wales), September 1999

We must not in our conduct of hearings give rise to perceptions of unfair treatment.

The quality of judicial decision making is crucial. Neutral application of legal rules is fundamental to high-quality judicial decision making. Decisions based on erroneous perceptions, interpretation or understanding may lead to faulty decisions and thus to substantive unfairness. Inappropriate language and behaviour is likely to give offence and result in a perception of unfairness, even if there is no substantive unfairness. This leads to a loss of authority and, importantly, loss of confidence in the judicial system. Perceptions are important.

The judge is manager and umpire of the hearing and should ensure that every one who appears before the court (or is entitled to appear but does not) has a fair hearing. This involves identifying the difficulties experienced by any party, whether due to lack of representation, ethnic origin, disability, gender, sexual orientation and/or any other cause, and finding ways to facilitate their passage through the court process.

1.1.2 Inequality

An individual may suffer unequal treatment or perceive that they are being treated unequally when appearing before a court because of discrimination or a failure to compensate disadvantages.

Discrimination

Discrimination, whether actual or perceived, may be the result of prejudice, ignorance, thoughtlessness or stereotyping and may be institutionalised.

Direct discrimination occurs where, for example, a person is treated less favourably for some unjustifiable reason than others would be in similar circumstances. It could be on grounds of race, colour, religious belief, gender, ethnic or national origin, employment status, age or disability.

Indirect discrimination occurs where a requirement is applied equally to all groups, but has a disproportionate effect on the members of one group because a considerably smaller proportion of members of that group can comply with it.

Prejudices of the court

We all have prejudices and it is best that these are identified and acknowledged. They should not be allowed to influence our judicial decisions. Unwitting (or unconscious) prejudice – demonstrating prejudice without realising it – is more difficult to tackle and may be the result of mere ignorance or lack of awareness.

The Equal Treatment Bench Book is not about political correctness nor preaching nor moralising. It is there to inform and assist judges.

Ignorance

Ignorance of the cultures, beliefs and disadvantages of others encourages prejudice. It is best dispelled by greater awareness. To achieve justice, judicial office-holders must be informed and aware. They should at the very least make necessary enquiries.

Thoughtlessness

The thoughtless comment, throw away remark, unwise joke, use of inappropriate terminology or even a facial expression may confirm or create an impression of prejudice, whether justified or not. It may also create or reinforce stereotypes or encourage discrimination by influencing the way people act or respond to others. It is important to be mindful about how your comments, actions or reactions might be interpreted by others. Parties may be very anxious and the issues being determined may be of the utmost importance to them. They are likely to be very sensitised in these circumstances.

Stereotyping

Stereotypes can be positive, negative or neutral. They can act as a form of mental 'shortcut' and amount to nothing more than using one's judicial experience. However, it is important to:

- avoid making assumptions that because people meet particular criteria (e.g. they are of a particular racial or national origin or are wheelchair users) they will behave in a particular way or have specific limitations;
- beware of attaching labels to people (e.g. learning disabled or young black males) and then using them to take away people's rights (e.g. assuming that they are incapable of giving evidence, or that they will lie or be disrespectful);
- avoid using these mental shortcuts to fill evidential or knowledge gaps.

Equality of opportunity

Special needs

Some people, for a variety of reasons, find it difficult or impossible to:

- attend at a court;
- function in a court room;
- understand what is going on; or
- be understood by others.

As judicial office-holders we should demonstrate an awareness of the feelings and difficulties experienced by those appearing before us. Every effort should be made to help in an effective way

whilst maintaining a balance between assisting and adjudicating to enable people to participate fully in the proceedings.

This aspect is of special relevance to people with disabilities, but may apply equally to others such as those who do not speak or understand the language of the court and need an interpreter, or those who cannot read or have difficulty understanding documents and need to have written material explained or presented in a different way. Failing to address these needs will lead to a sense of unfairness and is likely to affect the quality of decision making.

Fair treatment

It is important to emphasise that we are not concerned about equal treatment but about fair treatment. It is not sufficient to treat everyone in the same way – equal treatment may itself amount to discrimination.

Fair treatment means affording equal opportunity for the parties to achieve justice. This is emphasised in the judicial oath which states:

> "*… I will do right to all manner of people after the laws and usages of Bermuda without fear or favour, affection or ill-will.*"

Judgecraft

The art of judgecraft is sought universally:

> "*Judging is a significant act that requires careful attention, and respect for legal rules and principles. It is an act that requires qualities of humanity and compassion. Judging requires an effort to shed prejudice and untested beliefs. Aware as she is of this awesome responsibility, the new judge cannot help but pause and wonder whether she can meet the expectations of others in this respect.*"

(Beverley McLachlin CJ, 2004)

The judge as facilitator

It is part of our role as judge, with effective support from the staff, to ensure that everyone involved in the process – prosecutor and defendant, claimant/applicant and respondent, witnesses, jurors, advocates and judge – can fully play their part. The following may be of guidance.

Correspondence

Take into account that individuals can be disadvantaged by timing and postal delays if they do not have access to fax and e-mail facilities.

Getting to the court

Those unfamiliar with the court should be provided with clear directions explaining how to get to the court and practical guidance about transport, parking and delivery of documents together with advice about telephoning the court if there is any unexpected delay.

Nerves

It should be borne in mind that the court process and atmosphere can be very unnerving for parties and witnesses. Thus they may appear belligerent, hostile and sometimes rude, or confused and emotional. It follows that they may not give a good account of the case to be tried and should be helped to feel more relaxed. If they find it difficult to speak coherently or marshal the facts in an orderly fashion, they should be advised to speak slowly and take their time. The more information and advice that can be available before the hearing, the more pre p a red and relaxed the party or witness will be.

Forms of address

Many participants in a hearing are concerned about how to address the judge or panel member. Others worry about where they should sit and when they should sit or stand. Concerns of this nature add to their confusion and anxiety but can readily be dispelled by a helpful introduction and tactful explanation.

Communication

It goes without saying that it is as important for the individuals before a court to understand what is being said to them as it is for them to be understood.

Jargon

Lay persons may not understand court jargon or technical terms, such as ‘questionnaires’, ‘directions’ and ‘disclosure ’ and Latin legal terms such as “*sine die*” .

In an effort to overcome these difficulties, and to counteract the widely-held public perception that judges fail to appreciate the difficulty that ordinary people have in understanding the language of lawyers, it is advisable to keep language as simple as possible and to give clear explanations when required .

> “*There is something monstrous in commands couched in invented and unfamiliar language; an alien master is the worst of all. The language of the law must not be foreign to the ears of those who are to obey it*”

(**Learned Hand, 1929)**

Misunderstanding

Sometimes one or both parties may be aware that they have not understood or been understood (or may be oblivious to the fact). It is possible to test understanding by asking supplementary questions, or by reiterating or explaining what you understand the position to be, and checking to see if the party or witness agrees. Bear in mind, however, that unrepresented parties may not have the courage to test the understanding of others at the hearing or to admit that they do not fully understand a point.

Communication failures can have far- reaching consequences, especially in situations of social inequality.

Avoiding stereotypes.

Evaluating behaviour with an awareness of the cultural context within which it was generated is rendered entirely counterproductive if one relies on simplistic short-cuts. Not only are stereotypical generalisations grossly inaccurate but the perceptions they generate are invariably as unhelpful as they are misleading.

Complaints

Judges are accountable for their behaviour and those who do not take the trouble to avoid or prevent insensitive behaviour in their courts are vulnerable to complaints.

2. Diversity

Key points

- The judicial process must be seen to be fair and must inspire the confidence of all who enter into it.
- Fairness is demonstrated by effective communication.
- All of us view the world from our own perspective, which is culturally conditioned.
- People with personal impairments or who are otherwise disadvantaged in society are entitled to a fair hearing.
- Our outlook is based on our own knowledge and understanding: there is a fine line between relying on this and resorting to stereotypes which can lead to injustice.

The contents of this chapter should assist judges in:

- communicating effectively with persons from diverse cultures and backgrounds;
- using interpreters to assist communication with persons whose first language is not English or who encounter other barriers in communication;
- understanding basic points about names and naming systems;
- being sensitive about the use of language and terminology.

Culturally sensitive communication

"A judge must bear in mind that when he tries a case, he himself is on trial."

(Philo, Special Laws, 1st Century CE)

Although it may be thought that successful communication depends only upon understanding others, it is also necessary to understand ourselves: only then can we recognise any potential barriers.

Cultural diversity – not stereotypes

Divergences in attitudes are acceptable and the gaps are wider across different cultures. Attitudes to authority vary and our responses to them must take account of differences.

Be wary of making judgements on the basis of body language or tone of voice. Body language varies significantly and this is more apparent in the tense atmosphere of the courtroom.

- In some cultures gender norms are so pronounced that physical affection even between married couples or towards children will never take place in public.
- Raised voices are not a sign of anger in every culture, nor are tears amongst men so unusual in others.

Never underestimate the influence which our cultural background may have on our judgments and perceptions, no matter how open-minded we may consider ourselves to be. We should be well-informed about the differing realities of life for all peoples of diverse backgrounds. Some actions can never be condoned (such as sexual or physical abuse) but our general knowledge must not lead us to false conclusions: there is diversity within all social groupings.

Language

Key points

- Careful use of language and current terms increases confidence in the judicial process.
- Those who are disadvantaged may be more sensitive to the insensitive use of terms.
- Owing to increasing sensitivity in our diverse society we cannot underestimate the importance of using the correct terms.
- Just as the legal process utilises a technical language, users of the court system are entitled to benefit from the enlightened use of terms which generates confidence in the judicial process.
- Our choice of language is an indication of our attitude: the importance of correct etiquette has never diminished, but an appropriate sensitivity to the outward form always commands respect, particularly from those who may hitherto have been excluded or neglected.
- People from minority ethnic communities or with disabilities should always be described as people: White, disabled, etc. are adjectives and should always be used as such, as in 'White person', 'disabled person', etc.

There may be differences of opinion over some terms, and the meanings of words change and may vary between different parts of the country. Appropriate terminology is therefore a subject in which there are not always unambiguously 'right answers'. However, the use of Latin terms familiar to lawyers will usually be inappropriate where an unrepresented party is involved unless care is taken to explain the term.

Gender stereotyping

In the use of language we can unconsciously convey assumptions about gender roles which might be offensive or disconcerting to participants who do not match those roles (e.g. 'postman' or 'fireman' rather than 'postal worker' or 'fire fighter')

Insofar as possible therefore we should take care to use gender neutral language: 'they' (rather than 'he or 'she'); 'them' (rather than 'him' or 'her').

Families and diversity

Key points

- The family unit is the cornerstone of most communities: for many minority communities the family is a key source of personal identity which allows for differentiation from the majority.
- Differences in outlook amongst all families will exist in a diverse society: assumptions about the make up of the family unit have to be put aside.
- No major religion condones abuse and the voices against any such abusive cultural practices from within the communities should be acknowledged and supported.
- Our cultural outlook is based on our own knowledge and understanding: there is a fine line between relying on this and resorting to stereotypes which can lead to injustice.

The following material should assist judges in:

- understanding the range of diversity within families;
- understanding the many factors that lead to differences;
- being sensitive about not making assumptions.

No such thing as the 'average' family

We do not have to think hard to understand that all families are unique. However, there are factors which lead to a shared understanding:

- socio-economic background, schooling and employment;
- racial and national identities;
- gender composition;
- religious framework;
- cultural outlook (e.g. secular or traditional).

The combination of all these variables contribute to people's understanding of what a 'family' is. The task of respecting the differences in lifestyle has to be understood from the starting point that for many of us the 'norm' is actually our understanding of a particular family model. Statistics tell us that that 'norm' does not in fact exist. Families share tendencies but have idiosyncrasies as well:

> "*In the past 50 years, the definition of family has undergone a major transformation. The traditional structure characterised by a stay-at-home mother, a working father and their children living under one roof is no longer the only type of family. Current families do not always include the children's two biological parents – this is usually due to death, divorce and subsequent cohabitation/remarriage or the choice of some to be single parents.*"

('Justice for Families: a Review of Family in Bermuda', the Wade-Miller Report, 2009)

Experience in England (which probably translates well to Bermuda) suggests that sharing racial or ethnic backgrounds does not seem as important as differentiating families on the basis of traditional outlooks or more modern, secular lifestyles:

- Those with more traditional belief systems might be more inclined to resolve problems from within the family and less sympathetic to outside intervention.
- Those with more traditional belief systems are more receptive to change if there is an attempt to acknowledge and respect their differences.
- Those families with secular lifestyles have more in common with each other than those with similar ethnic backgrounds, for example, in the notions of discipline and child/individual autonomy.

Understanding cultural difference

Too often, when it comes to cultural aberrations such as forced marriages, female genital mutilation and 'honour' killings, it is assumed that such practices are the norm within certain communities and general conclusions are drawn about the attitudes within communities. No major religion condones any such practices.

Holidays resulting in child abduction or forced marriages

The problem of a dishonest intention is ubiquitous: it defies the boundaries of culture, religion or race. That is what we have to remember when dealing with cases where a party has acted dishonestly, not to draw conclusions assuming that:

- all trans- or cross-cultural divorces will lead to threats/acts of child abduction;
- all holidays to visit the country of the parent's origin are a ruse to entrap a man or woman into a forced marriage .

Assessing the credibility or honest intentions of any party that comes before the court is an individual question to be judged and not one that can be left to the operation of prejudice in favour of or against any individual.

Same-sex partnerships and family life

Recent changes in adoption law, immigration law and trends in society generally express support for the recognition of same-sex partnerships and their families. The dangers in assuming all families comprise heterosexual couples are obvious and differences should be acknowledged.

Interpreters and communication

Key points

- An interpreter may be necessary even if the witness is able to communicate in English to some degree: the language employed in judicial proceedings is so specialised in comparison to communicating in adequate English in order to get by on a daily basis.
- Common words may have different meanings according to the understanding of the speaker.
- Always establish that the interpreter speaks not only the language but also the dialect of the witness.
- The same interpreter may no longer be appropriate for opposing parties.
- There are serious dangers in allowing an advocate, friend or family member to act as an interpreter and whenever possible the interpreter must be professionally engaged and ideally from an officially approved list.
- It should not be assumed that an interpreter can continue without regular breaks: it is a very demanding process if done correctly, so allow an opportunity to indicate when a break is needed.
- A party may need the assistance of an interpreter throughout the proceedings, beforehand when giving instructions and afterwards when receiving an explanation as to what has transpired. An interpreter or translation of documents may be required to understand the documentation in proceedings. Failure to ensure this could amount to a denial of justice.
- To the extent that it is difficult for those with learning difficulties or inadequate language skills to understand the language employed in the court room, all efforts should be made to communicate in a manner comprehensible to the parties before you.

Reference should be made to Appendix I Interpreters at the end of this part for further information on interpreters.

Names and forms of address

Key points

- We are all sensitive about our names and titles or forms of address.
- In order to show respect, be prepared to ask any person participating in the process how they would like to be addressed – do not make assumptions.
- Getting it right increases everyone’s confidence in the judicial process.

Do:

- ask for the individual's full name and how it is spelt and pronounced – and how they wish to be addressed.
- appreciate that naming systems may be used in different ways by people according to their traditional conventions or by processes of adaptation to living in Bermuda.

But do not:

- ask for 'Christian' names;
- assume that everyone will have a family name as in the traditional Bermudian naming system;
- abbreviate names, unless the person prefers to be addressed by their abbreviated name;
- assume – ask !

From childhood we are all aware of the importance of the correct pronunciation of our names and we expect an understanding of our titles. Members of all communities should benefit from the fulfilment of this simple expectation in our diverse society. In court and throughout the judicial process getting the forms of address right with regard to the judiciary, the lawyers, all the personnel and the public is vital in increasing confidence. In case of doubt, ask the individual directly how it is they would like to be addressed.

3. Unrepresented parties

Key points

The 'litigant in person'

- Most unrepresented parties are stressed and worried, operating in an alien environment in what for them is a foreign language. They are trying to grasp concepts of law and procedure about which they may be totally ignorant.
- They may well be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party or an unrepresented opponent with greater familiarity with the legal process. The outcome of the case may have a profound effect and long-term consequences upon their life.
- They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.

Role of the judge

- Judges must be aware of the feelings and difficulties experienced by unrepresented parties and be ready and able to help them, especially if a represented party is being oppressive or aggressive.
- Maintaining patience and an even-handed approach is also important where the unrepresented party is being oppressive or aggressive towards another party or its representative or towards the court. The judge should, however, remain understanding so far as possible as to what might lie behind their behaviour.

- Maintaining a balance between assisting and understanding what the unrepresented party requires, while protecting their represented opponent against the problems that can be caused by the unrepresented party ’s lack of legal and procedural knowledge, is the key.

Introduction

There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer.

- Many do not qualify for public funding, either financially or because of the nature of their case.
- Some cannot afford a lawyer and even distrust lawyers.
- Others believe that they will be better at putting their own case across.

This section aims to identify the difficulties faced (and caused) by litigants in person before, during and after the litigation process, and to provide guidance to judges with a view to ensuring that both parties receive a fair hearing where one or both is not represented by a lawyer.

Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court which is concerned to adjudicate in proceedings in which that person is a party. But on the whole those who exercise this personal right find that they are operating in an alien environment. The courts have not traditionally been receptive to their needs.

> *All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists.*

(Lord Woolf, Access to Justice, Interim Report June 1995)

> “*Special case management measures may have to be adopted by judges in cases with litigants in person, such as limiting the amount of time allotted for cross-examination and submissions, and more carefully defining the issues at an early stage of proceedings.*”

(Judiciary of Bermuda, Annual Report 2016)

Unrepresented parties are likely to experience feelings of fear, ignorance, anger, frustration and bewilderment. They will feel at a profound disadvantage, despite the fact that the outcome may have a profound effect and long-term consequences on their lives. The aim of the judge should be to ensure that the parties leave with the sense that they have been listened to and had a fair hearing – whatever the outcome.

In what follows, the term ‘unrepresented party’ encompasses those preparing a case for trial, those conducting their own case at trial and those wishing to enforce a judgment or to appeal.

Disadvantages faced

The disadvantages faced by unrepresented parties stem from their lack of knowledge of the law and court procedure. For many their perception of the court environment will be based on what they have seen on the television and in movies. They tend to:

- be unfamiliar with the language and specialist vocabulary of legal proceedings;
- have little knowledge of the procedures involved and find it difficult to apply the rules even if they do read them;
- lack objectivity and emotional distance from their case;
- be unskilled in advocacy and unable to undertake cross-examination or test the evidence of an opponent;
- be ill-informed about the presentation of evidence;
- be unable to understand the relevance of law and regulations to their own problem, or to know how to challenge a decision that they believe is wrong.

All these factors have an adverse effect on the preparation and presentation of their case. Equally, there are other unrepresented parties who are familiar with the requirements of the process.

Numbers

Increasing numbers of people are now also representing themselves in the civil and family courts.

There is presently no bespoke small claims procedure in the Magistrates' Court and the formal civil Rules largely mimic those in the Supreme Court. Public funding has never been available for small claims.

Unrepresented parties also appear with increasing frequency in the Court of Appeal in criminal, civil and family cases. Some have represented themselves at first instance. Others, having had lawyers appear for them in the court below, take their own cases on appeal, often through a withdrawal of public funding after the first instance hearing.

Ways to help

The aim is to ensure that unrepresented parties understand what is going on and what is expected of them at all stages of the proceedings – before, during and after any attendances at a hearing.

This means ensuring that:

- the process is (or has been) explained to them in a manner that they can understand;
- they have access to appropriate information (e.g. the rules, practice directions and guidelines – whether from publications or websites);
- they are informed about what is expected of them in ample time for them to comply;
- wherever possible they are given sufficient time according to their own needs.

Particular areas of difficulty

Those who are involved in legal proceedings without legal representation may face a daunting range of problems of both knowledge and understanding.

Language

English may not be the first language of the unrepresented party and they may have particular difficulties with written English. Any papers received from the court or from the other side may need to be translated. The court may need to adjourn in order to ensure that a mutually acceptable translator can attend the proceedings to explain to the unrepresented party in their own language what is taking place, and to assist in the translation of evidence and submissions.

It is worth noting that there are free tools available on the internet that provide instant translations, free of charge, in most languages – see, for example, www.google.com/language_tools.

Intellectual range

Unrepresented parties come from a variety of social and educational backgrounds. Some may have difficulty with reading, writing and spelling. Judges should:

- be sensitive to literacy problems and prepared where possible to offer short adjournments to allow a litigant more time to read or to ask anyone accompanying the litigant to help them to read and understand documents;
- exercise and be seen to exercise considerable patience when unrepresented parties demonstrate their scant knowledge of law and procedure;
- not interrupt, engage in dialogue, indicate a preliminary view or cut short an argument in the same way that they might with a qualified lawyer;
- where it is necessary to interrupt a plainly irrelevant or unmeritorious submission or piece of oral evidence, this should be done in a sensitive manner and be accompanied by a clear explanation of why the party's presentation must be cut short.

Unrepresented parties often believe that because they are aggrieved in some way they automatically have a good case. When explaining that there is no case, bear in mind that this will come as a great disappointment to a litigant who has waited for their day in court for some time.

Information

Many unrepresented parties believe that members of court staff are there to give legal advice. Court staff can only give information on how a case may be pursued; they cannot give legal advice under any circumstances.

Before the court appearance

Pleadings and witness statements

- Unrepresented parties may make basic errors in the preparation of civil cases by:
- failing to choose the best cause of action or defence;
- overlooking limitation periods;

- not appreciating that they are witnesses in their own cases;
- failing to file their own witness statements in advance of trial (and not understanding that in consequence they may not be able to give evidence).

The individual's level of knowledge should be taken into account in civil cases when deciding whether to make allowances for such failures. A flexible approach ought to be adopted where possible, even if this involves an adjournment.

Directions and court orders

Unrepresented parties often do not understand pre-hearing directions (in particular those imposing time deadlines and 'unless orders') or the effect of court orders so:

- ensure that they leave a directions hearing appreciating exactly what is required of them ;
- involve them in the process of giving those directions (e.g. asking them how much time they need to take a particular step and why) so that they realise that the directions relate to the conduct of their own case;
- explain fully the precise meaning of any particular direction or court order.

Sometimes they believe that if the other side has failed to comply with such directions that this in itself is evidence in support of their own case, or the opponent should be prevented from defending or proceeding further. They often feel upset at what they regard as an over-tolerant attitude by the courts to delays by lawyers.

Documentary evidence

A common problem is lack of understanding about the use and application of documents and bundles. Experience shows that unrepresented parties:

- tend not to make sufficient use of documentary or photographic evidence in their cases;
- fail to appreciate the need for maps and plans of any location relevant to the case.

Preliminary hearings represent an opportunity to give guidance on these matters.

Disclosure of documents

- The duty to disclose documents is frequently neglected by unrepresented parties.
- Some will have little or no appreciation that they should adopt a 'cards on the table' approach. Consequently there can be delay, either because of the need to adjourn or because the judge or the other side requires time at the hearing to read recently disclosed documents.
- When a pre-trial hearing takes place, a short clear explanation of the duty of disclosure and the test as to whether or not a document needs to be disclosed helps both parties and the court in terms of time saved.

Preparing bundles

Many unrepresented parties do not have access to office facilities and have difficulties in photocopying documents, preparing bundles and typing witness statements. They have little concept of the need for documents to be in chronological order and paginated. Putting the case back is often the sensible course to take, in the event of litigants coming to court with their bundles in other than proper order.

Producing documents

All too often unrepresented parties do not bring relevant documents with them to the hearing. The court or tribunal is faced with the comment: 'I can produce it – it is at home', but it is then too late and an adjournment is likely to be expensive and will usually be refused.

The party should have been warned in advance not only to disclose relevant documents to the other side but to produce the originals at the hearing.

Sources of law

Most unrepresented parties do not have access to legal textbooks or libraries where such textbooks are available and may not be able to down-load information from a legal website. Why not let an individual, accompanied by a member of the court staff, have access to the court library or to a particular book?

Sometimes unrepresented parties do not understand the role of case law and are confused by the fact that the judge or tribunal appears to be referring to someone else's case.

- A brief explanation of the doctrine of precedent will enable an unrepresented party to appreciate what is going on and why.
- A represented party's lawyer should be told to produce any authorities to be relied on at the outset.
- An unrepresented party must be given proper opportunity to read such authorities and make submissions in relation to them.

Live evidence

Judges are often told: 'All you have to do is to ring Mr X and he will confirm what I am saying.' When it is explained that this is not possible, unrepresented parties may become aggrieved and fail to understand that it is for them to prove their case.

- They should be informed at an early stage that they must prove what they say by witness evidence so may need to approach witnesses in advance and ask them to come to court.
- The need for expert evidence should also be explained and the fact that no party can call an expert witness unless permission has been given by the court, generally in advance.

When there is an application to adjourn, bear in mind that unrepresented parties may genuinely not have realised just how important the attendance of such witnesses is. If the application is refused a clear explanation should be given.

Adjournments

Unrepresented parties may not appreciate the need to obtain an adjournment order if a hearing date presents them with difficulties.

- It is a common misconception that it is sufficient to write to the court without consulting the other side, merely asking for the case to be put off to another date, or that no more than a day's notice of such a request is required.
- Conversely, unrepresented parties may find it difficult to understand why cases need to be adjourned if they over-run because of the way in which they or others have presented their cases, or why their cases have not started at the time at which they were listed.

Guilty pleas

At the plea stage, where an unrepresented defendant pleads guilty, take great care to ensure that the defendant understands the elements of the offence with which they are charged, especially if there is, on the face of it, potential evidence suggesting that the defendant may have a defence to the charge.

The hearing

The judge is a facilitator of justice and may need to assist the unrepresented party in ways that are not appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:

- attempting to elicit the extent of the understanding of that party at the outset and giving explanations in everyday language;
- making clear in advance the difference between justice and a just trial on the evidence (i.e. that the case will be decided on the basis of the evidence presented and the truthfulness and accuracy of the witnesses called).

Explanations by the judge

Basic conventions and rules need to be stated at the start of a hearing.

- The judge's name and the correct mode of address should be clarified.
- Individuals present need to be introduced and their roles explained.
- Mobile phones must be switched off, or at least in silent mode.
- An unrepresented party who does not understand something or has a problem with any aspect of the case should be told to inform the judge immediately so that the problem can be addressed.
- The purpose of the hearing and the particular matter or issue on which a decision is to be made must be clearly stated.
- The hearing will be electronically recorded and the parties may obtain discs containing all or parts of the hearing on payment of the requisite fee.
- A party may take notes b**ut should not make** personal tape-recordings **without leave of the court**.

- If the unrepresented party needs a short break for personal reasons, they only have to ask.
- The golden rule is that only one person may speak at a time and each side will have a full opportunity to present its case.

Particular difficulties

Difficulties often arise for unrepresented parties in getting to the court, being nervous and incoherent, coping with the jargon used and forms of address. All these issues are addressed above.

Purpose of hearing

The purpose of a particular hearing may not be understood. For example, the hearing of an application to set aside a judgment may be thought to be one in which the full merits of the case will be argued. The procedure following a successful application should be clearly explained, such as the need to serve the proceedings on the defendant, for a full defence to be filed and directions which may be given thereafter so that the parties know what is going to happen next.

The judge's role

It can be hard to strike a balance in assisting an unrepresented party in an adversarial system. An unrepresented party may easily get the impression that the judge does not pay sufficient attention to them or their case, especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties.

- Explain the judge's role during the hearing.
- If you are doing something which might be perceived to be unfair or controversial in the mind of the unrepresented party, explain precisely what you are doing and why.
- Adopt to the extent necessary an inquisitorial role to enable the unrepresented party fully to present their case (but not in such a way as to appear to give the unrepresented party an undue advantage).

The real issues

Many unrepresented parties will not appreciate the real issues in the case. For example, a litigant might come to court believing that they are not liable under a contract because it is not in writing, or that they can win the case upon establishing that the defendant failed to care when the real issue in the case is whether or not the defendant's negligence caused the loss.

At the start of any hearing it is vital to identify and if possible establish agreement as to the issues to be tried so that all parties proceed on this basis. Time spent in this way can shorten the length of proceedings considerably.

Compromise

Unrepresented parties may not know how to compromise or even that they are allowed to speak to the other side with a view to trying to reach a compromise.

- Tell them, particularly in civil proceedings, that the role of the court is dispute resolution – explanations as to forms of alternative dispute resolution (ADR) may be appropriate.

- Ask them whether they have tried to resolve their differences by negotiation and, if possible, spell out the best and worst possible outcomes at the outset. This can lead to movement away from the idea that to negotiate is a sign of weakness.
- Remind them to tell the court in advance if their case has been settled.

Advocacy

Often unrepresented parties phrase questions wrongly and some find it hard not to make a statement when they should be cross-examining. Explain the difference between evidence and submissions, and help them put across a point in question form.

Unrepresented parties frequently have difficulty in understanding that merely because there is a different version of events to their own this does not necessarily mean that the other side is lying. Similarly, they may construe any suggestion from the other side that their own version is not true as an accusation of lying. Be ready to explain that this is not automatically so.

Where one party is represented, invite this advocate to make final submissions first, so that an unrepresented party can see how it should be done.

Criminal cases

Under section 6 (2) of the Bermuda Constitution, everyone charged with a criminal offence has the right to defend him or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance, to be given it free where the law so provides.

Those who dispense with legal assistance do so, almost always, because they decline to accept the advice which they have been given, whether as to plea or the conduct of the trial. A firm hand almost always persuades such defendants that they are much better advised to retain their representatives. If this does not work the problem for the judge is likely to be retaining control over the proceedings rather than providing a sensitive explanation to the defendant of the rules of procedure and evidence. Nevertheless, care will need to be taken to ensure that the Prosecution complies with its disclosure obligations and the unrepresented defendant complies with his disclosure obligations under the Disclosure and Criminal Reform Act 2015.

Cross-examination

Throughout a trial a judge must be ready to assist a defendant in the conduct of their case. This is particularly so when the defendant is examining or cross-examining witnesses and giving evidence:

- always ask the defendant whether they wish to call any witnesses;
- be ready to restrain unnecessary, intimidating or humiliating cross-examination;
- be prepared to discuss the course of proceedings with the defendant in the absence of the jury before they embark on any cross-examination.

Summing up

In the course of summing up a case to a jury in which the defendant is unrepresented, tell the jury that it was always open to defendants to represent themselves and that the jury should bear in mind

the difficulty for defendants in properly presenting their case. In some cases, such comments may be more appropriate at the outset.

Adjournments

Sometimes a defendant in a criminal case becomes an unrepresented party during the case either by reason of the defendant's representatives withdrawing or because they are dismissed by the defendant.

- Bear in mind that you may exercise your discretion in deciding whether or not to grant an adjournment to enable fresh legal representatives to be instructed.
- That decision should be based on what is in the interests of justice having regard to the interests of the witnesses, the public and the defendant, the stage reached in the trial and the likely ability of the defendant to conduct the defence case properly.
- Bear in mind also the duty to warn a defendant against any course that might not be in that defendant's best interests, but if the defendant decides to go on alone, allow them to do so.

Assistance and representation

A party may wish to be assisted by a 'friend' at a hearing or even represented by a person without rights of audience.

'McKenzie friend'

This term refers to an assistant or friend (whether lawyer or not) who assists in presenting the case by taking notes, quietly making suggestions or giving advice. The term McKenzie friend has been discouraged but is still used and its meaning is generally understood. Their role differs from that of the advocate and is generally permitted at trials or full hearings although the 'friend' can be excluded if unsuitable (e.g. someone who is pursuing their own or an unsuitable agenda). It may be less appropriate to allow such assistance in chambers because the judge generally provides more assistance to an unrepresented party at such hearings.

The English Court of Appeal summarised the principles in *Paragon Finance plc v Noueiri* [2001] EWCA Civ 1402, [2001] 1 WLR 2357, as follows:

(i) A McKenzie friend had no right to act as such: the only right was that of the litigant to have reasonable assistance.

(ii) A McKenzie friend was not entitled to address the court: if he did so, he would become an advocate and require the grant of a right of audience.

(iii) As a general rule, a litigant in person who wished to have a McKenzie friend should be allowed to do so unless the judge was satisfied that fairness and the interests of justice did not so require. However, the court could prevent a McKenzie friend from continuing to act in that capacity where the assistance he gave impeded the efficient administration of justice.

Rights of Audience

- Sections 27 & 28 of the Courts and Legal Services Act 1990 (UK) govern exhaustively rights of audience and the right to conduct litigation. They provide the court with a discretionary power to grant lay individuals such rights. A court may grant an unqualified person a right of audience *in exceptional circumstances only* and only after careful consideration.[1] The litigant must apply at the outset of a hearing if he wishes the MF to be granted a right of audience or the right to conduct the litigation.[2]
- No such statutory provisions exist under Bermuda law. The Bermuda Bar Act 1974 merely prohibits unqualified persons from issuing proceedings or acting as a barrister, pretending to be a barrister or (for a fee) preparing court documents (sections 26-28).
- **The topic has been addressed in local case law.** The Court of Appeal for Bermuda has held that a McKenzie friend may be permitted to address the court on behalf of a litigant in person: *Moulder-v- Cox Hallett Wilkinson (a firm)* [2011] Bda LR 40. This decision was followed by the Supreme Court in *Stowe-v-R* [2016] Bda LR 44.
- It is self-evident that legislation governing the use of McKenzie friends is needed in Bermuda.

Duty Counsel

- Litigants in person should also be aware of the Duty Counsel scheme which operates in Plea Court in the Magistrates' Court.
- Where duty counsel is available, the court should take care to ensure that the unrepresented defendant is given a reasonable opportunity to obtain advice.

Potential problems

It is worth noting however, that once the privilege has been granted it is difficult to withdraw it even if the representative turns out to be unsuitable. It may, however, be appropriate to grant a right of audience on a one-off basis (e.g. where a party is infirm and cannot afford the services of a lawyer).

After the hearing

Having won or lost the case, the unrepresented party will need to understand what has happened and the options available or steps that can still be taken.

Explaining the decision

Unrepresented parties often do not understand the outcome of the case and the reasons for it. In complicated cases it may be especially difficult to deliver an appropriately full judgment which is easy for a lay party to understand. The following guidance is particularly important, therefore, if they have lost:

- Always set out clearly the reasons for the decision.

[1] D v S (Rights of Audience) [1997] 1 F.L.R. 724 (CA), Milne v Kennedy & Others (11 February 1999) (TLR) (CA). Paragon Finance PLC v Noueiri (Practice Note) [2001] 1 WLR 2357 (CA).
[2] *Clarkson v Gilbert* [2000] 2 FLR 839 (CA).

- If possible, provide an unrepresented party with a copy of the order before leaving the court .
- If judgment is reserved, or the order is to be sent on, tell the unrepresented party approximately when they can expect to hear further from the court and why there may be a delay.

Costs

Unrepresented parties are frequently unaware that they may recover costs from the losing side in civil cases. If such party is entitled to costs but says nothing, consider drawing the question of costs to their attention, without offering advice, so that any relevant costs application can be made. If an application is made that an unrepresented party pays the costs, an explanation must be given with an opportunity to argue against this.

Appeal

Unless the unrepresented party has been wholly successful in the case, explain the requirement to seek leave to appeal, if applicable. Tell the unrepresented party to consider their rights of appeal, but explain that the court cannot give any advice as to the exercise of those rights.

Enforcement

An unrepresented party may be wholly unaware of the fact that although a civil judgment has been secured, it still has to be enforced. It is important, therefore:

- to explain this in general terms at the end of the case and to make it clear that the court cannot advise on enforcement, but that leaflets are available at the court office;
- to explain the alternatives and that, short of giving advice, the court staff are always willing to appropriately assist on matters of enforcement .

Social disadvantage

Key points

Economic disadvantage

- A disproportionate number of those appearing before courts and tribunals are from economically disadvantaged backgrounds.
- This may affect the way individuals present and understand evidence, and how they respond to cross-examination

> "*…increasingly, families are finding it impossible to afford the basic necessities such as rent, food and necessities*"
>
> **Sheelagh Cooper, 2011**

Economic disadvantage

A large proportion of economically disadvantaged people come into contact with the justice system. At the same time, those who operate the courts – judges and lawyers – are rarely from such backgrounds, and are by definition removed from the contemporary situation of economically disadvantaged people. It is necessary therefore to attempt to bridge any knowledge and understanding gaps between judges and those in their courts.

The concept of social disadvantage

The term 'social disadvantage' refers to a situation of economic or social disadvantage. It incorporates, but is broader than, concepts like poverty or deprivation, and includes disadvantage which arises from discrimination, ill health or lack of education, as well as that which arises from a lack of material resources.

An understanding of social disadvantage is relevant to the administration of justice in three ways.

1. Many individuals drawn into the justice system will come from socially disadvantaged backgrounds. To understand the circumstances which have brought the case to court it is necessary to understand how processes of social disadvantage operate.
2. The social disadvantage experienced by those individuals may affect the way they present and understand evidence, and how they respond to cross-examination.
3. Sentences of the courts may create or exacerbate social disadvantage for offenders. This may be intentional and justified, but it is as well to understand the full implications.

There is no legal definition of social disadvantage, but the term is used here in the same sense as the term 'social exclusion' is used in England and Wales. A range of definitions is used by academics and politicians, according to their disciplinary and ideological perspectives. However, there are a number of core features which most definitions share:

- An individual who is unable to fully participate in key activities in society is socially disadvantaged. Key activities might include:
  - consumption-being able to purchase goods and services which are customary in that society;
  - production-being able to contribute to society, whether through paid or unpaid work ;
  - social interaction-having access to emotional support, being able to socialise with friends, having avenues for cultural expression;
  - political engagement-experiencing a degree of individual autonomy, being able to take collective action, having a say in local or national decision making;
- Social disadvantage is a matter of degree, rather than a dichotomy between 'us' and 'them';
- Complex chains of cause and effect lead to social disadvantage. The causes of social disadvantage operate at many levels: individual personality, family background, neighbourhood or peer group effects, the local economy and services, national policy and economic systems, and international and global trends.

Given the breadth of the term social disadvantage, it is difficult to quantify how many people in Bermuda are affected. Research has indicated that:

- Experiencing disadvantage in one respect is associated with an increased likelihood of experiencing exclusion in other respects, either simultaneously or at some point in the future;
- There is no evidence of a fixed 'stock' of socially excluded individuals, cut off from mainstream society over the long term (sometimes referred to as an underclass).Rather, individuals move from being more to less disadvantaged, and vice versa, over time;

- Risk factors include having had a disadvantaged childhood, having low or no educational qualifications, being in poor health, living on a low income, having inadequate housing and being a member of a group which is discriminated against.

Characteristics of social disadvantage

In order to understand social disadvantage in the courts it is important to be aware of the wider context of people's lives and the ways that different aspects may impact on their experience of court. The next sections try to highlight some characteristics of socially excluded lives and consider their potential impact. However it is important not to perceive socially disadvantaged populations as a homogenous 'underclass' with a wholly alternative set of norms, values and behaviours from those of mainstream society. Whilst some commentators attempt to paint this picture, there is no evidence for it. The aim of this chapter is rather to alert judges to some of what may occur in court.

Low income

The realities and practicalities of life on a low income can be very hard for many people. Attempting to 'make ends meet' through a combination of the Social Assistance system and low paid, inflexible and informal work is challenging. Reliance on benefit system rigidities and bureaucracies create great pressures especially when moving into and out of employment. Many people on low incomes, whether in the formal or informal labour market, are paid by the hour and do not receive the full range of employment benefits, even if they are entitled to them. They lack the flexibility in their work to maintain their income while dealing with emergencies whether relating to children, illness, a court appearance or anything else. Financial exclusion hits hardest when there is a shortfall of income or people need to meet one-off costs for emergencies and important goods and services.

Lack of choice and control

Socially disadvantaged people have a significant amount of contact with bureaucracies, officials and the state apparatus. Housing officers, social workers, health visitors and probation officers are amongst the many people who some socially disadvantaged individuals come across on a weekly or even daily basis, on top of teachers, the police and others. Some of these relationships can be positive, but the choice, agency and control taken for granted by people with resources are missing.

Family life

A lack of family stability is common amongst many socially disadvantaged groups. Whilst less settled family lives are widespread across society, they are more frequently found and often more

extreme amongst socially excluded populations. This, alongside the strains of managing on a low income, and the lack of control over one's life, may all contribute to the greater anxiety, stress and depression which is found among socially excluded people.

Education

The lack of a good education is a characteristic strongly associated with social disadvantage. This feeds into very low education levels amongst the prison population in comparison to the general population. As well as the significant effect lack of education has on the ability to get decently paid work and to manage in a society that requires certain levels of functional literacy, this may be one of the factors that contributes to low levels of 'perceived self-efficacy' – a lack of belief in one's own ability to achieve a desired outcome. This has been shown to have a major impact on the choice, effectiveness and persistence of people's behaviours across a range of settings, and has been shown to be markedly lower amongst many people who might be described as socially disadvantaged.

Race

Failing to mention the lingering significance of historical discrimination against persons of African or mixed African descent (Black Bermudians) would be tantamount to ignoring the 'elephant in the room'. Popular narratives of current events still frequently have a racial theme.

Bermuda was a slave society between 1616 and 1834. De facto racial segregation in clubs, hotels, restaurants and schools only ended between 1959 and 1970. Citizenship rights were based on property ownership until 1968 resulting in a black majority country where private wealth and political power largely remained in white hands. In 2016 the Bermuda Judiciary celebrated its 400th anniversary. The Judiciary was dominated by White judges, magistrates and jurors for roughly 350 of those 400 years. There is now a need to ensure that White Bermudians are not under-represented.

Nevertheless, it remains a notorious fact that Black Bermudian males continue to be over-represented in the role of criminal defendant and that Black Bermudians of modest means are over-represented amongst the ranks of civil debtors at the Magistrates' Court and Supreme Court levels. In most consumer debt cases and mortgage repossessions, the plaintiffs will often be (or perceived to be) 'White businesses'. Black Bermudians continue to be over-represented in the socially disadvantaged class and such litigants may well approach the courts with a justified anxiety that their position will not be fairly and fully understood.

Social disadvantage and the court

It is beyond the scope of this Bench Book to engage with the issues of how all of these factors are implicated in bringing individuals to court or to discuss how and whether any of these re p resent reasons for mitigation in any circumstances. However, their implications for the actual court process are substantial. In essence, it is necessary to understand the different educational and social norms that can be the experience of socially excluded people. Norms, rules and formalities of the court in connection with aspects of language, dress, communication, procedure and behaviour may be not be known, understood or shared by everyone; knowledge and skills should not be assumed. Sensitivity is required to both avoid prejudice and allow the individual the best opportunity to make their case.

- For those in hourly-paid employment, time in court – especially if there are delays – may be particularly stressful, as people may be concerned about missing necessary work thus exacerbating their financial situation, or needing to pick their children up from school yet unable to pay for or rely on help from others;

- Judges and the court process may be seen as just another in the long list of individuals and authorities getting involved with someone's life. This can have many implications, but could result in immense frustration leading to anger for some individuals. Judges need to understand that such a situation is not borne out of a lack of respect for the law, but out of the helplessness stemming from lack of choice and control;

- Research has shown that many people find courts intimidating places and this can be exacerbated by aspects of court such as dress. This may be especially so for people who experience social disadvantage and who may lack confidence in such an environment. Attempts to put people at ease may be an important part of allowing them to express themselves fairly;

- People on a low income, or whose social network does not include professionals, are less likely than those in a more privileged position to gain access to timely, high quality legal advice and representation. This will affect the presentation of their case in court;

- Where paper work has been provided by the court or claimant that an individual should have seen prior to, or during, the court appearance, it cannot be assumed that the individual is able to understand, even if English appears to be their first language;

- Language problems may not be confined to the written word. Explanations or comments from lawyers and judges, especially if using legalistic language, may not be properly understood. Individuals may not be used to expressing themselves publicly or with strangers, and may struggle to get their point across. All of this may lead to miscommunication, discussion at cross purposes, frustration and annoyance for all parties. It is important that everything said is understood on all sides;

- People may come to court not really understanding why they have been summoned. They may well have no clear idea of their rights. A process which does not ensure that these preconditions have been met will be essentially prejudicial. For example, if a free advocacy service exists, and the individual comes into court alone, have they understood that the service was available and free, and rejected it, or have they not been sufficiently made aware of its availability?

Decisions of the court

There are cases where it is necessary or desirable for individuals who have been convicted of a crime to be sent to prison and excluded from society. Sentencing may have other objectives, such as punishment, deterrence or redress for the injured party. Whatever the intention, it is important to consider the impact sentencing may have on the social disadvantage of the offender and on others, including society.

Custodial sentences

For those with already precarious employment and/or low educational qualifications, a custodial sentence can reduce the chance of subsequent legal employment to almost zero. Private or social housing tenancies may be terminated, creating a risk of a period of homelessness on release from prison. Any supportive relationships or social networks the offender had in the community at large may break down and be replaced by connections among the prison population (sometimes referred to as negative social capital). Lone parents are over-represented among those at risk of social disadvantage; custodial sentences for this group are likely to have significant adverse impacts on the children, whatever alternative arrangements are made for their care.

Community sentences and treatment orders

Non-custodial sentences can also have a negative impact on the chances of retaining employment. Again, this impact is likely to be magnified by lack of educational qualifications or an already disrupted work history. In addition, people at risk of social disadvantage often have complex and even chaotic lives, as a result of juggling the demands of living on a low income and negotiating with a range of different service providers and authorities. This can make it more difficult to keep appointments or attend regularly.

Financial penalties

Self-evidently, the impact of a $500 fine is greater for someone whose weekly income is $250 than for someone whose weekly income is $2500. The majority of people on low incomes have no savings or access to cheap credit. Attempting to pay fines, legal costs or compensation from limited resources can result in problematic levels of debt, a failure to meet other financial commitments such as rent (resulting in a risk of homelessness), utility bills (with the attendant risk of disconnection), or child support payments (increasing child poverty). Payment may also create pressure to acquire resources by illegal means. Financial hardship is likely to affect not only the offender but also any children or other dependants. These considerations may be relevant when deciding whether imprisonment is appropriate for failure to comply with financial court orders.

Possession orders

Where possession orders for residential accommodation are made, the risk of subsequent homelessness, loss of assets and potential impact on children should be taken into account. Timing may also be important, to give maximum opportunity for other arrangements to be made, or to take account of other impending events in the individual’s life (e.g. childbirth). The impact of any decision on the property owner should also, of course, be taken into account.

Impact on citizenship

Research in England and Wales has indicated that the majority of people share similar fundamental views about justice and many of those who have committed an offence believe it is right that they should be punished. This may well reflect the Bermudian position.

Public confidence in the criminal justice system depends on a perception of having been fairly treated. As discussed above, this requires that the process is perceived to be fair and transparent. It also requires that the defendant feels they have been judged fairly and that the decision is proportionate. There may be a predisposition to feel unfairly treated and misunderstood among some people at risk of social disadvantage, since this is often their experience of dealings with authority in the past. Judges may therefore need to explain their decisions more fully and more carefully, and show that they have taken into account the context of the offence. Remarks which demonstrate a lack of understanding of the circumstances of the defendant are not an effective way to admonish or prevent recurrences of the offence, but serve only to further entrench alienation from authority.

The argument in this section has not been that people at risk of social disadvantage should be treated more leniently than others, but that, where possible, sentences should take into account the actual likely impact on an individual's life chances and the lives of any dependants, given the current circumstances of all affected. Both immediate and longerterm effects need to be considered.

Specific jurisdictions

When dealing with debt and property repossession cases, particularly in the Magistrates' Court, the judge may have to deal with the 'poverty' of the defendant.

Debt

Where liability to pay is established, the judge will be dealing with a defendant falling into one of four broad groups:

1. 'can't pay';
2. 'won't pay';
3. 'won't play' (i.e. will not respond to orders or otherwise participate in the court process); and
4. 'can't cope' (perhaps due to infirmity or mental or physical disability).

The court has ample powers to deal with the second and third groups. But what should be the approach to ensuring payment (of an amount lawfully due) when dealing with a defendant falling into the first or fourth group (or sometimes both)? Perhaps:

- Enquire if the defendant is receiving all potential capital and income with which to satisfy any indebtedness;

- If the problem is non-employment, the litigant may be able to maximise their income from Social Assistance benefits, either by claiming unclaimed benefits or by having a re-assessment of any current benefits. They may not be presently getting the correct benefit or the correct amount. Arrears may be due and many benefits can be backdated or the benefit enhanced.

It may be best to adjourn proceedings (in appropriate cases) and direct the debtor to an appropriate source of advice and assistance.

Mortgage repossession claims

In a 'can't pay the mortgage' case it may be appropriate to adjourn the proceedings or suspend any order for possession on terms.

5. Equality law

Key points

- Anti-discrimination law is a dynamic area of law and is changing rapidly.
- In the legislation, the scope of protection against discrimination varies according to the ground protected.
- 'Discrimination' is, broadly speaking, committed in two circumstances: that is by way of 'direct' discrimination and 'indirect' discrimination.

Background

In Bermuda there is no open-ended equality guarantee at constitutional level or otherwise. Instead, discrimination is regulated at the constitutional level and through ordinary legislative provisions that address discrimination on particular grounds. Section 12 of the Bermuda Constitution Order 1968 and the Human Rights Act 1981 contain the main legal protections against discrimination.

Constant change in law

It should always be borne in mind that anti-discrimination law is a dynamic area of law and is changing rapidly. The law as it is described below is accurate as far as possible as at May 31, 2018 and where changes are imminent and known they are mentioned.

Human Rights Commission

The Human Rights Commission ("HRC") is a statutory body whose powers and duties, in very broad terms, are to work towards the elimination of discrimination and to promote equality of

opportunity on the various grounds prohibited by the Act. The HRC has the power to fund litigation and also has the power to take enforcement action under its own name in certain circumstances.

Legal regulation of discrimination

Section 12 of the Constitution prohibits discrimination on the following grounds:

- Race;
- Place of origin;
- Political opinions;
- Colour or creed.

Section 12(2) provides:

> "*Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*"

This provision prohibits judicial officers from applying the law in a discriminatory way in contravention of section 12 of the Constitution.

The Human Rights Act 1981 prohibits discrimination on the following grounds:

- Race;
- Place of origin;
- Political opinions;
- Colour or creed;
- Ethnic or national origins;
- Sex or sexual orientation;
- Marital status;
- Disability;
- Family status;
- Religion or beliefs;
- Criminal record;
- Mental health;
- Age (the sphere of employment excepted).

The Human Rights Act prohibits public authorities providing services to the public from contravening the Act. It would be inconsistent with the judicial function for the Judiciary to seek to contend that it is not required to comply with the spirit and letter of the Human Rights Act.