McKENZIE FRIENDS

Ms Justice Marie Baker, High Court

What is a 'McKenzie friend'?

In Irish law a litigant in person may avail of the assistance of a '*McKenzie friend*', namely someone who may accompany the litigant to court, take notes, and offer general assistance during the course of proceedings. McKenzie friends are of considerable benefit to litigants in person, particularly those who find it difficult to properly articulate the arguments they wish to make.[1] At the outset it must be stated that there is no right to a McKenzie friend per se. Indeed, it may be more adequately described as a right to request a McKenzie friend or perhaps a conditional right to a McKenzie friend subject to the approval of the court.[2] This right to request a McKenzie friend is an incidence of the public's right of access to legal proceedings conducted in public.[3] The parameters of the role are strictly defined, and a McKenzie friend does not have a right to appear as an advocate or to address the court on behalf of the litigant in person. The role of a McKenzie friend is confined strictly to providing assistance and advice to the unrepresented litigant during the course of legal proceedings.[4] They are usually allowed to accompany the litigant in person in court, organise their legal documents and whisper suggestions to them during the course of legal proceedings.
Monnin C.J.Q.B. in *Law Society of Manitoba v Pollock* noted that the role of a McKenzie friend is "*limited to assisting the litigant and giving advice to the litigant, not advancing argument, cross examining or performing any other functions that counsel usually do.*"[5] McKenzie friends may only address the court when they are invited to do so and strictly speaking, have no right of audience before the courts. The precise role is one for the presiding judge as noted by Fennelly J. in the judgment of the Supreme Court in *Re Application for Orders in Relation to Costs by Coffey & Ors.*[6]:

> *"This is not to say that a judge may not, on occasion, as a matter of pure practicality and convenience, invite the McKenzie friend to explain some point of fact or law, where the party is unable to do so or do so clearly. That must always be a matter solely for the discretion of the judge. The McKenzie friend has no right to address the court unless invited to do so by the presiding judge."*

What is given can also be taken away, for the court retains a residual discretion to prevent a McKenzie friend from continuing to act in that capacity where their behaviour is inimical to the efficient administration of justice.[7] Moreover an individual will not be permitted to act as a McKenzie friend if they are in any way connected to the proceedings. For example, in *Satchithanantham v. National Australia Bank Ltd*,[8] a husband was not permitted to act as a

[1] Joseph Delaney v. Allied Irish Banks PLC., Declan Taite and Sharon Barrett (Unreported) [2016] IECA 5 at [2].
[2] R v Secretary of State for the Home Department; Ex parte Tarrant [1985] QB 251; R v. Bow County Court; Ex parte Pelling [1999] 4 All ER 751.
[3] H.W.R. Wade & C.F. Forsyth, *Administrative Law* (10th edn, OUP 2009) 789.
[4] R v. Bow County Court; Ex parte Pelling [1999] 4 All ER 751; See also Damjanovic v. Maley (2002) 55 NSWLR 149.
[5] Law Society of Manitoba v. Pollock (2007) MBQB 51; [2007] 5 WWR 147; 153 CRR (2d) 131.
[6] [2013] IESC 11
[7] Noueiri v. Paragon Finance Plc (No. 2) [2001] EWCA Civ 1402.
[8] Satchithanantham v. National Australia Bank Ltd [2009] NSWCA 268.

McKenzie friend for his wife because he was intimately involved in an issue which was the subject of proceedings: whether or not he exercised undue influence upon his wife.
On the whole, however, it is accepted that "*McKenzie friends are able to provide advice and support to a number of the most vulnerable litigants in the court system and accordingly enhance access to justice*."[9]

The source of the term 'McKenzie friend'

The term 'McKenzie friend' derives from the case of *McKenzie v. McKenzie*[10] which was decided by the Court of Appeal for England and Wales in 1970. The case concerned the divorce of Mr. McKenzie and Ms. McKenzie, both of whom were of Jamaican origin. The case involved cross charges of adultery and cruelty.
Mr. McKenzie appealed against the judgment of Lloyd-Jones J. which rejected his claim of adultery and granted Ms. McKenzie a decree nisi, having found that Mr. McKenzie had been guilty of persistent cruelty towards his wife.
Mr. McKenzie received the benefit of legal aid but for some reason this was terminated before the trial began in 1970. Bereft of all legal advice and possessing an untutored mind, Mr. McKenzie faced the difficult task of arguing his own case in court. Fortunately, Mr. McKenzie managed to find some help from Mr Hanger, an Australian barrister. Mr. Hanger was spending some time working in England and appeared voluntarily at the ten-day trial to assist Mr. McKenzie.

On the first day of trial, Lloyd-Jones J. noticed Mr. Hanger sitting beside Mr. McKenzie and was informed that Mr. Hanger was instructed by the firm of solicitors who, prior to the revocation of certificate of legal aid, had acted for Mr. McKenzie and was thus sent by the firm to offer Mr. McKenzie some assistance. The trial judge, Lloyd-Jones J. discovered that this firm was no longer on the record and as a result, Lloyd-Jones J. ordered Mr. Hanger to leave the courtroom and to play no further part in proceedings. Complying with the wishes of the court, Mr. Hanger left and did not reappear.

In the Court of Appeal, Davies L.J. endorsed the words of Lord Tenterden C.J. in *Collier v. Hicks* in 1831 and concluded that Lloyd-Jones J. erred in refusing to allow Mr. Hanger to advise and assist Mr. McKenzie during the ten-day trial. Sachs L.J. agreed and held that Mr. Hanger "*had done nothing, ... other than sit quietly beside the husband and give him from time to time some quiet advice or prompting.*"[11] Mr. McKenzie was found to be "*fully entitled to have that assistance, and Mr. Hanger was fully entitled to give it.*"[12]

Sachs L.J. added that:

> "*It is moreover always, to my mind, in the public interest that litigants should be seen to have all available aid on conducting cases in court surroundings, which must of their nature to them seem both difficult and strange.*"[13]

[9] Law Commission of New Zealand, *Review of the Judicature Act 1908: Towards a new Courts Act* (November 2012, Wellington, New Zealand) (Report 126) page 148 at [15.13].
[10] McKenzie v. McKenzie [1970] 3 All ER 1034.
[11] Ibid 1038.
[12] Ibid.
[13] 3 All ER 1039

Allowing Mr. McKenzie's appeal, their Lordships ordered a new trial on the issue of Ms. McKenzie's adultery. As a result of this decision, the term 'McKenzie friend' was born.

Since 2013, there has been an increase in the number of lay litigants coming before the Irish courts, many of whom request the assistance of a McKenzie friend.[14] Unable to secure legal aid or afford legal representation, many are forced to represent themselves. For those litigants who are adroit, mentally nimble and perhaps capable of turning matters to their own advantage, such a task may prove surmountable. But for those who, through no fault of their own, do not possess such capabilities and perhaps suffer from what Sachs L.J. characterised rather pejoratively in *McKenzie v. McKenzie* as *"court dumbness"*,[15] the thought of representing oneself in legal proceedings is, understandably, quite disconcerting.

Case law

In *Collier v. Hicks*,[16] the plaintiff, Mr. Collier, entered the police station with the informer, Mr. Latham, and proceeded to act as his attorney and advocate without leave of court and in contravention of the order of the court. He took notes of a witness's evidence and acted in the proceedings. The plaintiff continued to assert a right to be present and continued to take part in proceedings and was held in contempt of court.

Lord Tenterden C.J. in the Court of King's Bench held that the defendants were entitled to extract the plaintiff from proceedings and expel him into the street on the grounds that no person has by law a right to act as an advocate for another party without permission of the court. Speaking *obiter*, Lord Tenterden C.J. said:

> "*Any person, whether he be a professional man [or woman] or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.*"

Lord Tenterden C.J.'s decision in *Collier v Hicks*, gives rise to the following propositions:

- The question as to whether certain persons are entitled to take part in proceedings must depend upon the discretion of each Judge who has the power to regulate proceedings in his or her own court.

- It may be useful, in particular cases, to allow certain persons to speak on behalf of lay litigants, to expound the law and to reason on the facts. However, it is not permissible for anyone to claim, as of right, the ability to act in that capacity without the consent of the presiding Judge.

[14] Neal Sweeney, McElhinney Fashions Limited v. Meath County Council, the Commissioner for Valuation and Judge Grainne Malone [2016] IEHC 200 (McDermott J.) (19 April 2016); Danske Bank A/S v. Connotes Limited and Seán McElvaney (Unreported) [2016] IEHC 183 (McDermott J.) (12 April 2016); Joseph Delaney v. Allied Irish Banks PLC., Declan Taite and Sharon Barrett (Unreported) [2016] IECA 5 (Peart J.) (28 January 2016); Thomas Tougher v. Tougher's Oil Distributors Limited and John O'Regan (No. 1) (Unreported) [2014] IEHC 254 (Cregan J.) (15 May 2014); In the Matter of Application for Orders in Relation to Costs in Intended Proceedings by Coffey and others (Unreported) [2013] IESC 11 (Fennelly J.) (26 February 2013).

[15] 3 All ER 1034, 1039.

[16] Collier v. Hicks 2 B. & AD. 663.

- Any persons, whether legally qualified or not, may attend as a McKenzie friend and may take notes, quietly make suggestions and give advice. The use of the word 'may' makes clear that such a right must be conditional upon the sanction of the court.

In the 1991 case of *R v Leicester JJ, ex parte Barrow*,[17] the applicants, by way of judicial review proceedings, claimed that they were wrongfully refused the assistance of a McKenzie friend at a hearing. It was further argued that the justices, in the exercise of their inherent discretion, should have permitted same and their failure to do so amounted to a breach of natural justice, insofar as the applicant had been unfairly treated.

In response, the justices highlighted that they had the right to regulate their own proceedings and were therefore afforded a certain level of discretion in relation to whether an individual would or would not be permitted to act as a McKenzie friend. In deciding to refuse relief, the justices placed emphasis on the fact that the proceedings were uncomplicated.

The 2013 Supreme Court case of *Coffey & Others*[18]

On 26 February, 2013, the Supreme Court gave judgment in *Coffey & Others* which clarified the legal principles regarding McKenzie friends in this jurisdiction.

With regard to lay litigants, Fennelly J. acknowledged at paragraph 17:

> "*Such litigants have become an increasingly common feature of litigation in our courts. The reasons are many and various. ... The courts have recognised the capacity of a McKenzie friend to assist a lay litigant, usually by giving advice or organising papers. That procedure, however, must, of necessity, be carefully supervised. Only in most limited circumstances will a court permit a McKenzie friend to address it."*

Acknowledging the importance of privacy in family law proceedings, the Judge noted:

> *"In the family courts, in particular, it is necessary to ensure that the admission of a McKenzie friend does not undermine the confidentiality of proceedings being heard in camera."*

In determining any request for a McKenzie friend, Fennelly J. stressed that "... *any application in this regard must be made bona fide and must relate solely to the activities which, if admitted, such a friend may perform.*" Fennelly J. approved the statement made by Macken J. in the High Court in *R.D. v. McGuiness*[19], namely that

> "*a party who prosecutes proceedings in person is entitled to be accompanied in court by a friend who takes notes on his behalf and quietly make suggestions and assist him generally during the hearing, but ... may not act as advocate. ... The McKenzie friend has no right to address the court unless invited to do so by the presiding judge.*"

This, of course, restates the earlier principles enunciated in *Collier* and *McKenzie* regarding the role of a McKenzie friend. In fact the description and powers of a McKenzie friend have not changed in any material respect.

[17] [1991] 2 WLR 974.
[18] [2013] IESC 11 (Fennelly J.).
[19] R.D. v. McGuiness [1999] 2 IR 411 at 421

Recent Developments in Irish Law

In *Tougher v. Tougher's Oil Distributors Limited & Anor. (No. 1)*,[20] the plaintiff nominated a former solicitor, Mr. O'Donoghue, to act as his McKenzie friend. However, Mr. O'Donoghue further sought an unrestricted right of audience before the court in order to represent the plaintiff. The defendants objected to this, on the grounds that Mr. O'Donoghue was not entitled to an unrestricted right of audience before the court.

Cregan J. noted the parallels between the application in this case and that in *Coffey & Others* wherein the applicant asked the court, in the words of Fennelly J. "*to permit something utterly different*" to a request for a McKenzie friend.[21] Rather in both proceedings, applications were sought for an unrestricted right of audience before the courts. Applying the principles established by the Supreme Court in *Coffey*, Cregan J. rejected the application, holding that the plaintiff's nominee was not qualified in law and did not have a right of audience.[22] Moreover, there were no "*exceptional circumstances*", as discussed in *Coffey*, which would permit a departure from the strict application of this rule.[23]

The decision in *Tougher (No 1)* does represent a welcome restatement of the legal principles regulating lay litigants, the use of McKenzie friends in Irish law and an endorsement of the Supreme Court's decision in *Coffey*. Moreover, *Tougher (No 1)* is significant insofar as it distinguishes the right to act as a McKenzie friend from the more expansive right of audience before the court, the latter being granted only in exceptional circumstances.

In *Dolan v. Culloo & Loughrey, Loughrey v. Dolan, Dolan v. Culloo & Anor., Loughrey v. McCloughan Gunn & Co.*,[24] the role of the McKenzie friend was also addressed. Dunne J. noted that Mr. Loughrey, a plaintiff in one of five applications before the Supreme Court, suffered from dysphasia which is caused by damage to the left side of the brain and results in speech and language impairment. In these circumstances, the court permitted Mr. Loughrey to avail of "*the assistance, and very able assistance ... of his niece, Ms. McNally"* who acted as his McKenzie friend.

Reaffirming the limits to the powers and functions of a McKenzie friend in this jurisdiction, Dunne J. noted that:

> "*Ms. McNally was allowed to address the Court solely for the purposes of enabling the Court to understand what Mr. Loughrey was saying rather than for the purposes of permitting her to make anything that could reasonably be considered to be submissions in the case.*"[25]

In an ex tempore judgment in *O'Shea v. Governor of Mountjoy Prison*[26] delivered on 30th March 2015, Ryan P. dealt with, *inter alia*, the question as to whether an applicant can be represented by a lay person in habeas corpus proceedings, Ryan P. started by saying at paragraph 15 of his judgment that it was perfectly understandable for one citizen to look after the interests of another and that the court was happy to hear from such an applicant and indeed benefited

[20] Tougher v. Tougher's Oil Distributors Limited and John O'Regan (No. 1) [2014] IEHC 254 (Cregan J.) (15th May 2014).
[21] [2013] IESC at [19].
[22] [2014] IEHC 254 at [11].
[23] ibid at [9].
[24] [2016] IESC 29.
[25] Ibid.
[26] [2015] IECA 101.

from such assistance. He added, however, that "*the Court does not want to set a precedent or make a general rule.*", namely in relation to lay litigants effectively exercising full rights of audience before the court which is in contradistinction to the limited rights normally conferred upon such applicants whilst acting as McKenzie friends.

Ryan P.'s comments were endorsed by Humphreys J. in the case of *Knowles v. Governor of Limerick Prison*[27] which was decided on 25th January 2016. At paragraph 18 of his judgment, Humphreys J. opines:

> "*It would appear that it is at least possible that some persons may have misinterpreted limited concessions afforded in particular cases as giving rise to a misconception that there is a general acceptance by the courts that there is no difficulty with the general principles of lay "representation"... .*

The principle was restated by Humphreys J. in *Walsh v. Minister for Justice and Equality & Ors.*[28] at paragraph 12:

> *" This does not take away from the entitlement of a lay person to apply for an inquiry on behalf of a detained person at the ex parte stage. But once the inquiry has been ordered and the detained person is himself or herself before the court, no lay person has a right to act as an advocate for that person, save in extraordinary circumstances. To hold otherwise would be to set the scene for courtroom anarchy. It would be to allow persons who know little or nothing of law or of obligation to the court, and still less of codes of discipline or professional standards, to hold themselves out as advocates, to the destruction of the rights of the citizen. Indeed Mr. Beades' attempt at "advocacy" in this case provided abundant exemplification of why such a procedure is unacceptable."*

Corporate litigants

The question of whether a company can be represented by a director was considered by the Supreme Court in *Battle v. Irish Art Promotion Centre Limited*[29]. It was held that a director, servant or other officer of a company could not represent that company in the absence of a statutory exception. The reason given by O'Dalaigh C.J. was that:

> *"The creation of the company is the act of its subscribers; the subscribers, in discarding their own personae for the persona of the company, doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience which they would have as individuals; but the choice has been their own."*
>
> *"…in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant."*

In *Pablo Star Media Limited v. EW Scripts Company*,[30] Humphreys J. noted that while the company had been represented by its director in various procedural applications, this did not amount to a recognition that the director could represent the company at a substantive hearing.

[27] [2016] IEHC 33.
[28] Walsh v. Minister for Justice and Equality & Ors. [2016] IESC 323.
[29] Battle v. Irish Art Promotion Centre Ltd. [1968] I.R. 252.
[30] Pablo Star Media Limited v. EW Scripts Company [2015] IEHC 828.

The day-to-day management of the court process such as the lists, applications for adjournments, and even the ability of a court to determine applications for costs against a company which is not represented, would be severely impacted by approach that was overly strict. However it must be abundantly clear, for example, that in permitting a director to apply for an adjournment, that is not authorisation from the court that the company may be represented by that director at any subsequent substantive hearing.

Recent Developments in England and Wales

In 2010 Lord Neuberger Master of the Rolls (as he then was), issued a *Practice Note (McKenzie Friends: Civil and Family Courts)*[31] which gave the following guidance in relation to McKenzie friends:

- An unrepresented litigant has the right to reasonable assistance from a lay person, known as a McKenzie friend, even where the proceedings relate to a child and are being held in private.

- There is a strong presumption in favour of allowing a McKenzie friend and permission should be given unless the judge is satisfied that fairness and interests of justice do not require it.

- A request for a McKenzie friend should be made as soon as possible and should include the proposed named of the McKenzie friend.

- The court's decision should be regarded as final and should not be challenged later unless there was misconduct by the McKenzie friend or the efficient administration of justice was impeded. In the latter situation, the court should consider whether an unequivocal warning might suffice in the first instance.

- The litigant should not be required to justify a desire to have a McKenzie friend. It is for an objecting party to rebut the presumption in favour of allowing a McKenzie friend to attend.

- The McKenzie friend should be allowed to help the litigant make the application and should not be excluded from the courtroom or chambers while the application is being made.

- Legal representatives should serve documents on the litigant in good time to allow him to seek assistance from the McKenzie friend in advance of any hearing or meeting.

- A McKenzie friend is allowed to provide moral support for the litigant; take notes; help with case papers; and quietly give advice on points of law, procedure or questions which the litigant might wish to raise in court.

- A McKenzie friend cannot act on behalf of the litigant by signing court papers, addressing the court or questioning witnesses.

[31] [2010] 1 WLR

- A prospective McKenzie friend should produce a short curriculum vitae setting out relevant experience and confirming the absence of an interest in the case.

In February 2016, the Lord Chief Justice of England and Wales and the Judicial Executive Board (JEB) published a Consultation Report entitled *Reforming the courts' approach to McKenzie Friends: A Consultation*.[32] The consultation opened on 25th February 2016. Certain questions were posed to the public and comments were sought on the questions and issues raised in the Consultation Report. The consultation process closed on 9th June 2016.

Concern has been expressed as to the confusion which has arisen as a result of the multiple roles adopted by McKenzie friends:

> "*While 'McKenzie Friend' only properly applies to individuals providing LIPs [litigants in person] with reasonable assistance, it has come to be used to describe individuals who are granted rights of audience on a case-by-case basis. As noted in the Hickinbottom Report, 'Although the term 'McKenzie Friend' is technically apt to describe only persons who fall into the first category (provision of reasonable assistance), in practice the term is used in different ways to describe one or more, or all of these categories (reasonable assistance, right of audience and right to conduct litigation).*"[33]

The inconsistent and oftentimes incorrect categorisation of certain persons as McKenzie friends, in circumstances where the powers they have sought to exercise are clearly *ultra vires* the powers conferred upon those acting as a legitimate McKenzie friend, has led to a lack of clarity for litigants in person and, as the Lord Chief Justice's Consultation Report notes "*can lead to the situation where they [litigants in person] expect, or are led by McKenzie Friends to believe, that the latter are and will be able to address the court.*"
The Report adds that this "*has led to situations where there is an expectation that by dint of the title 'McKenzie Friend' an individual has a right of audience.*"[34] The Consultation Report noted that this can "*lead to the improper conclusion that a McKenzie Friend may exercise each of the three rights of the same basis.*"[35]

Conclusion

At paragraph 4.4 of the Consultation Report, the Lord Chief Justice and the JEB have queried whether the term 'McKenzie friend' should be replaced with something simpler which would aid understanding and not unduly complicate the legal process for lay litigants. By way of example, the Report cites the recent simplification of the terms 'Mareva Injunction' and 'Anton Pillar Order' in England and Wales which have now become 'freezing injunction' and 'search order' respectively.[36] It has been suggested that in the future, the term 'court supporter' should be used instead of 'McKenzie friend'.

[32] <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016-1.pdf> accessed 27/06/2016.
[33] The Judicial Working Group on Litigants in Person: Report (July 2013) (The Hickinbottom Report) at [6.13] <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf> accessed 27/06/2016. Indeed, this is something which has been noted in Ireland by barrister David Kavanagh in his 2014 *Bar Review* article entitled '*McKenzie Friends and the Right of Audience Before a Court*' Bar Review (2014) XX, 50 : *It now appears that the distinction between the limited right of audience enjoyed by a McKenzie friend and the full right of audience, granted as an indulgence by the Court in the exercise of its inherent jurisdiction where the interests of justice so require, has become blurred*."
[34] R (Koli) v. Maidstone Crown Court (Queen's Bench Division, Administrative) (10 May 2011, unreported).
[35] Lord Chief Justice of England and Wales and the Judicial Executive Board, *Reforming the courts' approach to McKenzie Friends: A Consultation* (February 2016) at [4.3].
[36] ibid at [4.4].

The Law Commission of New Zealand considered McKenzie friends in their report: *Review of the Judicature Act 1908 - Towards a new Courts Act.*[37] The Commission recommended that McKenzie friends should be renamed "'*support persons for self-represented litigants', and provided for in legislation, with additional assistance provided in guidelines or court rules, and that lawyers should be able to take on this role.*" The use of the term 'McKenzie friend' "*inhibits access to justice to continue to refer to such "lawyer's terms" and a self-represented litigant who, on turning up at court was asked whether their support person is a "McKenzie friend" would quite rightly be confused.*"[38]

The Report further noted that it "*has arguable been abused at times in the United Kingdom when "professional" McKenzie friends, who may be being paid or have their own agenda to push, have been engaged by the self-represented litigant. It was also noted that there has been confusion as to whether a lawyer can be a McKenzie friend, in light of barristers' and solicitors' ethical and professional obligations to the court.*"

The Commission concurred with the view expressed by the New Zealand Law Society that because lawyers are bound by the strict ethical and professional duties of their regulating bodies, lawyers should not be allowed act as a McKenzie friend.[39] The Commission added that if a lawyer wanted to assist a litigant in person who could not afford legal representation, it is more appropriate for that lawyer to act *pro bono* in their capacity as a lawyer, rather than as a McKenzie friend.[40]

[37] November 2012, Wellington, New Zealand) (Report 126).
[38] Ibid, p 147, footnote 221
[39] Ibid, p150, para 15.26
[40] Law Commission of New Zealand, *Review of the Judicature Act 1908 - Towards a new Courts Act* (November 2012, Wellington, New Zealand) (Report 126) page 150 at [15.26].