The Formal and Informal Schemes of the Civil Justice System: A Legal Symbiosis Explored

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THE FORMAL AND INFORMAL SCHEMES
OF THE CIVIL JUSTICE SYSTEM:
A LEGAL SYMBIOSIS EXPLORED

By ALLAN C. HUTCHINSON*

In all law there is, and nothing can avoid it, a conflict as unending as the war
between Heaven and Hell, a war between two principles that may never be recon-
ciled but only compromised. On the one hand there is the principle (said by some
to be a high principle) *fiat justitia ruat caelum*; on the other hand there is the
pragmatism (said by others to be low and unworthy) *interest reipublicae ut sit
finis litium*. And so the conflict may not cease, because whilst there are lawsuits
there will be defeated litigants, and whilst there are defeated litigants, the clamour
for the application of the high principle will never be stilled. The low pragmatism
may interest the republic but it interests the defeated litigant not at all. Is this
of Heaven or of Hell?1

I. INTRODUCTION

The civil justice system consists of two different, yet equally important
and complementary components. While the rules of substantive law deter-
mine and establish the conditions and circumstances under which liability
will be imposed, the rules and institutions of procedural law govern the pro-
cess within which civil disputes are resolved in accordance with the substan-
tive law.2 The relationship between the two components is both subtle and
complex. Unfortunately, the tendency has been for Anglo-Canadian jurispru-
dence to draw a hard and fast distinction between procedural and substantive
rules of law. As first glimpsed in the thirteenth century by Balduinus,3 tradi-
tional wisdom declares that whereas substantive rules give rise to legal rights
and obligations, procedural rules simply describe the institutional framework
through which such rights can be protected and enforced. This evaluation is
"artificial and illusory."4 The problems of the administration of justice are
inseparable from the problems of what is or ought to be the substance of the
rights being administered. A legal right without an effective machinery to
enforce it is "a brutum fulmen; no law at all."5

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2 The third component of the civil justice system is, of course, the law of evidence.
This serves to determine which facts will be placed before the court in order to decide
whether the circumstances or conditions under which civil liability will attach are met.
For a general theoretical appraisal of the rules of evidence, see Montrose, Basic Con-
cepts of the Law of Evidence (1954), 70 L.Q. Rev. 527 and Eggleston, Evidence, and
3 Meijers, L'Histoire des Principes Fondamentaux du Droit International Privé
(1934), 49 Rec. Ac. Dr. Int. 547 at 595.
4 Chamberlayne, 1 Evidence (London: Sweet & Maxwell, 1911) at §171.
5 Id.
As an integral part of the legal system, the rules and institutions of procedural law cannot be designed and evaluated in isolation, but must be considered in relation to the system's overall operation and performance. Consequently, in very broad and general terms, procedural law must function in such a way that it results in "the maximization of the execution and effect given to the substantive branch of the law." Although the different procedural schemes and devices adopted to facilitate the resolution of disputes over legal rights lie at the heart of the Anglo-Canadian legal system, there is a marked absence of scholarly literature about the conceptual structure of this central and pervasive topic compared with similar debate over the criminal justice system. In this article, an attempt will be made to explore the general operation of the dispute-resolution process, with special reference to the crucial and intimate relationship between the formal and informal branches of that process. Each scheme depends upon the other in order to achieve any degree of efficiency or efficacy; their relationship is mutually supportive and truly symbiotic in nature. For the sake of clarity and generality, attention will be focused upon traditional disputes over private common law rights and not upon proceedings involving familial matters or administrative affairs of a public nature.

II. THE CIVIL JUSTICE SYSTEM

The various schemes that exist to resolve disputes between private parties are intended to serve two functions. While they must bring about the resolution of particular disputes between specific parties arising out of past

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7 The only sustained attempts to provide a rigorous analysis of the law of civil procedure are made by Bentham, id. and Fuller, The Forms and Limits of Adjudication (1978), 92 Harv. L. Rev. 353. In recent years, however, there have been a number of serious attempts to remedy this state of affairs; see, inter alia, Engel and Steel, Civil Cases and Society: Process and Order in the Civil Justice System (1979), 2 Amer. Bar. Fond. J. 295; MacLauchlan, American Legal Processes (N.Y.: John Wiley & Sons, 1977); Thibaut and Walker, A Theory of Procedure (1978), 66 Cal. L. Rev. 541; Tullock, Trials on Trial: The Pure Theory of Legal Procedure (N.Y.: Colum. Univ. Press, 1980); Cover and Fiss, The Structure of Procedure (N.Y.: Foundation Press, 1979).


9 For an excellent study of the relationship between the courts and the private ordering of matrimonial disputes, see Mnookin and Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce (1979), 88 Yale L.J. 950.
activity, they must also provide a guide to govern future conduct. These functions are not always compatible and are often in direct competition. Nevertheless, it is crucial to the efficacy and efficiency of the civil justice system that neither of these objectives be favoured to the exclusion of the other, for each represents a state of affairs fundamental to the harmony and fairness of society. This dilemma is brought out by Llewellyn and Hoebel:

Law has as one of its main purposes to make men go round in more or less clear ways... But there is more to law than intended and largely effective regulation and prevention. Law has the peculiar job of cleaning up social messes when they have been made. Law thus exists also for the event of breach of law and has a major portion of its essence in the doing of something about such a breach.

These differing functions are rooted in competing conceptions of the most desirable pattern of general social ordering and they hold very dissimilar implications for the design and development of the legal process. At different times and in different ways, the Anglo-Canadian legal system has sought to strike an uneasy balance between the two objectives; a striking illustration is the relationship between the formal and the informal schemes of dispute-resolution. In this regard, the dispute-resolution process forms a vital strand in the “tissue of paradox” that makes up the law.


12 In more technical terms, these two views of society have been labelled “mechanical” and “organic.” For a classic discussion of the impact of this dualistic approach to social activity, see Durkheim, *The Division of Labor in Society*, trans. Simpson (N.Y.: Free Press, 1933).

13 Jenkins, *Social Order and the Limits of Law: A Theoretical Essay* (Princeton: Princeton Univ. Press, 1980) at 58. It was Cardozo who gave prominence, through his eloquent writing, to the “ancient mysteries” of the law:

The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law. “Nomos,” one might fairly say, is the child of antinomies and is born of them in travail. We fancy ourselves to be dealing with some ultra-modern controversy, the product of the clash of interests in an industrial society. The problem is laid bare, and at its core are the ancient mysteries crying out for understanding—rest and motion, the one and the many, the self and the not-self, freedom and necessity, reality and appearance, the absolute and the relative. We have the claims of stability to be harmonized with those of progress. We are to reconcile liberty with equality, and both of them with order. The property rights of the individual we are to respect, yet we are not to press them to the point at which they threaten the welfare or the security of the many. We must preserve to justice its universal quality, and yet leave to it the capacity to be individual and particular.

Deep beneath the surface of the legal system, hidden in the structure of the constituent atoms, are these attractions and repulsions, uniting and dissevering as in one unending paradox.

Within the primitive communities of the Anglo-Saxons and the Normans, men settled their differences by resort to self-help and violence. While such methods could be tolerated on a small scale, their uninhibited escalation constituted a real threat to social order and harmony. Accordingly, the State, in order to preserve a peaceful and settled social order and to retain control over its citizens, introduced a formal state sanctioned system of dispute-resolution through which citizens could vindicate their legal rights. The formal system of civil litigation was thus conceived out of concern for matters of a public rather than a private nature; the focus was upon the peaceful termination of controversies rather than the just resolution of disputes. By way of balance, however, the formal system that was developed owed much of its character and format to the private nature of most disputes. Indeed, the adversarial mode of argument that has characterized the formal system since its foundation ensures that, even today, "litigation resembles warfare." As Lord Denning declared, "in litigation as in war."

Despite the shifting emphasis of various rules and procedures, the basic distinguishing features of traditional civil adjudication have remained the same:

1. The lawsuit is bipolar. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-take-all basis.
2. Litigation is retrospective. The controversy is about an identified set of complete events: whether they occurred, and if so, with what consequences for the legal relations of the parties.
3. Right and remedy are interdependent. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty—in contract by giving plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused.
4. The lawsuit is a self-contained episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement.

14 For an excellent historical introduction to civil procedural law, see Millar, Civil Procedure of the Trial Court in Historical Perspective (N.Y.: The National Conference of Judicial Councils, 1952).
15 For a jurisprudential account of the significance of this step in the development of a legal system, see H.L.A. Hart, The Concept of Law (Oxford: Oxford Univ. Press, 1961) at 89-96. The significance and character of this stage in the evolution of the legal process has been forcefully and elegantly stated by Kiralfy:

In a primitive community men do not naturally go to law to right a wrong; force and arms is the instinctive act as we can still see in international affairs. But self help by man against man without restraint or control must lead to anarchy. To end this evil influence leaders have laboured to find a peaceful solution by appeal to the law, but the process has been slow. Potter's Historical Introduction to English Law, ed. Kiralfy (4th ed. London: Sweet & Maxwell, 1962) at 313.
The process is *party-initiated* and *party-controlled*. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.\(^{18}\)

Although the formal system of civil litigation provides a unique and indispensable ""agency[y] of society for the adjustment of disputes between litigants,"" society is ill-served by a system that obliges citizens to submit any legal dispute to a full-blown contest of a formal, adversarial nature; the cost to society at large, legal institutions, and the individual litigants is much too high.\(^{20}\)

The legal process is incapable of handling anything but a fraction of the legal disputes that arise. It is estimated that fewer than five per cent of disputes involve any contact with the formal system; of these, only about four percent in the United States and two percent in the United Kingdom and Canada ever proceed far enough to require a court verdict, and fewer than five percent of these are appealed.\(^{21}\) If these figures were only marginally increased, the formal system would collapse under its own weight. And even a relatively small formal system entails a sizeable charge on public funds for the provision of trained personnel and appropriate accommodation. Moreover, the extremely high cost of the formal process, both economically and otherwise, is debilitating to individual litigants. The adversarial system of

\(^{18}\) Chayes, *The Role of the Judge in Public Law Litigation* (1976), 89 Harv. L. Rev. 1281 at 1282-83 (footnotes omitted).

\(^{19}\) Morgan, *Judicial Notice* (1944), 57 Harv. L. Rev. 269.


case-presentation is almost guaranteed to exacerbate conflict. The winner-takes-all basis of the system simply serves to compound the resentment of at least one of the litigants. In short, civil litigation tends to be disruptive rather than therapeutic.

Thus, it is in the general interest of the community that litigation "should not be allowed to drag festeringly on for an indefinite period." The maxim interest reipublicae ut sit finis litium says it all. The almost universal official approval of this sentiment reflects the widespread assumption that the formal system not only fails to eradicate social disharmony but actually exacerbates it, and that litigation must be actively discouraged, as a positive social evil. It seems indisputable that society's welfare is best maintained if disputants work out their own problems, involving the courts only as a last resort: "settlement of litigation is very much in the public interest... ; [t]he sooner and more placably disputes within it are resolved, the better in general for society."

The whole formal system of civil litigation is structured on a crucial paradox. Although the system originated and exists to provide an official...
forum in which private disputes can be thoroughly investigated and resolved, it relies for any measure of efficacy on the vast majority of disputes being settled outside of the system. The formal scheme itself actively encourages and provides incentives for prospective litigants to settle their own disputes: "the purpose of a law-suit is not only to do substantial justice but also to bring an end to litigation." Does this elevate the "normative" aspect of the civil justice system above the interests of achieving full and fair resolution of particular disputes? The imbalance is more apparent than real. As Kaufman has said, "the extraordinarily high percentage of settlements [is] an index of injustice that reflects the malevolent workings of the twin demons that plague our judicial system: cost and delay." In short, justice delayed and over-priced is justice denied. While affording each individual litigant the fullest means to ensure that an accurate and just decision is reached, care must be taken that mechanisms are not "imposed beyond the point at which the costs or delays they involve outweigh the benefits from the additional accuracy they secure."

III. A LEGAL SYMBIOSIS

The valid aims, therefore, of the formal procedural system must be, in Benthamite terms, to maximize the occurrence of accurate decisions while at the same time minimizing the unavoidable hazards of delay and expense. Accordingly, the barriers to formal adjudication can be defended on the basis that they shift the cost-benefit equation towards the non-judicial resolution of disputes, and that their removal would impede the fair resolution of actual disputes within the system. The crucial and enduring difficulty lies, however, not so much in striking a general balance, but rather in discovering its precise and detailed location. Notwithstanding this central problem, the fundamental objectives remain clear:

(1) to permit full development of the contentions and evidentiary possibilities of the various parties, with the aim of deciding the case upon its merits; and

(2) to bring adjudication to a final conclusion with reasonable promptness and within reasonable limits of cost.

In this respect, the ascertainment of truth, while important, must not be the sole determinant of the most appropriate apportionment of relief. Truth must

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30 Supra note 6, at 8.
31 For a sound intellectual history of this compromise, see Muller, *The Forest of Due Process of Law: The American Constitutional Tradition* (1977), 18 Nomos 3.
32 Supra note 27, at 530.
be subordinate to justice.\textsuperscript{33} The task of the judge is not to reconstruct the past and ascertain historically whether the plaintiff has a genuine claim. The judge's responsibility is much more modest; it is to decide whether the plaintiff has "established his claim by lawful evidence."\textsuperscript{34} Indeed, many of the rules of evidence are capable of being construed as obstacles to the pursuit of truth. A hindrance of the truth-finding process is considered justified in order to protect interests of sufficient social importance.\textsuperscript{35} As Viscount Simon L.C. said, "[a] court of law . . . is not engaged in ascertaining ultimate verities; it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it."\textsuperscript{36} The formal system of dispute-resolution by civil litigation makes a massive contribution to improving the performance of the informal system. Indeed, the private settlement process operates within the shadow and with the forbearance of the official institutions and procedures. Although most law books and law reports suggest otherwise, civil litigation occurs only if the informal process of dispute-resolution has been unable to settle the conflict between the parties. Far from being the norm, civil litigation is but a function of the failure of the parties to settle their dispute informally. In this sense, the courts are nothing more than the final segment along a continuum of settlement processes, an institution of last resort.\textsuperscript{37} The courts provide a second level process for achieving the resolution of a dispute that could not be settled at the first level.\textsuperscript{38} By moving from one level to another, the parties have not only escalated their conduct, but they have also radically altered the tone and character of their relationship.\textsuperscript{39} Not only does the relationship become triadic as opposed to dyadic, but the very nature of the dispute changes as it becomes necessary to frame and present it in purely legal terms.

In the currently popular parlance of game theory, civil litigation is a zero-sum game.\textsuperscript{40} In the great majority of disputes, the court has to decide,

\textsuperscript{33} For a thorough examination of the fundamental dichotomy between the objectives of truth and justice, see Thibaut and Walker, supra note 7, at 542-44.
\textsuperscript{34} Viscount Kilmuir, The Migration of the Common Law (1960), 76 L.Q.R. 39 at 43.
\textsuperscript{37} See MacLauchlan, supra note 7, at 9.
\textsuperscript{38} See Golding, "On the Adversary System and Justice" in Philosophical Law, ed. Bronaugh (Conn.: Greenwood, 1978) at 98.
\textsuperscript{40} See, generally, Luce and Raiffa, Games and Decisions (N.Y.: John Wiley & Sons, 1957). While this analysis is revealing and instructive, it does tend to depersonalize the whole process unnecessarily. As Thompson opined in his minority report to the Winn Committee, "reference has been made to this part of litigation being treated as a 'game'. It may be a game for everyone else and it may be a purely financial matter for everyone else, but it certainly is not a game for the injured person." Supra note 21, at 160, para. 12.
no matter how evenly the facts may be balanced, which party has won. As Mr. Justice Brandeis observed, "to be effective in this world you have to decide which side is probably right and, once you decide, you must act as if it were one hundred percent right." This means that, in such a situation, one party will benefit to the extent that the other loses. In economic terms, it is a zero-sum game because the parties are not in conflict over some public or external group of resources, but over the allocation of their own resources; the gain to one party is exactly the same as the loss to the other. In order to avoid an all-or-nothing outcome, the parties will often be prepared to engage in negotiations in the hope that they may reach a compromise that is mutually acceptable to both. Rather than run the risk of losing entirely, if the dispute goes to court, a party will often be prepared to accept a lower sum or pay out a higher sum than the court might require. The settlement process is, therefore, a situation in which the parties co-operate to arrive at a compromise, while, at the same time, it enables them to compete so that the nature of the compromise is in each party's best interests. The necessary, but not sufficient condition for settlement negotiations is that both parties believe that there is a range of possible agreements that are preferable to no agreement at all; that is, in the event of no agreement, resort will have to be made to the all-or-nothing proceedings of civil litigation.

The courts contribute in a variety of ways, both directly and indirectly, to the improved performance and increased use of the informal scheme of dispute resolution. These different contributions can be loosely grouped together in two categories. First, procedural devices have been developed that seek to facilitate the settlement process by stimulating and creating an environment in which successful negotiation and compromise is most likely to occur; steps are taken to enable each party to discover the other's case and to encourage parties to make settlements in the confidence that such agreements will be adhered to. Second, rules have been introduced that exert a strong influence upon the timing, type, occurrence and terms of compromises actually reached.

IV. THE DYNAMICS OF SETTLEMENT

The determinants of the litigation-settlement decision are extremely subtle and complicated. Many factors conjoin and interact to create "a com-

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41 Quoted by Coons in *Compromise as Precise Justice* (1980), 68 Cal. L. Rev. 250 at 260.

42 See Deutsch and Krauss, *Studies in Interpersonal Bargaining* (1962), 6 J. of Confli. Res. 53. As Iklé has observed, "[n]egotiation is a process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement on an exchange or the realization of a common interest where conflicting interests exist." *How Nations Negotiate* (N.Y.: Harper & Row, 1964) at 3-4. It must also be remembered that "negotiation is not a phase, but an aspect of the settlement process"; see Ross, *supra* note 21, at 175.

plex of dynamic interactions." In general terms, they can be reduced to four main categories: socio-political, psychological, economic and legal. The propensity to litigate may vary from one ethnic or cultural group to another. For instance, the cultural heritage of some groups will provide a strong impetus to the resolution of disputes by informal negotiation rather than by resorting to a formal confrontation before a third party. Some tentative studies suggest that the urbanite shows a greater willingness to litigate than his rural counterpart. In part, this stems from the fact that “a crowded, competitive urban society creates more conflicts than a diffuse, rural, largely self-sufficient society.” Also, it is likely that only citizens who perceive the courts as an impartial and apolitical forum and who are prepared to accept the decisions of the courts as final, will enter into litigation. This means that minority groups may be less likely to litigate as a result of built-in prejudices and biases that they claim the society at large has against them.

A vital factor in determining the likelihood of litigation is the psychological response of the parties to the prospect of litigation. Resort to litigation depends in part upon the different attitudes of the parties towards risk; the more averse a party is to risk the less likely is litigation. The parties must assess the extent of the risk involved and evaluate their own responses to such risk. Although there is a marked lack of empirical data, it is assumed by most observers that most parties are risk-averse in a situation where litigation is a possible choice. Furthermore, their risk-aversion will increase as the stakes at issue increase. Particular disputants, however, differ in their attitudes to risk. Disputants who are regularly involved in the dispute resolution process, such as insurance companies, will be able to spread the risk, for “in litigating large numbers of cases, the insurance company is able to regard the choice between certainty and the gamble with indifference.” Except for claims involving very large amounts of money, such regular participants in the litigation process will be able to use their indifference as a strategic ploy to influence the bargaining negotiations. In global terms, this

44 Gold, "The Court's Authority to Award Costs Against Lawyers" in Studies in Civil Procedure, ed. Gertner (Toronto: Butterworths, 1979) at 86.
47 See Jacob, Black and White Perceptions of Justice in the City (1971), 6 Law & Soc. Rev. 69.
will give negotiations an asymmetrical structure. Moreover, the fact that an institutional party is risk-neutral will increase the risk aversion of an individual litigant for whom the experience of litigation is likely to be a unique and often stressful event.

The economic model of dispute resolution is the most precise and rigorous available. It seeks to explain the dispute resolution process by analysing the economic factors that influence and dictate the choice between litigation and settlement. In general economic terms, the parties operate as participants in a situation of "bilateral monopoly" in which each party can transact or deal only with the other party. The potential plaintiff can sell only to the potential defendant, and the potential defendant can buy only from the potential plaintiff; the market is in this way restricted. Within such a contextual model, various economic forces will combine to determine whether there is a "sale" of the claim, or a resort to litigation.

In order for a settlement to occur, there must exist a "bargaining range" within which both parties will agree to settle. The precise placing of the actual compromise will depend upon the relative bargaining abilities of the parties. As the mutual costs of litigation will almost always exceed those of settlement, it is reasonable to expect that it will nearly always be in the best interests of the parties to settle their dispute rather than litigate upon it. In most cases, the prospect of litigation will appear dark and dangerous; negotiation will offer a welcome opportunity to pursue a more certain and fruitful avenue of resolution. Indeed, assuming that the parties act rationally, litigation will only take place where the anticipated loss to the potential


61 See Aubert, supra note 43, at 45 and infra note 76.


63 See Atiyah, supra note 21, at 308-309.


65 This may not be the case, for instance, if one of the parties is an institutional defendant, such as an insurance company, which might wish to pursue a claim in circumstances in which it would lose economically in the short-term, but would benefit in the long-term. For example, it may wish to have a particular point of law clarified or, as a strategic ploy, demonstrate to potential plaintiffs that it is actually prepared to take cases to trial.

66 By rationally, it is simply meant that a litigant will have the maximization of wealth as the sole behavioural objective. For the purposes of the ensuing discussion, an irrational litigant is one who brings an action for purely non-economic reasons, such as harassment of a defendant or out of sheer vindictiveness. This concept of "rationality" has been a critical focus for much of the opposition to the "law and economics" movement; see Posner, The Economic Approach to Law (1975), 53 Tex. L. Rev. 757
defendant of litigating is less than the anticipated gain to the potential plaintiff of litigating. If the plaintiff anticipates that the least to be gained by litigating is $10,000 and the defendant anticipates that the most to be lost is $8,000, litigation will occur. The parties should take into account, however, their costs incurred in reaching such a settlement. If settlement costs amount to $500 each, the plaintiff would not settle for anything less than $10,500 and the defendant for not more than $7,500.

The determinants of anticipated gains and losses are threefold: the amount of the judgment if the plaintiff wins, the chances of the plaintiff winning, and the costs of litigating. Each party’s estimate of the amount of the judgment if the plaintiff wins will obviously have a significant effect on the figures involved. Typically, this will be the case in disputes over personal injuries. In such circumstances, the crucial factor will be the quantity of information available to each side. The theoretical impact on the economic model of dispute-resolution of the parties’ disagreement over the estimated amount of the judgment, however, is negligible. Although it will influence the actual amounts at which each party is willing to settle, it does not disturb the validity of the method by which such amounts are calculated. Consequently, it will be assumed in the ensuing discussion that the dispute is over a fixed amount or that there is agreement over the expected amount of the judgment if the plaintiff wins.

In order to assess the chances of the plaintiff winning, it will be necessary for the parties to evaluate the prospects of their version of the facts being accepted by the court, to predict the rules of law which will be relied upon by the court and to estimate how these rules of law will be applied to those facts. This is a daunting but very necessary exercise to be carried out by the parties and it provides one of the main reasons for employing legal professional assistance. The lawyer’s experience and expertise facilitates the making of a most informed and reasonable assessment of such probabilities.

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and Some Uses and Abuses of Economics in Law (1979), 46 U. Chi. L. Rev. 281. The rational act is nothing more than the consistent act, a consistent preference from those choices available. The emphasis is on what decisions are made rather than on procedural rationality. The assumption of rationality is based on predictions as to aggregate behaviour of a heterogeneous mass of people and, therefore, fails to consider the irrationality of individuals which is exactly the type of behaviour the law must grapple with; see Hollis and Nell, Rational Economic Man (Cambridge: Cambridge Univ. Press, 1975) and Sen, Rational Fools: A Critique of the Behavioural Foundations of Economic Theory (1977), 6 Phil. and Pub. Affairs 317. Furthermore, behaviour may appear rational, but motivations may be highly irrational. A greater understanding of the general psychology of human decision-making is required; see Fried, Right and Wrong (Cambridge: Harv. Univ. Press, 1978) at 81-107.

57 Another phrase, of a more technical nature, used to describe such amounts, is "the discounted value of the claim."

58 For a general discussion of the means relied upon to increase the volume and quality of information available to each party, see text accompanying notes 118-27, infra.

59 Also, it shifts the economic responsibility. The client will be able to recover from the lawyer any loss suffered as a result of the lawyer’s negligent miscalculation of the assessment of the risks involved (i.e., the amount that was likely to be recovered in the original litigation).
In addition to the respective anticipation of gains and losses, the matter of litigation costs will exert a very direct and quantifiable influence on the settlement-litigation decision. Indeed, the rules governing the incidence and responsibility for the costs of litigation represent one of the major devices by which the courts attempt to influence significantly the settlement-litigation decision.

A. The Costs Rules

The expense incurred in staffing and maintaining the courts is met largely by the state, the litigant paying only a minimal sum to utilize these facilities. The major financial burden incurred by the parties is the cost of legal representation. A lesser expense is the payment of incidental expenses: "disbursements," which are incurred throughout the litigation. In allocating this burden, the legal system has two obvious alternative solutions: it can permit costs to lie where they fall and leave litigants to pay their own costs, regardless of the outcome of the litigation, or it can order that costs should follow the event and require the unsuccessful litigant to pay the costs of the successful litigant. Whereas the Americans have adopted the former as a general rule, the Anglo-Canadian system has opted for a general rule of indemnity. In practice, this means that any costs that have been reasonably incurred in litigating the dispute may be recovered by the successful litigant, provided that his or her conduct is not of a kind that should result in no entitlement.

There has been a wealth of literature on the advantages and disad-

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60 See supra note 20.

61 For an introductory summary of the various relevant considerations in making such a choice, see Watson and Williams, Canadian Civil Procedure: Cases and Materials (2d ed. Toronto: Butterworths, 1977) at 2-3 to 2-29.

62 The principle that the loser ought to pay the costs of the winner was originally not part of the common law. In an action at law, taxable costs are entirely a creature of statute. First introduced in 1275 by the Statute of Gloucester, 6 Ed. I, c. 1, s. 2, costs became available in all actions only from 1667; see 4 Jac. I, c. 3. For a short history of costs, see Goodhart, Costs (1929), 38 Yale L.J. 849 and Note, Use of Taxable Costs to Regulate the Conduct of Litigation (1953), 53 Col. L. Rev. 78. Colonial America initially followed the English practice: see Atkinson v. Williams (1670), 3 Records of the Court of Assistants, Massachusetts Bay Colony 203, Clarke v. Davis (1662), id. at 130 and Hakins v. Goodin (1660), id. at 86. So great was the hostility, however, to the legal profession that the amount recoverable was severely restricted: see, Colonial Laws of New York (1709), c. 185. By the nineteenth century, the recovery of costs was restricted to disbursements in most jurisdictions: see Oelrichs v. Spain, 15 Wall 211, 21 L. Ed. 43 (1872); Dallas v. Dallas, 222 Iowa 42, 268 N.W. 516 (1936). Although this principle still applies generally today at the federal level, there are over thirty states which permit the recovery of costs from the losing party: see Hirsch, supra note 52, at 187. Several of these states, however, only allow plaintiffs to so recover. The general "American rule" was confirmed by the Supreme Court in 1975; see Alyeska Pipeline Service Co. v. Wilderness Soc., 421 U.S. 240, 44 L.E. (2d) 141, 95 S.C. 1612 (1975).

63 For an account of these circumstances, see Jacob et al. The Supreme Court Practice (London: Sweet & Maxwell, 1979) vol. 1 at 925-1069 and Watson, supra note 61, at 2-18 to 2-36.
vantages of each approach. The general conclusion is that neither of the solutions is without its drawbacks and each can produce hardship. The Anglo-Canadian rule, based on the notion of fault, exacerbates the already harsh consequences of the all-or-nothing character of litigation. Also, while it may serve to discourage frivolous litigation, it may result in meritorious and novel claims, which might be in the public interest to have litigated, not being pursued or pressed. On the other hand, the American rule, it is argued, increases the volume of litigation and, therefore, contributes to court congestion. Further, it fails to compensate justly the winner whose claim has been vindicated, and it discourages the litigation of small claims. Although these observations are informative, they are very generalized in nature and lack a necessary degree of precision. The advantage of the economic model is that it is able to explain with a relatively high degree of precision and exactness the very real differences that flow from reliance upon the American or Anglo-Canadian costs rules.

In short, the different schemes to litigation costs will affect, in various ways and to various extents, the discounted values of the parties' claims. Under a legal system in which the costs of litigation are distributed according to the American rule, litigation will occur only if the lowest amount the potential plaintiff is prepared to accept is greater than the highest amount that the defendant is prepared to offer. On this basis, providing litigation costs exceed settlement costs, as they almost invariably will, litigation will

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65 See Watson and Williams, *supra* note 61, at 2-5.

66 See text accompanying notes 40-43, *supra*.

67 This model is viable only if it is assumed that the parties to the dispute are risk-neutral and that court costs are not prohibitive. Where $J$ is the size of the judgment if the plaintiff wins, $P_p$ and $P_d$ are the probability of the plaintiff winning as estimated by each party, $C_p$ and $C_d$ are the litigation cost of each party and $S_p$ and $S_d$ are the settlement costs of each party, the condition for litigation can be expressed

$$P_p J - C_p + S_p > P_d J - C_d - S_d$$

In order to isolate the impact of costs, if it is assumed that the litigation costs and settlement costs of each party are the same, the condition for litigation can be alternatively expressed as

$$P_p J - C_p + S_p > P_d J - C_d - S_d$$

68 In other words, provided the costs of settlement are not prohibitive per se and, that in any event, the cost and expenses involved in reaching and implementing a settlement do not exceed litigation costs.
occur only if both parties are optimistic about the outcome of litigation. Conversely, settlement will occur if both parties agree on the likelihood of the plaintiff’s winning or if one party is more pessimistic than the other. A numerical example of these statements will clarify the point. Assume that in an action for breach of contract, the judgment of a winning plaintiff is $20,000, the litigation costs are $2,000 each and the settlements costs are $500 each. If the plaintiff estimates a seventy-five percent chance of success, but the defendant estimates the plaintiff’s chances at only fifty percent, litigation will result as there is no amount that the parties will be able to arrive at which will put both of them in a better position than if they litigated. The defendant’s highest offer of $11,500 will be less than the lowest offer of $13,500 that the plaintiff is prepared to accept.

Under the American rule, it may be said that, in general, the likelihood of litigation will increase as settlement costs and the probability of the plaintiff’s winning, as estimated by both parties, increase; yet, the likelihood will decrease as the costs of litigation increase. Consequently, a major defect of such a regime is that it discourages small claims and tends to lead to excessive litigation and lengthening of actions. On the other hand, providing a litigant has some basic resources, it means that the parties commence on almost equal footing and, as Warren C.J. argued, “since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit.” Under a legal system that utilizes the Anglo-Canadian rule, there will be a greater variance of returns. For instance, a plaintiff stands to receive more when successful, but to lose more when unsuccessful. It follows, therefore, that rather than resulting in less litigation as is traditionally assumed, the Anglo-Canadian rule will result in more litigation than under the American rule.

The framework for this example and the figures used are loosely based upon a similar example used in Stewart, Toward More Expeditious Civil Justice—Canadian and American Perspectives (1979), 26 Wayne L. Rev. 31 at 34. These figures are obtained by a simple introduction of the relevant figures into the equations expression at note 67, supra.

\[
\begin{align*}
(75\% \times 20,000) - 2,000 + 500 &> (50\% \times 20,000) + 2,000 - 500 \\
13,500 &> 11,500
\end{align*}
\]

See statistics in text accompanying note 21, supra.

It will be apparent that litigants can never be placed on a truly equal footing. Each litigant is entitled to expend any amount of resources desired on the litigation. However, there is an optimal level of investment that will ensure the greatest returns: see Tullock, supra note 7, at 148-59. With the advent of legal aid, access to courts has become something of a middle-class problem. For a thorough and international appraisal of this problem, see Access to Justice, ed. Cappelletti and Garth (Milan: Dott. A. Giuffre Editore, 1978) vols. 1-6.


Utilizing the same legend as in note 67, supra, this can be notationally expressed as

\[
P_p(I + C_p) - C_p - (1 - P_p)C_d + S_p > P_d(I + C_d) + C_d - (1 - P_d)C_d - S_d
\]

In order to isolate the impact of costs, assuming litigation costs and settlement costs of each party are the same, the conditions for litigation can be alternately expressed as

\[
(P_p - P_d)I > 2[(P_d - 1 + P_p)C - S]
\]

It will be assumed throughout that the indemnity will be a full one. In practice, of course, the indemnity amounts to about seventy percent.
can rule where the plaintiff's estimate of winning is greater than the defendant's assessment of the plaintiff's chances of winning. Furthermore, where the defendant is more optimistic about winning than the plaintiff is about the defendant winning, it is immaterial whether the American or Anglo-Canadian rule is used as litigation will occur under either regime. In the example of a contract action, the defendant's highest offer will remain at $11,500, and $14,500, instead of $13,500, will be the lowest offer the plaintiff is prepared to accept. In effect, the parties are $1,000 further apart than under the American rule.

On these calculations, it seems that the Anglo-Canadian rule leads to an increase in the ratio of litigation to settlement. This conclusion is more apparent than real, however, for it fails to take into account the impact that the Anglo-Canadian rule has upon the parties' attitudes to risk. The Anglo-Canadian rule results in the variance of returns being extended. Whereas under the American rule the plaintiff would stand to gain $18,000 and lose $2,000, a spread of $20,000, under the Anglo-Canadian rule the plaintiff would stand to gain $20,000 and to lose $4,000; a spread of $24,000 or, in other words, a twenty percent greater variance. Mindful of the fact that litigants tend to be risk-averse, this greater variance will encourage more litigants to settle than under an American regime:

Fee shifting increases the stakes, as a result of which risk-averse persons could be expected to calculate their chances of winning more carefully than when the stakes do not include the opponents' fees and to refrain from litigating many one-sided cases.

Furthermore, the Anglo-Canadian rule encourages or, at least, does not discourage, poor citizens from pursuing or defending meritorious claims; that is, those in which there is a better than fifty percent chance of succeeding. Furthermore, the Anglo-Canadian rule offers less disincentive in the case of small claims because the successful litigant will not be out of pocket, as would be the result under the American rule.

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75 The fact that the defendant's highest offer remains the same as under the American rule is due to the particular figure used; see text accompanying note 70, supra. It will never be higher and it will usually be lower.

76 See text accompanying notes 49-51, supra. The psychological aspect of litigation is extremely important and the costs rule uses the widespread fear of litigating to great effect; "fear of courts...plays a great part in discouraging people from using them..." But the over-riding discouragement—the thing that prevents the most fearless potential litigant from litigating—is expense." Consumer Council, Justice Out of Reach (London: H.M.S.O., 1970) at 17. It is unseemly for the legal process to allow itself to be manipulated in such a way for it is "being used as a threat to bring about an adjustment rather than a means of adjudication," see Linden, Studies in Canadian Tort Law (Toronto: Butterworths & Co., 1968) at 312. On the credit side, the indemnity system can be said to operate as a psychological force on solicitors to hold down costs. If the client wins, only those costs considered necessary will be reimbursed. But if the client loses, it improves the chances of recovering the actual fees: see Kaplan, An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure (1971), 69 Mich. L. Rev. 821.

77 Sands, supra note 64, at 515.
Civil Justice System: Formal and Informal Schemes

Under both the American and Anglo-Canadian regimes there is another costs device that operates in tandem with the basic rule allocating costs. Most legal systems possess elaborate procedures whereby one or both of the parties can make a payment into court or a court-recognised offer to settle.\footnote{The traditional method has been restricted to payments into court by a defendant. In recent years, however, it has been sought to extend this procedure to plaintiffs and to include matters of non-monetary nature. For instance, the British Columbia Supreme Court Rules, r. 57(13)-(18) allow a plaintiff to make "an offer to settle... specifying a sum that the plaintiff is willing to accept in satisfaction." However, this is restricted to offers in monetary terms: see Hattco Marine Services Ltd. v. B.C. Hydro and Power Authority (1979), 8 B.C.L.R. 307, 93 D.L.R.(3d) 764, 9 C.P.C. 149. The new Ontario Rules are not so confined: Any party to a proceeding may serve upon an adverse party an offer in writing to settle any claims in a proceeding and, where there is more than one claim, to settle any one or more of them, on the terms therein specified," see Civil Procedure Revision Committee (Ministry of the A.G.: Toronto, 1980) at r. 49.09 [hereinafter Proposed Rules].}

If a party accepts the offer or payment, the proceedings will come to an end. If a party does not accept the offer or payment and fails to improve on the offer or payment at trial,\footnote{Under such a procedure, the judge must not be informed of the existence or amount of any such payment or offer until after judgment has been given. While this judicial ignorance is obviously necessary, it does place the judge in a dilemma: A judge nowadays does not know what amount has been paid into court, and it is particularly galling for a judge whose mind may have been fluctuating between £750 and £1000 to find that because he chose the lower figure, the plaintiff not only gets merely that lower figure, but also has to pay much of it away to the defendant. Knowing how close a thing it was in his own mind, he does not want a plaintiff to suffer because the payment into court happens to exceed the amount he awards. Findlay v. Railway Executive (1950), 66 T.L.R. (Pt. 2) 836 at 841, [1950] 2 All E.R. 969 at 972 per Denning L.J. In general, a judge retains some discretion and need not make a rigid or automatic application of the procedure. For instance, the judge may wish to take into account the difference between judgment and the amount paid in as a percentage of the judgment or the time at which the payment was made: see Mangan v. Mendum (1970), 4 A.C.T.R. 44 per Smithers J.} that party will be obliged to bear his or her own and the other parties' costs from the date of the offer or payment.\footnote{In Ont. and B.C., of course, the possible involvement of the plaintiff has meant that slightly different costs rules have had to be devised. This has given rise to some difficulty. In B.C. the plaintiff is entitled to double the costs he or she would be awarded if successful, B.C. Rules of the Supreme Court, r. 57(18). In Ont. the sanction is in a slightly more conventional form: see Proposed Rules, supra note 78, at r. 49.09(a): Where an offer to settle was made by a plaintiff at least 10 days before the day of which the trial or hearing of the proceeding commenced and the offer has not been revoked, a plaintiff who obtains a judgment as favourable, or more favourable, than the terms of the offer to settle, shall be entitled to his party and party costs to the date of the service of the offer to settle and his solicitor and client costs thereafter, unless otherwise ordered. In both cases, the plaintiff will recover almost 100% of all costs expended. The effect of such rules is to increase the already considerable risk imposed on the defendant: see text accompanying notes 76-77, supra.} The effects of such procedures are rather crude. Although they do not affect the discounted value of the claims, they do have a marked impact upon the variance of terms and, therefore, the degree of risk involved in litigation. For
instance, under the English rule of “payment into court,” the plaintiff will stand to lose a further $2,000 in the example of a contract action. Moreover, the procedure operates unfairly. Whereas the only risk the defendant runs is making an over-payment, the plaintiff has to contend with a considerable addition to the risks being taken in continuing with the litigation. In this regard, the only advantage of a procedure that allows both parties to engage in the formal process of settlement is that the risk is spread evenly. Nonetheless, the procedure still tends to favour the gambler, a rare or, more importantly, institutional breed, and to penalize the more vulnerable and numerous risk-averse.

The conclusions to be drawn from this brief discussion can only be general and tentative. First, many may take the view that treating civil justice as a negotiable commodity is wrong and thus demeans the whole legal enterprise. In this regard, it has been said that:

[T]here are good bargains and bad ones. Any system resting on negotiation runs into all of the problems of inequalities of bargaining power and skill. And some will find it distasteful to consider that the product the legal system is supposed to produce—justice—is transformed into a product to be bought and sold. Those whose rights have been abridged are entitled to full vindication rather than the half loaf they get because of the unpredictability of the outcome of litigation, the expenses of the process and a discount for prompt payment.

81 See text accompanying notes 69, supra. This figure ($2,000) is arrived at on the assumption that litigation costs will be evenly divided before and after the payment (i.e., costs of $1,000 up to payment-in and $1,000 afterwards). In such circumstances, a plaintiff who wins but fails to recover more than the payment-in will be liable for his or her own costs from payment-in ($1,000) and for those of the defendant ($1,000).

82 Indeed, the rules may encourage settlement to be made, but they do so by “reducing the sum acceptable to the plaintiff, rather than by encouraging the defendant to make a ‘proper offer’”: see Phillips and Hawkins, supra note 50, at 509. A technical and graphical account of the precise effect of such rules can be found in id. at 514-15 and Phillips, Hawkins and Flemming, Compensation for Personal Injuries (1975), 85 Econ. J. 129 at 131. As Bowles notes, “a given risk-averse plaintiff will... settle for a sum that is both below the... net damages expected (after payment-in) from the court and is also below the sum for which he would have settled before the payment-in took place.” See Bowles, “Economic Aspects of Legal Procedures,” in Burroughs and Veljanovski, eds., The Economic Approach to Law (London: Butterworths, 1981) at 199.

In a study carried out by Zander, out of a sample of 664 personal injury cases in London in 1973-74, payment-in was made in 272 (41%). It was accepted in 167 (61%). In 77 (71%) of 105 cases it was not accepted, the offer was improved and accepted. Consequently, out of those 272 cases in which there was payment-in, 244 (90%) were settled: see Payment Into Court, [1975] N.L.J. 638.

83 Although the extent of risk-aversion felt by most litigants has not been fully appreciated, its recognition does not guarantee that it will be treated favourably or sympathetically. For instance, the Winn Committee took the view that:

The need is to provide material inducements for progress in litigation and effective sanctions for delay even if the latter be of such a character that they may be regarded by those apprehensive, by reason of their own frailty, of incurring them as swingeing and draconian.

Supra note 21, at 94, para. 322.

84 Friedman and Macaulay, Law and the Behavioural Sciences (2d ed. N.Y.: Bobbs-Merrill, 1977) at 190.
Yet, paradoxically, it is true that the reliance on bargaining provides each party with the best opportunity to achieve a reasonable settlement and avoid the all-or-nothing nature of the formal adjudicative process. As well, bargaining offers a means by which to ensure that the individuality of each case and its solution is preserved, and to deal effectively with a plethora of legal disputes. Nevertheless, so long as the legal process is obliged to translate legal rights into quantifiable monetary terms, it is less than realistic to ignore or underestimate the economic underpinnings of the civil justice system.

Notwithstanding the powerful economic forces at work, the legal process ought not to neglect the distributional and equitable implications that flow from litigation. An exclusive concern with the economic consequences of litigation not only distorts the operation of the legal process, but has a profoundly negative impact upon the general prospects for the legal system at large. It is far from clear that individuals evaluate different legal outcomes purely in terms of their conformity with the dictates of “wealth maximization”...
an entirely different preference structure may be in operation in ranking legal and social states as opposed to overt market transactions. As Tawney observed:

Economic efficiency is a necessary element in the life of any sane and vigorous society, and only the incorrigible sentimentalist will depreciate its significance. But to convert efficiency from an instrument into a primary object is to destroy efficiency itself.

The settlement of a dispute involves much more than a simple termination of that dispute. In so far as the legal process contributes to that settlement, it has a responsibility to ensure that the terms are fair and proper.

While rules and procedures must exist to reduce cost and delay, they ought not to be permitted to do so in disregard of the merits and reasonableness of settlement. To so do would be to create injustice in the attempt to remove injustice. The courts should not exist as an instrument of discipline, they ought "to provide guide-lines, not trip-wires, and they fulfil their function where they intrude least in the course of litigation." In short, the civil justice system must not allow an inequitable settlement to become less burdensome than the cost of justice. A concern for the merits and reasonableness of a settlement is not unknown to the civil justice system. Apart from a general supervisory jurisdiction over all agreements, the courts take an active role in proceedings involving persons under disability, such as minors or mental incompetents. In most jurisdictions, any settlement made by or on behalf of such a person will not be binding without the approval of the court. While an extension of this procedure to all settlements is unwarranted both in practice and in principle, a greater interest in the compromises involving disadvantaged individuals seems required.

87 In crude terms, it is a simple criterion by which to evaluate the justness and morality of social and legal institutions and practices purely in terms of their capacity to increase the wealth of society as measured in monetary terms: see Posner, Utilitarianism, Economics and Legal Theory, id.


89 Tawney, Religion and the Rise of Capitalism (London: Penguin Books, 1926) at 252. In an ironic vein, it has been observed that, in capitalistic terms, the civil justice system is an overwhelming success, for the product far exceeds the supply: see Hufstedler, supra note 46, at 754.

90 See Phillips and Hawkins, supra note 50, at 499 and, generally, supra note 86.


92 Master Jacob, "Note of Reservation" in The Report of the Committee on Personal Injuries Litigation, supra note 21, at 152, para. 2.

93 See Kaufman, supra note 25, at 4. This point, of course, has been forcefully made before. For instance as early as 1896:

Justice, to be sure, is like any other commodity in that it costs to produce it, but when the cost of justice is more than the man who needs it can afford to pay, or more than it is worth to him...it is intolerable that he should be forced to go without it.


94 See text accompanying notes 136-45, infra.
B. Legal Standards

In conjunction with the costs rules, one of the most direct contributions the courts make to the increased informal settlement of disputes is in the creation and clarification of substantive legal rules and standards. It has long been recognized that the more unsettled and unclear the law is, the greater the likelihood will be that the dispute will fail to be settled without litigation. A necessary condition for litigation, therefore, is uncertainty in regard to law, for this will result in the parties making different assessments of their own and the other party's chances of success which, in turn, will create a greater disparity between the amounts at which each party is prepared to litigate. Moreover, the court's attitude to precedent will be especially important. The rigour with which the courts are prepared to apply existing rules of law, or the ease with which they are willing to ignore or overrule established rules of law will have a definite effect upon the certainty of the law and, therefore, the volume of litigation. Consequently, the greater adherence to precedent by English courts than by American courts provides, at least, a partial explanation of the higher litigation rates in America.

Although these conclusions are universally and traditionally accepted, some of their implications have not been grasped or fully explored. It follows that the substantive content of the common law is a direct function of the parties' decision to litigate or settle and the development of the common law is constrained by that decision. That decision is itself determined by the content of the common law. Likewise, the best evidence of the existence of clear and established precedential authority is the absence of litigation. Those disputes that are litigated and adjudicated upon are those in which, for some reason, the force of precedent is weak or problematic. It has been argued, therefore, that the legal community is wrong to direct its search for the substantive content of the common law at the appellate stage of dispute

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95 This includes not only their common law power, but also their jurisdiction to interpret and enforce statutory enactments and administrative regulations.

96 Mill, Principles of Political Economy (1848), bk. 5, ch. 8, §5.

97 See text accompanying note 59, supra.

98 See text accompanying note 21, supra. For a fuller explanation of this phenomenon, see Landes and Posner, Legal Precedent: A Theoretical and Empirical Analysis (1976), 19 J. Law & Econ. 249.


100 The attempt to formulate a theory of decision-making to explain and assess the handling of such "hard cases" lies at the heart of contemporary jurisprudential debate: see Dworkin, Taking Rights Seriously (Cambridge: Harv. Univ. Press, 1978) at 1-149 and Jurisprudence Symposium (1977), 11 Ga. L. Rev. 969. For an accessible account of the manifold way in which a rule can be problematic, see Twining and Miers, How to do Things with Rules (London: Weidenfeld and Nicolson, 1977).
resolution where, by its very nature, legal rules will be indeterminate or absent. In order to unearth and articulate the settled and exact substantive standards of any legal system, attention should be focused on the decisions of parties as to whether to litigate or not: "from the standpoint of the standards of decision, the common law will appear relatively indeterminate, but from the standpoint of the parties' litigation decisions, it will appear consistent and predictable."\textsuperscript{102}

It follows, therefore, that the extant and active body of the common law rules is to be found not in appellate decisions, but in the settlement process and the terms on which disputes are compromised. When it is remembered that the vast majority of disputes are never litigated and that, of those, only a very small percentage ever reaches the appellate courts,\textsuperscript{102} the full implication of these arguments can be appreciated:

The legal rules affect most cases only to the extent that they are reflected in the process of settlement. . . .

[The] "law" that directly governs the disposition of most tort claims . . . consists in [the settlement practices of disputants].\textsuperscript{103}

Moreover, the other factors that operate on the litigation-settlement decision become even more important. For instance, costs rules not only operate to reduce the volume of disputes litigated, but actually have a real impact on the development of the substantive content of the common law.\textsuperscript{104}

Finally, it has also been suggested recently that there is a "Darwinian mechanism" at work within the legal process. Professors Rubin, Priest and Goodman have sought to demonstrate that all the rules, principles, doctrines and decisions produced by judges are subject to selective pressure through litigation.\textsuperscript{105} In a proposal similar to Hayek's thesis that natural selection operates among societies and that less efficient societies will succumb to more efficient ones,\textsuperscript{108} they argue that regardless of the method or criteria by which rules are originally formulated, only the efficient ones will survive and remain. Accordingly, inefficient rules will generate more litigation and less settlement than efficient rules.\textsuperscript{107}

\textsuperscript{101}Priest, Selective Characteristics of Litigation, supra note 99, at 421.

\textsuperscript{102}See text accompanying note 21, supra.

\textsuperscript{103}James Accident Liability Reconsidered: The Impact of Liability Insurance (1948), 57 Yale L.J. 549 at 566.

\textsuperscript{104}It has been pointed out, however, that the most powerful determinant of the litigation-settlement decision is the quality and quantum of information available to each party. Where there is a significant difference in information available to each party, the value and effect of precedent will be small. Rizzo, Can There Be a Principle of Explanation in Common Law Decisions? (1980), 9 J. Leg. St. 423.

\textsuperscript{105}See supra note 99.

\textsuperscript{106}Hayek, "Rules and Orders" in 1 Law, Legislation and Liberty (Chicago: Univ. of Chicago Press, 1973) at 18.

\textsuperscript{107}This observation and the analytical methodology supporting it have been strongly attacked: see especially, Fried, The Laws of Change: The Cunning of Reason in Moral and Legal History (1980), 9 J. Leg. St. 355 and O'Driscoll, Justice, Efficiency, and The Economic Analysis of Law (1980), 9 J. Leg. St. 355.


V. THE ENVIRONMENT OF COMPROMISE

Not only does the formal system make a direct contribution to the terms and frequency of settlements, it also seeks to ensure that an appropriate environment is cultivated in which the reaching of compromises will be stimulated and enhanced. Most civil justice systems have introduced elaborate and sophisticated procedures and rules to establish and sustain an environment that is conducive to informal dispute settlement activity. Some measures operate supportively so as to allow the parties to negotiate confidentially and confidently, while other procedural devices impose duties and obligations upon the parties. The four major areas of involvement by the formal system in the operation of the informal system will be examined briefly.

A. Privileged Communications

The law offers protection to communications aimed at achieving the settlement of a legal dispute. Where litigation is pending, contemplated or being actively pursued, all forms of negotiation carried out in a *bona fide* manner are accorded a privileged status; they may not be referred to at trial or ordered to be disclosed on discovery. The privilege is designed to encourage a full, frank exchange of views without fear that any concession or gesture may later be interpreted as an admission of liability or quantum of damages. As Chief Justice Dixon stated in the High Court of Australia:

The law relating to communications without prejudice is of course familiar. As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to compromise with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiation to avoid litigation or to settle it may go on unhampered.

Although the stated policy of the law "is in favour of enlarging the cloak under which negotiations may be conducted without prejudice," there is a

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109 For an empirical evaluation of the extent to which courts actively and effectively intervene to resolve disputes, see Friedman and Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties* (1976), 10 Law & Soc. Rev. 267.


111 There is no magic in attaching the words "without prejudice" to communications. It is the intention of the parties, as indicated by the surrounding circumstances, that is paramount: *Paddock v. Forrester* (1842), 3 Man. & G. 903, 3 Scot. N.R. 715, 133 E.R. 1404 and *Oliver v. Nautilus Steam Shipping Co. Ltd.*, [1903] 2 K.B. 639, 52 W.R. 200, 19 T.L.R. 607 (A.C.).


slight limit on the availability of the privilege. Such communications may be admissible to prove that a compromise was in fact reached and to indicate the terms of such an agreement.\textsuperscript{114} Also, the privilege will not be available if the communication contains a threat,\textsuperscript{115} or constitutes an unlawful act.\textsuperscript{116} Whether such correspondence is inadmissible on the question of costs where undue delay or unreasonableness is alleged remains a moot point.\textsuperscript{117}

B. Discovery of Information

It is evident that the greater the quantum and quality of available information, the greater is the likelihood that a dispute will be more fairly and expeditiously resolved. In order to encourage and facilitate the disclosure of relevant information, all jurisdictions have introduced rules and procedures designed to achieve this incontestable objective.\textsuperscript{118} Not all jurisdictions, however, have agreed upon the extent and rigour with which this objective ought to be pursued. In England the discovery process is confined to documents;\textsuperscript{119} whereas in the United States it extends to the oral examination of any person.\textsuperscript{120} Between these two extremes lies a number of alternatives.\textsuperscript{121} Nonetheless, the basic philosophy underlying modern discovery procedures is that it will "render the judicial process more accurate and fair"\textsuperscript{122} and, more importantly in the context of this article, it will enable the parties to "gain a better understanding of the opposing case, its strengths as well as its weaknesses, and thus have a more rational basis... for deciding whether to bring the action forward for trial or to compromise."\textsuperscript{123}

In spite of the apparent theoretical benefits, actual experience does not


\textsuperscript{118} For an historical account of the development of discovery procedures, see James and Hazard, supra note 27, at 179-84.

\textsuperscript{119} R.S.C. (Eng.), Ord. 24. Discovery is further confined to those documents "which are or have been in the [parties'] possession, custody or power relating to matters in question in the action;" R.S.C. (Eng.), Ord. 24, r. 1(1). There is no provision for oral discovery, but, with leave of the court, interrogatories may be made use of; R.S.C. (Eng.), Ord. 26, r. 1. In limited circumstances, it is possible to obtain discovery against non-parties; R.S.C. (Eng.), Ord. 24, r. 7A(4).

\textsuperscript{120} Federal Rules of Civil Procedure, r. 30(a).

\textsuperscript{121} For instance, the new Ontario Rules allow oral examination of certain non-parties with leave of the court: see Proposed Rules, supra note 78, at 102-17, rr. 32-34.

\textsuperscript{122} Louisell and Wally, Modern California Discovery (San Francisco: Bancroft-Whitney, 1972) at 2 and, see generally, Developments in The Law—Discovery (1960-62), 74 Harv. L. Rev. 940 at 944-46.

\textsuperscript{123} Williams, supra note 113, at 29.
wholly support the view that broader discovery and increased information improve the equity and number of settlements actually reached. Although those litigants who proceed to trial benefit considerably from evidence obtained on discovery, research has indicated that the increase in available information has provided some support for both parties and has encouraged them to proceed to trial rather than to compromise. While further information may persuade "an honest and fair-dealing litigant, on seeing how strong a case his opponent had,..." to withdraw from further litigation, the less scrupulous litigant might discover "that his opponent is not aware of some awkward fact or facts, and he may for that reason be emboldened to persevere with an unrighteous claim or defence." Notwithstanding these possibilities; it remains clear that, as the quality and quantum of information available changes, the parties will alter their positions accordingly.

C. Judicial Participation

Most jurisdictions have created formal occasions on which judges are able to involve themselves in the settlement process. There is mixed opinion, however, over the propriety and effectiveness of such judicial intervention. While some judges contend that the judge has a responsibility to pursue every legitimate means to achieve settlement, others still maintain that "the dispute is between the parties and the judge merely keeps the ring." Nonetheless, a variety of procedures exists to allow judges to stimulate and, occasionally, to initiate, settlement. Historically, the basic vehicle for such judicial participation has been the "summons for directions" which still remains in many jurisdictions today. This procedure provides an opportunity for the courts to take stock of the litigation to date and, in theory, to make such directions for the future conduct of the proceedings "as appear best adapted to secure the just, expeditious and economical disposal thereof." Unfortunately, despite its obvious potential, this has become little more than "an administrative affair" whose impact on the actual prospects for settle-

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127 On the economic model, such information will affect the parties' calculation as to the probabilities of success and, thereby, affect the amount at which they are prepared to settle: see text accompanying notes 54-76, supra.
128 See, for instance, Lacey, The Judge's Role in the Settlement of Disputes (unpublished manuscript, prepared for a seminar for newly appointed judges at the Federal Judicial Center, 1977).
129 R. v. Harris, [1927] 2 K.B. 587 at 590, 96 L.J.K.B. 1069 at 1070, per Lord Hewart C.J.
130 R.S.C. (Eng.), Ord. 25, r. 1(1).
ment has been minimal. Indeed, it has been criticized as being positively "useless and wasteful." 132

As congestion, costs and delay in the courts have increased, some jurisdictions have experimented with a number of devices. The most popular of these has been the "pre-trial conference." First introduced into the United States by the Federal Rules of Civil Procedure in 1938, 133 it provides a forum in which the parties, their representatives and a judge can meet. Apart from providing a formal occasion at which contentious issues can be clarified and undisputed facts can be agreed upon, it offers a forum at which the parties and, importantly, the legal system, as represented by the judges, can negotiate in earnest. There has been considerable disagreement, however, about the utility of such a procedure. Rosenberg has challenged the grass-roots judicial support and claimed that such a device, far from enhancing the efficiency of the courts, actually reduces its overall effectiveness and exacerbates the difficulties it was designed to overcome. 134 Nevertheless, there is evidence to suggest that litigants, who might otherwise be reluctant to explore settlement possibilities for fear of signalling weakness, welcome such judicial involvement. 135 Furthermore, it would not seem to offend the basic characteristic of "party-autonomy," if judges assisted, but did not coerce, parties in reaching mutually beneficial and fair compromises.

D. Enforcement of Agreements

The courts and the substantive law provide the vital machinery by and through which compromises can be effectively enforced and, where necessary, set aside. 136 The essence of any compromise is agreement. Hence, the general law of contract dictates the terms and conditions under which compromises giving rise to legal obligations can be validly entered into, performed and enforced. A valid compromise brings a dispute to a close as effectively as if

132 See Winn Report, supra note 21, at para. 351.
136 For a general, if in parts superficial, survey of the law governing settlements, see Foskett, The Law and Practice of Compromise (London: Sweet & Maxwell, 1980).
the dispute had been litigated to the full. In the event of a breach of the compromise, the usual range of contractual remedies will be available. For added security, however, the parties may wish to have their private agreement ratified by the court, thereby conferring upon it the status of a judgment of the court itself and making available the various official enforcement devices. Whichever method is relied upon to finalize an agreement to compromise, the guarantee of compliance offered by the formal rules and institutions may give an otherwise reluctant disputant the confidence to settle.

Although it is a well established principle of Anglo-Canadian law that a person is free to make bad as well as good bargains, the courts are prepared to intervene in order to relieve the weak and foolish where they are "overmatched and overreached." The common law has always operated to prevent a contracting party from being enriched by taking advantage of somebody who was in a state "of poverty... ignorance... and absence of independent advice." The Canadian courts have granted such relief in a number of cases where injured persons have unwisely agreed to a compromise on disadvantageous terms. Indeed, in one English case, the judge went so far as to say that an insurance adjuster is under an obligation to "make sure he starts... with what would be a reasonable sum." The precise ambit of this vitiating factor, however, is extremely difficult to gauge. Lord Denning has tried to articulate a single principle based on "the inequality of bargaining power" that embraces a whole range of situations:

English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair... for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. ...The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself.

137 Knowles v. Roberts (1888), 38 Ch. D. 263 at 272, 58 L.T. 259 at 263 (C.A.) per Bowen L.J. This applies whether litigation was commenced or not: Cook v. Wright (1861), 1 B. & S. 559, 30 L.J.Q.B. 321, 4 L.T. 704.
It has been held that the mere presence of independent advice will not of
itself necessarily save an agreement.\(^{143}\) And, duress of an economic
nature will operate to avoid a compromise where it amounts "to a coercion of will,
which vitiates consent."\(^{144}\) Yet mere inequality of bargaining power is in-
sufficient to avoid an agreement; it must lead to bargains in which an im-
moderate gain is made.\(^{145}\)

VI. CONCLUSION

This article has sought to explore the relationship that exists between
the formal and informal schemes of the civil justice system. It should be
apparent that each scheme operates only as a function of the other and any
attempt to evaluate their performance must recognize their mutual depend-
ence. Further, in seeking to detail the dynamics of this symbiosis, a better
understanding of the workings of the whole civil justice system as a unified
and complex whole will emerge. The benefits to be obtained from such a
system are obvious. If the civil justice system is to perform at its optimal
capacity, a more informed and less idealized appreciation of its workings is
a prerequisite. Although a blueprint of detailed proposals for improving the
system is beyond the scope of this initial analysis, it is appropriate to make
some general observations on the more pressing problems within the present
relationship and to indicate the direction and character that one significant
reform might take.

The major lesson to be learned is that, if progress is to be made or
reform is to be successful, the focus of critical attention has to shift from the
formal scheme to the informal scheme. In so far as the informal resolution
of disputes represents the overwhelming part of the civil justice system, it is
this aspect of the dispute-resolution process that must be confronted and
reviewed:

...[A] substantial majority of "serious" cases and the great mass of all cases
[are] terminated without court intervention ....If the handling of the great mass
of...claims is to be improved, it is the adjustment process rather than the
judicial process which will have to change.\(^{146}\)

Before there can be any meaningful reform of the civil justice system that
stands any reasonable chance of success, a clearer and more holistic percep-
tion of the informal scheme and its interaction with the formal scheme is
required. Indeed, there is substantial data to show that contemporary courts
and legal procedures are not as efficient or satisfactory dispute-resolvers as
their more informal counterparts in less developed societies.\(^{147}\)

1166 per Balcombe J.


\(^{146}\) Conard, supra note 21, at 3-4.

\(^{147}\) Such comparisons, of course, are extremely difficult to make, but the available
research suggests that such a conclusion can be reasonably drawn: see Nader, "Styles
The pervasive difficulty, of course, is to reconcile the many competing objectives and conflicting values that run through the civil justice system. In seeking to embrace procedures that are most productive of justice, the system must strive to allow the parties the fullest opportunity to present their case and to facilitate an extensive, impartial investigation of the law and facts pertaining to the case. At the same time, the system must ensure that all citizens have equal access to the courts and that cases are disposed of expeditiously and at reasonable expense. The system must strive to strike a balance that best accommodates and promotes these apparently irreconcilable demands; "the intended product of the court system is justice of which efficiency, convenience and costs are only constituent parts and do not together comprise the whole." It must satisfy a broad Kantian calculus that aims for an optimal state of affairs in which the fullest facilitation of any one objective is allowed to the extent that it is compatible with the fullest preservation of all the other objectives. Although the present Anglo-Canadian system is devoted to reaching such a compromise, it falls short of so doing in a number of areas. It is hoped that this account has exposed the inaccuracy of Lord Devlin's assessment that "the fallacy inherent in our High Court procedure of civil litigation is... that where justice is concerned, time and money are no object." It is clear that, in some circumstances, the converse is true; the price of justice, combined with the length of its gestation period, is often beyond the patience and financial resources of the average citizen.

A feature of the present Anglo-Canadian civil justice system that serves to increase the hazards of litigation is the all-or-nothing outcome of proceedings. Further, the existence of costs rules compounds the unsettling effect of this hazard upon litigants and conditions all the paraphernalia of the law. If a case proceeds to trial, there must be strong arguments on both sides that favour a finding one way or the other. In fact, the case may be finely balanced and the outcome may be too close to call. In such circumstances, the notion of "winner-takes-all" is anathema to the concept of justice between parties. Moreover, the fact that the formal scheme has developed rules to stimulate compromises in private settlements militates even further against the alternatives of polarized outcomes in the formal setting. Although there are difficulties of implementation, it has been suggested that the judicial process should operate from the initial assumption that there will be "equality of apportionment" unless there are adequate and legitimate grounds for departing from the original position of equilibrium. The attraction of such
a proposal is that it respects the reality of "contested cases," in that they will be finely balanced. It does not provide a powerful disincentive to sue and, in so far as it universalizes the reasoning behind the notion of "contributory negligence," it allows for quantified outcomes that represent "just and wise policy." Although such a proposal would have a massive impact on the workload of the formal scheme, it would eradicate in one fell stroke many of the less acceptable features of the civil justice system. The extra cost to society at large in financing such a system would be amply set off by the private gains of those who, at present, must settle for amounts that fall far short of the objective and just worth of their claims.

In conclusion, therefore, it must be urged that proper attention be given to the informal scheme of civil justice. Although it is the prerogative of the formal process to introduce rules and procedures, such devices will by and large affect the operation of the informal scheme. Any proposal for the renovation of civil procedural law must improve the quality of the whole of the civil justice system. Law reformers must be constantly aware that the province of justice extends far beyond the formal confines of the courts and their related institutions. In so far as procedure must continually strive to study and conform to the needs and progress of the times, the rule-makers must ensure that they fully appreciate and understand the operation of the informal activities and the regime of the civil justice system. Moreover, to the extent that the law exhorts the judges to construe procedural rules so as "to secure the just, least expensive and most expeditious determination of every civil proceeding on its merits," they must keep an eye open for the very real and influential effect that their decisions will have upon the frequency and fairness of informal settlements. If the civil justice system is to have a bright and healthy future, it must respect and attend to the needs and requirements of the informal process of the civil justice system.

152 Id. at 260.
154 See, for instance, Proposed Rules, supra note 78, at r. 1.03(3).