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THE LITIGATION EXPLOSION: THE WRONG QUESTION

ROBERT J. SAMUELSON*

Professor Galanter has reminded us that statistics can be distorted to create a misleading impression of reality. And we would all be better off if the term “crisis” were not applied to every problem that happens along. But his main message—that everything is, more or less, okay with the civil justice system—is less convincing. To get meaningful answers to important social questions, you must first ask the right questions. The right question is not: is there a litigation “explosion?” (There could easily be a perfectly justifiable “explosion.”) The right question is: does the civil justice system do its job as well as can be reasonably expected? I am no legal scholar, but my hunch is that the answer is “no.”

Admittedly, the right question is a tougher question. You first have to decide what is the purpose of civil justice and, then, whether the existing system is meeting “reasonable” standards of performance. On the broadest level, of course, our legal system exists to help society set and enforce rules of fair and just conduct, whatever those terms may mean. But, more specifically, the civil justice system—the laws, the courts and all the “servants” of the courts—is supposed to help resolve conflicts that cannot otherwise be resolved and to do so without imposing undue adverse social side-effects. The system’s purpose is not to intensify conflict, prolong it, or resolve it at huge costs to either the parties or society as a whole. My suspicion is that the existing system is guilty of precisely these evils and that, further, these defects often reflect the economic self-interest of practicing attorneys.

The more conflict that can be converted into legal action, the more lawyers prosper. Attorneys who bill by the hour have an obvious interest in billing more hours. Contingency-fee plaintiffs’ attorneys have a clear interest in identifying and suing wealthy defendants. Attorneys who respond to these strong incentives are not venal, but their collective behavior may pervert the civil justice system. Consider an analogy—doctors. The way doctors (and hospitals) are paid affects how medicine is practiced. Before World

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War II, patients directly paid about four-fifths of their medical costs. Now, private insurers and government programs (such as medicare) pay about 70%. For doctors and hospitals, this payment system means that the more services and procedures they perform, the more they're paid. Naturally, the line between what is appropriate medicine and what is rewarding has blurred. There are more tests, more hospitalization, and more surgery—more, in fact, than may be necessary. It's not that doctors or hospital officials are venal. They're human and respond to economic signals.

As a journalist, I detect no huge curiosity on the part of lawyers or legal scholars—including Galanter in his essay—about how today's incentives affect the civil justice system. Galanter's essay is intended to debunk the idea of a "litigation explosion." The idea seems to be that, if the litigation explosion can be shown to be a myth, then all the associated complaints about the civil justice system must be similarly exaggerated. But this easy logic leaves two basic questions hanging in mid-air. Why does America require a proportionately greater and greater number of lawyers? And is the increase good for us? Galanter himself points out elsewhere that the per capita level of attorneys in the United States is more than twice as high as the nearest industrial country (New Zealand) and more than four times the average of thirteen industrial nations.¹ More important, the number of lawyers has been rising much faster than the general population during the post war period. In 1951, there was one lawyer for every 695 Americans; by 1980, that was one for every 418 Americans. By one estimate, the ratio in 1995 may be one lawyer per 279 Americans.²

Clearly, there is a host of causes for our society's rising need of lawyers. Government regulation, taxation, and international com-

1. This table shows the number of lawyers per one million population. The figures are generally from the 1970s.

United States	2348.7
New Zealand	1081.3
Australia	911.6
England/Wales	606.4
West Germany	417.2
Japan	91.2
Average of 13 Industrial Nations (excluding United States)	545.6

Source: adapted from Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 53 (1983).

2. B. CURRAN, K. ROSICH, C. CARSON, M. PUCCHETTI, *THE LAWYER STATISTICAL REPORT, A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s* 4 (1985).

merce have all grown in complexity in the postwar era. Divorce has become more common, and crime rates have risen. More than ever, lawyers are involved in business and personal planning. Despite these influences, my guess is that civil litigation (and its threat) has played an important role in expanding the size of the legal profession. Like most of us, lawyers specialize. They have an economic interest in having their specialties become more important. If you are a tax lawyer, you benefit—financially, if not psychologically—from a complicated tax code. If you are a plaintiffs' products liability or personal-injury attorney, you benefit from broad doctrines of liability. We should not be surprised that lawyers have urged—and courts have accepted—increasingly expansive theories of liability. Many lawyers seek to extend the authority of the law in the same way that companies seek to create new products or expand the demand for existing products. It's their business. Nor should we be surprised that the number of plaintiffs' lawyers has apparently risen faster recently than the total number of lawyers. The membership of the Association of Trial Lawyers of America (ATLA) has roughly tripled to nearly 60,000 since 1970, a period when the total number of lawyers rose 90%.³ (I say "apparently," because it's impossible to know how rigidly ATLA's membership reflects the number of plaintiffs' lawyers.)

What are all these people doing? Galanter brushes aside the issue by showing that the rise in litigation levels has been modest. But his own work wisely warns us to be suspicious of raw caseload statistics. If lawyers are economic actors, then the volume of their activity is less important than its value. Some lawyers may be spending more time on fewer cases with higher stakes. Or more claims may be settled without court complaints ever being filed. Both developments seem plausible. According to one study, claims paid and the defense costs of insurance companies and other corporate defendants have risen sharply since the mid-1970s—from about 1.4% of Gross National Product (GNP) in 1975 to 1.8% of GNP in 1984.⁴ Likewise, a study by the Rand Corporation of civil cases in Cook County found that "deep pocket" defendants—in particular, corporations—usually paid larger awards than individual defendants for similar injuries.⁵ When plaintiffs had very serious injuries, cor-

3. Telephone conversation with office of ATLA, Spring 1986.

4. R. Sturgis, *The Cost of the U.S. Tort System: An address to the American Insurance Association* (Nov. 14, 1985) (available from Tillinghast, Nelson & Warren, Inc.).

5. A. CHIN & M. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* 43 (1985).

porate defendants were also more likely to be found liable than non-business defendants.⁶ The “deep pocket” theory of litigation is not just a myth.

I am not impressed with the argument that, because most cases are settled out of court, the system is working reasonably efficiently. My hunch is that the system encourages the settlement of otherwise weak cases. Consider a hypothetical example. *X* sues Corporation *Y* for \$100,000. Plaintiff and defense attorneys evaluate the case identically: if it goes to trial, the plaintiff has a one-in-four chance of prevailing; the cost of defending the case is estimated at \$15,000. In these circumstances, the defense’s least expensive course is to offer to settle for \$14,999. Given the chances of losing, a more generous settlement (say, \$25,000) may even make sense. The defense may still decide to try the case, motivated by a sense of righteousness or a concern for its reputation. But when future suits are inevitable—for example, when the defendant is an insurance company—these considerations will be weaker. In short, it’s possible (and probable, I think) that plaintiffs’ attorneys can “game” the system.

So, too, can defense attorneys. Although I believe the existing system is generally biased against the defendant, the reverse may be true. In any case, the system can clearly discriminate against plaintiffs by making a case too costly or time-consuming to pursue. In many instances, plaintiffs with legitimate grievances may simply be overwhelmed by larger, wealthier defendants. Consider a case in which Individual *X* sues Corporation *Y* for, say, \$10 million. Assume also that, if the plaintiff wins, the defendant will be exposed to other claims. Now assume that both plaintiff and defense attorneys believe that, if the case goes to trial, the plaintiff has a four-to-one chance of prevailing. The defense’s best strategy may be to procrastinate—to run up the plaintiff’s legal costs (or the lawyer’s out-of-pocket expenses), increasing the temptation for a much smaller settlement in which the defendant admits no guilt. In neither of these admittedly hypothetical cases has the civil justice system operated as I would like. It has rewarded weak cases and punished strong cases. It has not resolved conflicts clearly or quickly. It has been expedient, not efficient.

My belief is that these defects could be reduced by adopting something like the “British rule”: that is, the losing side would pay the winning side’s legal fees and costs; in a contingency-fee case, plaintiffs’ attorneys would pay the winner’s expenses. The conven-

6. *Id.*

tional objection to this system is that it would reduce access to the legal system and, therefore, is undesirable. This might be the result when plaintiffs themselves (as opposed to their lawyers) are at risk for the other side's legal costs. But this outcome is not necessarily undesirable. Courts cannot resolve all disputes, even of a legal nature, and there needs to be a threshold of entry into the system. Someone suing ought to feel sufficiently confident about the outcome or sufficiently aggrieved to bear the full costs of being wrong. The existing system is not morally superior. If you sue me and I win, I still lose; I'm out my legal costs. If the litigation involves individuals or small businesses, why should the winner bear this "tax"? Not only is it unfair, it is precisely this imbalance that creates pressures for expedient settlements and, therefore, encourages weak cases.

The real fear, of course, is that the British approach would further insulate large businesses from suits by wronged individuals. In my view, this anxiety is baseless. Under the existing system, few—if any—individuals can sue large corporations with their own resources. Can I sue G.M.? Are you kidding? G.M. would depose me into insolvency and insanity. It is the contingency-fee attorney who decides to take the case and, therefore, assumes most of the economic risk. When attorneys bring cases, they should also bear the full costs of losing. Those who fear that this change would reduce litigation need to acknowledge the logic of their position. It must mean that plaintiffs' attorneys are now accepting cases that they do not truly wish to try because they do not think they can win. A winning case under the British approach would be more lucrative than under the present system, because the attorney's fees and costs would be reimbursed—that is, added to the award. No one can know with absolute certainty whether a case will be won or lost. But if all the cases being brought today are strong, then they will remain strong and would also be brought under a new system. In some cases, contingency-fee attorneys would pay the other side's fees and costs; but in other cases, their contingency fee awards would be supplemented by the reimbursement of fees and costs. The rewards and costs of individual cases would be greater, but as a group plaintiffs' attorneys would fare as well as they do today.

In our court system, lawyers constitute the most important first line of screening: they determine which conflicts get admitted into the system (because a plaintiff needs a lawyer) and, once admitted, how cases are conducted (because attorneys shape legal strategies). In my view, a changed fee system would force attorneys—both

plaintiffs' and defendants'—to focus earlier on the merits of individual cases. How the process might affect defense attorneys is, I admit, speculative. These attorneys can now often recommend to clients a legal strategy—delay, increase the other side's legal costs—that also suits their economic self-interest. My suspicion is that, faced with the possibility of paying the other side's legal costs, defendants would pressure their attorneys to act differently. Confident defendants would be more eager for a trial, because—assuming victory—their final costs would be less. Less assured defendants would move more quickly for a settlement. Defendants and plaintiffs would have an interest in expediting a resolution and limiting legal costs. And that's the purpose of the civil justice system: to resolve conflicts quickly and efficiently.

Anyone who thinks the system now operates adequately needs only examine the current medical malpractice mess. It is a genuine disgrace—not because lawyers or doctors are evil, but because the system channels conflicts in antisocial ways. Ideally, we would like a malpractice system that compensates victims and disciplines incompetent or irresponsible doctors, including barring them from practicing. Today's system is a parody of this ideal. It imposes large costs (through higher insurance premiums) indiscriminately on all doctors, diverts a substantial part of the award away from victims to attorneys, and, finally, provides no formal mechanism for disciplining bad doctors. One possible virtue of changing today's system of legal fees is that it might encourage attorneys to design alternative dispute resolution mechanisms that limit their costs. For malpractice, this might involve some type of review board that, aside from compensating victims, would also discipline doctors.⁷

I agree with Galanter that there are many public benefits to litigation—and, especially, its threat. I am also worried that the current “crisis” atmosphere may result in undesirable legislation. The insurance industry is clearly trying to exploit today's climate for its

7. A number of recent studies indicate that the flaws in malpractice suits may more broadly apply to the tort system. The Rand Corporation estimated, for example, that in 1985 net compensation to victims amounted to about 45% of the total cost of the system. Total costs included legal fees and expenses of defendants and plaintiffs, the value of litigants' time, insurance company costs for processing claims, the courts' administrative costs, and awards to plaintiffs. *Costs and Outcomes of Tort Litigation: Testimony Presented July 29, 1986, Before the Subcomm. on Trade, Productivity, & Economic Growth of the Joint Economic Comm.*, 99th Cong., 2d Sess. (1986) (page 12 of separately paginated testimony) (testimony of James S. Kakalik, The Institute for Civil Justice of The Rand Corporation). Two other studies are: A. SCHOTTER & J. ORDOVER, *THE COST OF THE TORT SYSTEM* (1986); R. Sturgis, *supra* note 4.

own purposes. Some matters of liability may, in fact, warrant redefinition. But I am suspicious of arbitrary limits—for example, on pain and suffering awards to successful plaintiffs. These restrictions may help certain insurers and almost no one else. They may deter riskier suits, involving novel issues, because awards are artificially limited. The idea that these restrictions reduce litigation may turn out to be fanciful. Deterred from personal-injury suits, plaintiffs' attorneys may simply "go into business litigation," as columnist Jane Bryant Quinn (whose husband is an attorney) recently wrote.⁸ Securities litigation, in which lawyers bring class actions against corporations for alleged misrepresentation in their financial disclosure statements, is already one booming area.

But it is simplistic to think that attorneys will flock towards different dispute-resolution procedures because this is socially desirable. My belief is that they will only do so when they find it in their economic interests. Nor am I suggesting that designing an alternative system of compensations is easy. There surely would be many messy problems of detail. How would reasonable fees be determined? Are there some areas of civil litigation in which one might not want to apply a new standard? Are there other changes one might want to undertake simultaneously? (For example, an attorney has suggested to me that judges, not juries, should determine damage awards. The jury would decide liability. He justifies this division of labor as analogous to criminal cases, in which juries determine guilt and judges impose sentences.) But there is already an explicit recognition in public policy that how fees are awarded affects the type of cases that will be brought. Specifically, Congress has allowed courts to award attorneys' fees to prevailing plaintiffs in some types of cases—civil rights is the best-known example—so that these cases, which are deemed in the public interest, will be brought. It's simply common sense that the way our system rewards attorneys profoundly shapes how the system operates.

The need is to acknowledge this reality and address its consequences. Galanter notes that there has been a "general but uneven spread of higher expectations of justice and the growth of a sense of entitlement to recompense for many kinds of injury."⁹ He then adds that "this sense is not self-activating" and that its translation "into claims depends on various contextual matters."¹⁰ One of these "contextual matters" is lawyers' own economic interests. The law

8. Quinn, *Cutting Back Verdicts*, NEWSWEEK, July 7, 1986, at 44.

9. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 28 (1986).

10. *Id.*

today is a business. The sooner we recognize how lawyers' commercial interests may undermine our system of civil justice, the better.