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Going to Trial: A Rare Throw of the Die

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Going to trial

This essay is adapted from "Don't Try: Civil Jury Verdicts in a System Geared to Settlement," appearing in *44 UCLA Law Review* 1 (1996). Publication is by permission. A complete, fully cited version is available from the editor of *Law Quadrangle Notes*.

A rare throw of the

DIE

— BY SAMUEL R. GROSS AND KENT D. SYVERUD

PHOTOS BY THOMAS TREUTER



If it is true, as we often hear, that we are one of the most litigious societies on earth, it is because of our propensity to *sue*, not our affinity for *trials*. Of the hundreds of thousands of civil lawsuits that are filed each year in America, the great majority are settled; of those that are not settled, most are ultimately dismissed by the plaintiffs or by the courts; only a few percent are tried to a jury or a judge.

This is no accident.

We prefer settlements and have designed a system of civil justice that embodies and expresses that preference in everything from the rules of procedure and evidence, to appellate opinions, to legal scholarship, to the daily work of our trial judges. Our culture portrays trial — especially trial by jury — as the quintessential dramatic instrument of justice. Our judicial system operates on a different premise: that trial is a disease — not generally fatal, but serious enough to be avoided at any reasonable cost.

Preference for settlement is not unique to the American legal system but it is especially pervasive and strong, for several reasons. We have many lawyers, by any count, but few judges. As a result, we have very many litigated disputes per judge — so it is essential that most cases be resolved without judgment. This scarcity of judges is possible because of our adversary system of adjudication. In this system the parties control the development and presentation of facts; the fact finder (judge or jury) is passive, and has a comparatively small role in the process. Party control of evidence makes private settlement easier, since the parties themselves, rather than the court, procure the information they need to negotiate. Adversary fact finding is also expensive, unpredictable (especially if the ultimate tribunal is a jury), and, given our scarcity of judges, slow. As a result, the savings to be realized by settlement — in time, money and risk — are greater than they might be in a quicker, cheaper and more predictable system. These explanations, of course, are not independent of each other. On the contrary, the major structural reasons for the special importance of settlement in American litigation — scarcity of judges and abundance of lawyers, adversarial fact finding, trial by jury — are all manifestations of a single cultural value: the preference for private ordering over public control.

Trials, of course, are important beyond their numbers. For the public, trials have the advantage of visibility. They are open and dramatic while settlements are usually boring and private — in fact, invisible. Their openness also makes trials attractive subjects for study by scholars, with the added benefit that cases that are fought to the end are likely to present more of the issues that we like to study

When civil disputes end in trial

and need to teach. But for practitioners trials are important primarily because they influence the terms of settlement for the mass of cases that are not tried — because they cast a major part of the legal shadow within which private bargaining takes place. Trials have this standard-setting effect despite the fact that they are not typical of the cases in which their results are used as guides for settlement. Scholars are unanimous in recognizing that trials are not representative of the mass of litigated disputes. They seem to be selected because of unusual rather than common features, such as high stakes, extreme uncertainty about the outcome, and reputational stakes of the parties. *Liebeck v. McDonald's Restaurants* (1994) is an extreme case, but a useful example nonetheless.

On Feb. 27, 1992, Mrs. Stella Liebeck, aged 79, a passenger in a car driven by her grandson, bought a cup of coffee at a take-out window of a McDonald's in Albuquerque. With the car stopped, she held the styrofoam cup between her legs, tried to pry off the top, and spilled the coffee — which was scalding hot. She suffered third degree burns. She sued, and three years later a jury returned a verdict against the McDonald's Corporation for \$160,000 in compensatory damages and \$2.7 million in punitive damages.

The verdict became an instant cliché in the tort reform debate. At first, it was the ultimate jury-trial horror story: Woman gets \$2.86 Million For Spilling Her Coffee. Later, it re-emerged as a tale of justice done: Mrs. Liebeck was severely injured — she was hospitalized for eight days and required skin grafts; she was injured because of McDonald's policy of serving coffee 15 to 20 degrees hotter than its competitors; McDonald's knew the danger of selling coffee at that heat — it had received 700 prior complaints in the previous five years, some involving serious burns — but it never considered changing its practice; the \$2.7 million



there is almost always a clear loser, and usually a clear winner as well.

punitive damage award was chosen by the jury to be equal to two days worth of coffee revenue for McDonald's; the trial judge reduced the total award to \$640,000; in the aftermath of the case, McDonald's lowered the temperature of its coffee.

Needless to say, *Liebeck v. McDonald's* was an unusual trial. The damages were unusually high, and the facts of the claim were uncommon, to say the least. In many respects, however, it is a perfectly representative example of an American civil jury trial — as we shall see.

To understand civil trials in America it is necessary to consider them in the context of the pretrial bargaining in which civil litigation is usually resolved. That is what we attempt in this article, using two samples of civil jury trials in California state courts, one from 1985-1986, and one from 1990-1991. Both samples were drawn from case reports in *Jury Verdicts Weekly*, a state-wide California jury verdict reporter that is widely used by lawyers in evaluating their cases — in other words, our data were generated by one of the instruments through which trials cast their shadows over settlement negotiations. For the second sample, we also interviewed 735 attorneys who represented a plaintiff or defendant in one of the cases, and asked them about insurance coverage, fee arrangements, the parties' pre-trial bargaining positions, and the factors that drove the cases to trial. This survey provides unique data.

For this article, we assembled a statistical portrait of the civil jury-trial caseload of the California State Superior Courts, the state courts of general jurisdiction. Briefly, we find that most civil jury trials in California (over 70%) concern personal injury claims of one sort or another; that almost all plaintiffs, in trials of every sort, are individuals; that the overwhelming majority of these plaintiffs (especially in personal injury cases) pay their attorneys on a contingent basis; and that almost all defendants,

except some large businesses and most government entities, have insurance that covers the cost of defending the lawsuit and all or some of the potential damages. The typical civil jury trial is a personal injury claim by an individual against a large company, in which neither party is playing with its own money: the plaintiff is represented by an attorney whose fee and expenses will be paid out of the recovery (if any), and the defendant has an insurance policy that covers all defense costs and any likely judgment. *Liebeck v. McDonald's* fits all those criteria, except that the defendant may well have been self insured.

Three notable outcomes emerge from the outcomes of these trials:

First, most of the total sum of money awarded in these trials is concentrated in a small number of very large cases.

Second, the pattern of outcomes in personal injury trials is very different from that in commercial trials. Plaintiffs lose most personal injury trials — that is, they do less well at trial than they would have by settling — while defendants are more likely to lose in commercial trials. On average, personal injury verdicts are roughly midway between what the plaintiffs demand and what the defendants offer in settlement; on average, commercial verdicts are considerably larger than the plaintiffs' demands as well as the defendants' offers.

Third, jury verdicts are rarely compromises. Compromise, of course, is the essence of settlement, but compromise judgments are also possible at trial. In fact, they hardly happen. When civil disputes end in trial there is almost always a clear loser, and usually a clear winner as well.

Here, we examine the role of trial in American civil litigation, and consider possible reforms. The key question is: Why are compromise verdicts so

uncommon? We offer a structural explanation: This is a natural consequence of a legal system in which settlement and trial are mutually exclusive rather than complementary methods of dispute resolution, and it is exacerbated by the high cost of trials. Very few cases go to trial, and those that do are atypically difficult disputes that could not be compromised by the parties and are not likely to produce compromise verdicts. Once again, *Liebeck v. McDonald's* is a good illustration. The defendant passed up many opportunities to settle, starting with a \$2,000 demand by the plaintiff before she filed the complaint, and ending with a \$225,000 recommendation from a mediator. At trial, the issue was framed in all-or-nothing terms: The Case of the Careless Customer vs. The Case of the Callous Corporation. The verdict was much larger than any proposed settlement, but judging from public response it could just as easily have been zero.

The trials we see are the products of a procedural system that is devouring itself. As we have refined and elaborated the rules for jury trials we have multiplied the costs of trial both to the parties and to the courts. The costs to the parties drive them to skip all these expensive procedures and settle; the costs to the system drive judges and rulemakers to find new ways to encourage them to do so. Increasingly, the cases that litigants insist on trying are not only rare but peculiar. In a sense, the *Liebeck* trial was common even in its peculiarities. It is misleading to hold up *Liebeck* as a typical example of American litigation: car accidents and medical procedures must generate a thousand lawsuits for every coffee-burn case, and punitive damage awards in any amount are rare in personal injury trials. But trials are never typical. Ordinary cases of every sort are compromised and settle, and those that don't are unusual even if the context is a garden-variety two-car crash. Trials are

“Win/win” outcomes are rare in civil trials in America.

the most visible aspect of our system of adjudication, and they show it at its worst: the slowest, most expensive and most contentious cases, where compromise has failed, and where the verdict is most likely to seem arbitrary or extreme.

Why are civil jury verdicts so uncompromising?

In most trials there is at least one loser. This may not sound surprising — it may even seem obvious — and for that reason it is important to remember that losing is not an inevitable feature of adjudication. “Winning” and “losing” are defined by reference to the alternatives, and in this setting the common alternative is settlement. A “loser” at trial is someone who does less well than she could have by accepting an available settlement offer from the opposing side — and a “winner” is someone who does better by that standard — considering both the judgment and the cost of obtaining it. By that definition, it is perfectly possible for a trial to produce a “win/win” outcome, an adjudicated compromise between the pretrial positions of the parties. However, judging from these samples, “win/win” outcomes are rare in civil trials in America — by our estimates, 4% to 7%. When one side wins the other almost always loses. And when one side loses the other usually wins; all around disasters in which everyone takes a beating are also uncommon — by our estimates, 9% to 14% of civil trials. In the great majority of the cases, perhaps 80% to 85%, the verdict is a clear victory for one side and a clear loss for the other.

Why are compromises so rare among the small percentage of cases that go to trial? The major reason seems to be structural: the sharp division we draw between settlement and adjudication. In any system, the parties to a litigated civil

dispute are allowed — indeed encouraged — to try to settle their differences on their own. Even if they fail, they are likely to resolve some issues along the way, and to narrow their differences. In the United States, however, these partial compromises generally come to naught if the case proceeds to a jury trial. The dispute shifts to a new mode — adjudication before a fact finder who was not party to any prior partial compromises, under rules of procedure that make reference to settlement discussions improper. At trial all deals are off, and all risks are restored. If you fail to settle you must drop out entirely or pay a lot to gamble at high stakes.

This is not the only way to run a court. In Germany, for example, the process is very different. As in America, a primary goal of the system is to facilitate settlement, but that is done by very different means. German civil procedure does not distinguish between trial and pre-trial proceedings. Each case is assigned to a single judge, who actively oversees it from start to finish. Along the way, the judge will convene a series of hearings or conferences with the attorneys and parties, identifying and resolving issues, taking testimony and hearing argument as necessary, attempting at each stage to focus on the legal and factual disputes that must be resolved in order to end the case, either by adjudication or by a settlement that completes the court-assisted convergence.

A typical California Superior Court case, by contrast, is set before a series of judges who know little about it and who play limited reactive roles at various steps along the way. Pre-trial negotiation and much of pre-trial litigation go on in private with no judicial oversight at all. The first point at which a judge is likely to take part in an attempt to resolve the case is a settlement conference close to the date of trial, after the parties have failed to settle on their own and have invested a great deal in trial preparations.

If that too fails, there is a trial from scratch before a jury that (by definition) knows nothing of the history of the case.

Actual practice in each country is variable and complicated. For the moment, however, it may be useful to reduce these two systems to ideal types: Court-assisted settlement backed up by court-imposed compromise, vs. private settlement with a high-price poker game as the penalty for failure. The second system, which is pretty much what we live with in America, might as well have been designed to discourage trials. And it does, very successfully; that’s why civil trials are so rare.

Few people want to go to trial under these circumstances, or at least they are not willing to own up to it. For our second sample of trials we asked the attorneys directly: “Why did this case go to trial rather than settle?” We classified the first reason given by each respondent as follows: Did the attorney say that her side (the party or its attorneys) was responsible for the trial, or did she say that the other side was responsible, or did she mention some other cause? A clear pattern emerged immediately: Each side says the other one did it. Fifty-four percent of the plaintiffs’ lawyers said the defendant or the defense lawyers caused the trial, 19% said their own side did it, and 27% gave some other reason. On the defense side, 41% blamed the opposition, 27% blamed themselves, and 31% chose some non-party cause. This tendency is as pronounced among winners as among losers. For example, 54% of the plaintiffs’ lawyers who recovered nothing at trial blamed the defense for the failure to settle, as did 64% of those who recovered

more than \$500,000. Attorneys who won hundreds of thousands of dollars said they were forced to court by the defendant's stupidity, and others who successfully defended big claims said trial was caused by the plaintiff's greed or craziness. Almost nobody said "We gambled and lost" or "We decided to fight, and we won."

This is the way people talk about unfortunate events — wars or losses, not adventures or victories. That attitude is no surprise, not even coming from lawyers. Attorneys, like insurance adjusters and other regular players in litigation, make their daily bread in negotiation. When a case falls through the cracks into the other costlier and chancier arena, their reaction reflects the judgment of the system as a whole: A trial is a failure. This view of trials is related to their outcomes in two ways. First, as a cause: The (accurate) belief that trials are expensive and risky is a powerful incentive to settle those cases that can be settled — to compromise whenever compromise is possible, and to avoid trial at all costs when the stakes are too small for either side to come out ahead. That leaves a residue of all-or-nothing cases that resisted compromise before trial and are likely to produce all-or-nothing verdicts after trial. Second, as a consequence: The fact that trials usually are expensive winner-take-all affairs reinforces the consensus that they are dangerous and to be shunned.

And what are these stubborn, uncompromising cases that end in trial? Judging from our data, they are primarily disputes over liability rather than damages. In part, that is inherent in the nature of the issues: Damages is a continuous variable, and therefore more susceptible to compromise and settlement. In addition, if damages were the main issue in contention at most trials we would expect to see more

compromise verdicts. A case in which liability is given may go to trial if *either* party is overly optimistic in its prediction of the award, or overly aggressive in its bargaining, but it is most likely to go to trial if *both* sides are unrealistically optimistic or overly aggressive — if the plaintiff asks for too much *and* the defendant offers too little. When that happens, the verdict is likely to fall between their bargaining positions, and may well be a win/win outcome. The fact that such verdicts are rare suggests that damages is not often the main issue at trial.

Liability, by contrast, is a dichotomous variable. If damages are known and liability is at issue a trial can only be *avoided* if the parties agree on a discounted figure that reflects the actual damages multiplied by some estimate of the likelihood that a jury will find the defendant liable. Pre-trial bargaining will reflect this logic. The plaintiff will not ask for more than the known damages, although in an extreme case she may demand no less, while the defendant will offer some fraction of the real loss, or nothing at all. If the case does go to trial the jury is likely to side with the defendant and to give the plaintiff nothing, or to side with the plaintiff and give her as much as or more than she demanded in settlement. And indeed, one or the other of these outcomes occurred in about 77% of our cases. In other words, trials over liability will produce the all-or-nothing battles that we mostly see — cases in which one side always loses, and the other side almost always wins.

Why do we have trials at all?

Considering the cost and risk, the interesting question about American litigation is not why there are so few trials, but why we have as many as we do. The obvious problem is resources: How can litigants afford to go to trial? The key is that the costs and risks are aggregated across many cases, through the twin institutions of contingent fees and liability insurance. Almost all plaintiffs in our cases are individuals, and nearly half of defendants are individuals or small businesses. Such parties, on their own, could rarely muster the funds or the nerve to conduct a Superior Court trial. The plaintiffs would settle or dismiss; the defendants would settle or default. But a plaintiff with a contingent-fee attorney or a defendant with an insurance company can afford to go ahead, even to trial. As a result, plaintiffs' attorneys and liability insurers play a major role in determining who has access to court. In most cases, a plaintiff who can't get a contingency fee lawyer probably won't be able to sue; one reason plaintiffs' attorneys may decline to take a case on a contingency is that the defendant is uninsured — which means that, except for large institutions, uninsured defendants are unlikely to be sued, and if they are sued, they are unlikely to be able to defend themselves through trial.

But contingent fees and insurance only make trials *possible*. They do not explain why civil trials actually occur, or tell us what functions trials serve (if any) in a system in which 98% of disputes are resolved by settlement. The possible explanations fall into three categories: guidance for settlement, strategic bargaining and strategic intransigence, and non-economic interests.

1. **Guidance for Settlement.** Every theory of pre-trial bargaining assumes that a negotiated settlement is



Trials over liability will produce the all-or-nothing battles we mostly see —

determined, at least in part, by the parties' predictions of the outcome of the case if it did go to trial. Needless to say, such predictions are uncertain, and that uncertainty may affect the terms of a settlement. For example, a risk-averse plaintiff may accept less than the expected value of her claim because she is unwilling to take the chance of an unlikely but possible defense verdict. But there must be some common basis, however shaky, for assessing the consequences of a failure to settle. If trials became vanishingly rare lawyers and litigants would make increasingly crude predictions of trial verdicts. As a result there would be more cases in which their ill-informed guesses would be too far apart to compromise; which would lead to more trials, more verdicts, and better information on trial outcomes; which in turn would produce more settlements, and reduce or stabilize the trial rate. For all we know, the few trials that now occur are pretty close to the minimum number our settlement-dominated system requires.

2. Strategic Bargaining and Strategic Intransigence. In litigation, as in other adversarial contexts, many of the moves in negotiation are "strategic" — ploys that are used to mislead and manipulate. Thus litigants will conceal or distort information to impress their opponents, demand things that they don't want to get other concessions that they do, and play chicken with the opposition in order to get paid to avoid trials that nobody wants. When strategic bargaining works it improves the terms of settlement — you may get an additional \$20,000 out of a defendant by convincing him that otherwise you'll go to trial even if it costs you \$100,000 — but if he calls your bluff the result may be no settlement at all.

Our data show clear signs of this sort of strategic bargaining. For example, most defendants in our commercial trials made puny settlement offers and then got hammered in court. In 1985-86 the offers in commercial trials averaged \$574,000 less than the verdicts and the defendants lost 67% of the trials; in 1990-91 they averaged \$1,710,000 less and the defendants lost 55% of the time.

Wouldn't it have made simple economic sense for many of these defendants to offer more and settle instead of losing? In some individual cases, of course, that must be true, but overall we think not. For the most part the *plaintiffs* in these cases played along with the defense and made puny *demands* — on average \$322,000 less than the verdicts in 1985-86 and \$710,000 less in 1990-91 — in contrast to personal injury plaintiffs, who demanded on average a great deal more than the juries gave them. If the commercial plaintiffs who ultimately went to trial were willing to settle for that little, those who did settle may have agreed to take an even smaller fraction of the jury value of their claims. Why? The great majority of these commercial plaintiffs are individuals, and (unlike personal injury plaintiffs) most of them must pay some or all of the costs of trial: over a third pay their lawyers at least partly by the hour, and two thirds advance at least a portion of the trial expenses. Very likely most of these plaintiffs were reluctant or unable to invest money in litigation, even in

cases in which one side always loses, and the other side almost always wins



winning cases — and the defendants can take advantage of their timidity by sticking to low-ball offers. That strategy, however, requires the defendant to maintain a posture of intransigence: Take \$20,000 or go to trial. This may be the best approach, and it may work 95% of the time, but when it fails the result probably won't be a settlement for \$100,000 but an expensive trial followed by an even larger verdict.

When a party to a dispute is a repeat player — a person or an institution that participates in a steady stream of litigated cases — it has an additional incentive to behave strategically: to influence the outcomes of other cases. For example, a newspaper may refuse to ever settle any defamation claim, regardless of the merits or the cost, in order to discourage libel suits by building a reputation as a stubborn and expensive opponent. On the other hand, a manufacturer may quietly settle a products liability case in order to avoid a public trial that could produce a dangerous precedent if the manufacturer loses, and might provoke other similar lawsuits even if the manufacturer wins.

The most common repeat players in civil litigation for monetary damages are not parties themselves but agents of the parties — plaintiffs' attorneys and insurance companies. This creates the possibility of conflicts of interest. On the plaintiff's side, the attorney may want to go to trial to establish herself as a winner, or at least as someone who will fight to the expensive end. Such a reputation might bring in business, it might even help future clients, but it has no value to the current one-shot plaintiff. On the defense side, the most common potential conflict occurs in cases with doubtful liability and damages in excess of the liability limit of the defendant's insurance policy. If the plaintiff makes a demand at or near the policy limit, the defendant will probably want to take the settlement, which is free to him, rather than risk a trial after which he might be stuck with personal liability for damages above that limit. Most liability insurance contracts,

however, give the insurance company the power to accept or reject settlements, and the insurance company may prefer a trial: It can't lose more than the policy limit one way or the other, and, for the price of trying the case, it might save itself a settlement of about that amount.

We don't doubt that plaintiffs' attorneys and defendants' insurers sometimes act in conflict with the best interests of the parties. But we don't believe that such conflicts (strategic or otherwise) are a common cause of trials. Taking a case to trial against the interests of the client violates professional norms, and may subject the attorney or the insurance company to formal or informal sanctions. Norms and sanctions don't eliminate abuses, but they do suggest that the disfavored behavior is the exception rather than the rule. In this context, our survey data are consistent with that expectation. The attorneys we interviewed frequently said that the trial was caused by the opposition's stupidity or stubbornness, but no defense attorney said that there was no settlement because the plaintiff's attorney wanted a shot at a

Almost nobody said “We gambled and lost” or “We decided to fight, and we won.”

major verdict, and no plaintiff’s lawyer said that it happened because the insurance company had little to risk at trial and was unconcerned about its insured.

If we ignore occasionally serious conflicts and assume that attorneys and insurance companies handle these cases in the best interests of the parties, then the repeat players in ordinary civil litigation are all on the defense. Plaintiffs are almost always individuals and therefore necessarily one-shot players, while defendants, if they are not large businesses or government entities — and therefore likely to be repeat players in their own right — are almost always insured, usually completely. In other contexts, repeat players may just as easily be plaintiffs. This is true of some private litigants (e.g., environmental groups) and it is the rule for public litigants: the Internal Revenue Service, regulatory agencies, and, most important, criminal prosecutors. If a repeat party is a plaintiff it can set its agenda and influence law and practice by its *filing strategy*. Indeed, that is likely to be its main tool, since nothing that happens later is as influential as the decision to file in the first place — especially since most repeat player plaintiffs see many more possible cases than they can ever handle.

A repeat player defendant can hope to exercise some control over the general pattern of litigation, but only through its *settlement strategy*. Unlike a repeat player plaintiff, it has no other way to send signals or channel cases. The only ultimate threat it can make is the threat of trial, and it must take some cases to trial to keep that threat credible. Therefore we would expect the defendants in these ordinary civil cases to be more likely than the plaintiffs to engage in strategic bargaining, and more prone to take cases to trial for strategic reasons. Our survey data support this prediction. Although

each side was apt to say the other caused the trial, overall the attorneys were more likely to say the defendants rather than the plaintiffs did it, 52% to 42%.

One way to influence litigation is to win most trials, and repeat players on both sides do just that. The non-repeat player opponent is more risk averse; therefore, the repeat player plaintiff (e.g., prosecutor) can win most trials by taking strong cases to court and offering defendants in weak cases deals that they are afraid to refuse, and the repeat player defendant (e.g., insurance company) can do the same. *Plaintiffs* win most cases in both situations, usually by plea bargain or settlement: repeat players or not, they rarely file unless they expect to win. But the repeat player plaintiffs (prosecutors) also win 75% or more of criminal *trials*, while insured civil defendants (who settle and pay up on most *claims*) win approximately 70% of personal injury trials.

Our settlement data show clear signs of strategic bargaining by defendants that is aimed at goals beyond the outcomes of the trials at hand. Many of these cases went to trial without any meaningful pre-trial negotiations because the defendants made no settlement offers whatever. These zero-offer cases make up over a quarter of all trials, and about 60% of medical malpractice trials. A zero offer is never a reasonable assessment of the expected cost of a case to a defendant. The trial itself is never free and usually expensive, and there is always a chance, however low, that a jury will side with the plaintiff. But unlike the low-ball strategy that defendants seem to use in commercial cases, making zero offers is not a promising way to avoid trials. If no

face-saving settlement whatever is offered, a plaintiff who has already filed and pursued a case may well plow ahead to the end, at high cost to everyone. This is particularly true in personal injury cases, where the costs of trial are usually born by the plaintiff’s attorney — a repeat player who has the money to spend, and who can afford to lose most cases as long as she wins some big ones. On the other hand, a defendant (or his insurer) might make such an offer to affect *other litigation*. Refusing to settle increases the risk to future litigants and may discourage future claims, and taking winners to trial may be worth the cost if it helps you bluff successfully in negotiations with plaintiffs in future cases.

3. Non-Economic Interests. Trials may also occur because the parties have non-economic interests in obtaining judgments. Several scholars have discussed the importance of one particular non-economic motive: the desire to have a day in court, to obtain formal justice. They claim that many litigants want a type of satisfaction that settlement rarely provides — public vindication — and they argue that vindication is a goal that our legal system should promote.

Our interviews with attorneys in the 1990-91 trials provide some hints on the role of non-economic stakes in civil trials. For the most part, our findings are negative. In 735 interviews, only three attorneys mentioned a desire for vindication as an explanation for why their case went to trial. Two attorneys said their case was tried because a party demanded her day in court; they were on the opposing sides of the same case, and each pointed his finger at the other’s client. Only a few attributed trials even in part to the desire of a client for a hearing or a public judgment. Nor did any other non-economic motive surface as a common explanation for these trials.

Why is vindication all but ignored by those attorneys as an explanation for trials? There are several possibilities. The attorneys may undervalue their clients' desire for vindication and focus on their clients' (and their own) economic interests in the litigation. Some attorneys may have become so acculturated to the professional view that trials are bad that they fail to notice that their clients actually want to go to court. If so, they might underestimate the role of non-economic factors in the clients' trial-seeking behavior: if a desire for vindication is driving their cases to trial, they don't see it.

It is also possible that the clients in most common litigation in California courts don't care much about having their day in court. Despite what some scholars think, they may in fact have no preference for public adjudication over private settlement unless there is an economic advantage. Finally it may be that many plaintiffs and defendants would prefer vindication at trial to private settlement, but they do not have the power to act on that preference and force a trial, since the defendant's insurance company and the plaintiff's attorney usually control the settlement decision. As the result, few of the cases that do go to trial get there because of a party's desire for vindication.

Other less direct data suggest that a desire for vindication was indeed at the root of many trials — at least in one type of case. As we've seen, 27% of these cases did not settle because defendants offered nothing to the plaintiff, at any point in the pretrial proceeding. This "zero-offer" rate varied across types of claims, from a low of 11% to 15% in vehicular negligence trials, to a high of 59% to 60% in medical malpractice trials. We believe the high rate of zero-offers in medical malpractice cases is best explained by the desire of physicians for vindication at trial.

Most physician malpractice insurance policies sold in California contain a "consent to settle" clause which requires the agreement of the doctor to any non-zero settlement negotiated by the insurer. Lack of consent is mentioned by an attorney as a cause of trial in 19 of the 32 1990-91 zero-offer medical malpractice trials, and we suspect that it was a factor in at least several other medical malpractice trials in which no attorney specifically mentioned it. We also know that the trial rate in medical malpractice cases is considerably higher across the nation than for any other category of personal injury litigation, and that doctors win defense verdicts in more than 90% of the cases in which there is no settlement offer at any point in the litigation. What explains these patterns?

What seems to be happening is that doctors are insisting on trial in some medical malpractice cases in which they expect to obtain public vindication. This is most likely to happen when the doctor is convinced that she acted in a professionally responsible manner, but has nonetheless been wounded in her self esteem and damaged in her reputation by a patient's claim that she committed malpractice. Cases where the defendant feels like that all the way up to trial are likely to be winners for the defense. In other contexts, insurance companies settle most odds-on winners for comparatively small amounts, in order to save trial costs and to minimize risks. Not here. Unlike other litigants, doctors have negotiated insurance contracts that give them the power to make that choice themselves. Moreover, since the insurance company remains responsible for the

defense costs and for damage awards at trial, the defendant doctor can usually reject a low settlement without undertaking personal liability for legal costs or for any judgment within policy limits. The usual result is a trial that the insurance company pays for, and the doctor wins. In other words, at least in one type of litigation where reputation and vindication are particularly significant for a coherent constituency of defendants, those defendants have been able to order their private relationships with their insurance companies in a way that protects that interest.

How might we change this system?

As we noted at the outset, a major — and successful — goal of lawyers, judges and rule makers is to promote settlements. We do not advocate an attempt to further reduce the extremely low trial rate in our civil courts, but if a further reduction is sought, our research suggests that some methods are more likely to succeed than others.

The techniques of encouraging settlement can be roughly divided between two approaches. The first set of techniques rely on *information*. They attempt to achieve settlement by providing unbiased information to the parties about the dispute. The second set of techniques rely on *incentives*. They encourage parties to settle by increasing the risks or reducing the rewards of proceeding to trial.

Information based techniques include judicially-supervised settlement conferences, mediation, and most other forms of court-sponsored dispute resolution. The theory is that if both parties to a dispute confront an evaluation of their case by a



At trial all deals are off, and all risks are restored. If you fail to settle

disinterested expert they are more likely to converge on a single estimate of the outcome, and to agree to settle. While such techniques may contribute to the existing low trial rate, our data suggest that they are unlikely to succeed in squeezing out many more trials. Mediation and similar procedures are probably most effective in helping the parties close the gap in their predictions of the jury's evaluation of damages, but that doesn't seem to be the main problem in the cases that go to trial. Predicting verdicts on liability is another matter. Most litigants on both sides already discount their estimates of damages in light of their uncertainty about the jury's decision on liability. On the plaintiff's side, that explains the large number of judgments that exceed the plaintiff's demand; on the defendants' side it explains the fact that in most cases with zero awards the defendants did offer money to settle the claims. The trials that occur nonetheless are primarily in cases in which the parties remain so far apart in their predictions of the decision on liability that they are willing to gamble on the jury's notoriously unpredictable verdict. In that context, no information from a disinterested expert is likely to change their minds.

The alternative to attempting to provide more information about the outcome of the case is to alter the rules under which it is litigated. The common method is to increase the risk of trial by requiring the losing party to pay some or all of the winners' legal fees. Other proposals change the structure of incentives at trial by limiting the damages that a party may recover, or the fees that its attorney may receive. We do not necessarily advocate such changes, but we do believe that they have greater potential to depress the trial rate than attempts to provide more information to litigants who are already willing to bear the risks and costs of gambling on trial

you must drop out entirely or pay a lot to gamble at high stakes.

on the basis of the best information they have been able to obtain. By changing the structure of costs and rewards it is possible to change the odds of favorable outcomes for one side or the other, or for both, across whole categories of cases. The result might be an overall change in the pattern of civil litigation, including, perhaps, a reduction in the number of trials.

Or perhaps not. For example, consider the effects of eliminating contingent fees altogether — an extreme proposal, and, in our opinion, an extremely bad idea. If that happened the number of civil law suits would be reduced drastically, at least in the short run; and the distribution of cases that were filed would change dramatically (e.g., a higher proportion of the remaining filings would be in commercial cases); new institutions would be created to cope with the new needs generated by the system (e.g., new systems for paying legal fees, including perhaps new forms of insurance); the pattern of settlements and trial outcomes would change in unforeseeable ways; and the number of trials *might* go down. But it also might not. It could turn out that we would still need as many trials as we now have, or more to define the contours of the new system.

Procedures that affect the risks of trial may also have the opposite effect. The risk of large jury verdicts on the one hand, and of defense verdicts on the other, weigh heavily in favor of settlement. Ancient procedural devices such as remittitur and additur, and newer ones such as damage caps and limitations on punitive damages, should (if anything)

increase the percentage of filed cases that proceed to trial. In addition, or instead, the parties to a lawsuit may agree privately to restrict the risk of extreme outcomes at trial. A striking example is a technique known as the “high-low agreement.”

A “high-low agreement” is a partial settlement in which the plaintiff and the defendant each insure the other against an extreme verdict. The plaintiff agrees to collect no more than a maximum amount specified in the agreement, regardless of a higher jury verdict, while the defendant agrees to pay no less than a minimum amount specified in the agreement, regardless of a lower jury verdict. High-low agreements have been reported since at least 1968. They are usually reached shortly before or during trial, particularly in personal injury cases involving large potential damages and uncertain liability; they are legal and enforceable.

High-low agreements permit private parties to limit the scope of a jury’s fact-finding on damages in ways that go beyond those permitted by the rules of evidence and summary judgment. Under this procedure, trial outcomes are constrained by the settlement negotiations that preceded them: the agreement to participate in this constrained trial is the last step of an incomplete compromise. The availability of this option (if the parties are aware of it) will tend to discourage full settlements and to facilitate trials. It’s no secret that our system of civil justice has generated a pent-up demand for *low cost* litigation. As a result, a procedure that lowers the cost of litigation — for example, a small-claims court — will increase the volume of litigation and the number of trials (albeit cheaper, quicker trials). The development of the high-low agreement demonstrates the existence of a parallel demand for *low risk* adjudication. Any technique, public or private, that reduces the range of

possible outcomes at trial could help answer that demand by making trial less scary, which might encourage more parties to take their chances and try it.

Conclusion

The essence of adversarial litigation is procedure. We define justice in procedural terms: the judgment of a competent court following a trial that was procedurally correct. When we want to improve our judicial system we pass a procedural reform, which invariably means elaborating old procedural rules or adding new ones — rules that govern the presentation of evidence and arguments, rules that create opportunities to investigate and to prepare evidence and argument, and rules that are designed to regulate the use of the procedures that are available to investigate, prepare and present evidence and argument. The upshot is a masterpiece of detail, with rules on everything from special appearances to contest the jurisdiction of the court to the use of exhibits during jury deliberation. But we can’t afford it. As litigants, few of us can pay the costs of trial; as a society, we are unwilling to pay even a fraction of the cost of the judicial apparatus that we would need to try most civil cases. We have designed a spectacular system for adjudicating disputes, but it’s too expensive to use.

We respond to this dilemma on two levels, private and public. The private response is to create institutions that enable parties to aggregate the costs, risks and benefits of litigation across many cases: liability insurance for defendants, to pay for legal fees as well as damages, and contingency fees for plaintiffs. These structures make it possible for parties to prepare for trial, and to retain trial as an

The main function of trials is not to resolve disputes but to deter other trials.

option. The public response is to actively discourage trials. We provide some positive assistance in reaching compromises, but the main push is negative: Litigants learn to avoid trial in order to reduce their risks and save their money. Formal litigation is presented not as an adjunct but as an alternative to private settlement; not as an aid but as a threat.

The main function of trials is not to resolve disputes but to deter other trials. And they do, very effectively. One consequence is that those few cases that do go to jury trial — perhaps 2% of civil filings, and less than 1% of all civil claims — are very different from the mass of cases that settle. They are typically high-risk, all or nothing cases, cases with unusual facts or intransigent parties, cases that defy compromise. Their outcomes, by comparison with ordinary work-a-day settlement cases, are costly, unpredictable, and sometimes bizarre. Since jury trials and jury verdicts are the most visible products of litigation, these extreme and unrepresentative cases distort public perception of the administration of civil justice. In the process, they perpetuate the image of litigation as terror, which helps drive all but the most hopeless disputes out of court, which means that any general policy based on what happens in those cases that are tried will be misconceived.

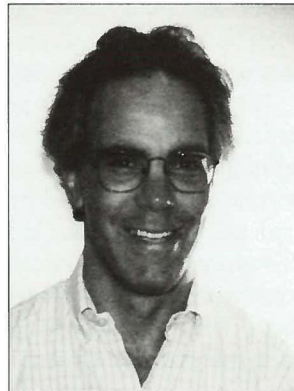
In 1921 Learned Hand wrote that “as a litigant I should dread a law suit beyond almost anything else short of sickness and death” — a widely repeated and deceptively simple sentence. Judge Hand’s statement was not intended as a report of an idiosyncratic aversion, but as a judgment by one who ought to know that litigation is dreadful. Lesser judges and mere lawyers mostly agree, including us. Our research adds evidence to support one part of this widely shared

belief: those lawsuits that are fought to the end are indeed risky, costly, and unpredictable.

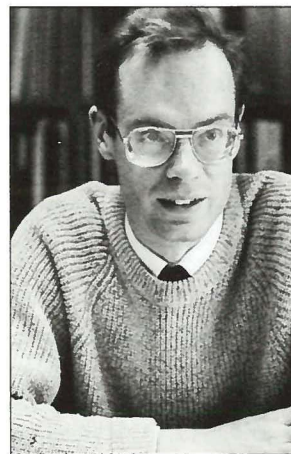
Hand’s main message, of course, is not a description, but an injunction: Don’t litigate. It is a concise expression of the repeated advice of generations of conscientious lawyers: Anticipate problems and avoid conflicts; if conflicts arise, resolve them privately; if at all possible, don’t sue. And when lawsuits are filed, this advice is transformed into the mantra of the judge: Settle. Every day in countless settlement conferences trial judges sell their own versions of Learned Hand’s wisdom: “They’re offering you \$70,000. A jury could give you \$150,000, but I’ve seen folks just like you come up empty, lots of times. If it were me, I’d be scared; I’d take it.” More often yet, this lecture is delivered by lawyers

long before any judge enters the picture.

There is another injunction that could be embedded in Judge Hand’s aphorism: Our system of justice is terrible, and we must change it. But we don’t understand him that way anymore than we interpret him to mean that a dispute is an injury and a lawsuit the process by which it is healed. We not only accept as a fact that it is the *lawsuit* that is the disease, we seem to relish it. If trial were a safe, soft, reassuring process, many more disputants would seek trial and the courts would be overwhelmed; they’re struggling as it is at a 2% trial rate. But there’s no cause for concern. The major elements of the system — adversarial factfinding, trial by jury, contingent fees, liability insurance — all fit together to make trial the dangerous event we need to drive nearly everyone to settle.



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