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Pre-trial Settlement: Who's for two-way offers?

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Abstract

This paper reviews the use of cost shifting devices intended to encourage pre-trial settlement. Both the well-known instrument of judicial offers (tenders) and the more recently introduced pursuers' offers are discussed. Numerical examples are provided and experimental evidence is reviewed. Both sources create some doubts regarding the efficacy of such devices in encouraging settlement. There is a strategic aspect of negotiating that is encouraged by these rules. In essence, these arrangements impart a certain amount of power to one side or other. This influences the level of settlement (if any), but may also reduce the probability of reaching a settlement. Abandoning such arrangements, while somewhat contrary to conventional views may well be a positive step in encouraging pre-trial settlement.

JEL Classification: K4.

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I. Introduction

Use of judicial offers, or tenders, is a long-established negotiating procedure in civil actions for damages in Scotland[1]. These are made by the defender as an offer to settle the claim without prejudice as to liability. There are various technical requirements regarding allowing a reasonable time for consideration of the offer, being explicit regarding expenses and so on, but the mechanism is a popular and robust one. The arrangement is meant to encourage sensible offers to settle a claim by holding out the prospect that should the judge's award of damages at trial be no more than the tender, then the pursuer is liable for the taxed costs of the defender and for their own costs from the time that the tender was made.

A similar situation exists in England and Wales in terms of cases involving debt or damages, although there is a requirement there for the defendant to make an actual payment into court. This system has been recently extended by the introduction in 1976 of the Calderbank offer[2] which extends the scope of cases in which defendants' offers to settle can be made and avoids the need in these cases for actual payment into court. In his review of the civil justice system in England and Wales, Lord Woolf (1995, p. 194) proposed extending and liberalising the system still further.

In jurisdictions such as Australia and Canada[3] systems were introduced in the 1980s allowing the pursuer to make similar offers to settle. In 1991 these systems[4] came to the attention of Lord President Hope who had his private office conduct some

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[1] Walker (1974, p. 1099) refers to cases as far back as 1847 in his discussion of tenders.
[2] See Zander (1997, p. 54).
[3] See Hutchinson (1985) and Civil Justice Quarterly (1986).
[4] Discussed at Chapter 34A in the Rules of the Court of Session. The rules in question existed in British Columbia, New Brunswick, Nova Scotia, Ontario and Saskatchewan in Canada and New South Wales, Queensland, South Australia and Victoria in Australia.

research into these matters. Lord Hope also drew the existence of these Australian and Canadian rules to the attention of Lord Woolf's Committee of inquiry. Lord Woolf (1996, p112) regarded offers to settle as 'capable of making an important contribution to the change of culture which is fundamental to the reform of civil justice' and included among his recommendations a system of offers to settle. This system would allow the plaintiff to make an offer to settle, and to enjoy additional interest[5] on any damages awarded in the event of beating this offer (i.e., where the offer is not accepted and the award at trial is for at least as much as the amount at which the plaintiff offered to settle).

In Scotland the idea of pursuers' offers received a favourable comment from the Cullen Report (1995: p59), which backed the proposals then under consideration by the Court of Session Rules Council noting that "the defender should normally be found liable in expenses at an increased level where the pursuer has succeeded in 'beating his own offer" '. Indeed, after some consultation, the Rules Council of the Court of Session agreed to introduce a system of pursuers' offers for an experimental period of two years. The innovation was not universally popular and, as explained below, the actual wording and design of the rule was unfortunate, the penalty chosen being "not the most appropriate", in the words of the Court of Session Rule Book.

Instituted with effect from 23 September 1996, the new procedure was withdrawn some seven weeks later, on 14 November 1996. The original Act of Sederunt[6] included the following terms in Rule 34A.6(2)b,

> *Where the pursuer is awarded a sum equal to or more than the sum*
> *specified in the offer to settle, he shall be entitled, from the defender to*
> *whom the offer to settle was made –*
> *a) unless the court otherwise orders, to the expenses of process*
> *(including any additional fee under Rule 42.14) as taxed by the Auditor;*

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[5] In the final (1996) Report, Lord Woolf suggests: a 25 percentage point interest premium on damages of up to £10,000; a premium of 15 percentage points on damages of more than £10,000 and up to £50,000; and a premium of 5 percentage points on awards over £50,000. These interest payments are to run from the date of the relevant offer to settle.

and

b) to a sum equal to the taxed amount of those expenses (excluding any additional fee under Rule 42.14).

Not only was this procedure precipitously withdrawn, but an award that qualified under its terms was denied after appeal to the Inner House of the Court of Session[7]. The design of this cost-shifting rule can be seen to be flawed in two ways. First, as the sanction in section b) above is calculated on taxed expenses and as the offer could be submitted any time before judgement is made (or before the jury retires to consider its judgement) there is, far from an incentive to settle early, an incentive to delay serious negotiation. With delay comes increased costs to both sides and, hence, the prospect of additional gains to the pursuer should the conditions of clause 34A6(2)b be applied. Concerns were also raised regarding cases where the quantum of damages is not in dispute. In such cases it was claimed that the pursuer could obtain an advantage by making an offer to settle at that level, thereby increasing the stakes for the defender. In such cases, of course, the defender has a not dissimilar advantage through the use of a judicial tender.

Second, there is serious legal debate on whether the authority exists to award anything more than actual expenses incurred, and specifically to award a penalty beyond the actual expenses incurred in preparation of the case for trial. It is on this second consideration that the legal arguments centred at the appeal stage, but from an economic perspective it is the first that is the more important. It is clear that careful modelling of the incentive effects of any such procedural rule is vital.

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[6] The devolved power under which such procedural changes are made in the Scottish Legal System. Rules of the Court of Session Amendment No. 6, 1996 (S.I. 1996 No. 2769).

[7] The case in question is William Copland Taylor against Marshall's Food Group and was heard by the Lord President (Lord Rodger of Earlsferry), Lord Coulsfield and Lord Allanbridge. Opinion 26 June 1998.

II. What is to be expected? The case of judicial tenders.

When two parties to a dispute meet to negotiate, they each have an idea of what the outcome is likely to be if they end up in court. This view colours their pre-trial (indeed pre-law suit) negotiation and is known as 'bargaining in the shadow of the law'. Posner (1992, p 554) suggests a simple way of analysing the situation. Let us assume that the pursuer would expect a settlement of O_p and the defender a settlement of O_d. These figures would, of course, allow for the claim being thrown out altogether. If the parties display relative pessimism then O_p will be less than O_d and the scope for settlement is clear:

$$O_p \qquad\qquad O_d$$
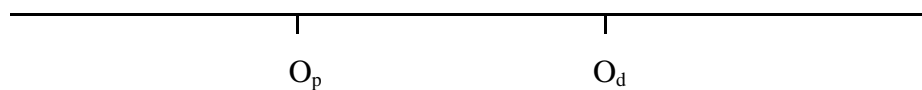
Any settlement in the range O_p to O_d leaves both sides feeling better off than if they had gone to trial. The introduction of total legal costs C which are borne by the defender with probability P (the probability that the case is proved) and by the pursuer with probability (1-P) (the probability that the case is thrown out), extends the bargaining range, or Zone of Possible Agreement as it is known in the negotiation jargon.

$$O_p-(1-P)*C \qquad O_p \qquad\qquad O_d \qquad O_d+P*C$$
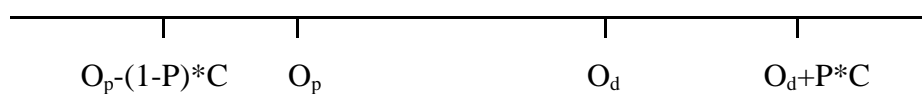
The important point is that the possibility of ending up in court makes settlement more likely owing to the fact that the legal costs involved extend the bargaining range by making the expected out of pocket expenses greater for the defender and the net gains to the pursuer less. Even in cases where the expectations of the parties makes settlement unlikely (relative optimism, where O_d is less than O_p) then the addition of prospective legal costs moves the parties closer together.

$$O_d \qquad O_d+P*C \qquad\qquad O_p-(1-P)*C \qquad O_p$$

The Posner argument is that the larger is the bargaining range, then the more chance of the two parties finding a mutually advantageous out-of-court settlement. A numerical example may clarify these points and allow us to introduce judicial offers into the picture. The number are chosen for arithmetic convenience and should not be taken as a realistic representation of any case. Assume that both parties agree that if the case comes to court then the quantum of damages awarded is likely to be in the range £50,000 to £250,000, but with any outcome in that range being equally likely. The average outcome is, therefore, £150,000. Assume further that each side is set to incur some £75,000 of legal costs and expenses (remember, this is only an example). Finally, assume that there is a one in four chance that the case will fail at proof.

If the pursuer and defender go to trial, then we can see that the expected or average gain at trial to the pursuer is a gain of £150,000 three out of four times but a legal bill (loser pays) of £150,000 the other one out of four times. The net outlook is, therefore, £75,000. From the defender's viewpoint the prospect of going onto trial brings an expectation of paying out an average of £150,000 in damages plus £150,000 in costs three out of four times and having no out-of-pocket expenses the remaining one out of four times (neglecting the difference between solicitor and client expenses and taxed expenses). The net position is £225,000. Any settlement in the range £75,000 to £225,000 leaves both parties better off than going onto trial.

The possibility that the defender could avoid some of the loser-pays-costs burden by entering a judicial tender, shifts this negotiating balance. For example, if the defender makes a judicial tender of £162,000, then, from what we know about the chances of various trial outcomes, there is a 56% chance that the judge's award will not exceed this number (£162,000 is 56% along the range £50,000 to £250,000). Thus, although above the defender would be liable for both sides' expenses three out of four times, we now have the complicating factor that in 56% of these times the

judgement will be such that costs are reversed and fall on the pursuer. The expected outcome[8] at trial for the defender is now £162,000 and for the pursuer[9] is £12,000.

This offer was chosen on purpose as an illustration as it can now be seen that there is now no incentive for the defender to offer or consider settlement at any level above this figure. Whereas in the absence of judicial tenders the defender would have been better off at any settlement up to £225,000 than at trial, this is no longer true. At the lower end it can be seen that an offer of as little as £66,000 is now possible[10] as this would have an 8% chance of being above what the judge awards, and leave the pursuer an expected outcome of £66,000. Offers below this (even if made as tenders) would be rejected by the pursuer as trial would leave the pursuer better off. But note that offers below the previous minimum of £75,000 if made as judicial offers are now preferred by the pursuer than going to trial with such a tender in place.

Thus, is can be seen that the range of negotiation has shifted from £75,000 to £225,000 (a range of £150,000 with a mid-point of £150,000) to a range of £66,000 to £162,000 (a range of £96,000 with a mid-point of £114,000). The bargaining range has shifted in favour of the defender (i.e., towards lower payouts) and has shortened. This last fact sits uneasily with the claim that judicial offers (or tenders) encourage settlement.

These results are contrary to intuition. At first blush, it would seem as if the possibility of often non-trivial legal costs falling on an otherwise successful litigant who has refused what subsequently is judged (literally) to be a reasonable offer can only have the effect of making settlement more likely. Increasing the tendency to settlement is

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[8]With an tender of £162,000 there is a 56% chance that in the 75% of outcomes where the claim is found valid then the damages awarded are less than or equal to £162,000. This gives an overall

$$=(0.75)*(50000+250000)/2+(.75)*(150000)-(0.75)*(150000)*((162000-50000)/(250000-50000))$$

As will be seen below, the £162,000 figure is chosen on purpose.

[9] After trial the difference between the two sides' positions is different by the £150,000 that has gone on legal costs.

[10] With an tender of £66,000 there is an 8% chance that in the 75% of outcomes where the claim is found valid then the damages awarded are less than or equal to £66,000. This gives an overall expectation of:

£66,000

$$=(0.75)*(50000+250000)/2+(.75)*(150000)-(0.75)*(150000)*((66000-50000)/(250000-50000))$$

generally regarded as a beneficial outcome in that it reduces legal transaction costs. And, indeed, the outcome for some who choose to reject a payment into court can be drastic.

Consider, for example, the case[11] of Kwasi Minta, a person badly burned in the Kings Cross Tube Station fire in 1987. Having turned down a payment into court of £355,000 from London Regional Transport, he was warded £110,427 damages in March 1997 after an eight day hearing in the High Court. This left Mr Minta liable for some £150,000 of LRT's legal expenses. Similarly, in a libel suit against the Sun[12] William Roache (who plays Ken Barlow in Coronation Street) rejected a payment into court of £50,000 only to see the jury award him exactly £50,000 in damages, thus leaving him liable for the Sun's legal expenses. Mr Roache subsequently sued his solicitors for poor advice, but lost this case and ended up with a legal bill said[13] to be in the region of £200,000.

In a study of 664 personal injury cases (1973-74), Zander (1975) reports that a payment into court was made in 41% (272) cases. Some of these offers were improved after initial rejection (77 cases) and overall the payment-in was accepted in 90% (244) of cases where it was used. But most litigants who refused a payment-in and continued on to trial were successful, with only two cases failing to 'beat the offer'. Our model above also serves as a reminder that negotiation need not be assisted by such arrangements -- particularly in terms of the impact on the negotiating range.

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[11] Reported in the Times on 27 March 1997.
[12] Reported in the Scotsman on 10 March 1998.
[13] The Times July 10, 1998.

III. With two-way offers.

The view that payments into court are successful in inducing settlement is sufficiently strong and pervasive that, as discussed above, both the Woolf Report (1995, 1996) and the Cullen Report (1995) give their backing to the introduction of two-way offers by approving of the extension of the payment-into court (or more strictly offer-into court) mechanism to the pursuer. A problem presents itself here, of course, as the pursuer who successfully 'beats their offer' is already entitled to have their taxed costs paid by the defender. Some additional sanction/ incentive is therefore necessary. In the Woolf proposal the device suggested is that there should be a penal rate of interest imposed on the awarded damages, to run from the date of the rejected pursuer's offer. In the scheme that emerged for the Court of Session Rules Committee, the defender was to pay the pursuer what amounted to double costs. In addition, under this experimental Scottish system the pursuer's offer could be lodged any time up to the point of avizandum or where the jury retired to consider its verdict.

Some of this finer detail will be discussed below, but consider first the general scheme in the context of the numbers already introduced. Assume for the moment that the impact of refusing a pursuer's offer which the judge subsequently betters at trial is to leave the pursuer with all costs paid, plus the awarded damages, and plus an additional premium of 50% of the awarded damages (representing, say, the impact of the penal rate of interest).

In this case, the defender would not offer any more than £180,050, as once such an offer has been made (as a tender) the only inducement to offer more would be if the pursuer placed an offer to settle of less than £180,050. But, in such a case[14] it would be pointless to offer more than £180,050.

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[14] With a tender from the defender of £180,050 and an offer to settle from the pursuer of £180,050 the expected outcome at trial to the defender is
£180,050
 $=(0.75)*(50000+250000)/2+(0.75)*(150000)-(0.75)*(150000)*((180050-50000)/(250000-50000))+0.5*(0.75)*((250000-180050)/(250000-150000)*(180050+250000)/2)$
which is the standard expectation at court less the impact of the 65% chance that in the 75% of times when the claim is found valid that the award will be less than the defender's tender of £180,050 and, consequently, the pursuer will have to pay the £150,000 of costs. Also plus the impact of the 35% of

Thus, the defender will never offer more than £180,050. At this point the expected cost of going to court has fallen to £180,050, so there is no incentive to increase the offer to the pursuer beyond this point when the expected cost at trial would be less. This is because with an defender offer into court (judicial offer, or tender) of £180,050 there is, as before, a 75% chance of having to pay the average damages of £150,000. There is also a 75% chance of having to pay all of the costs. The existence of a pursuer offer of £180,050 implies[15] that there is an expected extra £28,303 that will have to be paid on those occasions when the judge's award is more generous. On the other hand there is an expected[16] reduction in liability for costs of £73,153 when the judge's award is less generous than the judicial offer of £180,050.

In a similar vein, the pursuer has no incentive to consider an offer of less than £97,765 as for a lower offer to be attractive the defender would have to be making a tender offer of more than £97,765 , in which case there is no point in the pursuer lowering their demand. This is because if the pursuer made the £97,765 an offer into court then the expected outcome of going to court could be no lower than £97,765. This is because the expected outcome is the sum of the expected damages if the case is successful, the expected premium if in a successful case the award is above this amount, less any costs if the case is unsuccessful, and less any costs if the award is less than the defender's offer. This can be shown[17] to equal £97,765.

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the time when in those 75% of cases when an award is made that it is greater than the pursuer's offer to settle of £180,050 and the defender then has to pay a 50% premium on the damages in question.

[15] As before, there is a 75% chance of the having to pay out average damages of £150,000 and a 75% chance of having to pay both sides' costs (£150,000), i.e., a net figure of £225,000. In the 75% of times when the claim is upheld, 35% (= (250000-180050)/200000)) of the time the award will be greater than £180,050. That is, 26% (= 0.75 * 0.35) of the time a premium will be due the pursuer. As the average award in the range £180,050 to £250,000 is £215,025 (= (180,050+250000)/2), the

[16] In the 75% of times when the claim is upheld, 65% (= (180050-50000)/200000) of the time the award will be less generous than the judicial tender of £180,050. This means that 49% of the time (= 0.65 * 0.75) the pursuer will consequently be liable for costs. This effects a reduction in the overall cost of trial to the defender of £73,153 (= 0.48 * 150000). The net position from the defender's perspective is, therefore, £180,050 (= 225000 + 28202 - 73153).

[17] From the pursuer's perspective, as before, there is a 75% chance of the average damages of £150,000 and a 25% chance of having to pay both sides' costs (£150,000), i.e., a net figure of £75,000. If the defender makes an offer into court of £97,765 then there is a 24% (= (97765-50000)/200000) chance that this will exceed the judge's award, thus leaving the pursuer with an additional expected costs bill of £26,868 (= 0.75 * 0.24 * £150,000). With a pursuer offer of £97,765 there is a 76% (i.e. (250000-97765)/200000) that the judge's decision is more generous than this in

Note that in this example (and indeed as can be shown in general, see Main and Park 1998 a, b) the negotiating range (or 'zone of possible agreement' as it is known in the negotiation literature) has contracted. Originally in the absence of any judicial offers any settlement between £75,000 and £225,000 (mid-point £150000 and a range of £150,000) would leave both sides better off than trial. Then with judicial offers only, any offer between £66,000 and £162,000 (mid-point £114,000 and a range of £96,000) would leave both sides better off than trial. Finally, with two-way offers, an offer between £97,765 and £180,050 (mid-point £138,908 and a range of £82,285) would leave both sides better off than trial. The range in which agreement could be found has successively shrunk from £150,000 to £96,000 to £82,285. This could be regarded as forcing the parties together, but it merely restricts the range of agreement and enhances the possibility for error, miscalculation and misunderstanding.

It is also clear from these considerations that it is important to have the settlement and cost-shifting rules designed in a way that provides the desired incentive towards early settlement. Thus the usual rules for payment into court or judicial tenders is that any benefit arising from making such an offer will be calculated from the point when the offer was made. The earlier the offer is made, the greater the advantage. This encourages the early use of good faith offers. The Woolf proposal for penal interest rates to be charged on the damages and to be calculated from the time the plaintiff's offer was made provides a similar incentive towards the early lodging of a good faith offer to settle on the part of the plaintiff. But the recent version of the pursuers offer, as discussed above in the context of Taylor v Marshall's Foods, was not designed in an appropriate manner. This rule, in fact, provided an incentive to the pursuer to delay for as long as possible the lodging of anything like a reasonable offer. The longer the case ran, then the greater would be any eventual

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the 75% of the times the judgement is in favour of the pursuer. There is, therefore, a 57% chance of a 50% premium. The average award on which such a premium would be calculated is £173,883 (= (97765+250000)/2). This amounts to an expected £49,633 (= 0.75 * 0.76 * 0.5 * 173883). The net impact is, therefore £97,765 (= £75,000 - £26,868 + £49,633).
Putting this all together, the expression is
£97,765
 =(0.75)*(50000+250000)/2-(1-0.75)*(150000)-(0.75)*(150000)*((97765-50000)/(250000-
       50000))+(0.5)*(0.75)*((250000-97765)/(250000-50000)*(97765+250000)/2)

penalty which was to be computed on the basis of the pursuer's costs. In addition there remained some ambiguity as to whether the costs concerned were to include expert witness fees and the like. In any case, far from there being an incentive towards early treating, there was an incentive to delay -- particularly in cases when the damages quantum involved was unambiguous.

IV. Experimental evidence.

Although certain prominent cases concerning judicial offers and pursuer offers are well reported, there remains a paucity of data in this area. It has also proved an area in which data collection has been difficult, either due to access to records or to confidentiality. To provide some consistent basis on which behaviour under various cost shifting schemes could be studies, the authors conducted some experiments under controlled conditions. Using computer technology, pairs of bargainers were observed under different cost shifting rules and their behaviour analysed for consistent differences.

Participants in these experiments were assigned a role as either a pursuer or a defender. The pursuers knew they had a claim against the defender, and that if the claim went to court the judge would decide for them 75% of the time, but dismiss the claim the remaining 25% of the time. It was also known that, if the claim was accepted as valid, the judge would then decide damages by choosing a number between £2,000 and £10,000 with any number in that range being equally likely. The legal costs of failing to agree and going to trial are £3,000 to each party with the general rule of loser pays in force.

Those assigned as defenders are provided with exactly equivalent information. Each participant sits in front of a computer screen and exchanges offers and counter-offers using some purpose built software. There are a series of such negotiating games run, and each time different random pairings of the pursuers and defenders are used, with no party ever knowing the identity of the either party. A total of 15 experiments

are conducted, with the first three being for practice and the subsequent 12 being run under different cost-shifting regimes.

Each of the games lasted for some three minutes. During this time, either party could elect to go to trial. At the end of each three minutes a "trial" outcome was imposed on pairs who had not come to an agreement. In such cases, liability was decided by spinning a roulette wheel. A number between one and nine indicated rejection of the case at trial. A number of 10 to 36 indicated that the claim was held to be valid. When a valid case emerged, the quantum of damages to be imposed was chosen by turning a bingo cage with balls for all numbers between 20 and 100 (taken to be the level of award in £100s). The ball chosen at random (each being equally likely) was the figure used for damages. This process was repeated (with replacement of the balls) at the end of every game.

Participants were each give sufficient "money" to ensure that in any possible trial outcome they had enough reserves to meet any payments due. The defenders were trying to hold on to as much of this endowment as possible and the pursuers were trying to add to it by as much as possible. Defenders wanted low settlements and pursuers wanted high settlements. Each wished to avoid legal costs.

The endowment was renewed at the start of every game and participants were rewarded by payment of cash at the end of the session based on their respective performance on one of the games chosen at random. The incentive was in place to treat each game seriously. Payments ranged from a low of £5 (guaranteed minimum for participating) to a high of £32.

The results can be summarised as follows. There was no significant change in the proportion of pairs of "litigants" who settled. This proportion was a fairly steady 70% to 78% across the various sessions. In the games with no offers-into-court possibilities, the average agreed settlement among those avoiding court was £6627. It was noticeable, however, that with defenders offers only the settlement were more pro-defender (averaging £6324 in one set of games and £6306 in another) while in the

two-way-offers situations the average settlements observed swung back somewhat towards the pursuer (with an average settlement figure of £6599).

These results (presented in some more detail in Table 1) at least suggest that cost-shifting settlement procedures such as judicial offers and pursuers' offers to settle may do little to encourage the rate of settlement but may add power to one side's negotiating position at the expense of the other party.

V. The way forward.

The Rules Committee of the Court of Session is currently reconsidering the wording for a pursuers' offer to settle procedure. It would seem to be important that those responsible should be clear as to their objectives. If increased settlement is desired (although pre-trial settlement already occurs in over 90% of cases), then an expansion of the negotiating range might be desired. Providing strategic advantage to one side over the other, as has been seen above, is no way to bring about this result. If early settlement is the objective, then rules should reward the avoidance of delay. Woolf's punitive interest rate has much to offer here. If the idea is to engineer settlement without running up excessive costs, then alternative dispute resolution may offer a way forward.

As the Taylor v Marshall's Foods case illustrated, the imposition of incentives may bring with it the implicit imposition of penalty against the party held to be at fault for intransigence or delay. This penalty may well deviate from the more narrow, but widely accepted, notion of accepting a certain share of expenses incurred. Penalties in the form of wasted cost orders exist, but these focus on responsibility for observable expended costs. Tiplady (1991) suggests a nice way of finessing this problem, normally by awarding costs on a solicitor and client basis rather than an inter-parties basis. In the course of the Taylor v Marshall's Foods appeal it was suggested that such an arrangement might in that particular (but not too typical) case have been empirically close to what the original Court of Session rule suggested (double costs).

If penalties as such (either to be paid to the court or to the opposing party) are to be imposed then legislation may be required. There is much to recommend penalties paid to the court. This has the effect of extending the negotiating range and hence expanding the prospect fro settlement. It also, needless to say, brings an additional source of revenue to the court which may allow the mitigation of more burdomesome charges elsewhere.

VI. Conclusions.

The analysis presented above has raised the possibility that we have the wrong idea about the effectiveness of tenders and other cost-shifting rules as far as their beneficial effects on the propensity to settle go. From the perspective of the Posner (1992) "bargaining in the shadow of the law" approach, it may well be that the introduction of such procedural rules does more to shift bargaining power in favour of one or other of the parties than it does to encourage settlement.

The experimental evidence that we have collected (Main and Park, 1998a b) provides some empirical support for his view. The additional complicating factor of risk aversion would, in many situations, simply amplify the shift in power and encourage the very strategic use of this power shift that brings about the reduction in the bargaining range, or zone of possible agreement.

It may well be that pre-trial negotiating behaviour is completely different in spirit from the type of analysis presented above. It would be strange indeed, of course, if it were so arid and dry. It would be equally strange, however, if the rational approach that lies behind our analysis were to be completely missing. Perhaps not in an explicit manner, but at the very least in an implicit manner possibly through learned modes of behaviour, we can expect there to be a connection between the rather theoretical analysis presented above and real world practice.

In this light, if the main impact of introducing pursuers' offers to settle is simply to restore some of the bargaining power ceded to the defender through the judicial offers

(tenders) option, then it might be better to do away with all such cost-shifting incentives to settle. This is particularly true if the additional complexity also reduces the bargaining range.

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Table 1A - Basic Results for Experiment 1

| | Cost Allocation Mechanism | | Total |
	English	English with Defendant offers into Court	
No of Settlements (f)	83 (72.8%)	82 (71.9%)	163
No of 'Gone to Courts'	31 (27.2%)	32 (28.1%)	63
Total	114	114	288
Value of settlements (Y)			
Mean (μ)	6626.5	6324.4	
Std. Dev.	825.96	759.56	
Minimum	5000	4000	
Maximum	8500	8400	
Range	3500	4400	

Table 1B - Basic Results for Experiment 2

| | Cost Allocation Mechanism | | Total |
	English with Defendant offers into Court	English with both side offers into Court	
No of Settlements (f)	82 (75.9%)	77 (71.3%)	159
No of Trials	26 (24.1%)	31 (28.4%)	57
Total	108	108	216
Value of settlements (Y)			
Mean (μ)	6306.1	6598.7	
Std. Dev.	1460.6	1226.8	
Minimum	4000	4000	
Maximum	14900	13000	
Range	10900	9000	