

15 STRICT LIABILITY FOR LAWYERING

May you have a lawsuit in which you know you are in the right.

—*Gypsy curse*

It's not as if lawyers can't be sued. Indeed, they get sued all the time. But the major type of suit that is allowed against them actually tends to make matters worse. That is the malpractice suit from one of their own clients.

Today's law graduate can reportedly expect to be sued for malpractice at least three times in the course of his career. The *National Law Journal*, describing the trend as an "epidemic" and "deluge," has reported that in the two years up to June 1988 nearly 40 percent of law firms got sued. The average settlement per case has increased threefold over the past several years, according to Patricia Myers of Shand, Morahan & Company: "What used to be a \$5,000 mosquito bite is now a \$100,000 shark bite."

Record verdicts follow each other at a rapid clip. Texas trial lawyer John O'Quinn, of the full-page Yellow Pages ad and telephone hotline, got a jury to hit the Houston law firm of Sewell & Riggs with a \$17.5 million verdict, including \$7.2 million in punitive damages, for allegedly giving bad advice that caused Ali Ebrahimi and Yousef Panaphour to get sued in connection with a speculative real estate syndication deal. Local observers believed that the Houston verdict in part reflected jury hostility to lawyers as a group—a base sentiment that through the alchemy of courtroom advocacy could be transmuted into a golden contingency for, inevitably, another lawyer.

Not surprisingly, insurance rates for law firms went up six- or sevenfold over a decade, with deductibles doubling or tripling and policy limits cut back. A few trial lawyers have publicly hinted that the wicked insurance companies are to blame for this spiral, but inconveniently for that theory much of the coverage is in fact provided on a cooperative basis by lawyer groups themselves.

The rise in lawyers' malpractice suits does not appear to track any great surge in the number of incompetent legal practitioners; beginners' errors don't seem to be the problem, for example, since veterans in the business actually run into more claims. In language that other professionals would instantly recognize, lawyers' practice manuals are mournfully advising that no degree of care and precaution can wholly protect an attorney from these suits.

A good many suits are aimed at the less adversarial sort of lawyers, the ones who draw up trusts and foundation papers, give advice on taxes and estate planning, draft business deals, and so forth. But all in all the lawyers of peace get off relatively easy. With what might seem to be Homeric fitness, more than half the avenging fury is visited on the race of litigators themselves, especially the plaintiffs' accident lawyers, who are the targets of around a quarter of all legalmalpractice complaints.

This should come as no real surprise. Like amateur rugby, demolition derbies, and other hostility-releasing pastimes, litigation has been known to cause injury to its enthusiastic participants. The more restless contestants, recruited and warmed up with hints of gigantic purses in the offing, are put through the grueling scrimmages only to land, very often, in the most ruinous sort of "bad outcome" (as other professions have

delicately come to refer to their clients' setbacks): in this case, a defense verdict. The question naturally arises: couldn't the lawsuit have been won if handled differently? Trial advocacy, with its skilled judgments under time pressure, will often yield to a second opinion in hindsight. And of course the client can ignore any papers he signed knowingly accepting a risk of loss; remember, contract disclaimers are unfair to consumers.

Resolving a suit charging litigation malpractice commonly calls for a technique known as the trial within a trial. The client's new lawyer argues that the original claim, which may have failed before an earlier jury, would surely have won if not for the original lawyer's sad lapse in judgment. Lawyer number one, now the defendant, may be reduced to arguing that the case he accepted and perhaps touted as unbeatable at the time was in reality quite spurious and would have been shot down no matter what. That requires him to reconstruct the case of the original (now absent) opponent, with little hope, of course, of getting much willing cooperation from the actual people he has so recently been suing.

Exotic damage theories have proliferated in lawyers' malpractice as elsewhere in the law. In the old days, when courts distrusted "speculation" in damage assertions, the client had to show that his claim would have been a virtually sure winner had it been handled properly. That kept out all but the strongest litigation malpractice claims. Now many courts are happy to turn probabilistic hurts and might-have-been injuries into cash; some of them have even embraced what is known as the "loss-of-a-chance" doctrine, which makes doctors pay if they did anything to worsen the chances of a patient who would probably not have pulled through anyway.

When it comes to litigation, unlike medical prognoses or prospects of operatic stardom, it does not seem all that strange to reduce the vicissitudes of the future to a single dollar figure. Lawyers do it all the time when they calculate settlement values. So it has begun to be argued that to avert the need for the cumbersome trial within a trial, the lawyer who bobbles a claim should simply be made to pay over to the client the settlement value of that claim as gauged by (dueling hired) experts. The notion has a certain logic, but observe its odd result: it gives clients an enforceable right to cash in on a claim that was provably baseless but whose nuisance value gave it an undeniably positive settlement value.

Other generous damage theories also come back to haunt today's litigator-defendant. For example, the unhappy client may collect for his emotional distress in seeing his claim go down to courtroom defeat, on top of the inward trauma, if any, he suffered at the underlying injury. In much the same way, punitive damages can be stacked dizzily atop punitive damages. Or, more simply, the lawyer can be made to pay the punitive damages for which his original opponent could have been mulcted, though his own conduct would in no way have justified a punitive award. Racketeering claims, with their invigorating triple-damage entitlements, are of course being piled on, too.

Higher-order lawsuits over lawsuits do not yet appear common. Few clients line up lawyer number three to sue lawyer number two for blowing the malpractice case against lawyer number one. But Jonathan Swift had it all mapped out:

*So, naturalists observe, a flea
Hath smaller fleas that on him prey;
And these have smaller still to bite 'em,*

And so proceed ad infinitum.

This one particular outbreak of litigiousness is causing anxiety in some unlikely quarters. An article in *Trial*, the magazine for people who sue people, complains that the cost to a litigator of defending one of these suits can be even higher when the charges are unfounded than when they have substance. The author frets that the confused state of the law allows complainants "to throw in a RICO claim whenever a lawyer makes mistakes and to extort a settlement from a lawyer terrified of the racketeering taint." A former head of the Association of Trial Lawyers of America has said, rather defensively, that "obviously we are not responsible" for "mistaken judgment or shoot-from-the-hip calls during trial. . . . Just because our judgment was mistaken, just because the result was bad, that alone does not create liability."

It is certainly amusing to watch the high priests of recrimination gag as they drink from the chalice they have prepared for the rest of us. But *schadenfreude*—delight in others' well-deserved misfortune—is never a very reliable guide to policy. This mode of chastisement is not likely to teach its targets the desired lessons and is all too likely to worsen the plight of the rest of us.

Why? Because the whole point of a typical malpractice charge is that a lawyer did not fight hard enough. Many complaints arise from the failure to throw in a damage claim or legal theory that might have turned a modest jury award into a whopper. According to news reports, some lawyers reluctantly add RICO claims to their lawsuits because they fear that not doing so could open them to a malpractice charge. So-called discovery malpractice can consist of failure to depose an opponent or ransack its files with sufficient zeal. Some lapses that sound like instances of mere incompetence, such as missing deadlines, may in fact arise from shadings of professional opinion. A lawyer forbears to file papers in a suit, and a statute of limitations runs out; he may have been grossly forgetful, or may simply have felt in good conscience that the case at the time was not yet strong enough to warrant a claim. If later developments make it appear that the case had a good chance, he can be in big trouble.

In short, malpractice liability pushes lawyers to be even more combative and ruthless, more hostile to opponents' interests, than they would be of their own inclination. It is thus misleading to say that fear of malpractice charges encourages "defensive litigation," along the lines of defensive medicine: the better word would be offensive. Demanding extra crates of discovery documents helps forestall charges of being illprepared for trial. Filing lots of motions helps give clients a comforting sense that their suits are going somewhere. Not all the incentives, to be sure, cut toward hyperactive lawyering. Some malpractice-chary lawyers are turning away the most excitedly litigious clients, and others are more careful about spelling out why they advise not suing, which could be a good thing. But mostly the trend is perfectly consistent with today's lawyering excesses. In fact, some of the shrewder supporters of litigation have come out in favor of stringent legal-malpractice liability, however discomfiting it may be to their colleagues in strife.

Punishing lawyers for not beating up on their opponents thoroughly enough is not a very promising way to bring the litigation explosion under control. More constructive would be to lend a hand to those on the receiving end of the beatings. Not until 1983 did the first glimmerings of such help appear on the scene.

The 1939 federal rules of civil procedure had a few provisions meant to discourage false or ill-grounded pleadings, but they were essentially toothless. You could try to get an opponent's spurious pleading struck out, for example; but your proof on this point was not normally to be introduced until trial, and of course holding the case open for years until then might be the whole point. For a stronger remedy you basically had to prove your opponent was litigating in bad faith, which is hardly ever feasible. Litigators virtually never get caught on bad-faith charges unless they have been almost insanely indiscreet.

Why not? In the first place, part of a lawyer's training is in knowing how to couch actions so as to avoid crossing the line to provable bad faith. More to the point, bad faith among members of all other professions is commonly proved with the aid of discovery tidbits taken in or out of context. But the magic Cone of Silence of lawyer discovery privilege repels all such eavesdropping. Legal-malpractice suits, incidentally, are an exception to the normal rule of discovery privilege, because there the client waives the secrecy in his own interest.

The first serious attempt at reform came in 1983. It is called Rule 11, and it finally begins to hold lawyers and litigants accountable for the candor and plausibility of the accusations they hurl at their fellow members of society. There had been a rule numbered 11 in the Federal Rules of Civil Procedure all along, requiring lawyers to sign their pleadings, but no one had paid it much mind. The 1983 changes provided that by signing a pleading a lawyer vouches that its contents are well grounded in fact and law. If instead they prove unfounded, he or his client can be hit with real sanctions. Crucially, the rule was extended to cover signatures on motions as well as pleadings, providing a way for courts to curb abuse all the way through a lawsuit and not just at the start.

The requirement that a pleading be well grounded in fact does not mean a lawyer has to assemble proof of each allegation, let alone proof that will pass eventual courtroom muster, before filing suit. It does mean he must not ignore readily available proof that his suit is unfounded. Sanctions have been imposed in cases where a little basic checking would have found that a deadline for suing had expired, or that a claim had already been disposed of in court before, or that the opponent had not yet gotten around to committing the mischief he was suspected of planning.

Some courts have used Rule 11 to muzzle "shotgun" pleadings. The lawyers who filed one class action named as defendants everyone listed under the heading of mortgage lenders in the Philadelphia Yellow Pages; they were made to pay under Rule 11 to some of the miscellaneous defendants swept in. The same lesson was taught to three insurance companies that, after the collapse of the Continental Illinois bank, filed allegations of fraud against too wide a circle of persons connected to the bank. Federal Judge Milton Shadur said this "unexamined assertion of serious charges against innocent parties" had apparently been premised on the view that it cost "nothing more to have sued 36 defendants rather than 31"; he called it a "collective-farm approach to litigation, scarcely appropriate to the capitalistic free-market society in which [the insurers] function."

The requirement that a filing be well grounded in the law, as distinct from the facts, is a bit more complicated. Lawyers constantly urge courts to revise or extend existing law, and the rule does not penalize them on that account alone. What it does require, according to most courts that have ruled on the issue, is that they flag their argument as a departure from existing doctrine and alert the court to squarely opposed precedent. If

consistently enforced, this might discourage the favorite ploy of leading courts into a virgin wilderness of new doctrine while assuring them that they are following the path of precedent.

Legal positions can be hit with sanctions if they are so outlandish that no reasonable observer could expect them to go over. Former Attorney General Ramsey Clark was penalized after he filed suit against President Ronald Reagan, Prime Minister Margaret Thatcher, and the government of Great Britain demanding reimbursement for residents of Libya who suffered losses from the 1986 U.S. bombing raid on that country. The rule has also been deployed against the tax protesters who urge for the umpteenth time that paper money is not legal tender or that the income tax is unconstitutional. Sanctions were likewise levied against a San Francisco lawyer/softball player who had been ordered out of the section of Golden Gate Park reserved for hardball and proceeded to sue the city and county, Mayor Dianne Feinstein, sundry police officers and officials, and the California Baseball Association on the theory (among others) that softball was symbolic speech covered by the First Amendment.

Rule 11 has brought relief to a long list of lawsuit victims who formerly had next to no effective recourse. Loyola University of Chicago was sued thirteen times by a woman whose medical-school application it had turned down; on the last round it succeeded in getting sanctions against her. An Arizona company had to go to Missouri to defend itself from a suit over a truck accident in Texas despite the complainant's "utter failure," as a court put it, to show that the defendant had even the "slightest connection" with Missouri for purposes of the suit; federal Judge John Nangle lambasted the opposing lawyer for not making a reasonable effort to look into the jurisdictional questions.

Rules against false pleading would have little bite if lawyers could get into court by saying nothing at all. So in line with the spirit of Rule 11, courts in a string of recent cases have been demanding more specificity in pleadings, especially where accusations are plainly invidious. Lawmakers in some states are helping out with measures aimed at identifying and screening out the weakest cases and issues at an early stage. Several states now require the complainant in a malpractice case to line up the opinion of an expert witness before, not after, filing suit against a doctor. Courts' new aggressiveness in granting summary judgment is part of the same trend. The 1983 round of rules changes also helped a bit in eliciting contentions by making pretrial conferences automatic within the first 120 days of a suit.

Equally welcome as a remedy for litigation abuse has been the application of Rule 11 to motion filings. Judges have started to grant sanctions against litigants who file timewasting requests for summary judgments to which they are plainly not entitled, or spurious post-trial motions after an adverse verdict to stave off the day of ultimate defeat.

A crucial question is whether Rule 11 allows judges to do anything about filings with some basis in fact that are grossly exaggerated or bulked out with add-on charges. If not, much abuse will continue: lawyers will go on with their Rumpelstiltskin-like requests to have a straw pile of merit spun into a gold heap of remedy. But help may be on the way here too. Ida Hudson was suing the company she worked for when it struck back with a counterclaim to which it attached a terrorizing dollar value of \$4.2 million. The judge applied sanctions to the company's law firm, not because the counterclaim had no basis at all, but because the damages asked for were so plainly and arbitrarily out of line with its

allegations. The next step is to apply this principle to original claims as well as counterclaims.

Some prominent litigators and like-minded academics have reacted with dismay to these modest initial efforts to bring the litigation industry under control. Their arguments will seem curiously familiar to those who have followed the story this far.

The most outrageous thing Rule 11 does (they say) is to saddle lawyers with liability for missteps that, although sometimes gross, were committed in good faith. Maybe the profession can learn to live with some controls on willful wrongdoing. But what will happen to its morale if liability begins to be applied for mere negligence, or—the ultimate horror—without fault?

Then, too, it is complained that whatever assurances may be made to the contrary, Rule 11 inevitably puts its lawyer targets under a cloud of stigma and bad feeling, seeming to label them as somehow unfit to practice after a single all-too-human error. The rule is furthermore said to stir up strife between parties who should stay on amicable terms because they may need to deal with each other in the future, namely opposing lawyers who are apt to meet again in negotiations.

The rule is also said to abet unfairness and discourage cooperation by leaving it uncertain who is liable for its penalties. Depending on a judge's sense of where responsibility lies, he can aim sanctions at lawyer alone or client alone or both together; at a lawyer who signed but did not prepare an offending paper or at one who prepared but did not sign it. For a while law firms themselves could be hit with sanctions, forcing the offender's partners to chip in, but the Supreme Court ruled in late 1989 that only individual lawyers were responsible. In short, the rule menaces the co-participants and higher-ups in a wrongful filing with a version of what is elsewhere called joint and several liability or enterprise liability—although here at least there are no reports, as there are from the wider arena of litigation, of 5 percent wrongdoers having to pick up the tab left by 95 percent wrongdoers.

Even more fundamentally, the critics complain that Rule 11's standard for liability is vague and unpredictable. Judges have so much leeway in deciding what is sanctionable that they come out with rulings all over the map or even (some darkly hint) play favorites among classes of litigant. In many borderline cases it is not easy for a lawyer to predict beforehand what kind of shoddy filing will trigger sanctions and what will slip by. Fordham law professor Georgene Vairo warns that the result could be to "chill" creative litigation by making lawyers feel less comfortable in stretching legal principles to their limits or even setting their work to paper.

Finally, like all forms of legal activity, Rule 11 costs time and money to carry out and is sometimes used as a tactical weapon. The rule might seem like a bargain as procedural devices go because it is often aimed at very costly misconduct and yet seldom calls for barrages of discovery or pricey expert witnesses. Still, the time and money spent on this one form of "satellite" litigation deeply distresses some trial lawyers who otherwise are wont to deride complaints of the wastefulness of legal process. On this single issue, if on no other, they argue that the power of courts to rectify human failings has its natural limits, that the compensation of victims must be balanced by a due concern for freedom of action, that there must be an end put to conflict.

Now that all these arguments have at last been endorsed by litigators worried about their own liability, perhaps they will be taken with due seriousness when made by everyone else. If the imposition of Rule 11 is vague and unpredictable, revising it should be a high priority. But logic points toward revising it forward, toward fuller accountability for lawyers, and not backward to the days of lawyering with impunity.

One step toward making Rule 11's application more uniform and predictable would be for judges who have been ignoring the rule to catch up with their brethren. Courts are not only allowed but instructed to apply sanctions when they see a violation, and to do so on their own initiative, without waiting for an opponent to object. Some jurists have used the rule quite vigorously to raise the standards of practice in their courts. But others turn down nearly all requests. Many states have not adopted versions of Rule 11 at all, or enforce it only with great laxity, making it hard to get relief for misconduct in litigation however egregious.

It is important to draw a clean and predictable line on which victims of meritless litigation deserve compensation and which, if any, do not. One extensive survey reports that European courts have found it relatively hard to police distinctions between "frivolous" or bad-faith lawsuits and others. Rule 11 is sometimes spoken of, quite wrongly, as if it banned only "frivolous" litigation; but that word appears nowhere in the rule, and its coverage is plainly broader than that.

There is another place to draw the line on which litigants deserve compensation from their opponents, a line that is considerably cleaner and more intuitive. All that is needed is to recast the concept of meritlessness to reflect the best guess the legal system ever winds up making about the merits, namely the outcome of trial and appeal itself. Before describing the kind of rule that would emerge, however, it is well to step back and discuss one further facet of the Rule 11 controversy.

That is what might be called the issue of damages. How much should a wrongful litigator pay to the opponent he has harmed? Should he be let off with a warning or light penalty? (The lawyer who filed the softball suit was made to pay only a token fifty dollars.) Or should he be made an example of through punitive or treble fines, to avenge the court's dignity and achieve general deterrence of wrongful lawyering, much of which goes undetected? Or should he simply pay straight compensation for the knowable, nonspeculative expense to which he has put his opponent? Most trial courts to date have converged on this last answer. By far the commonest Rule 11 sanction in reported cases has been an award of the reasonable costs of response, mostly consisting of attorneys' fees.

The notion of awarding attorneys' fees to prevailing opponents is enough to trigger anxiety attacks in many American litigators, even those who are otherwise most hard-boiled (especially in them, in fact). It reminds them uncomfortably of the distinctive, peculiar American exception on lawsuit costs. Other civilized countries, with few if any exceptions, agree that the winner of a lawsuit deserves to be reimbursed by the loser for much if not all of the costs of the suit. Everywhere else it would be considered astounding and insupportable to afford no relief to the person or organization dragged into a civil lawsuit for years, made to unveil its internal secrets, and then vindicated on all issues.

Only America fails to recognize this right of redress. Both prevailing plaintiffs and prevailing defendants suffer from this injustice. Because attorneys' fees are normally unrecoverable in this country, plenty of valid, airtight claims trade at much less than 100 cents on the dollar on the settlement market, and others cannot economically be pressed at all: reportedly in Manhattan it is hard to get some contingency-fee firms to look at claims below \$200,000. One leading commentator sardonically observes that under the "American rule" it is always irrational to pay a debt or carry out an obligation in full once the other side has finished its performance. The imbalance creates a field day for the chiseler or defaulter in any line of work where money is pocketed before service is provided or vice versa: the sloppy building contractor, the flyby-night insurer, the crooked mail order house, anyone who lacks for one reason or another the strong aversion to being sued that most productive members of society share.

The contrary, "English" rule on costs, as it is called— though it might just as well be called the rest-of-the-world rule—seems so intuitively appealing that there must be another side to the story. If the American rule is so patently unjust, why did it ever take hold at all? And why has it lasted for more than a century?

Two arguments sometimes made for the American rule fail to impress on inspection. First, fee-shifting might appear to raise the stakes in a lawsuit by widening its range of possible financial outcomes, thus intensifying the combat and making litigation even more of a terror to private planning. Second, it might encourage the running up of lawyers' bills, given a case of preordained size, since clients may not watch a meter closely if they know for sure that the opponent will be the one who pays it.

It is hard to get observers from other countries to take these arguments seriously, since American lawyering is known around the world as hard-fought, uncertain, and expensive. The arguments are flawed theoretically as well. European systems typically hinge their finding of whether a litigant has "prevailed" on how close he came to achieving his demands. This furnishes a strong reason for litigants not to demand ten times more than they think the court is likely to give them. The resulting moderation of demands and sobering-up of exaggerations means that litigation inflicts far less financial uncertainty in Europe than here even when fee shifts are factored in. Fee padding is more of a potential problem, but allowing the losing opponent to litigate against the fee request sets up very heavy pressure against that abuse, and as we shall see below European systems arrange their fee-shift formulas so that even clients who prevail tend to be on the hook for many of their lawyers' marginal expenditures, giving them good reason to watch the meter.

What now may seem the most perverse feature of the American rule—its denial of fees to winning plaintiffs—may account for its original evolution. A rule against fee recovery hampers the pressing of claims that are not at all speculative, that are sure to win at trial; it hampers, in short, the pressing of valid claims. And that was apparently its foreseen and intended effect in early America. The backers of the original American rule were in large measure farmers and frontiersmen who wanted to stave off the enforcement against them of debts and mortgages about whose face validity there was no real doubt.

Depending on how stringently the English rule was enforced in those days, the debtors might have had a point. Shifting *all* the costs of enforcing a valid claim can be almost unimaginably harsh. Debt collection is the classic example. A borrower has stalled or fallen behind, the lawyers swing into action, and before long they get a judgment

against him for his two-hundred-dollar debt plus another eight hundred dollars in attorney fees. If every last dime in legal costs is recoverable from an opponent, lawyers can do a nice little business turning minor obligations into crushing burdens.

But European courts have found better ways to control such abuses than refusing fee recovery altogether. Their solution seems to be to low-ball the fee awards, so the winner can get back much but not all of what he paid his lawyers. In France some categories of costs cannot be recovered; in Britain the "taxing masters" (as the officials in charge of feeshifting are known) are relative pinchpennies; and so forth. Leaving a portion of costs to fall on the winner sacrifices some of the fairness and incentive considerations that make feeshifting so compelling in the first place, but the unpalatable alternative would seem to be the gross overkill of small claims. And in fact stinginess on winners' fee awards fits rather neatly into the view that litigation is an evil that should be discouraged. If courtroom strife is a costly and hurtful way of composing human differences, it makes sense to repress it to at least a small extent even for causes of undoubted merit.

Back in an era when most suits were predicated on a firm likelihood of success, the American rule probably cut down on the number of suits filed. What today seems strangest about it—that it actually encourages people to file doubtful and speculative suits—probably seemed like a relatively minor failing back then, if it was given much thought. An elaborate set of nonfinancial barriers still faced the feckless claimant, if not always the feckless claim-resister. In an age when pleading was strict, privacy until trial protected, home jurisdiction sacrosanct, legal solicitation forbidden, and so forth, the absence of one more major barrier to long-shot suits must not have seemed as significant.

But times have changed, of course, and the old barriers now lie flat on the ground. Rule 11, welcome as it is, does not in itself provide a comprehensive deterrent to wrongful litigation, or compensate all of its victims. And so the pressure to expand winners' fee recovery will inevitably grow.

In point of fact, it cannot be said that American law still hews to the principle of making each side pay its own costs. Feeshifting of one kind has already caught on in a big way, and now dominates wide tracts of the legal landscape. Unfortunately, it is a kind of feeshifting that shares the logic and neutrality of neither the English nor the American rule, while borrowing the litigation-stoking features of both. It is "oneway" shifting: the award of fees to winning plaintiffs but not to winning defendants.

The one-way fee, although perfected recently, was actually invented some time ago. A few such provisions were enacted in the last century, aimed at very rich and unpopular defendants: railroads and trusts. For many years the Supreme Court kept striking down these one-way laws, saying that they violated the constitutional rights of their targets and warning that once the principle was established a few wealthy institutions would not remain its only victims. Later it changed its mind and began upholding such rules. All its earlier warnings were then borne out.

Starting in the 1930s, picking up speed in the 1960s, and then going at feverish pace since the 1970s, lawmakers have loaded the statute books with these heads-I-win, tails-we're-even provisions. The usual practice was to proclaim a lopsided fee shift in new laws that were said to involve the "public interest." When you think of it, however, just about all the products of the legislation mills can be shipped under that self-congratulatory label. With the RICO law, to take one notable example, one-way fee shifts became

available in many routine commercial disputes between businesses. Some have argued that the device is a suitable means of vindicating congressional policy in each and every law, the only practical problem being how to identify which side should be favored in each kind of case.

Courts have learned other creative ways to put just the right amount of English on the fee ball. One common interpretation is that a plaintiff has prevailed and should get fees if he wins on any issue or claim on his list, however minor, or drops his suit after the defendant alters his conduct in any way that could be interpreted as a concession. The defendant can prevail (without of course deserving fees) by stonewalling on all concessions and then winning on all contentions. "The determination of whether a litigant is a prevailing party," note the authors of one leading treatise, ". . . is guided by standards which differ markedly depending on whether the fee petitioner is a plaintiff or a defendant." Some courts began ruling that plaintiffs should get back attorneys' fees even when they *lose*, on the ground that by suing they had done a public service in helping to clarify legal issues, provide reminders of accountability, and so forth. The Supreme Court decided in 1983, amid much gnashing of molars from the "publicinterest" bar, that that idea went too far.

All sides agree that one-way fee shifts to plaintiffs are meant to encourage litigation, and of course they have done just that. In the meantime, their widespread adoption has quietly undercut the chief practical argument against full, two-way fee shifting, namely that American courts are not used to calculating fees. Courts can no longer be thought to lack competence at setting proper fee levels; they do it all the time for victorious (and even hemi-demi-semi-victorious) plaintiffs. The only remaining step is to begin doing it for defendants as well.

In addition, of course, since Roman times and further back, fee-shifting has given rise to an elaborate body of law in the rest of the world, from which we might well borrow. Those countries have long since reduced the practice to a routine, governed by steady and predictable rules, to judge by a survey by Werner Pfennigstorf of European fee-shifting in the journal *Law and Contemporary Problems*.

European systems typically carve out a number of exceptions to the general fee-shifting rule. One is for criminal cases, perhaps because it is thought rough to pressure a criminal defendant to plead guilty if he has even an unreasonable belief in his own innocence. Another is for divorce: a marriage cannot be dissolved without positive court action, so that it might be said that neither spouse has unreasonably insisted on going to trial. There may still be a role for shifting fees, however, against the spouse whose demands were more out of line with the eventual court disposal of property and custody.

Litigants who raise superfluous issues or file needless motions may pay a partial or offsetting fee award even if they win the case on the merits. In split decisions, where each side wins on some issues of a case, the fee ruling can also be split (Pfennigstorf observes that this is a clarification rather than an exception to the rule). Some countries leave each side to pay its own costs after certain unusually close lawsuits, such as when a panel of judges is split on a case or a verdict is overturned on appeal. This custom, like many in fee-shifting, dates back to the Romans. European courts also maintain independent sanctions for bad conduct in litigation, which, like Rule 11, can be awarded against litigants who behave vexatiously even on the way to winning on the merits.

It is crucial that full fee recovery be denied to the litigant with an otherwise valid claim who demands vastly more than it is worth. Most countries treat such cases as outright defeats for the claim-inflater and assess fees against him, which plays an obvious (and extraordinarily important) role in discouraging Yankee-size damage claims. England gets the job done through a device that also has analogues elsewhere: the defendant can "pay into court" a settlement offer, and if the later verdict comes in below that offer the plaintiff who spurned it must pay whatever costs the defendant incurred afterward. Our own federal rules, by the way, include a device that somewhat resembles this one but has not been widely used in practice.

It has been objected that once juries know that costs will be paid by the loser, they will start fudging decisions to keep a sympathetic litigant from losing. The concern cannot be dismissed out of hand, but it should not be considered fatal. First, it is widely agreed that most juries try hard to follow legal guidelines in determining whether liability has occurred; the problem is that those guidelines are so amorphous and confusing that no consistent outcomes are possible, but changes in fee rules need not worsen that problem. Juries' damage calculations are more influenced by sympathy, but one of the sympathetic factors is currently the knowledge that winners have to pay their own costs; hence the tendency to blow up "soft" damages for things like pain and suffering to cover what is expected to be a huge lawyers' fee. Once it is known that costs will be awarded as a matter of right, that upwardly distorting influence will be removed.

To help set juries' minds at ease about sticking indigent plaintiffs with a fee shift and end Rule 11's confusion about which wrongdoer pays, it could be provided that fee shifts should normally be charged to the lawyer, with clients free to commit themselves by contract to reimburse him for such charges. That would ensure that lawyers do not litigate with impunity by lining up clients immune to judgment; yet, since lawyers would scramble to seek reimbursement agreements when they could, the more traditional principal/agent relationship, with the client in rightful control, could reestablish itself in most cases. Above all, contingency-fee lawyers who take an equity stake in legal claims should be put on the hook for at least some of the fee-shift risk, as befits true players rather than passive taxi drivers. The exposure would of course heighten the speculative nature of their activities, but they are gambling sorts and no doubt could easily spread the risk among their profits from their many clients who prevail, just as industrial manufacturers are said to be able to spread the costs of liability payouts among their many activities. Many European countries, incidentally, require litigants to post a deposit against the risk of having to pay costs after losing.

It would be interesting to see whether the contingency fee as such—that other venture in American exceptionalism—survived in its current form under a regime of full fee-shifting. Would prevailing lawyers settle for whatever hourly fee the court awarded from the opponent, or force their clients to chip in a supplementary payment as well? Either way, it would be hard for them to predemand a huge share of the award without running into some questions from clients, since if the claim wins they will already be getting what the court finds to be a reasonable hourly recompense for their work.

In the long run, one might even predict that fee-shifting would help curb the drift of American law toward vagueness and indeterminacy. Litigators in other countries do not seem to have formed themselves into a collective lobbying force against clear and objective law, the way so many of them have here. One reason may be that under a fee-

shifting regime, needless legal uncertainty is not especially appealing to plaintiffs (who have something real to lose) or their lawyers. Here, every new outbreak of legal uncertainty is a much more unalloyed boon to speculative litigators. Fee-shifting encourages both lawyers and litigants to converge with their adversaries, both in the suit at hand and on the wider issue of what the law's demands should be.

America's trial lawyers and their allies carry on at length about how courts should hold people to the very strictest liability for any and all harm they may cause others, with "harm" and "cause" so broadly defined as to pass all understanding. Fee-shifting is strict liability for litigators themselves. It deters them from using compulsory process to harm fellow citizens, whether the harm be negligent, intentional, or by ill chance.

Indeed, strict liability for lawyering is much more benign and workable than the new forms of liability found elsewhere in the modern law. It need not, for example, result in speculative and open-ended damage calculations. The employer sued by a former employee for giving a bad reference, the corporate management sued by a stockholder for failing to disclose some news development, the movie star sued by the former paramour who quit a job to keep house for him, can only guess wildly as to what they might be made to pay. Not so the payor of the type of fee-shift practiced in the rest of the world. Those assessments can be based on purely historical out-of-pocket costs. They do not require thirty-year income projections. They do not cover emotional distress, loss of enjoyment of life, or unhappiness caused to family members, although all three are very real in litigation. They should seldom require outside expert testimony. They are not tripled. They are not punitive. And so they will be much more predictable and even insurable, and less disruptive to the planning of daily life, than almost any of the novel legal obligations that have been so freely created in recent years.

Symmetrical, two-way fee-shifting has begun its progress on these shores. It has been the rule since the 1920s in Alaska, which admittedly boasts an atypical legal culture. Arizona shifts fees for breach-of-contract claims. Florida shifts them for medical malpractice claims. A 1970 amendment to the Federal Rules of Civil Procedure made two-way shifting the rule for disputed discovery motions, as well as for the rare cases where a lawyer's bad faith can be shown.

Full two-way fee-shifting is the single most important and constructive legal reform that ordinary citizens can fight for over the long term. It is memorably simple, and fair, and not easily subverted once put into effect. It may also be the only reform that could render tolerable today's procedural system of push-button litigation on demand, if that system is one we want to keep. If the coercive power to drag others to court is not tempered by some levying of costs on those who use that power for ill, the injustice it visits on the innocent will inevitably lead to pressure to ration its use in some other way, when the victims of wrongful litigation finally rise up and organize themselves.

Plaintiffs with strong cases have everything to gain from fee-shifting, and will be the most fiercely fought-over allies in the coming battle for legal reform. Trial lawyers sometimes contend that in a system of two-way fee-shifting these plaintiffs would be so terrified of the fluke chance of losing that they would not dare to file their rightful suits. In reality, the vast majority of cases will as always be settled out of court, and the right of fee recovery will boost the settlement value of the truly strong cases. As Oxford's Patrick

Atiyah reminds us, the British accident victim with a good claim can find a lawyer just as easily as the American. And the British complainant gets the full value of the claim, without having to deduct a huge lawyer's contingency. The only real pressure on the litigant with a good claim would be not to exaggerate its value, and that does not seem too much to ask. It is the heavily contingent unlikely-to-succeed wildcat litigators who would be discouraged by fee-shifting. And they are precisely the ones who should long ago have been driven from the courthouse. Lawyers typically proclaim their complete confidence in the merits of their clients' causes. By the horror with which they react to full fee-shifting, we will get a good idea of their sincerity.

CHAPTER 15

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