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## Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know About the Litigation Experience of Individual Litigants

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\*(151)

# CIVIL LITIGATION FROM LITIGANTS' PERSPECTIVES: WHAT WE KNOW AND WHAT WE DON'T KNOW ABOUT THE LITIGATION EXPERIENCE OF INDIVIDUAL LITIGANTS

Tamara Relis

## ABSTRACT

*This study of the entire phenomenon of civil litigation commenced with the sole aim of ascertaining the extant gaps in the available knowledge about litigation from the perspectives of those who are by far affected most by it: the litigants. What does litigation mean for those who are directly embroiled and whose lives may consequently be radically transformed? Serious lacunas exist. However, extensive readings worldwide throughout the research process result in a stark elucidation of an overlooked, yet crucially important and somewhat egregious state of affairs, making surprisingly clear just how pernicious litigation is for the average 'non-repeat player'.*

\*(152)

## 1. INTRODUCTION

As the complexity and heterogeneity of society increases, so too does reliance on litigation (Sarat & Grossman, 1975; Auerbach, 1983). But what does 'litigation' mean for those who are directly embroiled and whose lives may consequently be radically transformed? It seems logical that this should be of great interest to all those involved in the law, both academically and professionally. Yet, despite a burgeoning of civil justice research in recent years, a dearth of empirical investigation and scholarly attention focuses on litigants' expectations, experiences, perceptions and feelings (Genn, 1995; Thomas, 1990). Consequently, numerous vital aspects of litigants' perspectives remain obscure (Chambers, 1997). But shouldn't litigants be at the core of our interests? After all, civil litigants are the users, the consumers of the civil justice system, which exists ostensibly for them

and 'provides them with this highly important service' (Genn, 1999; Court Service, 1995). Thus, it absolutely must be responsive to their interests and needs. But how can this ever really be accomplished without knowing the reality of what it is like for litigants throughout litigation? It cannot. Indeed, this is evidenced by the fact that despite various efforts to rectify problems over the years, litigant satisfaction has hardly increased.

The content and focus of this study set it apart from other scholarship as it offers a different way of understanding the civil litigation phenomenon. Studies mention in passing the lack of information from litigants' perspectives, but few actually focus on this area. Importantly, despite extensive research worldwide, we found no single study, which comprehensively follows litigants throughout their entire litigation experience from beginning to end, examining all facets of litigation exclusively from litigants' viewpoints. Hence, the available writings are partial and exiguous, and consequently may be misleading. Yet, it is impossible to correctly assess the situation of those affected most by litigation without obtaining what until now has been unavailable – a comprehensive picture, at least of what is known.

Our first research objective is to explore the entire litigation process as experienced by individual litigants, questing for the uncharted so that we may assess 'what important issues remain unidentified or insufficiently investigated.' Secondly, whilst we journey through the eyes of litigants we aim to cogently address the stark realities manifested by the empirical evidence that does exist. We endeavor not only to collect facts, but also to understand the reasons for their occurrence and to map the dimensions of the practical realities and implications of litigating. This should facilitate at least a tentative assessment as to how litigants fare in terms of the overall litigation phenomenon.

As the sections unfold, certain realities become evident. Indeed, whilst we explore the existing empirical data, focusing predominantly on individual, non-corporate/commercial parties in cases where legal proceedings have been filed or are at least contemplated, what actually happens to litigants becomes quite clear. In fact, it may be that if those contemplating suing were aware of what is contained in this paper, there would be far less need to devise methods of deflecting disputants from courts to alleviate burgeoning case loads.

Our findings are particularly relevant to litigants in North America, as though our research strategy entailed a wide-ranging, in-depth survey and analysis of relevant literature worldwide, the main findings stem predominantly from North America, with some from the U.K., and Australia. Additionally, data derives from current doctoral research (Relis, 2002) based in Toronto, Canada as well as several semi-structured interviews in England with Peter Johnson, head of the Office for the Supervision of Solicitors ('OSS') 'Client Focus' (20-2-98), Joy Julien, head of the Citizens' Advice Bureau ('CAB') project at the Royal Courts of Justice (i.e. London, High Court) (8-5-98), Alexander Mercouris, CAB adviser at the Royal Courts of Justice (24-4-98), and Sylvia Tull of the Royal Courts of Justice Enquiries Department (24-4-98). Working chronologically through the phases of litigation, Section 2 explores disputants' initial emotions, dispute perceptions and goals. Section 3 then moves on to the 'lawyer part' of litigation where we investigate and analyze clients' expectations, what actually occurs and litigants' feelings about this. In Section 4 we examine the subsequent 'court stage' where issues relating to unrepresented litigants will be highlighted, followed by an exploration into the feelings and perceptions of all litigants before, during and after their court experiences. Finally, Section 5 assesses certain realities in terms of end results for

litigants, including the way litigation affects their lives. Throughout, we utilize the words 'litigant', 'party', 'disputant' and 'client' synonymously.

Undeniably, litigants are hugely diverse in every conceivable respect including their perceptions and feelings. Indeed, litigants consist of a heterogeneous group of very different personalities, situations, expertise, cultures and expectations. Hence, to avoid distorting the true picture extreme caution is necessary in making any broad generalizations as to litigants' perceptions. For some, litigation will be nothing new, whereas for others it will have great emotional significance (Baldwin, 1997). Equally, diverse dispute types per se can result in very different litigation experiences. We have therefore noted research findings focusing on specific dispute types. But throughout the findings lies a common thread (Curran, 1977). It is this commonness that we focus\*(154) upon; as clearly it would be grossly unfair to ignore litigants' perspectives simply by saying, they are too disparate to generalize.

## 2. LITIGANTS' PSYCHES

The rational systematic pattern of legal thought may induce the legal mind to dissociate itself largely from the everyday needs of those who are most affected by the law, and so does a lack of their concrete substantiation. The power of the unleashed dictates of pure logics in legal theory and in practice under its sway may in effect largely eliminate the demands of those directly concerned as the driving force for the formation of law (Weber, 1967, p. 243).

Litigants' initial emotions relating to their disputes directly impact upon their feelings throughout litigation. Much theoretical argument exists in this area, but little has been proven empirically utilizing information from 'the mouths of litigants'.

### *Initial Emotions and Dispute Perceptions*

What is it that impels disputants towards litigation? In psychological terms, disputants seek relief from difficult or distressing experiences. They commence litigation in reaction to feelings of frustration and disappointment, backed by fear of both material and psychological loss. As these feelings are uncomfortable, disputants may feel a sense of urgency that they be dispelled (Redmount, 1959). Indeed, empirical litigant evidence indicates that regardless of dispute-type, litigants are frequently emotionally agitated, highly tense (Felstiner & Sarat, 1992 – divorce; Interview: Julien: 8-5-98 – diverse case types), and commonly seek in litigation a solace for their inner disturbances (Conley & O'Barr, 1988 – small claims). Though some may feel empowered by litigating (Merry, 1990), for others the entire experience will be traumatic, particularly as it may necessitate becoming adversaries against the same individuals or establishments previously connected to them (Lopez, 1989). Additionally, recent disputant research shows that regardless of legal validity, disputants take action or defend themselves predominantly due to convictions that they have moral claims to the results they are pursuing. This is against the background, at least in Britain, of pervasive perceptions that legal actions entail potential protracted upset, expense and uncertainty, warranted solely by the most severe of problems (Genn, 1999). Throughout consideration of this paper, one must not lose sight of these simple truths.

As for their dispute perceptions, it is vital to appreciate that for litigants, the reality of their disputes is comprised solely of their subjective experiences and\*(155) understandings (Pinkley, 1992; Selya, 1996). Past occurrences are not immutably set in an objective state of affairs, but are social constructions created in reaction to

subjectively viewed interactions (Berger & Luckman, 1967; Hosticka, 1979). Perceptions of case facts (though found to change over time – Conley & O’Barr, 1990; Lloyd-Bostock, 1991; Felstiner et al., 1980-8, p. 1; Harris et al., 1984; Mather & Yngvesson, 1980-1981) result from the comprehension and interpretations of those involved (Galanter, 1983; Mather & Yngvesson, 1980-1). Furthermore, litigants’ cognitions are affected by various factors, e.g. it may be that men and woman have different moral reasoning patterns (Gilligan, 1982). Evidence also suggests that the nature of disputes can affect which stimuli are salient (Taylor & Fiske, 1978). Some disputants concentrate on their feelings (e.g. anger, jealousy, frustration), whilst others focus on the rights involved and who is responsible for the conflict (Pinkley, 1992; Conley & O’Barr, 1988, 1990; O’Barr & Conley, 1985). Still, others concentrate on particular actions or things said (Sarat & Felstiner, 1995). Thus, different people may perceive the same dispute in rather different ways. Yet, parties’ perceptions of their disputes, including whom they blame for their harm, directly influence their emotions throughout litigation, and guide litigants’ goals, actions and case decisions (Taylor & Fiske, 1978).

### *Goals*

Though disputants’ main concerns may be for self-preservation (Redmount, 1959), the objectives of litigants who may be plaintiffs, defendants, ‘repeat players’ or ‘one-shotters’ (Galanter, 1983) are clearly diverse and complex (Trubek et al., 1983; Galanter, 1983; Aubert, 1967). Moreover, as litigants’ perceptions of their needs change throughout litigation (Sarat, 1976; Sarat & Felstiner, 1988), so too may their goals (Genn, 1999).

Some litigants lack any fixed, unambiguous objectives (Spiegel, 1979). Matrimonial litigant research indicates that many are unsure about their goals, often unpredictably change their minds, and frequently seek lawyers’ assistance in clarifying what their real interests are (Sarat & Felstiner, 1986, 1995; O’Gorman, 1963; Mnookin & Kornhauser, 1979). Others have more than one goal (Ingleby, 1992; Vidmar, 1990). For instance, apart from simply aiming to assert their rights and to recoup what they have lost, litigants may want their opponents to admit or be found in the wrong (Interview: Julien: 8-5-98). Indeed, evidence reveals that most litigants (unaware of what experience suggests is rarely attained) have strong desires (albeit in varying degrees – Galanter, 1983, 1986) to achieve a measure of moral vindication and what they perceive as ‘justice’ by the system ascertaining the truth and finding their opponents in the wrong (Genn, 1999; Merry & Silbey, 1984; Cranston, 1986; Engel, 1984). For **(156)** some, emotionally vindicating themselves may be their sole objective (Dinnerstein, 1990; Sarat & Felstiner, 1995). Furthermore, as psychological injury to feelings is an important stake for parties, some may harbor feelings of hostility, which may manifest in desires to harm opponents (Redmount, 1959). Thus, though found to be less important than other objectives, some litigants may seek revenge (Genn, 1999; Cranston, 1986; Couture, 1950) or at least use litigation as a coercive weapon.

Indeed, despite arguments that the vast majority of disputes are about money (Mather & Yngvesson, 1980-1; Kritzer, 1990 – though he too identifies nonfinancial stakes in his research), and though this may be the situation in most commercial cases, empirical data in tort and divorce cases proves that these litigants frequently have important hidden agendas and unrevealed aims, which may be their cardinal goals. Even Merry’s (1990) contract case of a professional female making a \$30 claim against a repairman for allegedly causing damage in her house, illustrates that litigation entails far greater issues for many litigants than simply money. In questionnaire data of medical malpractice plaintiffs, less than half said that

obtaining compensation was a 'very important' objective (Genn, 1995a). Current North American medical dispute research substantiates this (Relis, 2002). In fact, in the NCC (1995) British survey, covering diverse dispute types, only one third of respondents said monetary compensation was the most important thing they wanted to achieve; with apologies and prevention of similar occurrences also being primary goals that were frequently noted. This conflicts somewhat with Genn's (1999) research of individuals with a wide range of justiciable problems, where the desire to be rid of the problem or to be compensated was generally found to be more important than apologies or altruistic solutions. That being said, not all respondents took any legal action, and only 20% of cases entailed legal proceedings. Nevertheless, 37% of the injury respondents cited 'compensation' as their most common reason for taking action; and though often found to be an impetus for litigating, surprisingly none stated that receiving an apology was their main objective in claiming.

But it cannot be denied that litigants repeatedly pursue objectively deficient cases (even when advised they have scant or no chance of winning), seemingly requiring to prove something to themselves, to obtain some social goal not directly connected to the litigation or to have authoritative figures confirm the importance of their problems. Indeed, it has been found that medical and divorce litigants often need acknowledgement that they have been treated unjustly (Relis, 2002; Sarat & Felstiner, 1986) as evidenced by the fact that they commonly seek apologies. In fact, non-monetary unrevealed objectives might be of much greater significance to commercial litigants than is presumed (Conley & O'Barr, 1988). **\*(157)**

Importantly, not all litigants intend to go to court. Questionnaire data, albeit dated, from a random sample of Manhattan small claims litigants indicates that 38% utilized litigation solely to express their feelings, never intending to reach court (Sarat, 1976). Other research suggests that the more parties see their disputes as stemming from relational issues, the greater their desires to discuss their feelings and decipher underlying problems (Pinkley, 1992). Some disputants commence proceedings with the sole aim of encouraging settlement negotiations. However, once commenced, parties may gradually identify themselves with the role of 'litigant', viewing their litigation with unforeseen importance (Sarat, 1976).

In sum, although some empirical research has been done in the area of litigants' psyches, not only is much of it dated, but numerous lacunas still exist in this key area. Importantly, we see there is little empirical knowledge on what litigants aim to achieve, and how objectives may change (Genn, 1999, 1995a). Still, arguably litigants desire to disarm their opponents and are willing to go to great lengths and suffer at least perceived maltreatment for this, as it is a way of maintaining feelings of well being and power (Pinkley, 1992). The next section examines one aspect of this maltreatment and its extent.

### **3. CLIENTS AND LAWYERS WHAT REALLY OCCURS DURING LITIGATION?**

What happens to litigants during their lawyer relationships? Certainly, the bulk of the literature relates to client-lawyer interactions. Nevertheless, even in this crucial part of litigants' litigation we find that several important aspects remain obscure. Additionally, this section represents a turning point in our study seeking to highlight important unexplored aspects of litigants' perspectives, as something more ominous emerges. We will see that of what is known, little is salubrious as far as individual clients are concerned. Arguably, this section evidences the beginnings of

litigants' suffering during litigation.

Why do disputants turn to lawyers? They do so because they are distressed due to conflicts (Freedman, 1987), which they view as serious (Genn, 1999), and which they feel they cannot rectify themselves (Menkel-Meadow & Meadow, 1983). These feelings are justified. Recent British research reveals not only pervasive perceptions of ignorance in terms of legal rights, but also disputants' real need for legal advice and assistance to resolve legal problems (Genn, 1999). Though people may rely on culturally accessible legal narratives to explicate their daily interactions (Ewick & Silbey, 1998), the majority of individuals possess neither the self-assurance nor the necessary knowledge to deal with even small claims disputes (Genn, 1999). Thus, they may feel they\*(158) have no choice but to turn to lawyers (Griffiths, 1986; Mnookin & Kornhauser, 1979). At a minimum, disputants need guidance in unfamiliar situations (Genn, 1999; Bogart & Vidmar, 1990; Hildebrandt et al., 1982). Hence, unsurprisingly researchers stress the significant personal and even intimate needs that disputants bring to their relationships with lawyers (Fried, 1976; Rosenthal, 1974).

Yet, most disputants are not particularly careful in how they select their lawyers (Davis, 1988; Wheeler, 1991). This is despite public survey evidence indicating that the attributes most often looked for in choosing a lawyer are commitment, integrity, competence, fairness and reasonableness of fee (Curran, 1983). In fact, choices are often down to chance (Genn, 1987). Indeed, research on various case types reveals that disputants usually choose the first lawyer they can think of, the first one they contact, or the first one recommended to them by someone they view as knowledgeable (Bogart & Vidmar, 1990 – Ontario study of diverse dispute-types; Rosenthal, 1974 – U.S. data from, inter alia, 60 personal injury litigant interviews; Curran, 1977 – U.S. data from an extensive ABA national litigant survey; Hunting & Neuwirth, 1962 – interviews with a random sample of 321 Manhattan motor accident plaintiffs; Kritzer, 1990). At least for injury litigants, this has been found to be because they are unsure about which factors are important to look for and about ways in which to apply criteria they believe are correct (Rosenthal, 1974). Still, this is particularly worrying, as many litigants have been found to view their relationships with their lawyers as highly significant aspects of their litigation experiences (Matruglio, 1994; Flemming, 1986).

### *3.1. Manipulation*

It seems that when first approaching lawyers, disputants usually view the litigation system as fair, truth seeking and relatively faultless. Empirical findings show that most litigants initially have firm beliefs in formal justice (Merry, 1985). Yet, in various case types, disputants' contacts with lawyers and the litigation system often change what they expect and aim for, forcing them to redefine their circumstances and reconstitute their perceptions. Clients rarely order lawyers to do what they say (Sarat & Felstiner, 1995, 1986; Felstiner & Sarat, 1992 – divorce; Bogart & Vidmar, 1990 – various dispute types e.g. torts, consumer, discrimination, debt, divorce; MacCaulay, 1979 – consumer; Felstiner et al., 1981) on the basis that they are paying for lawyers' services (Kritzer, 1984; Aubert, 1967). In fact, though it is incorrect to believe that lawyers normally know what is best for clients (Davis, 1988), in reality clients get manipulated by lawyers in numerous ways (Kritzer, 1998; Morris, 1987). For instance, most litigants get directed by lawyers on how to view their cases\*(159) (Kritzer, 1998; Rosenthal, 1974); and litigants normally acquiesce, as their own interpretations of events are often unclear and mutable.

Indeed, in reaction to various subsequent experiences and to what others say, do or expect, litigants have been found to continuously redefine their complaints as well as the way they perceive injurious experiences (Felstiner et al., 1980–1981).

However, sharp contrasts are frequent between litigants' expectations, goals and views of justice on the one hand, and lawyers' far narrower explanations of legal justice and law's capabilities on the other. Thus, unsurprisingly empirical findings in injury, matrimonial and diverse small claims cases consistently show huge differences between the objectives, values and views on appropriate tactics of lay people and lawyers. We know that such litigants pursue social and emotional benefits from litigation, whereas lawyers will be primarily interested in protecting and enhancing clients' financial positions (Sarat & Felstiner, 1986, 1988–1990, 1995; Felstiner & Sarat, 1992; Conley & O'Barr, 1990; Melli et al., 1985; Griffiths, 1984). Indeed, notwithstanding arguments that it is vital for lawyers to understand what litigants' goals mean to them and why they consider them important (Kronman, 1993), some argue that lawyers frequently fail to even attempt to comprehend these issues (Goriely, 1993), probably paying scant attention to the problems involved in determining precisely what clients' desires are and how they feel about their disputes (Zander, 1978).

In fact, much research in these areas suggests that what litigants describe as their aims often get treated by lawyers as something ephemeral, with clients regularly being urged not to pursue these goals. Though initially lawyers may be sympathetic, they soon attempt to persuade clients about what they see as legally realistic (Sarat & Felstiner, 1986, 1988–1990, 1995; Felstiner & Sarat, 1992 – matrimonial cases; Rosenthal, 1974 – injury cases; Dinnerstein, 1990; Conley & O'Barr, 1990 – different type small claims cases) by relying upon their knowledge, experience and views on trial results (Simon, 1991; Freidson, 1970; Alfieri, 1991a). Consequently, most litigants get persuaded not to expect too much from the legal process and not to unrealistically demand things in terms of rights, financial entitlements, and emotional and moral vindication (Maiman et al., 1992; Sarat & Felstiner, 1995; Rosenthal, 1974). Indeed, lawyer interview data and observations of injury and other cases in three Wisconsin firms indicates that lawyers deflate client expectations, emphasize uncertainty in terms of case values and set settlement expectations (Kritzer, 1998). Similarly, Ontario focus group data of disputants in diverse case types suggests that clients' expectations are shaped by their lawyers, who very strongly influence their views on their rights and duties and guide their responses (Bogart & Vidmar, 1990). This is arguably in line with recent British findings in diverse case types\*(160) where outcomes of legal disputes had a 56% higher than average likelihood of being viewed as fair by those disputants who had been assisted by lawyers as compared with those who had not (Genn, 1999).

But how does this happen? As Shapiro notes, "Law is not what judges say in reports but what lawyers say ... to clients in their offices" (Shapiro, 1981, p. 1198). Indeed, in practice, because lawyers familiarize litigants with the law, normally clients' uncertainties, anxieties, unfamiliarity or inexperience make them completely susceptible to lawyers' persuasions, e.g. as to what is fair or just (Yngvesson, 1989; Redmount, 1961). Hence, inevitably most clients respond to the threatening unpredictability of their cases by wholly relying on lawyers for direction (Sarat & Felstiner, 1995; Rosenthal, 1974).

Of course, some manipulation, whether conscious or not, is inevitable as litigants cannot be assisted in making even their own decisions without concurrently being influenced (Ellman, 1987a). Even if litigants are simply provided with

information to make their own choices, lawyers will have made myriad decisions as to what information to communicate to them and how (Simon, 1991). But some lawyer influence, albeit indirect, seems undeniably intentional as divorce data indicates that litigants' attentions get diverted from things that matter to them to those their lawyers see as important such as the acceptance of particular views of 'reality', and that legal justice is quite distinct from social justice (Griffiths, 1986; Sarat & Felstiner, 1986, 1990, 1995; Felstiner & Sarat, 1992). Indeed, Sarat & Felstiner found that usually in response to their questions, U.S. matrimonial clients are given 'law talk' by their lawyers. Such lawyers describe legal processes and actors in critical, cynical and negative ways, stressing limitations whilst at the same time attempting to be sympathetic to clients' situations and emphasizing their insider knowledge, connections, positions and/or reputations (Sarat & Felstiner, 1986, 1988–1990, 1992, 1995 – observing matrimonial client-lawyer interactions in two U.S. towns, interviewing clients in 40 cases). Thus, unsurprisingly, litigants' dependence on lawyers is frequently enhanced.

Nevertheless, this manipulation takes much negotiation (White, 1990; Felstiner et al., 1980–1981; Mather & Yngvesson, 1980–1981), which is regularly laden with conflict and power struggles. Clients persistently fight for their views to be accepted, rejecting lawyers' interpretations of their situations and views on what is attainable and reasonable. This is manifested in clients insisting on discussing matters technically irrelevant or initially trying to explain their needs, aims and perceptions of justice, repeating themselves or remaining silent only to re-introduce their views later on (Sarat & Felstiner, 1995; Felstiner & Sarat, 1992). Indeed, it is often difficult for disputants to accept what is traditionally seen as legally possible (Blumberg, 1967; Macaulay, 1979; Mann, **(161)** 1985). It seems, however, that though some litigants remain steadfast in their views, eventually most acquiesce to lawyers' interpretations of 'reality' or at least move closer to what lawyers deem reasonable to aim for; certainly not demanding anything very different from what lawyers say courts would order. Consequently, apart from those very experienced with litigation that are in less danger of lawyer domination (Morris, 1987; Hosticka, 1979 – legal services cases), most litigants reduce their demands on the legal system (Sarat & Felstiner, 1986, 1995).

So in essence, as diverse case type data suggests, clients get provided with a new group of premises, which may be quite different from their initial expectations (Davis, 1988) and perceptions of justice, often being forced to redefine their objectives to accord with lawyers' definitions of what the legal system can achieve. This occurs whilst parties are persuaded into casting aside their strong emotions and wishes for moral vindication (Sarat & Felstiner, 1986, 1988–1990, 1992, 1995 – matrimonial; Merry, 1985; Yngvesson, 1985 – small claims; Macaulay, 1979 – consumer; Hunting & Neuwirth, 1962 – injury). This may be because non-corporate litigants have insufficient power to convince lawyers to agree with their perceptions of what is possible (Alfieri, 1991b) or because litigants are unable to appraise lawyers' advice. Thus, they are forced to rely on lawyers' insider litigation knowledge and accept lawyers' views on almost everything to do with their litigation (Ingleby, 1992; Rosenthal, 1974; Menkel-Meadow & Meadow, 1983). Significantly, how the contest over expectations ends may have a substantial influence upon the way litigants feel about the entirety of their litigation experience.

These research results may also explain findings that though perhaps happy with their lawyers, litigants with past lawyer contact feel more negatively about the legal system (Campbell, 1976). In fact, if we envisage each person's input getting placed on a continuum, with lawyers' input being far greater, the above conclusions need not conflict with other findings that clients and lawyers nearly always influence each

other's decisions (Ingleby, 1992; Galanter, 1983).

In sum, though perhaps fewer gaps exist in this area, it is noteworthy that the 'manipulation' data predominantly comes from U.S. research. Thus, arguably, the situation in other jurisdictions remains unclear. However, from what is known, what emerge are initial examples of litigants' suffering throughout litigation. The next section describes further litigant manipulation manifested in their subsequent loss of control over their own problems.

### 3.2. *Losing Control*

It has repeatedly been found that when disputants go to lawyers they often relinquish control over many choices in their litigation and frequently get dominated by lawyers who take charge of the relationship, dispute descriptions, and how litigants' cases are conducted and proffered.

Though cases are about litigants, not lawyers, and are not solely about what occurred but also about clients' life experiences (Miller, 1994), it is well established that litigants' dispute descriptions get reformulated and translated by lawyers into a new legal language, which may have little meaning for ordinary individuals (Sarat, 1977). The effects of this translation should not be underestimated. The ways conflicts are linguistically defined are critical aspects of disputes (Mather & Yngvesson, 1980–1981), as language and words influence people's perceptions and views about things (Kay-Kempton, 1984). Certainly, the style, syntax and emotion will not be the same when their stories are communicated to the courts (Mehta, 1994). As Bumiller notes, "transforming lives ... into cases, takes away from their stories the meaning behind their circumstances and unique identities" (Bumiller, 1988, p. 69). Significantly, it is lawyers who decide which parts of litigants' experiences to include in their case presentations (Cain, 1979, 1983; Conley & O'Barr, 1990; Hosticka, 1979), often narrowing the scope of issues (Cranston, 1996; Engel, 1984; Felstiner et al., 1980–1981) and constructing new meanings and explanations. By excluding the particularity of litigants' experiences and the significance of clients' words, lawyers inevitably re-define litigants' perceptions and transform the 'reality' that litigants describe (Cunningham, 1989, 1992).

In fact, empirical evidence relating to divergent case types, suggests that regardless of sex, background or class, litigants often talk past their lawyers who consequently interpret their descriptions without there ever being a shared comprehension of events. Hence, e.g. the importance of past occurrences for litigants is often ignored (Sarat & Felstiner, 1986, 1988 – divorce; Hosticka, 1979 – legal services; Macaulay, 1979 – consumer cases). This commonly results in litigants being effectively silenced whilst lawyers purport to recount their stories in court (Alfieri, 1991a). Indeed, findings indicate that lawyers' case theories and client narratives are disassociated from client contexts, almost treating them as invisible (Alfieri, 1991a – legal services cases; Miller, 1994). Though litigants may consent to this (Cunningham, 1989), one must note that clients' reactions to lawyers' translations are influenced by their scant expertise and experience with law. Thus, they cannot easily question how lawyers have interpreted their disputes (Davis, 1988).

Consequently, legal descriptions of conflicts may hold little meaning for litigants, and could result in them being offered remedies which do not deal with their needs as they perceive them (Conley & O'Barr, 1990). Indeed, data from diverse legal services cases suggests that lawyers redefining clients' experiences commonly alters the nature of disputes and hence the legal consequences for litigants (Hosticka, 1979).

Unfortunately, this subject has been neglected **\*(163)** (Cunningham, 1992), and hence arguably represents yet another gap in the knowledge of litigants' perspectives.

As for the conduct of parties' cases, divorce evidence suggests that lawyers' power over clients is no longer coterminous with complete domination (Sarat & Felstiner, 1995; Felstiner & Sarat, 1992). Furthermore, differences in client-types, lawyer-types and legal area may reflect levels to which litigants are controlled (Cain, 1993, 1979; Heinz & Laumann, 1982). Nevertheless, a plethora of international research into diverse-type lawyers and litigants in numerous legal dispute areas indicates that litigants lose varying degrees of control over how their cases are conducted as lawyers take charge (Kritzer, 1998 – injury; White, 1990; Heinz & Laumann, 1982; Johnson, 1972; Becker, 1970; Sarat & Felstiner, 1995; Felstiner & Sarat, 1992 – divorce; Alfieri, 1991 a – legal services cases; Kritzer, 1990 – diverse case types based on the Civil Litigation Research Project data of state and federal courts; Kritzer, 1984 – interviews of corporate clients and their lawyers in Toronto, Kritzer, 1980–1981 – Civil Litigation Research Project data of monetary disputes over \$1,000 or substantial discrimination cases; Rosenthal, 1974 – injury; Hosticka, 1979 – legal services cases; Hunting & Neuwirth, 1962 – injury; Cunningham, 1989; Genn, 1987 – injury; Harris et al., 1984 – injury; Abel, 1989; Abel & Lewis, 1988; Flood, 1987 – India; Galanter, 1983a; Heinz, 1983).

In sum, more lacunas surface in this section. Importantly we do not know what effect litigants' different backgrounds and personalities have on degrees to which they get controlled. Yet, we see here more disadvantages for litigants. Therefore, in view of all we know so far, we ask 'how do litigants actually perceive and feel about their lawyers?'

### *3.3. Litigants' Feelings About The 'Lawyer Part' of Their Litigation*

#### *Expectations of Lawyers*

The scant litigant data that exists indicates that expectations and preconceptions about what lawyers can do and the service they will receive vary enormously (Davis, 1988, p. 299 British divorce litigant interviews). Nevertheless, what litigants expect from their lawyers will strongly influence their feelings about the relationship (Watson, 1965) and consequently their feelings about their entire litigation experience.

It seems that at least for most injury litigants, worries about the effects of what happened to them and about litigation directly impact upon their ideas and perceptions of lawyers' duties to them (Rosenthal, 1974). It has also been found in diverse case types that though clients are often unable to fully communicate their expectations to lawyers (Steele & Nimmer, 1976 – random interview**\*(164)** sample of 45 clients in diverse case types in Michigan, not limited to private individual clients; Simon, 1991; White, 1990), litigants commonly reason upwards from their needs, expecting lawyers to be able to help them more than they actually can (Sarat & Felstiner, 1995 – matrimonial). Similarly, it has been argued that client expectations are usually unreasonably high. In fact, anecdotal evidence suggests that litigants now want more than value for money. Regardless of the difficulty of their situations, they want 'delightful experiences', with lawyers making things as easy as possible for them in the circumstances (Interview: Johnson, 20-2-98). Additionally, client data in diverse type cases reveals that perceptions about how lawyers should behave entail an emotional element, with parties often expecting lawyers to be personally interested in their cases (Genn, 1999 – diverse dispute types; Steele & Nimmer, 1976 – diverse case types), providing them with a

personal service which includes explaining why various unpleasant experiences have to be tolerated, and what to anticipate in litigation (Rosenthal, 1974 – U.S. injury; Matruglio, 1994 – questionnaire data from Australian injury litigants).

Recent British findings covering a wide range of diverse justiciable problems, though not necessarily entailing legal proceedings, also provide some new insights. Of the 60% of survey respondents who obtained assistance from lawyers and other advisers, it was found that disputants unsurprisingly desire advice on how to solve their problems, advice about their legal rights and advice about litigation procedures. But importantly, the forty depth interviews conducted elucidate the fact that what people with legal problems expect from advisers, including lawyers, will vary according to the nature of the problem. Additionally, expectations are linked to individuals' own innate capabilities (self-assurance, spoken and written skills) as well as their emotional states. Consequently, the more educated and informed want advice about how they can enforce their rights (at least, in part, themselves); whilst for large numbers of disputants, what they desire is for someone to take charge and handle their problem for them, including any demanding letters or phone calls that this may entail. In fact, it was found that even for those who would normally feel self-assured and capable of dealing with matters, emotional exhaustion as a result of their problem worries made some disputants feel simply unable to cope themselves and consequently they desired to be 'saved' from their situations by lawyers and other advisers. This is particularly significant in view of the fact that 90% of cases in the study did not exceed values of £5,000 (Genn, 1999).

Unfortunately, this is all our extensive readings have produced. Hence, we do not know what precisely litigants in diverse case types expect from lawyers. Indeed, things have not changed significantly since Ellman (1987) noted that\*(165) scant detailed information exists about what exactly clients expect from lawyers.

#### *Initial Feelings*

Litigants experience numerous diverse feelings throughout their relationships with lawyers. The majority are negative.

Firstly, it seems that at their initial point of contact, lawyers' offices, clients may feel intimidated (Palmer, 1984). Indeed, research suggests that few litigants view lawyers' offices as welcoming. (Harris, 1994 – British National Consumer Council survey data of diverse dispute-types). This seems to be the better view to unsupported assertions that lawyers' offices provide psychologically supportive environments (Dinnerstein, 1990). Secondly, though it may be crucial for litigants' own psychological well-being to trust their lawyers (and vital to case success as often private issues must be disclosed – Rueschemeyer, 1973), at least in divorce cases, clients feelings towards their lawyers have been found to be often replete with doubt and suspicion (Huebner, 1977) about lawyers' commitment, loyalty, abilities and characters (Felstiner & Sarat, 1992). This is unsurprising, as such clients will often have just had their trust betrayed by their opponents (Sarat & Felstiner, 1986), only to be subjected to alien legalities by individuals who are probably strangers (Sarat & Felstiner, 1995; Campbell, 1976). Hence, these litigants commonly have difficulties accepting lawyers' descriptions of law's limitations (Sarat & Felstiner, 1995; Scheingold, 1974) as well as the costs of realizing their objectives (Felstiner & Sarat, 1992).

Additionally, litigants worry. They worry that their lawyers may not be completely loyal or sufficiently competent. If they see lawyers as too busy, litigants worry that they may be unable to deal effectively with all aspects of their cases (Sarat & Felstiner, 1995). That being said, it may well be that the primary thing disputants

worry about is how much they will be charged by lawyers (Goriely, 1993). But though some clients both want and resist their lawyer dependence (Rosenthal, 1974 – injury), clients also worry they will not be able to control lawyers' handling of their cases. Indeed, notwithstanding assertions to the contrary (Cochran, Jr., 1990) and contentions that lawyer control may work to alleviate clients' emotional suffering and stress (Ellman, 1987), divorce and legal services data indicates that clients can feel powerless (White, 1990) and are often frustrated by the lack of control they feel over what lawyers are doing (Sarat & Felstiner, 1995). Hosticka (1979) postulates that litigants' strong feelings of lack of control can result in them perceiving their individuality as unimportant to the legal system. However, relying solely on observations, Hosticka's findings may not correctly reflect litigants' feelings. **(166)**

Similarly, as to lawyers controlling definitions of litigants' problems, though some argue that parties may prefer this in order to ameliorate their chances in court (Miller, 1994), this practice had been found to lead to unhappiness and frustration for injury and legal services litigants in the long term (Matruglio, 1994 – injury; Fitzgerald, 1975 – legal services data). This makes sense in view of the reality of litigants' experiences being translated, reconstituted and coerced by lawyers to fit into legal compartments, which ignore aspects deemed irrelevant in law (Cain, 1979, 1993; Galanter, 1986; Cunningham, 1989). But litigants, unfamiliar with law, do not perceive their experiences as legal events (Cunningham, 1989; White, 1990). Thus, they may feel perplexed and uneasy when they hear that something is not legally relevant (Sarat & Felstiner, 1995 – divorce; Genn, 1987 – injury). However, as Genn's findings derive from lawyers' and insurance companies' views, not those of litigants, her assertions about how litigants feel remain to be supported by empirical litigant evidence). This is particularly so as non-legal concerns, such as litigants' feelings and outcome implications, are often the most important issues for litigants (Shalleck, 1993; Binder & Price, 1977), far outweighing legal worries (Binder et al., 1991). Analyses of matrimonial client-lawyer conversations consistently show that litigants, whose worlds are filled with urgent emotional requirements (Felstiner & Sarat, 1992) concentrate on explaining the social and emotional realities of past events and their present situations. Arguably, most litigants are concerned to discuss the way they have experienced their problems and how this affects their lives (Morris et al., 1973). Though it may be initially upsetting for them (O'Gorman, 1963; Binder & Price, 1977), this can make their whole litigation experience far less distressing (Rosenthal, 1974), as having someone of status and authority understandingly consider what they have to say may increase litigants' sense of faith in themselves (Freeman & Weihofen, 1972).

However, at least in divorce, consumer and legal services cases, lawyers are generally insufficiently sensitive to litigants' views of their disputes and how their situations should be dealt with, as evidenced by the fact that lawyers have been found not to be prepared to deal with legal irrelevancies. Hence, they often do not respond to litigants' feelings (Zander, 1978; Redmount, 1959) and instead have been found to side step them by focusing on cases' legalities (Sarat & Felstiner, 1995; Griffiths, 1986 – divorce; Alfieri, 1991b; Hosticka, 1979 – legal services; Macaulay, 1979 – consumer cases). Indeed, research suggests that most litigants receive no help from lawyers in coming to terms with any frustration and anger they may feel. It may be that by ignoring what clients perceive as the most crucial elements in their disputes, lawyers deflect litigants' needs to obtain some moral vindication (Merry & Silbey, 1984). This may be why some litigants feel frustrated and perceive lawyers as not understanding **(167)** them (Alfieri, 1991 a – legal services; Cunningham, 1989), unsympathetic, overly rational, disloyal (Felstiner &

Sarat, 1992; Sarat & Felstiner, 1986, 1995 – matrimonial), uncaring and uncompassionate (Missouri Bar, 1964 – interviews with representative sample involving different dispute types).

Still, in Britain, 87% of litigants in the National Audit Office ('NAO') survey (1992-utilising postal questionnaires) and 80% in the National Consumer Council ('NCC') study (Harris, 1994 – using postal questionnaire data from a random sample of litigants in 30 firms in England), both covering diverse dispute types, did feel their lawyers understood their cases prior to advising them. Similarly, data from two other extensive surveys in the U.S. reveals that 79% and 76% believed lawyers attempted to comprehend them and their desires (Curran, 1977). Perhaps the disparities arise to some extent, in terms of the findings on matrimonial litigants, from the fact that such litigants are unique in numerous respects as they undergo far more serious emotional crises than other litigants (Sarat & Felstiner, 1995; Felstiner & Sarat, 1992; Erlanger et al., 1986; O'Gorman, 1963). Hence, they are usually harder to please and may often expect far more from lawyers than other clients (Turner, 1979–1980). Indeed, Bogart and Vidmar (1990) found that of all dispute types, the largest single source of complaints derived from domestic disputants, who were among the most dissatisfied with their lawyers and with the whole of their litigation experience.

Of course, whether litigants open up to lawyers is another issue. Despite some evidence suggesting that most litigants feel comfortable discussing private matters with lawyers (Campbell, 1976), empirical findings in divorce cases indicate that for various reasons litigants may feel reluctant and uneasy to fully communicate their true feelings (Felstiner & Sarat, 1992). In fact, other research indicates that even business clients are not at ease with lawyers (Wheeler, 1991). Litigants may feel embarrassed or ashamed about their disputes, their behavior or their motives and consequently tend to withhold things they feel harm their self-esteem. They also withhold matters they feel may be damaging to their cases (White, 1990; Margulies, 1990; Binder & Price, 1977). Thus, unsurprisingly small claims and matrimonial litigants have been found to hide their real reasons for approaching lawyers (O'Gorman, 1963; Conley & O'Barr, 1988). This accords with assertions that clients may communicate their needs as one thing, when, in fact, there may be other areas where they desire assistance (Zander, 1978).

In terms of the big picture, clearly much remains to be investigated, particularly as to non-matrimonial litigants' feelings. For instance, are clients in other case types also as suspicious about lawyers' abilities and commitment? How do disputants perceive what they hear from their lawyers? This may explain\*(168) how it is that the U.S. and British majority felt lawyers tried to understand them and their desires in survey evidence of diverse cases, while other studies including those covering injury and legal services cases found that lawyers do not respond to litigants' feelings or assist litigants with anything deemed legally irrelevant. Even Sarat and Felstiner's research lacks much input from clients about their understandings and feelings of what was occurring in their lawyer relationships (Cunningham, 1992). Nor does it tell us whether clients absorb and internalize what they hear from their lawyers (Chambers, 1997) and if so, how they feel about this. That being said, of what has been empirically proven, nearly every paragraph in this section highlights different aspects of litigants' suffering. One needs only to refer back to the commencement of this section and to Section 2 to see that what litigants require psychologically is hardly provided.

*Service*

Enormous disparities exist in the quality of service received by litigants (perhaps attributable to whether they bring repeat business or not – Galanter, 1983a). Still, service is a sore point for many. This is evidenced by the numerous complaints that consistently resurface in various studies (demonstrating that litigants are quite capable of providing valuable evaluations of vital elements of service received – Goriely, 1993; Baldwin, 1997a; Harris, 1994a; Bogart & Vidmar, 1990; NAO, 1992; Davis, 1988).

Firstly, it seems that lawyers' use of technical language results in large numbers of litigants not really understanding what they are being told (Zander, 1978; Sarat & Felstiner, 1986). It is true that 92% in the NCC survey (Harris, 1994) felt advisers explained what they were going to do and checked clients comprehended their advice 86%–93% of the time. However, the data derived from questionnaires, not all advisers were lawyers, and the findings do not actually indicate whether litigants in fact comprehended the advice. Indeed, despite arguments that this is impossible to empirically verify (Spiegel, 1979), research in various jurisdictions covering diverse case types indicates that litigants feel confused (Christensen et al., 1998 – various dispute types, Office of Supervision of Solicitors 'OSS', 1997 – various dispute types; Harris, 1994 – various dispute types – Britain; 37% in Matruglio, 1994 – Australia injury clients; Felstiner & Sarat 1992; Sarat & Felstiner, 1986, 1995 – U.S. divorce cases; Re, 1994 – U.S.) and/or frustrated a material proportion of the time (Tomasic, 1978 – Australia-diverse case types). This may be because lawyers are insufficiently sensitive to what clients are feeling (Interview: Johnson, 20-2-98; Allen, 1961) or because litigants do not communicate comprehension problems to lawyers, due to fears of appearing ignorant or foolish (Zander, 1978). There are also **(169)** those 'confused' litigants who may believe they have understood when, in fact, they have not (Allen, 1961).

Secondly, it is well established that litigants need to be informed about case progress and litigation processes in order to feel more involved with their litigation. Also, litigants have been found to frequently desire constant reassurance about their cases' development, the probable results and to have their questions answered in order to assist them in dealing with their worries (Sarat & Felstiner, 1995; Bogart & Vidmar, 1990 – diverse case types). Yet, data from a variety of case types indicates that litigants feel they are often not adequately kept updated and consequently feel unsatisfied, unhappy, alienated from their cases and badly treated as clients and as litigants (Curran, 1977 – U.S.; Matruglio, 1994; Tomasic, 1978 – Australia; Interview: Julien, 8-5-98; Interview: Johnson 20-2-98; a substantial minority felt this in the NCC Harris 1994 study and 25% in NAO 1992 survey – Britain). This supports assertions that litigants are not simply interested in winning; they want to understand what has occurred and what is currently happening (Cunningham, 1989). One consequence of clients being rarely apprised of changes affecting their cases is that if lawyers later advise them to accept particular offers, what gets immediately triggered in litigants' minds is the fact that their lawyers had previously said their claims were worth far more (Interview: Johnson, 20-2-98).

Of course, the fact that many litigants are pleased with lawyers' services overall should not be discounted. Recently in the Genn (1999) study, 81% of divorce/separation clients and 91% of injury respondents felt the advice they received from advisers (mainly lawyers) was very or fairly helpful. Of course, this is not surprising in light of the further finding relating to disputants' general 'depth of ignorance about the legal system', even when involved in legal proceedings (Genn, 1999, p. 247). But also, in the NCC survey (Harris, 1994) 55% rated their lawyers' service as very good, 25% as good and only 9% as poor or very poor. Thus similar to the NAO (1992) findings, it seems that in general, most litigants in

Britain (regardless of whether private or legally-aided) are satisfied with lawyers' services. Similarly, disputants in diverse case types in the U.S. and Canada speak positively about their lawyer experiences overall and are satisfied with lawyers' services (Bogart & Vidmar, 1990; Moore, 1983; Yale, 1981).

That being said, data lucidly demonstrates that satisfaction with the relationship and with lawyers' work is highly related to whether litigants are multi-users of lawyers (who are more critical) as well as to dispute type (Curran, 1977). For example, Davis (1988) found 26% of the 299 British matrimonial litigants interviewed had changed lawyers, indicating high amounts of dissatisfaction. Furthermore, as Zander notes, the sole fact of whether clients are **(170)** satisfied, does not in itself conclusively prove anything about the service they obtain as dissatisfied litigants may be unreasonable whilst satisfied clients may be apathetic (Zander, 1988). In fact, as most litigants are unable to comprehend technical information and legal complexities of their cases, they may not realize when they are given unsound advice and hence may be satisfied with it (Goriely, 1993). Indeed, Kritzer's (1998) empirical data on injury and other contingency fee cases found that such clients are relatively unsophisticated, consequently missing the necessary information to assess lawyers' actions and recommendations. Similarly, Rosenthal (1974) notes that clients may expend scant effort or time evaluating the lawyers they rely on. Moreover, asking litigants retrospectively whether they were pleased with the service they received does not provide an independent measurement; as lawyers then get assessed by criteria that they themselves have provided (since clients are influenced by lawyers about what is reasonable to demand and expect – Cain, 1979, 1983; Matruglio, 1994; Bogart & Vidmar, 1990; Lind et al., 1990, 1989; Genn, 1987; Harris et al., 1984).

Indeed, though some research suggests that many unsatisfied litigants concentrate on lawyers' capabilities (Christensen et al., 1998 – 52% complained of poor advice; Abel-Smith et al., 1973), litigants are generally incapable of judging their lawyers' skill and effectiveness. Hence, they are forced to trust that their best interests will be served (Zuckerman, 1996; Harris, 1994; Re, 1994; Zander, 1978; Campbell, 1976; Watson, 1965). This is illustrated by Rosenthal's (1974) research where 66% of injury litigants interviewed were satisfied with their lawyers' work notwithstanding the fact that in up to 77% of cases clients received less than they should have. This emphasizes the reality that lawyers are inevitably evaluated by clients who are overall ignorant or misinformed about laws and the workings of the legal system (Genn, 1999 – diverse dispute types; Kritzer, 1998 – injury disputant data; Bogart & Vidmar, 1990 – disputant data in various case types; Gulliver, 1979), and who may be unaware that using lawyers does not guarantee they will always obtain better results (Eisenberg, 1994; Yates, 1995).

#### *Delays and Costs*

Though few empirical examples exist to prove that delays actually result in injustice, what is known is that delays are and have historically been common reasons for litigants' distress (Abraham, 1997; Christensen et al., 1998 – 34% complained of delay; Harris, 1994a; Legal Services Ombudsman, 1992; Bogart & Vidmar, 1990; Clark & Corstvet, 1938; Drinker, 1953). Some view slowness as lawyers' attempts to incur more fees (Davis, 1988). Others simply feel annoyed (Interview: Julien, 8-5-98), believing that lawyers have neglected their **(171)** cases or consider them insignificant (Steele & Nimmer, 1976). In the NCC study, only 59% felt delays were always explained satisfactorily to them (Harris, 1994). But though we know that litigants are unhappy because of delays, little is really known about how they perceive they have been affected by delays. Are all litigants equally affected? Does

dispute type or value matter?

As for litigation costs, they are often unpredictable regardless of whether matters are simple or complex, quick or delayed, important or not (Zuckerman, 1996). Hence, unsurprisingly legal costs are of prime concern to litigants and are at the forefront of their thoughts throughout the entirety of their litigation (Genn, 1999, 1987; Baldwin, 1997a). It may well be that the indemnity rule in jurisdictions such as England and Ontario results in costs getting magnified in litigants' minds over and above the merits of their cases (Jacob, 1987). But in any event, costs can become litigants' main worry causing them profound anxiety and distress, possibly more than that caused by their original disputes. Consequently, litigants want clear information on likely costs at the commencement of their proceedings (OSS, 1997).

Yet, much research on various dispute types reveals that all too commonly litigants feel they are provided with inadequate, unclear or sometimes no costs information at all, nor with warnings of their real chances of success (Baldwin, 1997a – small claims; Matruglio, 1994 – injury; Harris, 1994 – consumer; NAO, 1992 – various case types; Jenkins, 1993; Bogart & Vidmar, 1990 – in diverse dispute types, 58% said lawyers did not discuss fees before providing services; Cain, 1983; Davis, 1988 – divorce; Strauss, 1987). Some studies have found that clients frequently receive initial costs estimates that are far lower than actual fees charged (Matruglio, 1994; Tomasic, 1978; *Lay Observer*, 1976, 1977). Certainly much empirical data indicates that litigants commonly feel legal fees are inordinate, unreasonable or unfair (Genn, 1999; Christensen et al., 1998; Hengstler, 1993; Harris et al., 1984; Curran, 1977; Steele & Nimmer, 1976; Curran & Spalding, 1974; Hallauer, 1973; Missouri Bar, 1964) in terms of either the total amount ultimately received or in relation to the work and effort put in by lawyers (Baldwin, 1997a; Matruglio, 1994; Tomasic, 1978). Interestingly, no correlation exists between costs paid and parties' beliefs as to whether charges are reasonable (Matruglio, 1994).

Yet importantly, Curran's (1977) U.S. data suggests that whilst nearly all litigants may feel fees are no higher than what other lawyers would charge, clients' appraisals of fees' fairness vary to a great extent depending on problem type, thus seemingly relating to the nature of disputes and how they are perceived by clients. This was also found by Bogart & Vidmar in Ontario (1990). But arguably, because litigation is not something individuals view as a natural part of day to day life, virtually any expenditure on legal representation for litigation is likely to be seen as more than parties would like to spend. Indeed, this is supported by recent findings that disputants don't want to have to pay for something they view is their right or owed to them (Genn, 1999).

As to benefits litigants perceive they obtain, Australian research in injury and community disputes (Matruglio, 1994; Tomasic, 1978) suggests that only half of litigants feel they receive their money's worth in terms of what they get out of lawyers. This supports certain U.S. findings covering different dispute types (Senate Standing Committee, 1991). Similarly, Curran (1977) found that even parties who felt fees were reasonable in terms of costs of the service, had serious doubts as to whether costs were reasonable as compared with the value to them of having lawyers (data from national ABA survey covering diverse dispute types). This may be because litigants perceive lawyers' work as invisible, hence find it difficult to link legal fees to service received and benefits gained. This is particularly true of 'one-shotters' (Galanter, 1983; Senate Standing Committee, 1991; Sykes, 1970) as multiple users of lawyers have been found more frequently to view fees as fair (Curran, 1977; Hunting & Neuwirth, 1962). Yet litigants, incapable of assessing

legal complexities and unable to comprehend legal terminology, cannot protect their interests in this regard to ensure they are provided with value for money (Zuckerman, 1996).

Furthermore, though information may be available on how litigants can check whether lawyers' fees are reasonable (OSS, 1996b), much evidence indicates that even if they find charges are unreasonable, most litigants, for a whole host of reasons, prefer not to complain (Baldwin, 1997a; Zander, 1978). This is elucidated by findings of divorce litigants' frequent aversions to confrontation with lawyers (Sarat & Felstiner, 1995; Felstiner & Sarat, 1992), litigants' proclivities in diverse case types to view their cases as relatively unimportant from their lawyers' perspectives (Steele & Nimmer, 1976), and litigants perceiving complaining as embarrassing, protracted, frustrating, fruitless, and simply causing a fuss (Harris, 1994 – diverse case types). Some litigants worry about being charged for time spent by lawyers listening to their complaints (Williams, 1997). Indeed, diverse case type data indicates that though changing lawyers is difficult for most, litigants normally prefer to do so rather than complain (Davis, 1988 – matrimonial; Goriely, 1993 – diverse case types; Hirschman 1970). Of course, not complaining does not necessarily provide the impetus to change lawyers. Though a number of Erlanger et al.'s (1986) divorce litigants felt dissatisfied, very few fired their attorneys.

Fewer gaps exist in this crucial area. Yet, unfortunately, nothing that is known is good from most litigants' perspectives. Thus, despite Fried's (1976) emphasis on client-lawyer relationships being like trusting, caring friendships, this analogy does not appear to reflect many litigants' real experiences and cannot explain why\*(173) those who use lawyers throughout their litigation tend to have the least favorable perceptions of them (Baldwin, 1997a; Interview: Julien, 8-5-98). Of course, it may be impossible for litigants never to complain about lawyers, particularly as issues that lead them to lawyers are often emotion-laden, whereas neither laws nor lawyers can ameliorate many of life's cruelties (Zander, 1978; Allen 1961).

### *3.4. Negotiations and Settlements*

Though data on negotiations and settlements is frequently unobtainable (Simon, 1991) and no official records, statistics or information exists, it is well established that the vast majority of cases settle prior to reaching court (Sarat & Felstiner, 1995; Zander, 1995, 1997; Genn, 1995a, 1987; Melli et al., 1985; Galanter, 1983, 1984, 1986; Cain, 1983; Cranston, 1986; Trubek et al., 1983a; Harris et al., 1984; Sarat, 1976). In view of the pervasiveness of this aspect of civil litigation, it is surprising to note the scarcity of systematic empirical research into litigants' perceptions and feelings during and after settlement negotiations (Menkel-Meadow, 1993; Mnookin & Kornhauser, 1979). This section aims to weed out and evaluate what is actually known empirically from the vast array of what amounts to speculation, attempting to highlight some important questions that remain to be answered.

#### *Negotiations*

Expectations as to settlement negotiations may be either case type or jurisdiction dependent. Australian injury data suggests that at the outset most litigants are unaware that in all probability they will settle. In Matruggio's research (1994), 78% of plaintiffs believed their cases would get adjudicated whilst only 8% did. In contrast, interviews with Wisconsin divorce litigants indicate that negotiation is central in parties' minds as they expect their cases to settle (Melli et al., 1985). Regardless,

most litigants are encouraged to settle (Matruglio, 1994 – injury; Erlanger et al., 1986 – divorce; Macaulay, 1979 – consumer disputes). But it seems that some clients are given the impression that negotiations are replete with bluffing, insincerity and imperfections, hence must be utilized with skill (Merry, 1990 – various small claims case types; Sarat & Felstiner, 1995 – divorce). Initially many litigants reject their lawyers' exhortations to negotiate. Still, divorce data indicates that most clients are swiftly persuaded as they are told that more can be obtained by negotiated settlements than through adjudication (Sarat & Felstiner, 1995, 1986). Nevertheless, it has been found that some litigants, expecting their lawyers to unequivocally accept their stories, are unable to understand how they can be in favor of compromise agreements (Genn, 1999 – diverse case types; Davis, 1988 – divorce). **\*(174)**

Once involved in negotiations, litigants' own evaluations of what is fair may initially be self-serving and biased (Loewenstein et al., 1993; Mnookin & Kornhauser, 1979). Yet, their views on fairness can be unclear and changeable (Lloyd-Bostock, 1991; Conley & O'Barr, 1990). Thus, litigants seek lawyers' advice on what courts would decide, what they would obtain if they settle, how to react to various offers and what offers to make. Clearly, this influences litigants' views on what is acceptable and consequently affects their feelings and negotiating behavior (Matruglio, 1994). Moreover, at least some litigants are very much told how to behave during negotiations and that emotions must be ignored, notwithstanding the fact that large numbers of litigants see negotiations as fights between their views of reality and those of their opponents (Merry & Silbey, 1984; Sarat & Felstiner, 1995, 1988). Hence, some litigants feel negotiations, which concentrate on money alone, trivialize issues they view as important (Lind et al., 1990). Unsurprisingly, negotiations may be quite difficult for litigants. For instance, injury plaintiffs undergo much stress often caused by defendants' bargaining strategies when lawyers are incapable of insulating them (Genn, 1987); and divorce client interviews indicate that for parties, the negotiation arena is replete with emotional turmoil (Erlanger et al., 1986; Melli et al., 1985).

Moreover, it seems that bargaining elements inherent in negotiations (Gulliver, 1979) include factors that are psychological aggravations for litigants, potentially damaging their beliefs in the dignity and fairness of the system (Redmount, 1959). We know that many actions necessary for preparing the ground for settling diverse disputes are perceived as alien and at times improper to inexperienced British disputants (Genn, 1999). Matruglio (1994) found that though Australian injury litigants are at least as concerned (if not more) about the perceived fairness of negotiations as about actual results, 64% of plaintiffs view negotiations as unfair. In fact, British divorce litigant interview evidence indicates that those who view their lawyers as conciliatory during negotiations will often perceive them as protecting their interests, whereas perceptions of lawyers as overly aggressive tends to engender negative views (Davis, 1988). This accords with findings that litigants perceive trial procedures as more careful and fair than bilateral settlements (Lind et al., 1990).

Furthermore, notwithstanding arguments that litigants commonly want to accept negotiation results and leave lawyers to deal with the business of bargaining (Redmount, 1959), injury data indicates that material numbers of clients feel left out of negotiations and consequently feel pressured to accept whatever has been offered. In Matruglio's research 80% said they would have wanted to participate more in the negotiations. These findings seem to support the view that litigants may feel alienated from justice by lawyers alone doing the negotiating (Morris et al., 1973). **\*(175)**

That being said, at least in matrimonial cases, findings are somewhat unclear as to who controls negotiations. Some client and lawyer interview data suggests that it is at least perceived that parties, often with extra-legal agendas, control negotiation processes (Melli et al., 1985). Yet, other divorce litigant findings indicate that parties often feel negotiations are out of their control (Erlanger et al., 1986). This accords with further matrimonial research, which found that litigants, fearing that their interests will not be wholly protected, frequently resist bilateral lawyer negotiations and often partake directly in negotiations (Sarat & Felstiner, 1995). Though this may result in feelings that lawyers do little apart from legally translating agreements that parties have reached themselves (Jacob, 1992), litigants' initial reasoning may be justified. Indeed, a variety of evidence in U.S. and British injury cases indicates that lawyers do not always obtain the best deals they can for clients (Genn, 1987). For instance, Harris et al. (1984) found that in 63% of the accident cases that settled, plaintiffs accepted first offers predominantly as a result of legal advice, yet second offers were 33% higher. Rosenthal (1974) too found that apart from ineffective service from lawyers not being rare, in 42% to 77% of cases litigants should have received more than they actually did. It may be that employing active methods, including persistently participating in case decision-making, can increase clients' chances of protecting their emotional, psychological and financial interests (Rosenthal, 1974). But clients may not have either the ability or the strength to do so.

Apart from these relatively sparse empirical findings, there has been extensive theoretical debate in this area. Numerous unsupported assertions have been proffered as to how litigants feel during negotiations. Yet, we really know little about how parties in various case types and jurisdictions perceive settlement negotiations, including who controls them. What is clear is that the scarcity of empirical research into this fundamental and pervasive part of litigation is simply unacceptable.

#### *Settlements*

Settlements are often encouraged (Matruglio, 1994 – injury; Erlanger et al., 1986 – divorce; Macaulay, 1979 – consumer disputes) or 'sold' to clients (at least by contingency fee lawyers utilizing numerous tools to influence them into accepting settlements – Kritzer, 1998). This may partially account for why diverse case type research indicates that litigants view settlements as lesser evils to courts (Relis, 2002 – medical; Bogart & Vidmar, 1990 – diverse case types; Genn, 1987 – injury; Erlanger et al., 1986; Melli et al., 1985 – divorce). That being said, empirical evidence also reveals that bilateral lawyer-negotiated settlements often leave litigants dissatisfied (Merry & Silbey, 1984; Erlanger et al., 1986). **\*(176)**

There are numerous assertions as to why this is so. It may be that litigants are not ready psychologically for the inevitable disappointments (Merry & Silbey, 1984), or that clients are generally heavily influenced by what their lawyers think of settlement offers (Erlanger et al., 1986; Turner, 1979, p. 80; Eisenberg, 1976; Hunting & Neuwirth, 1962), regardless of whether such offers are less than what they had originally expected (Harris et al., 1984). Another factor may relate to the fact that what constitutes satisfactory settlements are monetary matters for lawyers whereas emotions make up an important part of the equation for many clients. We know that reluctant U.S. divorce litigants have been found to very often get persuaded by their lawyers into settling for amounts that are below what they consider just (Sarat & Felstiner, 1986, 1995). Interviews with other matrimonial clients shed some light on why this occurs. Frequently given reasons for settling include the need to reduce the tension and emotional strain of their disputes as well as litigants' perceptions that they have no choice but

to settle. Interestingly, litigants view settlement as the only way out of their disputes due to numerous pressures they experience. These pressures include a type of social pressure to resolve their cases without going to court, pressure from their lawyers and/or judges to settle, uncertainty of adjudicated outcomes, and pressures relating to the emotional and financial costs of litigation and trial (Erlanger et al., 1986; Melli et al., 1985).

The strong financial pressures to settle felt by parties highlights another possible reason for dissatisfaction with settlements: Fiss' (1984) vehement argument that the weak are often coerced into settlements. Certainly, varied empirical findings demonstrate that inequalities in litigants' strengths, resources and abilities to endure protracted disputes reflect the terms of agreements reached (Galanter & Cahill, 1994; Cranston, 1995; Davis et al., 1994; Bogart & Vidmar, 1990; Genn, 1987; Erlanger et al., 1986; Harris et al., 1984; Galanter, 1974; Rosenthal, 1974).

As to views on fairness of settlements, it seems that the nature of disputes may be a factor. In the Genn (1999) study, 32% of divorce/separation parties and 48% of employment disputants felt their settlements were unfair as compared with only 10% of injury disputants who felt this way (though not all were involved with lawyers or litigation). Additionally, there were disparities among income groups 67% of those earning over £41,000 felt their settlements were unfair as compared with only 13% of those earning £10,000–£20,000. Unfortunately, reasons for these feelings were not included in the data.

But clearly, a paucity of empirical knowledge exists on litigants' perceptions, mental processes and emotions during this fundamental and pervasive part of litigation. What are the thought processes of those in non-matrimonial cases\*(177) when making decisions relating to settlement? What affects perceptions of settlements in diverse case types? Still, once again, from what we do know the picture looks rather bleak. Unfortunately, things do not ameliorate for those litigants who do not settle.

#### 4. COURTS

'Going to court' is perceived differently in varying locations, with different dispute-types and by diverse people in disparate roles, relationships and status positions (Nader & Todd, 1978; Greenhouse, 1982; Engel, 1984; Kritzer et al., 1991). However, in much of the western world, though having courts available to enforce rights is considered important, courts are frequently seen as cumbersome, formal, not geared towards dealing with real-life relationships, unfriendly, hostile, biased, and to be used only in extreme situations (Genn, 1999; Rottman, 1999; National Center for State Courts, 1999; Galanter, 1986; Sarat & Felstiner, 1986; NCC, 1979). Furthermore, disputants are often deterred from using courts due to fears of excessive costs, complex, upsetting procedures, anxiety about the entire court atmosphere and concerns about feeling disappointed and frustrated if losing at trial (NAO, 1996 – based on postal questionnaires from small claims U.K. litigants in 3,000 cases throughout seven county courts; Baldwin, 1997, 1997a – diverse case types; Friedman & Percival, 1976; NCC, 1979, 1989, 1995; Sarat, 1977; Raymond, 1992; Moulton, 1969). Still, those litigants who survive lengthy and wearying pre-trial processes (Galanter, 1983) may desire their 'day in court' (Genn, 1999; Huang & Wu, 1992) and do use courts. Perhaps this can be explained by U.S. litigant interview data, which illustrates that some view courts as powerful and able to provide some type of justice (Merry, 1986).

Notwithstanding the dearth of writings on perceptions of court experiences (Genn,

1999; Baldwin, 1997, 1998), we shall explore some of the reasons why some litigants may have negative views of courts by first examining issues and difficulties pertinent primarily to unrepresented litigants, followed by an analysis of perceptions and feelings of litigants in general and an investigation into litigants' satisfaction with their court experiences.

#### *4.1. Unrepresented Litigants*

The bulk of the research into litigants' perspectives in relation to courts comes from small claims litigants who generally represent themselves. This data has become increasingly important in Britain, in view of the substantial and increasing numbers of unrepresented litigants in the higher courts, the expansion of the small claims jurisdiction, and the recent finding that 90% of all justiciable problems for private individuals do not exceed £5,000 – the new small claims limit (Genn, 1999; LCD, 1997; Interview: Julien, 8-5-98; Interview: Mercouris, 24-4-98).

Upon entering court buildings, litigants immediately notice that courts are not structured for their convenience (Church, 1990; Baldwin, 1997, 1997a – small claims; Matruglio, 1994 – injury). The amount of assistance litigants receive from court staff will differ between jurisdictions and courts, as will litigants' feelings about their treatment by court staff (Baldwin, 1997; CJR, 1988; NCC, 1979), issues that have been found to most strongly influence small claims litigants' satisfaction with court experiences (Hildebrandt et al., 1982; Weller et al., 1979).

Once having entered the courtrooms, judicial assistance is vital. Indeed, research reveals that most difficulties experienced by lay litigants, whether substantive or procedural, could be resolved by judges, if willing and able to intervene. Yet, though judges' behavior greatly impacts upon the type of accounts advanced by litigants (O'Barr & Conley, 1985; Conley & O'Barr, 1990), British data suggests that judges differ enormously in terms of the extent to which they use their discretion to relax evidentiary rules and attempt to discover further details from litigants (Baldwin, 1998). Unfortunately, unrepresented litigants have little way of knowing in advance, whether judges will be hostile or friendly (Rosenthal, 1974).

Still, regardless of litigant-type or court-type, international research highlights the fact that the majority of unrepresented litigants are seriously disadvantaged. Only some consciously appreciate this (Baldwin, 1997). Nevertheless, though differing immensely in characters, capabilities, self-assuredness, eloquence, experience and prior research done, large numbers of unrepresented litigants view the pursuance of their cases to be uphill struggles (GCC, 1992; Baldwin, 1997). Often relying on common-sense and luck, at least in the case of injury and small claims cases, many litigants come to court with little understanding of court procedures (Genn, 1995) and little appreciation of courts' passivity, litigation's adversarial nature, or the fact that they will have to prevail over substantially diverse versions of their cases (O'Barr & Conley, 1988; Conley & O'Barr, 1990 – U.S. large scale study of mainly unrepresented small claims litigants in 14 courtrooms of states, including over 100 open interviews with litigants at various stages and trial observations). Furthermore, it seems that such unrepresented litigants do not completely recognize the requirements of establishing legal validity nor do they wholly appreciate the evidential burden imposed upon them in proving their cases. Hence, evidence proffered is frequently extremely limited (Baldwin, 1997, 1998 – observing 109 small claims hearings in 18 British county courts) and litigants' presentations, replete with their own assumptions about justice, often omit or fail to deal adequately

with vital legal requirements. Interviews with U.S. and U.K. small claims lay litigants reveal that they are frequently more interested in who 'should' be deemed responsible for wrongs (Conley & O'Barr, 1990) as their ideas about causation, proof and legally sufficient case presentations are fundamentally different from how courts consider these issues (Baldwin, 1997, 1998; O'Barr & Conley, 1985; Conley & O'Barr, 1988).

Though the extant data is insufficient to determine whether informal-type narratives adversely affect case outcomes, some opine that they do (Conley & O'Barr, 1990; O'Barr & Conley, 1985). Arguably, it seems logical that many valid arguments or defences may not be raised, as litigants may be unaware and incapable of properly asserting their rights. This could result in insufficient consideration of their cases' merits (Moulton, 1969). Though British data suggests that the vast majority of small claims litigants cope well in court and are adequately competent and capable of participating effectively (Baldwin, 1997; GCC, 1992), it may be that those who do not obtain preliminary legal advice will experience numerous difficulties. Baldwin's research (Baldwin, 1997a) indicates that unrepresented litigants frequently do not comprehend why certain decisions are reached which do not accord with what they advanced in court or with their own perceptions of justice.

Furthermore, notwithstanding litigants' tendencies to perceive disputed issues as straightforward and to presume courts will have no difficulty in understanding them, evidence suggests that courts are sometimes unable to comprehend litigants' case presentations, irrespective of legal merits. Though U.S. small claims litigants and judges have been found to be oblivious to communication difficulties (Conley & O'Barr, 1990; O'Barr & Conley, 1985), High Court Masters in London, unable to understand what litigants are saying, have been known to adjourn hearings and refer unrepresented litigants to the CAB office (Interview: Julien, 8-5-98).

Notwithstanding these important findings, more research is needed particularly as small claims litigation is not typical of all litigation (Sarat, 1976). Indeed, scant data exists on unrepresented litigants' experiences in higher courts where large numbers attend.

#### *4.2. The Court Experience Litigants' Perceptions and Feelings*

Numerous disparities exist in terms of the way litigants get treated by courts and judges (NCC, 1979). Furthermore, litigants' perceptions of their court experiences are affected by factors such as parties' personalities, needs and **\*(180)** relationships with opponents, as well as case types, court procedures and outcomes (Hildebrandt et al., 1982; Nader & Todd, 1978). Hence, generalizations of litigants' feelings could be misleading (Baldwin, 1997a). Still, a common thread exists throughout the various findings.

##### *Stress*

Court experiences are considered the crux of litigation for most. Yet, it is well established that resolving disputes through the courts is not congenial for most ordinary individuals (Palmer, 1984). Simply put, coming to court causes litigants distress (Genn, 1999; Court Service, 1995; Re, 1994; Davis, 1988). Large numbers of litigants panic prior to hearings (Interview: Julien, 8-5-98). Indeed, regardless of case details, stakes involved or outcome fears, litigants generally experience tremendous anxiety and trepidation due to fears of having to appear in court (Genn, 1999 – diverse courts; Baldwin, 1997 – interviews with 262 small claims litigants in 16 county courts in England and Wales, including represented

and unrepresented plaintiffs, defendants, private litigants and corporate litigants; Merry, 1990, 1986 – U.S.; Hildebrandt et al., 1982 – Canada; Lloyd-Bostock, 1984 – England).

It is the nervousness of both having to speak in public, sometimes without knowing in advance precisely what they are expected to do, and having to deal with opponents' accusations which is so frightening (Baldwin, 1997). This is unsurprising in view of findings which reveal that litigants are usually unfamiliar with court environments, do not comprehend courts' functions, procedures or how civil courts resolve various issues (Rottman, 1999; Genn, 1999; NCC, 1979), and are unaware or misinformed of what to expect (Binder & Price, 1977; Hildebrandt et al., 1982). Furthermore, pre-trial anxiety is often exacerbated for British litigants, unprepared for the fact that their initial meetings with their barristers, who represent them in court and who may be relatively unfamiliar with their cases, are on the mornings of their hearings. Divorce litigant interviews indicate that this engenders considerable unease, causing a material number to subsequently feel their barristers had not done the best job possible for them (Genn, 1999; Davis, 1988). Additionally, individual litigants, often expecting their representatives to be as involved or emotional as they are about their cases, can view their lawyers' familiarity or well-mannered conversations or negotiations with opponents' attorneys in court hallways as threatening or pernicious (Genn, 1999).

That being said, litigant interviews suggest that most litigants feel highly tense throughout their time at court for other reasons as well (Davis, 1988). Firstly, courtroom contests can have immense emotional value for litigants and consequently very intense emotional effects on them. Litigants may feel they **\*(181)** will be morally judged. This aspect of litigation may have psychological elements that go deeper than self-vindication (Frank, 1949; Stein, 1992). Indeed, Merry (1990 – interviewing 150 working class litigants in 2 Massachusetts towns, and observing trials) argues that litigants are spurred to vent feelings of combativeness in court and fight for their perceptions of situations to be the authoritative ones, whilst often believing that 'the best person will win'. This explains some litigants' feelings of frustration and being cheated if opponents fail to attend hearings (though clearly numerous litigants feel relieved to avoid any possible confrontations – Baldwin, 1997). It also explains why all or nothing judgments (Sarat, 1976; Aubert, 1967) can result in trial losers feeling blamed and humiliated (Hayden & Anderson, 1979).

Numerous other factors may also cause litigants anxiety during hearings. Firstly, it may be psychologically stressful for litigants to feel that the majority of those around them are comparatively at ease in court environments (Moulton, 1969), which are alien to them. Furthermore, courts' architectural layouts can intimidate parties who are made to rise and sit clumsily in compliance with unfamiliar etiquette (Simon, 1978). Some research suggests that at least for inexperienced litigants, courtroom formalities are shocking and frightening (Baldwin, 1997a; Merry, 1986). That being said, a questionnaire study of one Canadian small claims court (which is virtually the same as formal courts in England and Wales – Baldwin, 1997) found that 80% of respondents, both represented and unrepresented, did not find court processes intimidating. However, education and prior court experience did influence lack of intimidation (Hildebrandt et al., 1982).

Another cause of unease stems from the fact that litigants find discussing their personal affairs in courts full of strangers and sitting in waiting rooms with opponents difficult. Though this data derives solely from divorce litigant interviews, it importantly found that both male and female litigants especially need and appreciate the support they receive emotionally from their lawyers whilst in and around courts

(Davis, 1988). Arguably, these findings could apply to all litigants in emotional circumstances or with past relationships.

A final reason for stress derives from the fact that once in court all litigants further lose control over their disputes. Indeed, despite feeling empowered in relation to their neighbors and families, Merry's (1990) litigants reported feeling controlled by the courts. Many litigants consequently feel astounded or even insulted as they commonly experience feelings of sudden powerlessness (Matruglio, 1994 – injury; Merry, 1990 – small claims). One aspect of this control is that litigants will often have been coached on their conduct in court and groomed physically by lawyers in ways aimed at pleasing judges. Furthermore, not only do lawyers present litigants' cases, but **(182)** they also decide the content and order of what litigants themselves will say in court, as this will have been formulated by lawyers' questions (Conley & O'Barr, 1990). In fact, small claims litigant interviews reveal that they are often prevented by their lawyers from saying things they want to (Baldwin, 1997a).

#### *Communication*

Despite the common view that judges are detached (National Center for State Courts, 1999; Genn, 1999), it is well established that litigants consider their chances to freely recount their stories to judges to be fundamental. Expressing themselves, having their voices heard and feeling they have had a fair opportunity to put forward their side can greatly increase litigants' sense of well being and satisfaction (Baldwin, 1997a; Conley & O'Barr, 1990; O'Barr & Conley, 1985, 1988, 1990 – though some may be concerned about sounding foolish – Spiegel, 1979). In fact, in U.S. magistrates courts, litigants have been known to retract their complaints after freely recounting their stories to judges (Weinstein, 1977).

But litigants' testimonies in diverse courts, during which they attempt to communicate their accounts in ways familiar to them, have been found to be commonly interrupted (to varying degrees – Baldwin, 1998) and strictly controlled by judges and lawyers in court. This is done to accord with rules, which though aimed at protecting litigants, are alien, often nonsensical to them, and generally act as barriers preventing or restricting communication with courts (Conley & O'Barr, 1990; O'Barr & Conley, 1985, 1990 – small claims; Sarat & Felstiner, 1986; Davis, 1988 – matrimonial; Sarat, 1977 – diverse types). This causes litigants much frustration (Davis, 1988; O'Barr, 1982; Conley et al., 1978), particularly as they receive scant explanation from courts about why legally what they say is unacceptable (O'Barr & Conley, 1985). Though the present relaxed rules of evidence in some jurisdictions must alleviate these problems to some extent, it seems that evidentiary rules are rarely fully explained to litigants. Furthermore, U.S. and U.K. small claims litigants have been found to regularly fail to understand why judges tell them to focus on certain issues which they perceive as trivial and of little relevance to their disputes (Baldwin, 1998; O'Barr & Conley, 1985), whilst what they do view as pertinent (e.g. disputes' histories and litigants' reputations) may be omitted as legally irrelevant (Merry, 1979). Recently, apart from difficulties in dealing with court vocabulary, 25% of British litigants in various courts felt they had been able to say only some, very little or none of what they wanted to say at their hearings, about half of whom feeling that significant facts about their dispute were not discussed at all. Additionally, 20% felt that the adjudicator **(183)** had not understood their case very well or at all well (Genn, 1999). Litigants have been found to often stress the social context of their disputes and expect courts to do likewise (Baldwin, 1997; Conley & O'Barr, 1990). Additionally, frequently unaware that their needs and wishes are irrelevant for courts

(Aubert, 1963), litigants expect courts to be attentive to their feelings. Clearly, this does not generally occur.

Thus unsurprisingly, substantial empirical research in injury, magistrates, and diverse small claims cases indicates that regardless of results (no correlation exists between success and how court experiences are perceived – Kritzer, 1990; Matruggio, 1994), litigants commonly feel disappointed, unhappy and frustrated about how they were treated in court, particularly if prevented from fully expressing themselves (Merry, 1990; Conley & O’Barr, 1990; Weinstein, 1977; Carlen, 1976). Such litigants can leave courts feeling that no one has understood how it was for them (Morris et al., 1973). In fact, in post court interviews some small claims litigants stated they would never have gone to court had they been aware beforehand how little opportunity they would have to recount their side of events (O’Barr & Conley, 1985, 1990). These reactions may occur because litigants need to perceive judges as understanding their distress and the gravity of their problems in order to obtain the official validation they seek. Even trial losers view judges’ understanding to be vitally important, providing them with a sense of relief and capable of making the whole process worthwhile, regardless of whether judges do anything to help. Indeed, large numbers of litigants in diverse case types use litigation as a type of therapy and require the catharsis of recounting their problems to sympathetic, authoritative judges (Conley & O’Barr, 1988 – small claims; 1990; Davis, 1988 – divorce; National Audit Office, 1992 – survey of over 800 legal aid clients).

#### *Oppression*

But both small claims and injury litigants have been found to perceive their court experiences as demeaning when their cases get treated routinely, hurriedly and impersonally by passive courts (Baldwin, 1997; Conley & O’Barr, 1990; Merry, 1990; Rosenthal, 1974). Judges have been perceived as uninterested (Haggstrom, 1965) or even oppressive and rude (Baldwin, 1997a), making litigants feel insignificant (Merry, 1986). Furthermore, for unrepresented litigants, though feeling equally treated to their represented opponents is of great importance (as they are particularly concerned about unfairness resulting from opponents being legally represented – CJR, 1988), some do not feel this way and consequently view procedures as unfair. In fact, anecdotal evidence suggests that numerous unrepresented High Court litigants feel they are victims of conspiracies between judges and opponents’ lawyers, particularly if opponents **\*(184)** are given unequal time to speak (Interview: Julien, 8-5-98). Certainly, litigants feel distrustful and angry if they perceive judges as more sympathetic to opponents (Davis, 1988 – divorce cases).

Additionally, being subjected to cross-examination, entailing very sensitive, personally abusive or condescending questions, has been found to be perceived as highly degrading and deeply humiliating for injury, small claims and unrepresented litigants the High Court (Simon, 1978; Baldwin, 1997a; Rosenthal, 1974; Interview: Johnson, 20-2-98), who often intensely feel victimized. Thus large numbers of these litigants consistently emphasize their feelings of being treated like criminals and of how badly affected they were by being screamed at or called liars by opponents’ lawyers, who are perceived as generally oppressive and rude (Rosenthal, 1974; Baldwin, 1997a). Similarly, litigants in more formal open court proceedings have also been found to frequently experience fear and intimidation (Baldwin, 1997, 1997a). Though numerous respondents surveyed in diverse type British adjudications in Genn’s research (1999) did not specify feeling that their

court or tribunal experiences were especially upsetting, it may be that a greater proportion than reported actually attended small claims hearings. Furthermore, open questions did reveal some graphic depictions of traumatic experiences, with litigants feeling utterly terrified, feeling like criminals, nervous wrecks, feeling scared and distressed at being asked numerous questions, whilst being told by their own lawyers not to use certain words.

However, though some of the court-related findings pertain to diverse type courts, one must note that a material portion of the above findings derive from small claims research (e.g. Baldwin, 1997, 1997a; Merry, 1986, 1990; O'Barr & Conley, 1985; Conley & O'Barr, 1988, 1990). We have only included those findings that in our estimation are relevant to litigants in all courts. Nevertheless, it may be that small claims data should not be generalized to other courts as it is unique and will not represent the whole spectrum of court experiences (Sarat, 1976). For instance, in the Baldwin research (Baldwin, 1997, 1997a, 1998), formal court litigants complained four times as much as small claims litigants whose complaints were also far less serious. Furthermore, litigants' anxiety and stress levels during formal proceedings were not felt by parties in small claims procedures where far fewer suffer the acute worry about results. Thus, arguably it may be that for litigants, small claims hearings are a totally different experience to formal courts. If so, we must view all findings based solely on small claims research as representing gaps in terms of what remains unknown in courts that are more formal.

The need for further research is exemplified in other areas as well. For instance, older studies suggest that knowledge and experience of courts erode\*(185) people's support, irrelevant of whether favorable outcomes are achieved (Sarat, 1977; Walker et al., 1972; Kessel, 1966; – though the Yankelovich, 1978 study may not, in fact, support the view that familiarity with formal courts engenders lower opinions of them). Yet, fresh research of litigants with very recent court experience suggests that they have more positive opinions than those with court experience a few months old or with no direct experience (Kritzer & Voelker, 1998). So being in court may engender at least short-term augmentation of opinions. Clearly, this suggests more qualitative research is needed to understand litigants' perspectives. Indeed, court experience reports in the Genn (1999) research are somewhat unclear. The generally positive evaluations of diverse type court experiences noted in questionnaire responses somewhat conflicted with other answers given about negative repercussions of being embroiled in the legal system as well as with some of the depictions of court experiences provided during open questioning in interviews. Certainly, throughout our extensive reading, we could find few positive feelings from litigants who had been to formal courts (Tyler, 1988a; Kritzer, 1990; Burger, 1982; Sarat, 1977; even in India – Kidder, 1973).

Again, certain questions still remain e.g. Do represented litigants suffer the same levels of anxiety, fear and intimidation as unrepresented litigants prior to and during hearings? Do litigants view their stories as presented by lawyers as having changed so drastically that they are substantially different to their initial objectives? (as Galanter, 1983, asserts). However, once again, of what is known, we see a dismal picture as far as large numbers of litigants are concerned. The reasons for litigant dissatisfaction should not be surprising.

#### *Reasons for Dissatisfaction*

The reasons for litigant unhappiness with court experiences are clear. Voluminous empirical findings prove that litigants are at least as concerned about how they get treated in court and how fair they perceive procedures used in

reaching decisions, as they are about substantive issues (Matruglio, 1994; Interview: Julien, 8-5-98; Baldwin, 1997; O'Barr & Conley, 1988; Conley & O'Barr, 1988; Goerd, 1992; Clark, 1992; Pinkley, 1992; Casper et al., 1988; Casper, 1978; Barrett-Howard & Tyler, 1986; Thibaut & Walker, 1978, 1975; Tyler, 1984, 1988; Lind & Tyler, 1988; Leventhal, 1980). These are main determinants of litigants' reactions to court experiences (Shuman & Hamilton, 1992; Tyler, 1988; Lind & Tyler, 1988; Lind et al., 1989) and to the entirety of their litigation, including case results (Baldwin, 1997; Matruglio, 1994; Vidmar, 1990; NCC, 1979; Pound, 1906; CRU, 1991; Hildebrandt et al., 1982; Lind, 1982; Tyler, 1984, 1988; Walker et al., 1974; LaTour, 1978; Thibaut & Walker, 1975, 1978; Casper et al., 1988; Lind & Tyler, 1988; Barrett-Howard\*(186) & Tyler, 1986; Lind et al., 1989, 1990; – though satisfaction with outcomes has been found to be related to dispute-type – Curran, 1977).

Litigants' feelings about the fairness of court procedures are strongly influenced by their subjective appraisals (Jacob, 1971) of their opportunities to comprehend and actively take part in proceedings, their chances to thoroughly advance their side of events, how comfortable they are, whether they are treated equally and with dignity, and whether they have control over procedures and outcomes in that their views are considered by judges in reaching final decisions, irrelevant of whether they have any impact (Baldwin, 1997a; Clark, 1992; Sheppard, 1985; Tyler, 1988, 1987, 1984; Lind et al., 1983, 1980; Lind & Tyler, 1988; Leventhal, 1980; Casper et al., 1988; Barrett-Howard & Tyler, 1986). Of course, what litigants perceive as justice in civil courts may also be part of the cultural beliefs shared by individuals in a particular society (Merry, 1985, 1986; Tyler, 1988).

A second important reason for discontent relates to expectations. It is no secret that litigants are frequently dissatisfied with delays, costs, results and sums awarded (Rosenthal, 1974; Interview: Julien, 8-5-98; Genn, 1995; Matruglio, 1994; Goerd, 1992; Clark, 1992; Lind et al., 1989; Ruhnka & Weller, 1978). However, what seems to matter is how costs, delays, procedures and outcomes are subjectively perceived to measure up to litigants' expectations (O'Barr & Conley, 1988; Tyler et al., 1989; Conley & O'Barr, 1990; Thibaut & Kelley, 1959; Rosenthal, 1974; Jacob, 1971), as litigants invariably feel that court experiences are unlike what they had expected (Merry, 1990). Indeed, though expectations infinitely differ (O'Barr & Conley, 1988; Conley & O'Barr, 1988, 1990; Cranston, 1986; Nader & Todd, 1978; Pinkley, 1992), data proves that parties who feel they fared better than they had expected will consequently be more satisfied, regardless of objective determinants. This is supported by recent findings where litigants who described their court experiences more positively included not only the well prepared, but also those who felt they received greater sensitivity and consideration than they had expected (Genn, 1999).

Notably, apart from some commercial clients, litigants' expectations mostly derive from information received from their lawyers (Matruglio, 1994; Lind et al., 1990, 1989; Genn, 1987; Harris et al., 1984). However, the effects of employing lawyers on satisfaction are unclear (Sarat & Felstiner, 1995; Ruhnka & Weller, 1978; Missouri Bar, 1964; but cf. Genn, 1999). Nevertheless, whether represented or not, research shows that many litigants' expectations are based on misapprehensions. For instance, litigants in diverse case types seriously misconceive the power of civil courts to remedy their problems, commonly believing they will receive the same sort of justice as criminal courts provide (Genn, 1999 \*(187) – diverse courts; O'Barr & Conley, 1988 – small claims; ABA poll – Keeva, 1994; Friedman, 1985; Interview: Julien, 8-5-98 – High Court CAB; Merry, 1986, 1992; Sarat & Felstiner, 1990 – divorce). Consequently, some argue that dissatisfaction stems from litigants arriving in court with unrealistic expectations and needs, often seeking intangible benefits, social

justice, and believing courts can solve their problems and right their wrongs (Burger, 1982).

But the litigation system is formulated to deal solely with economic pursuits and deciding legal issues. It is not interested in litigants' goals (Redmount, 1959) or personal and social problems. Hence, courts remain detached and impersonal (Galanter, 1983), and do not get involved with disputes' relational aspects. Likewise, court remedies often do not deal with litigants' perceived requirements and real objectives, including their non-monetary agendas. Yet, these have been found to be major reasons for litigants' dissatisfaction with courts, at least in small claims and injury cases (Baldwin, 1997a; Merry, 1990; Matruglio, 1994; Church, 1990; Conley & O'Barr, 1988, 1990, 1990a; O'Barr & Conley, 1988; Cranston, 1986; Nader & Todd, 1978). In short, ideological dissonance exists between how litigants and courts view both disputes and justice (Baldwin, 1997, 1997a; Felstiner & Sarat, 1992; Merry, 1990; Hunting & Neuwirth, 1962). Thus arguably, if litigants are provided with correct information on precisely what to expect in court, this could augment satisfaction (Conley & O'Barr, 1990; Interview: Johnson, 20-2-98). Certainly, for those with prior court experience, expectations are often lower (Merry, 1986).

The findings analyzed in this section arguably lead to one question 'if litigants suffer so badly in courts, why do some studies suggest that most litigants are satisfied with their court experiences (Kritzer & Voelker, 1998; Baldwin, 1977; NAO, 1996; LCD, 1986; CRU, 1991; Walker et al., 1972)? Perhaps the answer lies in the fact that in reality very little is known empirically about what litigants want and require from courts (Baldwin, 1997). Consequently, we have little knowledge of whether litigants' real aims are met by the realities of civil litigation (Genn, 1995). But for those who at this point still accept the realities of litigation without much protest, many soon change their views once they find out the harsh realities of litigation's 'end results'.

## 5. END RESULTS

### *How Does Litigation Affect Litigants' Lives?*

Upon commencing proceedings, it very well may be that litigants never consider the psychological and emotional costs of litigating, as many do not **(188)** appreciate what litigation entails (Genn, 1999; Interview: Mercouris, 24-4-98; Interview: Julien, 8-5-98) or even the purpose of law (Conley & O'Barr, 1988). Yet, small claims and injury research prove that very often litigants' lives will be severely affected by their litigation (Baldwin, 1997a; Matruglio, 1994). This also appears to be the situation for large numbers of British High Court litigants (Interview: Julien, 8-5-98). Arguably, if this is the case for small claims parties, it seems only logical that for large numbers of litigants with higher value cases and even more at stake, they will tend not to experience lesser effects on their lives.

The recent Genn (1999) research, covering a wide range of dispute-types, solidifies the point that involvement in legal dispute processes has serious negative effects on individuals' lives. Specifically, 80% of employment disputants, 77% of divorce/separation disputants and 42% of those in injury claims found trying to sort out their problems stressful. Additionally, over half (52%) of those with divorce or separation cases (most of whom were involved in litigation) reported difficulties sleeping, as did 37% of those with employment disputes. Those in employment, divorce/separation, money, landlord and neighbor disputes reported

substantial adverse effects on their health. Of working disputants, 25% reported negative effects on their working life caused by their trying to resolve their disputes, most often having to be absent from work due to stress (24%), with 17% having to depart their place of work. Though some of the effects may indeed have been caused by the problems per se, taking legal action certainly seems to have something to do with it. Indeed, unsurprisingly it was also found that adverse repercussions on disputants are most pronounced for those embroiled in adjudication proceedings (68% said it was stressful, 37% had sleeping problems, and the health of 39% suffered) as compared with those whose disputes were resolved by agreement (where 38% reported it was stressful).

Indeed, it is a frequently overlooked truth that much litigation profoundly affects litigants' lives for extremely prolonged periods, very often diverting both litigants and their families from their normal daily routines (Matruglio, 1994; Burger, 1982). In fact, empirical evidence from Britain exposes the reality that for large numbers of litigants (excluding the bulk of repeat players), regardless of dispute-type (even commercial disputes) and irrespective of whether they are represented or not, their litigation literally takes over their lives. Indeed, it has been found that litigants commonly live, breath and simply become obsessed with their cases, investing a large part of their time in them (Baldwin, 1997a; Interview: Julien, 8-5-98). In fact, not only are lives badly disrupted, but some are even ruined as evidenced, inter alia, by the plethora of letters received by the London High Court CAB office. Similarly, numerous injury litigants have **\*(189)** recounted how the stress of litigation was very damaging to their lives (Matruglio, 1994). For some High Court litigants, their personal relationships (e.g. with spouses) were destroyed (Interview: Julien, 8-5-98). Baldwin (1997a) found that even small claims litigants suffered devastating effects on their lives, including drastic social and personal repercussions, and years of incessant severe worry and anxiety just thinking about, fearing and preparing for court. It may be that this acute stress is primarily due to costs worries (Baldwin, 1997a; Thomas, 1990). Indeed, one litigant in Matruglio's injury study (Matruglio, 1994) described how stressful the years were while the case continued, living in fear of being forced to mortgage their home because of owing so much money in legal costs.

Some evidence even suggests that certain litigants literally deteriorate physically throughout their litigation or even change in personality. As Julien notes (Interview, 8-5-98), litigants who had initially been very calm individuals became so stressed during litigation that they underwent a type of metamorphosis, sometimes to the extent of threatening their advisers. One litigant in Baldwin's study (Baldwin, 1997a) described how their life was hell and how they had to be prescribed medication for depression. Though some may classify these as 'war stories' (Genn, 1995), they corroborate research findings that indicate that individuals' self-esteem is strongly affected by the way they perceive their treatment by the court system (Shuman & Hamilton, 1992; Interview: Julien, 8-5-98). This is also consistent with U.S. litigant interview data in discrimination disputes where it was found that individuals resist using legal tactics or seeking legal resolutions as they are aware of how this can disrupt their daily lives and how they can lose control of hostile situations (Bumiller, 1988).

But if such are the effects, why do litigants not 'get out' as soon as they begin to realize the inimical consequences of litigation? One reason appears to be that once litigants commence their actions, they feel they cannot exit without having to pay huge legal fees. Hence, it seems that many litigants realize the harsh realities of litigation simply too late (Baldwin, 1997a).

The creation of a professional network to which lawyers could refer clients in an attempt to decrease the effects of disputes and ensuing litigation has been suggested (Matruglio, 1994). However, we submit that far more information is required on this fundamental area, which we believe represents the most important and greatest gap in our knowledge of litigants. So little is known on how precisely litigants' daily lives are affected by litigation. Are effects different depending on whether litigants are plaintiffs or defendants? To what extent do litigants' personal characteristics or case types matter? How and when (if at all) do litigants assess whether they can physically, psychologically and **(190)** emotionally bear all that litigation entails. What factors do they consider? Do litigants consider how litigation will affect their jobs, families and lives in general? Do they weigh up the psychological and emotional costs as well as the monetary ones against the possible gains or is it more of an impulsive or emotional decision? How is it that there has been so little interest in what may be the most significant 'human' element of litigation?

#### *What Do Litigants Come Away With?*

It is easier . . . for societies to declare rights than to provide remedies' (Miller & Sarat, 1980, p. 1564). But 'remedies are the life-blood of civil justice' (Jacob, 1987, p. 169). Hence, '... the true worth of any civil justice system is the mode of enforcing judgments ...' (Mayer, 1983, p. 244).

For the average individual who has gone through the agonies of litigation, justice mainly means collecting whatever courts award. It is true that compensation for losses or injuries may frequently assuage feelings of anger or resentment (Engel, 1984). However, another fundamental truth of the entire litigation exercise is that because civil court rulings are hardly automatically implemented, substantial numbers of litigants are unavoidably faced with serious problems in collecting on their judgments (Baldwin, 1997a; Cranston, 1986). Indeed, research internationally reveals that winning in court does not necessarily lead to litigants actually recovering what they were awarded or, in fact, anything at all (Kritzer, 1990; Yates, 1995; Galanter, 1986; Davis, 1988; NCC, 1979). In Britain, 40% of successful plaintiffs in the NAO (1996) study had to enforce their judgments, with only 33% of them recovering even a fraction of their claims. Similarly, Baldwin (1997) found that six months after obtaining their judgments, a large percentage of litigants had not received anything. Even when payment was received, it was accompanied by further stress as often payments were late. But the fact that over two decades ago the NCC survey (1979) likewise found that only 25% of trial winners received their entire awards immediately and 44% found enforcement extremely difficult arguably shows that litigants are not considered 'top priority' in the litigation system, as little has been done in all this time to rectify this fundamental problem. At least now, the Access to Justice Act 1999 in England and Wales provides the statutory base for a new Legal Services Commission that has the responsibility, inter alia, to help in the enforcement of judgments.

People may take others to court simply to 'punish' perceived wrongdoers, knowing defendants have no money to satisfy any judgments (Conley & O'Barr, **(191)** 1990). Yet, far more often it simply does not occur to many litigants that once they obtain their judgments even greater difficulties of enforcement may lie ahead. Indeed, empirical research covering a variety of case types suggests that most litigants believe that since judges felt they were in the right, that would be the end of it (Baldwin, 1997; NCC, 1979 – where 65% believed enforcement was automatic – U.K.) or at least that the State would help them collect on their judgments

(Hildebrandt et al., 1982 – Canada). Even litigants who obtain default judgments frequently presume courts will ensure they get paid (Baldwin, 1997; O’Barr & Conley, 1988 – U.S.). Court leaflets in England and Wales do specifically state that even if plaintiffs win, there is no guarantee that they will obtain any money owed to them (Court Service, 1997a, b, c, d, e). However, because such leaflets are not sent automatically to all litigants, many never see them (Interview: Julien, 8-5-98). Thus, litigants are often stunned and disillusioned to hear that enforcement is their responsibility. Indeed, research reveals that many small claims litigants in the U.S. and Britain are horrified when they find out how little courts can do against cunning defendants who ignore judgments or against impecunious defendants (Baldwin, 1997; O’Barr & Conley, 1988). Indeed, it seems that frequently only at enforcement stages do individual plaintiffs consider the consequences of suing ‘men of straw’ (Baldwin, 1997).

Consequently, large numbers of litigants feel highly disappointed that what they thought was success in court ended up being worthless and little more than symbolic justice (Baldwin, 1997; Cavanaugh & Sarat, 1980). For innumerable litigants, enforcement issues make the whole protracted, painful litigation process seem futile (Baldwin, 1997a). In fact, Baldwin (1997) found that in sharp contrast to previously positive perceptions and satisfaction felt after small claims hearings, due to severe or insurmountable enforcement difficulties numerous litigants became so disillusioned and exasperated that they felt coming to court was a waste of time, court processes do not work, and judgments mean nothing. Many litigants said they would never again resort to courts. Similarly, Canadian small claims research indicates that prolonged collection times directly lead to dissatisfaction with their litigation experience as 85% of plaintiffs who collected within 3 months were satisfied with their litigation experience, yet under 42% were satisfied when collection exceeded twelve months (Hildebrandt et al., 1982).

This is understandable as enforcing judgments normally entails the further trouble, stress and costs of returning to court. It could even result in more litigation (Cranston, 1986). In British studies, covering various dispute types not limited to small claims, substantial numbers of litigants ended up spending further funds for enforcement, which they did not get back. Therefore, unsurprisingly, material numbers of trial winners, whether partially paid or not at all, simply give up without taking any enforcement action (NCC, 1979; Baldwin, 1997). Some reasons proffered by litigants include their beliefs that this should be the courts’ job, it would entail further costs, it did not seem worth the trouble, and that enforcement action is probably futile and would only worsen their stress and frustrations (Cain, 1983, 1986; NAO, 1996 – various case types).

However, again, much of the sparse data in terms of litigants’ feelings and perceptions derives from small claims litigants. Are litigants in higher courts more aware of the realities of judgement enforcement? But apart from this, we find no substantial gaps in this area, only further suffering for litigants. Arguably, for represented litigants, mistaken beliefs about enforcement seem to imply that they may not have been properly informed by their lawyers about this harsh truism of litigation. Indeed, the widespread misconceptions of all litigants manifest the vital need for them to be apprised at the outset of the realities of judgment enforcement (NCC, 1979).

*Was It All Worth It?*

There should at least be more information about what you are letting yourself in for in the first place (Baldwin, 1997, p. 139).

Do the gains litigants receive from litigation exceed the costs? As this study elucidates, monetary indicators of both benefits and costs are insufficient to evaluate whether 'it is all worth it' for litigants. As Trubek et al. (1983) note, litigants may obtain substantial net recoveries after paying legal fees and still be worse off when considering litigation's non-monetary costs. Though some argue these are impossible to calculate, a crucial fact is that such costs may often be the most important to litigants (Felstiner, 1974; Nader & Todd, 1978). Indeed, in Baldwin's small claims research substantial numbers of litigants felt their stress and worry throughout litigation far outweighed what it was worth (Baldwin, 1997) Other evidence too exposes the stark reality that numerous litigants, regardless of results, wish they never started the whole thing (Interview: Johnson, 20-2-98 – High Court CAB) for all the reasons discussed in this article. In fact, some opine that perhaps half of all litigants in England would not have commenced their litigation had they been aware of the stress, pain and anguish it entailed (Interview: Julien, 8-5-98).

But here too we find insufficient empirical research. Why do studies rarely even attempt to ascertain whether for litigants, any gains (whether monetary or psychological) are eradicated by the non-monetary costs inherent in litigation? Of those who feel it was all worth it, what makes them feel this way? Though\*(193) psychological and emotional costs are difficult to measure, this does not diminish the reality of their existence. Obtaining at least some idea of such costs in relation to diverse litigants in various circumstances may be of fundamental importance to future litigants who have the right to be fully informed prior to deciding whether or not to litigate. As Sarat & Felstiner (1986) note, litigants must be aware of the reality that often the type of justice provided by the legal system is not sufficiently broad to encompass the kind of justice they seek.

## 6. CONCLUSION

By exploring litigation as experienced by individual litigants, we have undeniably found numerous critical matters that remain obscure. Particularly important lacunas relate to the lack of in depth knowledge covering diverse case types on the following: what litigants really aim to achieve and how this may change when litigating; what clients expect from lawyers; the practical effects of lawyers redefining disputants' experiences; party perceptions and thought processes during settlement negotiations and of their lawyers more generally (particularly in non-matrimonial cases); how clients internalize things they hear from lawyers; feelings and perceptions relating to experiences in formal courts and consequent judgment enforcement processes; also how litigants assess whether the entire litigation experience was worthwhile for them. Most significantly, we have uncovered a serious gap in an area that is fundamental to the whole of the litigation exercise and which may be the most significant 'human element' of litigating: the way litigation in disparate case types affects both plaintiffs' and defendants' lives.

Given the many important gaps that exist in the empirical knowledge, it is not entirely possible to provide a comprehensive view of the situation. However, of 'what we do know' it appears that at least in the case types covered by the extant empirical evidence, large numbers of individual litigants fare exceedingly poorly in terms of the overall litigation experience. Thus, in addition to the significant problems people have as a result of being embroiled in legal conflicts, embarking upon the litigation path clearly entails numerous further problems for them. These are not limited to the uncertainties inherent in litigation. We have reached this conclusion for

multifarious reasons exposed in this paper that can be summarized as follows:

Firstly, we have seen that litigants are propelled into litigation as a result of not only material but also psychological and emotional needs to alleviate the effects of distressing experiences. Hence, their aims often include non-monetary elements. Importantly, litigants frequently bring their significant\*(194) personal needs to their lawyer relationships. However, clients experience numerous difficulties and sufferings during their contacts with lawyers. Throughout diverse case types, disputants commonly get dominated and manipulated into altering their goals, expectations and the way they view their cases, while they lose control over how their cases are conducted and how their disputes and situations are described. Indeed, clients' experiences are basically reconstituted to fit into legal compartments that generally exclude many matters often most important to litigants. Moreover, clients receive little help from lawyers in dealing with the emotional realities of their circumstances. Thus during these distressing times, litigants may additionally feel that their lawyers do not comprehend or empathize with them. Possibilities of gaining greater control over their cases, though perhaps ameliorating outcomes, inevitably involve further costs and struggles for parties, who may already be war-weary as a result of their original disputes.

Importantly, litigants in diverse case types commonly feel uncomfortable with lawyers, and worry as to lawyers' abilities, commitment, loyalties, domination and how they conduct parties' cases. Thus, clients can be replete with suspicion. Additionally, litigants persistently worry about uncertain costs. Consequently, they suffer acute stress and anxiety. This is exacerbated by the fact that clients often do not receive adequate costs information, at least not early on. Hence, clients in diverse dispute types commonly perceive charges as extortionate or unfair. Moreover, many do not feel they receive value for their money. Yet, most clients are averse to complaining to lawyers about charges they view as excessive. Thus, the bottom line is that legal costs, normally out of litigants' control, often end up being far more than they expect, despite little they can do about it. Furthermore, litigants are regularly unhappy with the service they receive from their lawyers. They commonly suffer communication and comprehension difficulties thus frequently are confused by things they hear from their lawyers, and may not understand what is going on. Equally, despite their strong need to hear about how their cases are progressing, litigants often feel insufficiently updated, consequently feeling alienated and badly treated. Even for those who are satisfied with lawyers' services overall, it is problematic to assess the reasons for these feelings.

As for negotiations and settlements, notwithstanding the paucity of empirical knowledge, we have seen how some litigants, at least in divorce, injury and small claims cases, either hear about the insincerity of negotiations and/or perceive negotiating processes as unfair, sometimes viewing their focus on money as trivializing issues most important to them. Furthermore, numerous litigants feel left out of negotiations and consequently many feel obliged to accept any resulting offers (particularly due to much stress, pressure, worry and\*(195) incessant costs fears). Importantly, though lawyers' advice does not always result in clients obtaining the best settlements they can (Rosenthal, 1974; Harris et al., 1984), litigants in diverse dispute types are very much controlled by their lawyers in terms of what offers to accept and often get persuaded into settling for amounts they feel are unfair. Hence, bilateral settlements commonly leave litigants dissatisfied.

Moving on to the court stage, notwithstanding the emotional value of trials, large numbers of litigants suffer severe anxiety and stress, both before and throughout their time in court. This is exacerbated by the fact that litigants generally have

misconceived expectations about courts, what courts do and how they do it. Once inside courts, litigants lose total control over their cases, are permitted only to advance truncated versions of their stories (despite their significant need to express themselves) without comprehending why, and experience feelings of frustration, disappointment and humiliation because of how they perceive they were treated. Indeed, courts are hardly 'user-friendly' for litigants. Yet our analysis additionally highlights the fact that what is of greatest importance to litigants' satisfaction apart from whether they perceive processes to be fair, is whether their expectations of the various facets of litigation are matched by their perceptions of what actually occurs. Hence, reducing costs and delays will not necessarily augment litigant satisfaction. Furthermore, one must bear in mind that litigation is about conflict, which by its nature people generally find unpleasant and which, of itself, can affect litigants' litigation experiences.

But critically, our revelations as to the 'end results' of litigation demonstrate how litigation commonly affects litigants' lives in unexpected, yet highly damaging and sometimes irreparable ways. Furthermore, we have exposed the harsh, even ironic reality that after the agonies of litigation, large numbers of successful litigants are faced with serious, sometimes insurmountable difficulties in collecting on their judgments (with enforcement entailing further stress and costs which may never be recovered). Because large numbers of litigants are wholly unaware of this truism of litigation, erroneously believing that winning at court will be the end of their troubles, many are seriously disappointed, disillusioned and generally end up viewing the whole painful litigation process as futile. Thus, unsurprisingly the few existing findings illustrate that numerous litigants do not feel litigation was worthwhile at all. Indeed, on balance this paper has illustrated how, irrelevant of dispute-type, litigants seem to suffer in some way at nearly every stage in litigation, whether precipitated by lawyers, judges, courts or simply 'the system'.

Though it is far easier to highlight deficiencies than to propose adequate and workable plans to remedy the situation, we submit that a vital first step in addressing these serious problems is for all litigants to be made aware of the true facts of litigation. In order to make any apprised decisions on whether to litigate, individuals must be cognizant of the whole story. They have a right to know the realities of what they are letting themselves in for. Only then can they decide whether the real costs of litigation are worth paying. If disputants knew in advance what they frequently are only able to regret in retrospect, their behavior and actions might be quite different. That being said, perhaps the research findings discussed in this paper should be considered with a grain of skepticism in terms of changing the pattern of litigation, as the urge to litigate is often very powerful in the aggrieved; and for some, e.g. divorce disputants, they may have no choice but to litigate.

Additionally, due to several limitations this study's findings cannot be wholly conclusive. As we have predominantly relied on others' empirical research, the weaknesses inherent in their methodologies must be taken into account. Different methods of obtaining data can greatly vary findings (e.g. surveys, different-type interviews, mailed questionnaires, or observations). Moreover, each study method will include some amount of interpretation, and different researchers may give unequal weight to the same data. Secondly, though any consideration of litigants would be deficient if it did not look to the international experience, as the majority of studies originate in the U.S., one must bear in mind that conflating results between societies is problematic (Sarat, 1977).

Nevertheless, our findings are highly significant in numerous respects in terms of their practical importance and application. Vitally, they serve to provide a blueprint of

matters that simply must be communicated to all 'new recruit' litigants and lawyers. Furthermore, our analysis highlights the seriousness and extreme importance of the issue of how litigation affects litigants' lives, something all too often overlooked, ignored or simply noted in a cursory manner. But the potentially devastating affects upon litigants demands that their emotional situations throughout litigation be seriously considered. This is importantly evidenced by Matruglio's research (1994) where numerous injury litigants, without being requested, felt the need to volunteer on their self-administered questionnaires additional information relating to the impact that litigation had on both their personal and professional lives, how it affected their emotions, and generally emphasizing the stress and personal trauma involved. This proves that litigants clearly have a need for these issues to be acknowledged, understood and dealt with.

Thus, our findings should serve as an impetus for further data collection and analysis of the fundamental, yet greatly unexplored area of litigants' perspectives in civil litigation. The parameters of knowledge must be widened to encompass litigation's sociological, psychological, and emotional repercussions for litigants. It is hoped that this piece has revealed the breadth of what **(197)** is both possible and urgently necessary in terms of legal research. Indeed, though 'the world we are taught about is a world built on rights and duties, the world of practice is one built upon human needs and emotions' (Shaffer, 1979, p. 5).

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