CONTROLLING PROCEDURAL ABUSES: THE ROLE OF COSTS AND INHERENT JUDICIAL AUTHORITY

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I. THE SHAPE OF THE PROBLEM

It has often been suggested that the litigation process resembles warfare.[1] Much of the blame is traditionally shouldered by the adversary system,[2] but whatever the cause, advocates do comport themselves militaristically, seeking logistic or strategic advantage over their rivals. Most law suits have only one winner and lawyers naturally strive to succeed.[3] However, short of winning outright, other successes motivate lawyers and benefit clients. For example, instituting a law suit may drive a defendant to agree to an unwarranted settlement in favour of the plaintiff, if only to avoid the legal system and bad publicity. Defendants similarly will seek delays in order to diminish the plaintiff's zeal and, of course, to delay judgment day with little or no penalty.[4] In the result, procedural manoeuvres may be made by either party to secure undeserved gains.

While only the fertile imagination of the advocate delimits the possibilities for gamesmanship, the following short list is illustrative:

1. Frivolous or vexatious proceedings brought for relief on the basis of facts already proved to be non-existent or the contrary to those pleaded.
2. Substantively inadequate proceedings brought to obtain relief

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[1] "Litigation resembles warfare. Opposing counsel are charged with the responsibility of so conducting their campaign that ultimate victory will result." Cited in J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JURISPRUDENCE 8 (1949), quoting Leonard Moore, author of a handbook published in 1946 under the auspices of the American Bar Association.

[2] Resorting to legal action has become for modern man what self-help was for his progenitors. Frank described it as another kind of "war" or "mimic warfare". *Id.* at 8, quoting comments made in 1906 by the French judge, De la Grasserie.

At its extreme, the adversary system produces abhorrent tactics. What Wigmore called "the sporting theory of justice" is therefore oriented to the promotion of an "every man for himself" ideology, which is closely connected with the socio-political philosophy represented in the "individualism of the common law" and Western society as a whole. The danger, as Pound said, is that the "judicial administration of justice is a game to be played to the bitter end . . .". R. POUND, THE SPIRIT OF THE COMMON LAW 127 (1921).

[3] The various governing bodies might be effective in controlling the behaviour of lawyers if they considered war-like tactics as "conduct unbecoming a barrister or solicitor". The Law Society Act, R.S.O. 1970, c. 283, s. 34.

[4] *See* The Judicature Act, R.S.O. 1970, c. 228, ss. 38, 39.

which is unavailable at law on the basis of the facts pleaded and proved true.

3. Spurious or useless attacks against formal adequacy of pleadings, including motions for particulars, where the party moving is not prejudiced by the pleadings as they stand.
4. Attacks on service when the party moving, though already served, moves to set aside service on technical grounds.
5. Examining several witnesses, whether in support of a pending motion or at trial, where testimony is irrelevant or unnecessary at that point in the proceedings.
6. Objecting to questions asked upon an examination before a special examiner in order to invite an application before the Master for re-attendance.
7. Bringing an application for reattendance to answer questions obviously rightfully objected to where the examination took place before a special examiner.
8. Inviting attack by intentionally delivering prejudicial or irrelevant materials.
9. Resisting attack where the attack is obviously well founded.
10. Frivolous applications and appeals.
11. Launching an appeal or application with the intention of discontinuing before hearing.
12. Delivering pleadings in which averments are made which are known to be false or failing to admit facts known to be true.
13. Asking for adjournments which are not really necessary.

But identifying abuses is not a simple matter; often questionable actions are technically in order or lie below the horizon of visibility.[5]

Courts have not been totally idle in dealing with procedural misconduct. The doctrine of abuse of process,[6] based upon the inherent authority of every court to control its process and those persons who come before it,[7] is a power incidental and necessary to the exercise of substantive jurisdiction. That power, together with rules of court and statutory provisions, enables the court to dismiss claims and strike out answers which are substantively inadequate[8] or frivolous and vexatious.[9] In addition, it may be exercised

[5] The author spent five weeks at the Master's Chambers in Toronto during the months of May and June, 1973. During this time he read proceedings and attended upon the argument of applications in Chambers. He also discussed cases with both adjudicator and counsel alike.

[6] In this discussion, abuse of process is considered in its procedural context only, not in its relation to tort law or criminal law.

[7] *See, e.g., Ex parte* Evans, 9 Q.B. 279, 15 L.J.Q.B. 335 (1846); Collier v. Hicks, 2 B. & Ad. 663, 109 E.R. 1290 (K.B. 1831).

[8] The general policy promoting single rather than multiple actions is of course related to the policy encouraging settlement of disputes.

Multiplicity of actions is prohibited by The Judicature Act, R.S.O. 1970, c. 228, ss. 18(8), 24. This is merely a statutory enactment of powers already within the court's inherent jurisdiction.

[9] *See* O.R.P. 126; The Vexatious Proceedings Act, R.S.O. 1970, c. 481; and the

to discipline lawyers guilty of misconduct. [10] It is regrettable that this power has been used only grudgingly and in blatant cases. [11]

In Anglo-Commonwealth jurisdictions the law of costs, providing some indemnification for the expenses of litigation, has also had an impact on the control of litigation. However, costs may not be great enough to be a disincentive in large cases. And the pressure of costs may have a bad effect on meritorious litigation, for the risk of losing may be too costly to bear. In many American jurisdictions [12] and in England, [13] prejudgment interest is often awarded. Ontario has a most restrictive rule. [14] If judgment monies were to bear interest prior to assessment, defendants would be less likely to delay.

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discussion *infra* regarding abuse of process, substantive adequacy and the inherent jurisdiction of the court.

[10] Myers v. Elman, [1940] A.C. 282, [1939] 4 All E.R. 484 (H.L.).

[11] *Id.* It is indeed difficult to find cases in which lawyers have been disciplined by the courts. For the most part, the judicial response has been to make a costs order against the solicitor who acts with impropriety. See the discussion *infra* in regard to lawyers' conduct.

[12] *See, e.g.*, 4 RESTATEMENT OF TORTS s. 913 (1939); Mich. Comp. Laws ch. 438 s. 7; West. Cal. Civ. Pro. Code s. 1033 pt. III (West 1955); N.Y. Civ. Prac. Law and Rules s. 5001 (McKinney 1963).

[13] Law Reform (Miscellaneous Provisions) Act, 24 & 25 Geo. 5, c. 41, s. 3(1) (1934), *as amended* by the Administration of Justice Act 1969, c. 58, s. 22.

[14] The Judicature Act, R.S.O. 1970, c. 228, ss. 38, 39, 40. At common law there was no jurisdiction to award interest at any time before or after judgment. This was largely a result of the influence of the ecclesiastical civil law, which prohibited interest on any debt as being usurious and thus contrary to policy. However, admiralty always seems to have provided for the imposition of interest on outstanding losses without the need for specific legislation. *See, e.g.*, The Northumbria, L.R. 3 Adm. & Eccl. 6 (1869). Equity, too, in its attempts to remedy the hardships of the common law provided its judicial officers with the authority to charge interest. *See, e.g.*, Popular Indus. Ltd. v. Frank Stollery Ltd., 1 O.R. (2d) 372, 40 D.L.R. (3d) 256 (C.A. 1973). This equitable authority was of little comfort to litigants seeking the recovery of a debt or a damages award. By Lord Tenterden's Act, 3 & 4 Will. IV, c. 42, ss. 28, 29, 30 (1833), jurisdiction to award interest was provided for in specific situations, usually arising out of debts. Upper Canada adopted these provisions in its Act, 7 Will. IV, c. 3 (1837), which additionally provided, in section 21, that the jury should have power to award interest in the nature of damages. This Act was designed to diminish expense and prevent delay in common law courts. Within sixty years Lord Tenterden's Act became relatively ineffective due to restrictions imposed by precedent and the narrow confines of the statute: *see* London, Chatham and Dover Ry. Co. v. South E. Ry. Co., [1893] A.C. 429, at 437-441 (H.L.) (Lord Herschell). In 1943 the British Parliament provided judges with the discretion to award interest on all awards, but the discretion was apparently often left unexercised: Law Reform (Miscellaneous Provisions) Act, 24 & 25 Geo. 5, c. 41, s. 3 (1934). As a result, by virtue of the Administration of Justice Act 1969, c. 58, s. 22, judges *must* now make an interest order unless they are persuaded by special reasons to the contrary. *See* Jefford v. Gee, [1970] 2 Q.B. 130, [1970] 2 W.L.R. 702 (C.A.), where Lord Denning sets out the relevant considerations for a court making an interest order under the British legislation.

Courts have often felt that a plaintiff was entitled to interest on his judgment sum. As a result, they have either stretched the law or confused it, or else been unable to see their way clear to provide for such interest. *See* HOLMESTED & GALE, THE ONTARIO JUDICATURE ACT AND RULES OF PRACTICE 290 [hereinafter cited as HOLMESTED & GALE]. Modern courts and legislatures have looked at interest from three major perspectives. First, there is the ongoing concern with respect to delay in

In addition, Anglo-American jurisdictions have to some extent developed modern torts to deal with the losses which abuse creates. Malicious prosecution, malicious use of process, and abuse of process are but three examples. [15] The older law contributes the former crimes and present torts

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the courts. There is really no incentive for a defendant to pay early if he can use the money for his own purposes; the longer he waits, the less valuable will be the inflated dollar he ultimately pays out and the more profit he can turn through use of the funds. Secondly, it is sometimes said that interest should be awarded as damages, in addition to a debt or damage award, on the basis that the award, evaluated as at the date of loss, is not complete compensation when viewed in light of the time lag between loss and judgment. Thirdly, it is argued that while the plaintiff suffers no real loss through non-payment of a sum until judgment—it is not *legally* owed until then—the defendant is unjustly enriched, essentially at the plaintiff's expense. If a plaintiff is in fact awarded damages as assessed at the time of the loss, inflation will have a material effect on the diminution of his real award. And surely a defendant ought not to be allowed to benefit from the plaintiff's loss—even if this "benefit" is somewhat illusory and temporary. The value of delay can be minimized in the interests of the administration of justice through the imposition of reasonable interest rates. In many ways, therefore, the imposition of interest on damage and debt awards may be likened to both the indemnification and regulation features of costs awards (discussed in the text *infra*). However, the rate of interest is a matter of relevance and concern. Courts are likely to apply the rate of interest provided by the Interest Act, R.S.C. 1970, c. I-18, s. 3, *i.e.* a rate of 5 per cent—really very little disincentive in a 10 per cent market.

For discussion and comment regarding the issues of pre-judgment interest, see Williams, *Claims for Interest under Lord Tenterden's Act*, 10 AUST. CONV. & SOL. JO. 129 (1957); Comment, *Prejudgment Interest as Damages: New Application of an Old Theory*, 15 STAN. L. REV. 107 (1962-63); Comment, *Interest—Prejudgment Interest Allowed Under Death on the High Seas Act*, 110 U. PENN. L. REV. 612 (1961-62); Comment, *Interest on Damages*, 120 NEW L.J. 237, at 254 (1970); Comment, *Interest on Damages*, 114 SOL. JO. 612 (1974); Harper, *Personal Injuries Litigation*, 34 MOD. L. REV. 70, at 72 (1971); A. OGUS, THE LAW OF DAMAGES 96-103 (1973); D. DOBBS, REMEDIES 164-81 (1973); H. MCGREGOR, DAMAGES 316-33 (13th ed. 1972); C. MCCORMICK, DAMAGES 229 (1935); LAW REVISION COMMISSION, STATE OF NEW YORK, ACT, RECOMMENDATION AND STUDY RELATING TO THE AWARD OF INTEREST IN CAUSES OF ACTIONS FOR PERSONAL INJURY, LEGISLATIVE DOCUMENT (1966), No. 65 (1); LAW REFORM COMMISSION, (QUEENSLAND), EXAMINATION OF THE LAW RELATING TO INTEREST ON DAMAGES (1970).

The British Columbia Legislature appears to have acted upon the 1973 interim report on debtor-creditor relationships, LAW REFORM COMMISSION OF BRITISH COLUMBIA, PART 4—PRE-JUDGMENT INTEREST (1973). For an interesting legislative approach to this problem, see the Prejudgment Interest Act, S.B.C. 1974 c. 65.

[15] Malicious prosecution is of course unrelated to the institution and management of civil proceedings. The central gravamen of the tort is the institution or continuation of criminal proceedings in the absence of probable cause and with malice, for a purpose other than bringing the offender to justice: *see* W. PROSSER, LAW OF TORTS 834-56 (4th ed. 1971). Wrongful civil proceedings are related to malicious prosecution and generally consist of the same elements: *id.* at 850-56. But there is no such recognized tort in Anglo-Commonwealth jurisdictions: *see, e.g.*, Cotterell v. Jones, 11 C.B. 713, 138 E.R. 655 (C.P. 1851); and Quartz Hill Consolidated Gold Mining Co. v. Eyre, 11 Q.B.D. 674, [1883] L.J.Q.B. 488 (C.A.). However, abuse of process is recognized as a tort in Canada and the Commonwealth, though one rarely sued upon: *see* the famous case of Grainger v. Hill, 4 Bing. (N.S.) 212, 132 E.R. 769 (C.P. 1838); Varawa v. Howard Smith Co., 13 Commw. L.R. 35, at 91 (H.C. 1911); Parton v. Hill, 10 L.T.R. 414 (Q.B. 1864); and Gilding v. Eyre, 10 C.B. (N.S.) 592 (C.P. 1861). The essence of the tort is the use of a legal process otherwise justified but employed for a purpose collateral to that for which it was designed, together with a definite act or threat in furtherance of the illegitimate purpose. The elements of the tort were recently

of maintenance, champerty and barratry.[16] However, one must wonder at the efficacy of still another lawsuit to a person who already considers himself badly treated in having previously employed the legal process to obtain relief for a legally compensable wrong done to him: a lawsuit is a long, arduous affair under the best of circumstances. Furthermore, old causes of action tend to be stilted and encrusted with restrictions which are not mindful of modern needs.[17] Modern causes of action, created by courts slowly over long periods of time, generally deal with the most extreme examples of aberrant behaviour. Such activity is always easy to catch; it is more readily punished than proceedings which erode away the efficacious and salutary aspects of the legal system.

The courts do have tools presently within their grasp which are flexible enough to restrict and sanction recourse to counter-productive and inimical activity.[18] It is within the ken of legislators and rule-makers to devise a set of procedural guidelines which encourage the just, speedy and inexpensive resolution of disputes without foregoing the needs of due process, the positive aspects of the adversary system and the determination of the case on its merits.[19]

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reviewed in Guilford Indus. Ltd. v. Hankinson Management Serv. Ltd., [1974] 1 W.W.R. 141, 40 D.L.R. (3d) 398 (B.C.S.C. 1973), and Atland Containers Ltd. v. Macs Corp., 7 O.R. (2d) 107 (H.C. 1974). *See also* 3 RESTATEMENT OF TORTS s. 682 (1938). This tort recognizes, as does the definition of procedural abuse recommended by this paper, that malice or collateral purpose causing the wrongful bringing of a rightful process should not be tolerated and is contrary to the interest of legal and judicial systems. Proof of this collateral purpose is of course a serious stumbling block in the road to success in an action founded upon this tort: *see* W. PROSSER, LAW OF TORTS 856-58 (4th ed. 1971); WINFIELD AND JOLOWICZ ON TORT 485-86 (10th ed. W. Rogers 1975); C. BAKER, TORT 254 (1972); J. FLEMING, THE LAW OF TORTS 547-48 (4th ed. 1971); H. STREET, THE LAW OF TORTS 400-401 (6th ed. 1976); CLERK AND LINDSELL ON TORTS 1095 (14th ed. A. Armitage 1975). Armitage also discusses the tort of vexatious use of process. This tort arises out of repeated and unnecessary replication of process for the same cause of action and is similar to the statutory remedy provided for by the Vexatious Proceedings Act, R.S.O. 1970, c. 481. Under the tort, damages are available: *see id.* at 1098. *See also* Heywood v. Collinge, 9 Ad. & E. 268, 112 E.R. 1213 (K.B. 1838).

[16] By virtue of the Criminal Code, R.S.C. 1970, c. C-34, s. 8, common law crimes as well as offences under Imperial Acts and pre-Confederation laws are abolished. Only those crimes expressly provided for by the Code are sanctionable at law in Canada. Champerty, maintenance and barratry are not to be found in the present Code. Nevertheless, they continue to exist as torts in Ontario, although both champerty and maintenance have been abolished in England: *see* Criminal Law Act, 1967, c. 58 (U.K.), s. 14(1). See also Fleming, *supra* note 15, at 548-52; Street, *supra* note 15, at 407-409; and Winfield and Jolowicz, *supra* note 15, at 497-98.

[17] This is at least one reason for the abolition of champerty and maintenance in England.

[18] Cost, inherent authority, and Rules of Court.

[19] Pursuant to section 114 of the Judicature Act, R.S.O. 1970, c. 228, the Rules Committee of the Supreme Court of Ontario is constituted. While its task is to improve by modification our procedural system, it can only be piecemeal in its approach and therefore largely ineffective. True, the Committee is composed of Judges, Masters, Registrars and lawyers all having regular contact with the procedural system in action. However, such busy men hardly have the time required to review extensively the Rules of Practice. Additionally, they may well be so attuned to the system as to lack ob-

II. Costs as a Major Regulatory Device

It often comes as a shock to Canadian lawyers to learn that American jurisprudence does not generally include a notion of costs. Costs are those monies which one party to litigation is ordered to pay to the other to indemnify him for lawyers' fees and disbursements related to the conduct of litigation.[20] Costs orders for large sums[21] can be, and are, routinely made, materially affecting the conduct of law suits and conditioning the use of and access to the judicial process by potential suitors. It is essential for a party contemplating the defence of an action to consider the costs factor, for if he is ordered to pay costs to the plaintiff, he will still be responsible for paying his own lawyer. Although costs are to some degree scaled to the quantum of recovery,[22] those cases with fewer dollars at stake become disproportionately costly to lose, while those cases with huge sums in dispute may be litigated without, so far as costs are concerned, great incentive for early settlement.[23]

By contrast, the American system generally allows the expenses of litigation to lie where they fall.[24] In addition, it is almost a universal American practice to permit contingent fees,[25] despite a concern that they

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jectivity about the radical or fundamental change which may be necessary. What is required is a full-time commission to study, evaluate, and review our rules of procedure with a view to recommending reform and not simply revision and reorganization. The writer understands that some efforts are afoot in this direction.

[20] The kinds of costs orders are myriad and will be discussed *infra*. Additionally, the general discretion as to their award is almost without limit. Quantum is determined, as a rule, according to a flexible guide of tariffs: *see* The Judicature Act, R.S.O. 1970, c. 228, s. 82, and O.R.P. 683, incorporating by reference tariffs "A", "B", and "C". Costs include prescribed (allowable) disbursements and counsel fees.

[21] W. C. McBride, a taxing officer and Master of the Supreme Court of Ontario at present, has indicated that a $600 per diem counsel fee at trial is usual in regard to a law suit where the amount awarded is approximately $10,000. *See, e.g.*, Short v. Murch, [1971] 2 O.R. 138 (C.A.).

[22] There are separate costs tariffs for the various trial courts in Ontario: see The Small Claims Courts Act, R.S.O. 1970, c. 439, ss. 103-105, and R.R.O. 1970, Reg. 802. O.R.P. 656 provides that a party will be deprived of his costs (unless the trial judge makes an order to the contrary) if he recovers less than the minimum monetary amount within the jurisdiction of the court in which he has proceeded. For interpretation of this rule, see, *e.g.*, Comtois v. Johnson, [1969] 1 O.R. 336 (H.C.), and Snell v. Alteman, [1943] O.R. 704, [1943] 4 D.L.R. 785 (C.A.).

[23] A defendant who is able to ward off judgment day may gain two important benefits: (a) he may force the plaintiff to accept a lower settlement; (b) he will have the benefit of the present use of the monies which will ultimately have to be paid to satisfy the judgment.

[24] The failure of American jurisdictions to provide for attorney's fees as an expense of litigation payable by one of the parties has often been criticized. See Stoebuck, *Counsel Fees Inluded in Costs: A Logical Development*, 28 U. Colo. L. Rev. 202 (1965-66); Goodhart, *Costs*, 38 Yale L.J. 849 (1929); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619, at 637 (1931).

[25] Maine prohibits contingent fee arrangements as champtertous: *see* Maine Rev. Stat. c. 135, s. 18 (1954). Massachusetts allows contingent fees provided certain technical requirements are complied with: *see* Blaisdell v. Ahern, 144 Mass. 393, 11

will result in trumped-up litigation. Contingent fees may be defined as fees "received for services performed . . . payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts".[26] This "legitimate sibling of criminal champerty" has been prohibited in many Canadian jurisdictions.[27] It is apparently feared that contingent fees would result in the stirring up (maintenance) of unmeritorious suits, the employment of undesirable tactics and practice, and the effective reduction of the claimant's damages award.[28] In the United States, where there is not the general disincentive of costs, litigation is far less risk-laden than it is even in those Canadian jurisdictions where contingent fees are permissible, owing to the continued existence of costs awards in those jurisdictions.[29] In Ontario, a lawyer is to be paid without reference to the success or failure of the litigation, but only after it is complete and subject to the watchful scrutiny of the taxing officer.[30] Thus the Ontario litigant subjects himself to a rather

N.E. 681 (Sup. Jud. Ct. 1887). It also appears to be a general rule in the U.S. that in divorce cases the contingent fee is void as being against public policy: *see, e.g.*, Newman v. Freitas, 129 Cal. 382, 61 P. 907 (1900).

[26] MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 3 (1964). For a judicial review of contingent fee arrangements, see Lehman v. Cameron, 207 Misc. 919, at 927, 139 N.Y.S. 2d 812, at 819-25 (Ct. of Cl. N.Y. 1955).

[27] *See generally* Arlidge, *Contingent Fees*, 6 OTTAWA L. REV. 347 (1973-74), and Williston, *The Contingent Fee In Canada*, 6 ALTA. L. REV. (1967-68). While Ontario, Prince Edward Island, Newfoundland, Saskatchewan, and the Yukon prohibit contingent fees, the other provinces and territories do not.

[28] The law in England and Ontario prohibits contingent fees. The underlying principle is that such activity constitutes a champertous maintenance of suits and is contrary to the principle that, though the state provides courts for the resolution of disputes, it ought not to *encourage* suits because they are (a) a drain on public resources and (b) a species of gambling upon a cause of action: *see* P. WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE 131-60 (1921), and Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1935-36). The classic English position is set out in Haseldine v. Hosken, [1933] 1 K.B. 822, at 839, [1933] All E.R. 1, at 8-9 (C.A.) (Slesser L.J.). As noted in note 27 *supra*, the Canadian position varies from jurisdiction to jurisdiction. A good discussion of the law is found in 1 WILLISTON AND ROLLS, THE LAW OF CIVIL PROCEDURE 74-89 (1970). It is interesting to note that the LAW SOCIETY OF UPPER CANADA, PROFESSIONAL CONDUCT HANDBOOK approves the charging of contingent fees where they are legal in the particular jurisdiction in which a lawyer practises. It requires, however, that the charges be fair and reasonable. Recently, the Law Society of Upper Canada, in convocation, authorized the Treasurer to constitute a special committee to investigate contingency fee arrangements, in light of the trend in favour of such agreements elsewhere in Canada. See L.S.U.C., 41 Communiqué (June 20, 1975).

[29] Costs are still recoverable as between parties. The contingent fee protects the litigant from having to pay both his lawyer and the other party if his claim fails.

[30] The Solicitors Act, R.S.O. 1970, c. 441, ss. 4, 6, 8-13, 16, 22, 23, regulate the solicitor's financial relationship with his client. The lawyer may be liable to have his account taxed by the taxing officer, an official created under The Judicature Act, R.S.O. 1970, c. 228, s. 85. Pre-arranged fees (contingent or otherwise) are forbidden in litigation unless first assented to by the taxing officer: *see* Solicitors Act, R.S.O. 1970, c. 441, s. 19, and *Re* Solicitor, [1968] 1 O.R. 45 (H.C. Chambers). The present Ontario taxing officer, W. C. McBride, has taken a stern view of lawyers' accounts and overcharges. In a rapidly developing case law, lawyers' fees have been slashed and even eliminated where the taxing officer was of the opinion that fees charged were not

onerous ultimate liability for lawyers' fees (his own and his opponent's) without the benefit of very many hedges against the risk (such as contingent fees). The result is that, while a lawyer may elect to take on a bona fide but speculative case, [31] he may often be reluctant to do so unless his client has financial support. In the end, the cost of litigation in Ontario may often make litigation too risky.

A. *An Historical Perspective*

It is useful to review the origin of costs in our legal process in order to understand its nature, application and role. At common law there were no "costs" as we know them. In earliest times it appears that plaintiffs were fined for bringing a losing suit—*pro falsa clamore*. [32] This "fine" springs from a notion of punishment rather than indemnification, but that would not destroy its usefulness. Later the courts awarded plaintiffs a sum as damages to compensate them for the costs of a suit; [33] for the common law courts considered themselves as lacking jurisdiction [34] to make such an order merely as an incident of the litigation. [35] That jurisdiction was, however, granted

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consonant with the services rendered, or wholly unsupportable on the basis of advice and legal procedures followed: *see, e.g., Re* Solicitor, [1971] 1 O.R. 138 (H.C. Chambers).

[31] A prominent Australian case is illustrative. *See* Clyne v. New South Wales Bar Ass'n, 104 Commw. L.R. 186, at 203, [1960] A.L.R. 574 (H.C.).

[32] This amercement seems to have been paid into the "royal till". Defendants, however, paid no such sum, although they would be held *in misericordia* for their wrongful defence: *see* 1 & 2 HULLOCK, THE LAW OF COSTS (2d ed. 1810). In early Germanic procedure a party-fine was payable to the opposing party first as the cost of losing and later for litigation in bad faith. 7 ENGLEMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 188 (Millar transl. 1927).

[33] E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 288 (1817). "For costs are in law so coupled together, as they are accounted parcell of the damages." *See also* 1 & 2 HULLOCK, THE LAW OF COSTS (2d ed. 1810), and F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 597 (1923).

[34] See the discussion on inherent jurisdiction of the court, *infra*. However, it appears that costs were awarded by equity under its inherent jurisdiction. This chancery authority was said to be exercised *arbitrio boni viri*, upon conscience and not authority: *see* Burford v. Lenthall, 2 Atk. 551, at 552, 26 E.R. 731, at 732 (Ch. 1743); Andrews v. Barnes, 39 Ch. D. 133, 57 L.J. Ch. 694 (C.A. 1888). In Jones v. Croxeter, 2 Atk. 400, 26 E.R. 642 (Ch. 1742), it was said: "The giving of costs in equity is entirely discretionary, and is not at all conformable to the rule at law . . . ." *See also* Burgess v. Davis, 10 M.P.R. 496, [1936] 2 D.L.R. 532 (N.S.S.C.); and *Re* Sturmer, 25 O.L.R. 566, 2 D.L.R. 501 (Div'l Ct. 1912). For an American exposition, see Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233 (8th Cir. 1928), which has subsequently been limited to costs paid out of a common fund: *see* Gold Dust Co. v. Hoffenberg, 87 F.2d 451 (2d Cir. 1937).

[35] As such, costs are a procedural device which it has been said are awarded on the "proposition that litigation should be the last resort of all parties". Apparently this view of costs was not entertained in the early years of English law. Roman law has so provided from ancient times. *See also* 7 ENGLEMANN, *supra* note 32, where it is pointed out that Roman law was very harsh, providing a double recovery to a plaintiff where a defendant denied liability without reason, to which was added ordinary costs. In some cases, the penalty for bad faith litigation was public condemnation. *See also* Comment, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM L.

by statute in 1278.[36] To this day no costs may be ordered apart from statute,[37] except against lawyers and others for misconduct.[38] However, there is no reason to believe that the old equity rules have been abrogated by section 82 of the Judicature Act.[39] Under the common law regime, defendants could not be awarded costs for the successful defence of a claim except in conjunction with an award of damages.[40] Eventually, statutory enactment allowed the defendant costs in cases where the plaintiff, had he been victorious, would have received costs.[41] Under the statutes, costs were awarded as of right to the successful party and not as a matter of judicial discretion. The early statutes seem to have viewed costs at least partly as a penalty.[42] As a result, until the passage of the Judicature Acts, both in England[43] and Ontario,[44] costs orders were inapplicable to the wide variety of problems which they may now regulate. The Judicature Acts changed costs from a pro forma award to an award almost totally in the discretion of the court.[45]

Since the passage of the Judicature Act in both England and Ontario, costs have been awarded by courts for two separate but related reasons. First, costs serve as an indemnity for the expense of litigating.[46] This is akin to the principles upon which awards of damages are made in tort or contract; the victim is to be placed, so far as money may do so, in the same position he would have occupied had the tort not been committed or the

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REV. 78, at 79 (1953). By contrast, the practice in Ontario with respect to reporting cases concerning the taxation of solicitors' fees is to omit all reference to the name of the solicitor: *see, e.g., Re* Solicitor, [1971] 1 O.R. 138 (H.C. Chambers).

[36] 6 Edw. I, c. 1 (1278). "Before this statute at the common law no man recovered any costs of sute either in plea real, personal or mixt: by this it may be collected that justice was good cheap of auncient times . . . ." E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 288 (1817).

[37] *See* Rockwell Dev. Ltd. v. Newtonbrook Plaza Ltd., [1972] 3 O.R. 199, 27 D.L.R. (3d) 651 (C.A.), and Alexanian v. Dolinski, 2 O.R. (2d) 609, 43 D.L.R. (3d) 649 (C.A. 1973).

[38] *See* The Judicature Act, R.S.O. 1970, c. 228. Section 18 of that Act gave the Ontario Supreme Court the same equitable jurisdiction it had in 1881, the date of passage of the first Judicature Act in Ontario.

[39] *See* cases cited in note 36 *supra*. *See also* Myers v. Elman, *supra* note 10.

[40] From a different point of view, it is arguable that costs awarded to plaintiffs were an indemnity for expenses incurred due to the wrongful resistance of a just claim by a defendant.

[41] *See* Goodhart, *supra* note 24, for an excellent review of the historical background of the law of costs.

[42] The statute first awarding costs to defendants was 4 Jac. I, c. 3 (1606-1607).

[43] Supreme Court of Judicature Act, 36 & 37 Vict., c. 66 (1873), *as amended* 38 & 39 Vict., c. 77 (1875).

[44] The Judicature Act, 44 Vict., c. 5, s. 428 (Ont. 1873).

[45] The Judicature Act, R.S.O. 1970, c. 228, s. 82. However, there may be a distinction between the English and Ontario positions on this point. The English statute requires that costs follow the event "unless for a good cause" the court should otherwise order. No such condition is contained in the Ontario law. Nevertheless, the case law of the two jurisdictions is substantially the same: *see* notes 68 and 70 *infra*.

[46] *E.g.*, Ryan v. McGregor, 58 O.L.R. 213, [1926] 1 D.L.R. 476 (C.A. 1925); Harold v. Smith, 5 H. & N. 381, 157 E.R. 1229 (Ex. 1860).

contract breached.[47] However, as we shall see, modern costs awards do not fully succeed in achieving this goal. Secondly, and more importantly for our purposes, costs are a way of restraining all categories of unmeritorious activity in the litigation process.[48] Yet, while compensatory costs awards will undoubtedly deter the assertion of an unmeritorious position, they may also deter the assertion of meritorious claims and defences. In the result, costs may function as a species of punishment. Of course, deterrents and punishments have a great deal in common. A loser may "realistically" view an award of costs as a "penalty" for instituting or defending legally unfounded proceedings. Yet the penal function has been consistently denied as a rationale for the making of a costs order,[49] presumably because penalties are the tools of criminal and quasi-criminal courts. What litigant does not have cause for complaint at being ordered to pay costs for proceedings that were reasonably taken in the light of the circumstances and facts as they appeared at the time of commencement of the action?[50] If the courts are going to penalize him, it should be by virtue of a clear mandate to do so. Therefore, the express statutory provision of such penalties would better serve the needs and achieve the goals of the system.[51]

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[47] In contract law damages are awarded so that the innocent party will receive a sum (and no more) equal to that which he would have received had the contract been performed: *see* Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301, [1908-10] All E.R. Rep. 707 (P.C. 1910).

In tort, the following recent statement is germane: "In considering the question of damages, the underlying principle is that through the payment of money, the injured person will be put back into the position in which he would have been but for the defendant's wrongful act." Jackson v. Millar, [1973] 1 O.R. 399, at 409, 31 D.L.R. (3d) 263, at 273 (C.A. 1972) (Evans, J.A.). *See also* McCormick, *supra* note 24.

[48] *See, e.g.*, Comment, *Limitation or Denial of Costs in Trial Courts in Actions at Law as a Device for the Discouragement of Vexatious Litigation*, 27 COLUM. L. REV. 974 (1927); Comment, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953).

[49] *See* cases cited in note 46 *supra*. Serious questions are raised by the imposition of costs as a penalty. First, the courts seem dedicated to the proposition that costs are indemnifiers or regulators only: *see* Clarke v. Hart, 6 H.L.C. 633, at 667, 10 E.R. 1443, at 1457 (H.L. 1858) (Cranworth J.), cited with approval in Foster v. Great W. Ry. Co., 8 Q.B.D. 515, at 517 (C.A. 1882). Secondly, to whom should such a penalty be paid? Thirdly, what is the jurisdiction for such a penal order? Is it an incident of criminal jurisdiction, inherent jurisdiction, or statutory jurisdiction? In Rex v. Bennett, 4 O.L.R. 205, at 208, 5 C.C.C. 456, at 459 (H.C. 1902), Meredith C.J. suggests that such a punishment might have been imposed "as a punishment for erroneously putting the jurisdiction of the Court in motion." This view was affirmed in Rex v. Leach, 17 O.L.R. 643, at 671, 14 C.C.C. 375, at 406 (H.C. 1908). Both cases were based upon *In re* Bombay Civil Fund Act, 1882, 40 Ch. D. 288, at 289, 60 L.T.R. 796, at 796-97 (C.A. 1888), in spite of the many authorities to the contrary. These cases would appear to state the law inaccurately, unless their application may be confined to the criminal context.

[50] This danger has been perceived by Kuenzel: "[M]eritorious litigation does not deserve meretricious treatment." *See* Kuenzel, *The Attorney's Fee: Why not a Cost of Litigation?* 49 IOWA L. REV. 75, at 76 (1963-64). A variation of the existing system will be proposed in an attempt to meet this criticism. It may well be that the burden of litigation is altogether disproportionate to the gains achievable for average litigants in average law suits.

[51] See the discussion *infra* regarding proposals for reform of the law of costs.

B. *A Practical Perspective: The Nature of Modern Costs Awards*

From a practical point of view, the loss of money is, next to the loss of liberty, the most effective sanction available to courts. It is no surprise, therefore, to find that costs have been used as a ready and appropriate instrument for regulating and deterring both wrongfully brought suits and misconducted litigation. [52] But pragmatism also requires the sensible application of flexible rules. Better definition of the nature of costs awards may clarify the current situation and provide a basis for future applications.

Although Ontario courts have discretion to do otherwise, they usually award costs to the winning party; this serves only as a partial indemnity for the expenses of litigation incurred by the winner. [53] To understand the costs system fully, one must penetrate a rather complex and confusing maze. First, costs must not be confused with the financial arrangements made between a solicitor and his client. Such financial arrangements do not affect the opposing party in a law suit and are governed by the law of contracts and the Solicitors Act. [54] Those sums payable as a result of the court's award are entitled "party and party costs"—since they are payable by one party to the other without any reference to the solicitor's account. Party and party costs are taxed (assessed) by the taxing officer at the instance of one of the parties, [55] and, in the absence of a contrary order, in accordance with the tariffs prescribed by the Rules of Practice. [56] These tariffs are of three kinds: Tariff "A"—for lawyers' fees; Tariff "B"—for disbursements; Tariff "C"—for fees paid to sheriffs. The latter two categories provide for fixed amounts reflecting the actual costs of court fees and sheriff's services.

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[52] *See* note 48 *supra.*

[53] *See* note 20 *supra.* It is not possible to specify with any certainty how great the indemnity will be. Nonetheless, it is quite likely that the loser's payment will cover about two-thirds of the winning lawyer's fees and disbursements. However, the current taxing officer has termed this proposition "mythical" in Davies v. Davies, [1968] 2 O.R. 745 (H.C. Chambers).

[54] R.S.O. 1970, c. 441.

[55] Where the party entitled to costs fails to tax them and the loser would be prejudiced, the loser may himself initiate the taxing process.

[56] O.R.P. 683. The tariffs specify counsel fees which are fixed for some items and within the discretion of the taxing officer for others. There are different scales of costs for the Small Claims, County and Supreme Courts. Disbursements are only compensable if specified in the disbursement tariff: *see, e.g.*, Morgenstern v. Faludi, [1962] O.W.N. 189 (H.C. Chambers). For a full treatment of party and party costs, reference should be made to M. ORKIN, THE LAW OF COSTS (1968). The taxing officer has jurisdiction under O.R.P. 674 to disallow costs items claimed by a successful party where he finds that the work done or procedure taken was (a) unnecessary, (b) not calculated to advance the interests of the party for whom the work was done, or (c) not proper or necessary for the attainment of justice or defending the rights of the party. The discretion has, however, been limited in Edwards v. Pearson, 20 C.L.J. 93 (C.P. 1883), where it was held that the taxing officer has no power to disallow the effect of a costs direction already made upon an interlocutory proceeding. Nonetheless, since the taxing officer does have discretion as to quantum, he may exercise some judgment in assessing costs.

The tariff for lawyers' fees has both discretionary items [57] and fixed items. [58] Some discretionary items have lower or upper limits (or both); others have no limits at all. [59] This provides the taxing officers with some flexibility in assessing costs. [60] The issue of whether costs should be payable in any given proceeding is within the sole domain of the court, judge, or judicial officer conducting the proceeding, unless he delegates the matter to another official. [61] In exercising its discretion, the court has very broad and almost unfettered discretion, [62] which must, however, be exercised judicially [63] and never arbitrarily. [64] Orders as to costs made by the High Court are not even subject to appeal without the leave of the court or judge making that order. [65] As a result, costs orders are generally not automatic [66] unless the case is heard by a jury, in which case costs follow the event (unless the court otherwise orders). [67] In general, courts do order the payment of costs to the successful party. [68] Furthermore, by adjusting the "scale" of costs,

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[57] *E.g.*, O.R.P. 683 and Tariff "A", items 2 (defences) and 4 (discovery of documents).

[58] *E.g.*, O.R.P. 683 and Tariff "A", items 1 (institution of action) and 6 (third party notices).

[59] *E.g.*, O.R.P. 683 and Tariff "A", items 12 (examinations) and 13 (counsel fee at trial).

[60] He may in some cases disallow costs items sought: *see* O.R.P. 674 regarding party-party costs, O.R.P. 675 regarding the taxation of solicitor-client accounts and note 56 *supra*.

[61] *See id.*

[62] The Judicature Act, R.S.O. 1970, c. 228, s. 82.

[63] Donald Campbell & Co. v. Pollak, [1927] A.C. 732, 137 L.T.R. 656 (H.L.); *Re* Haasz, [1960] O.W.N. 85, 21 D.L.R. (2d) 764, at 767 (C.A. 1959).

[64] Gibson v. Snaith, 21 D.L.R. 716 (Man. C.A. 1915). The term "judicial discretion" eludes accurate definition. It is often said to be contrasted with "legal discretion". The latter is presumably more closely tied to pre-set rules, or conditions precedent to its application, while the former is applicable on a case by case basis in accordance with court findings.

[65] The Judicature Act, R.S.O. 1970, c. 228, s. 27.

[66] There are exceptions. *See, e.g.*, O.R.P. 320 and discussion *infra*.

[67] The Judicature Act, R.S.O. 1970, c. 228, s. 82 (3).

[68] "In the case of a wholly successful defendant . . . the judge must give [him] his costs unless there is evidence that [he] (1) brought about the litigation, or (2) has done something connected with the institution of the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains." Ritter v. Godfrey, [1920] 2 K.B. 47, at 60, [1918-19] All E.R. Rep. 714, at 723 (C.A. 1919) (Atkin L.J.). *See also* Cooper v. Whittingham, 15 Ch. D. 501, at 504, 43 L.T.R. 16, at 17 (1880), and Roberts v. Jones, [1891] 2 Q.B. 194, 7 T.L.R. 517 (1891). The English rule is that costs follow the event unless there is a "good cause" why it should be otherwise: *see* Huxley v. West London Extension Ry. Co., 17 Q.B.D. 373 (1886); *aff'd* 14 App. Cas. 26, 5 T.L.R. 355 (H.L. 1889); and note 70 *infra*. Ontario Courts reject this rule, theoretically leaving the judge's discretion wide open: *see* Byers v. Kidd, 13 O.L.R. 396 (H.C. 1906). However, to give the costs rules any efficacy, the discretion must be exercised for some cause, presumably good, and there is statutory authority for the proposition that, generally speaking, costs follow the event in jury trials: *see* The Judicature Act, R.S.O. 1970, c. 228, s. 82(3). This provision with respect to juries simply enacts the common law position prior to The Judicature Act, except that the rule under section 82(3) is a prima facie rule which can be varied through the exercise

courts may fully indemnify a party for his expenses.[69] These scales of costs are also within the discretion of the court. Some controversy has arisen over whether a court can either deprive[70] a winner of his costs or make an order against him.[71] To do so might assist a court in controlling unnecessary high-handedness. However, on the basis of the rather meagre case law, it would appear that a winner will seldom be deprived of his costs, let alone be ordered to pay the costs of the other side.[72] It may be that courts do not view costs as a regulatory device, or if they do, are inclined to interpret such regulation as penal and therefore out of their jurisdiction.[73] This is unfortunate.

The rule providing for *partial* indemnification of the winner may be a compromise allowing some scope for the litigation of reasonable claims. It is an attempt to balance the principle of compensation with the principle of free access to the legal process. However, the compromise may be unfair to reasonable litigants and may over-regulate access to the law.[74] If just claims are inhibited and rightful recourse to the law is discouraged, our legal

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of the court's discretion. *See also* Macfie v. Cater, 48 O.L.R. 487, 57 D.L.R. 736 (H.C. 1920); *aff'd* 50 O.L.R. 452, 64 D.L.R. 511 (C.A. 1921). *See also* ORKIN, *supra* note 56, at 16-26.

[69] In England there are said to be as many as six scales of costs or classifications of taxation, each providing a different and fuller "indemnity" figure: *see* ORKIN, *supra* note 56, at 3. Until recently only three classifications have been distinguished in Ontario: *see Re* Solicitors, [1967] 2 O.R. 137, at 139-40 (H.C.). These are: (1) party and party; (2) solicitor and client; (3) solicitor and his [own] client. It has recently been held, however, that only two scales exist: party-party and as between solicitor and client. The latter scale is said to be a complete indemnity for work reasonably done. *See* Singer v. Singer, 11 O.R. (2d) 775 (H.C. 1976), *aff'g* 11 O.R. (2d) 234 (H.C. Chambers 1976). Costs on scales (2) and (3) were usually awarded where the litigation was in relation to a fund; that is, the successful litigant caused a fund to be created or increased for his own benefit, or the benefit of others, or himself and others. It is also open to the court to award on these scales in cases of misconducted or unmeritorious litigation.

[70] *See* Anglo-Cyprian Trade Agencies v. Paphos Wine Industries, [1951] 1 All E.R. 873, at 874 (K.B.) (Devlin J.), where it was suggested that a winner cannot be deprived of costs unless he is guilty of some misconduct. In Myers v. Financial News, 5 T.L.R. 42 (Q.B. 1888), and Bostock v. Ramsey Urban District Council, [1900] 2 Q.B. 616, [1900] L.J.Q.B. 945 (C.A.), the successful defendants were deprived of costs where the plaintiffs reasonably brought their suit considering the defendants' conduct; that is, they "invited" litigation. This is a healthy approach to the ordering of costs and is much in line with the overall scheme proposed herein. It clearly indicates that the doctrine and rules currently available might be put to better use than they are at present to effectuate the necessary regulatory mechanisms.

[71] In Dayus v. Markowitz, [1972] 3 O.R. 57 (H.C.), Pennell J. awarded the costs of an interlocutory application to set aside an interlocutory judgment to the respondent, notwithstanding the applicant's success, since counsel for the applicant had acted unreasonably in proceeding by way of motion rather than by praecipe. Unfortunately, Pennell J. did not discuss the reasons for this costs order in his decision. See also Dick v. Yates, 18 Ch. D. 76, at 85 (C.A. 1879). "This [power to deprive a winner of costs or make an order against him] if wisely exercised, enables a judge to prevent the use of the courts as machinery for extortion or chicanery." Goodhart, *supra* note 24, at 862.

[72] *See, e.g., In re* Mersey Ry. Co., 37 Ch. D. 610, 59 L.J. Ch. 283 (C.A. 1888).

[73] See notes 31, 35 and 41 *supra*.

[74] Mause, *Winner Take All: A Re-examination of the Indemnity System*, 55 IOWA

system is failing us. And yet costs do provide an incentive to settle disputes without recourse to the formal legal system. We must distinguish between rules encouraging the parties to resolve their own disputes, and rules which coerce them into unreasonable settlements and interfere with the just determination of the controversy on its merits. Even a scheme of partial indemnity has too much the effect that the "winner takes all". Many people cannot afford to risk the uncertainties of litigation under these circumstances.

C. *The American Position*

The American viewpoint offers a rather marked contrast. The United States stands almost alone among legal systems in its handling of the question of costs. [75] As a general rule, in the absence of bad faith, misconduct, or a specific statutory provision, costs are unavailable to indemnify parties for lawyers' fees. [76] This rule is based on a fundamental principle: everyone ought to be guaranteed free and easy access to the judicial system. [77] While it is nowhere expressly provided, the "right to litigate" may well be considered an essential element of the right to due process of law protected by the Fourteenth Amendment to the U.S. Constitution. [78] Any rule which places a clog on that right might violate the Fourteenth Amendment. [79]

L. REV. 26, at 29 (1969-70), where it is stated: "The proposition that a majority of defeated litigants have litigated improvidently is questionable."

[75] For a comparative view, see PROCEEDINGS OF THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW OF THE AMERICAN BAR ASSOCIATION 119, 121, 126, 131 (1963). Generally speaking, the continental jurisdictions continue to provide costs awards to successful litigants, payable by their opponents: *see* Kaplan, Von Mehren & Schaeffer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193 and 1443, at 1461-70 (1957-58).

[76] For a discussion of traditional exceptions to the general American rule, see McCormick, *supra* note 24 (although this article is now over forty years old, it continues to reflect the American situation). *See also* Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784 (1939). Hornstein advocates awarding costs in suits which would otherwise be too costly for an individual to bring (*e.g.*, stockholder's derivative suits), where the litigation increases or protects a general fund for the benefit of a class of which the applicant-plaintiff is a member. In this regard, see Vogel, *Attorney's Fees Under the Landrum-Griffin Act: The Need for "Union Therapeutics"*, 7 LOYOLA L. REV. 137 (1974).

[77] Due process has been most often considered in the criminal law area. The landmark decisions of Gideon v. Wainwright, 153 So. 2d 299 (Fla. 1963) (right to counsel); Escobedo v. Illinois, 378 U.S. 478, 12 L. Ed. 2d 977 (1964); and Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966) (right to counsel, silence, and publicly supplied counsel, together with a consideration of the factors which render certain evidence unavailable for use against the accused) are founded upon the 14th Amendment of the U.S. Constitution.

[78] U.S. Const.

[79] It has been argued in American courts that the imposition of costs would restrict the free access to the courts and contravene the due process amendment of the Constitution. This argument is strengthened in the situation where there is the requirement of security for costs; a plaintiff or defendant may be ordered by counterclaim to pay money into court in order to maintain his right to litigate in specified situations. The English and Canadian positions are contrary to the American approach, and in this context do not deal with the question of due process or natural justice.

In addition, the frontier history of the United States made it necessary for individuals to protect their own interests. This "every-man-for-himself" philosophy made the lawyer appear to be either a charlatan or an unnecessary appendage to the legal process. Fighting one's own battle included combat in the courtroom. [80] As a result, everyone was presumed to be able to protect himself: if he could not, then his antagonist was not to suffer for it. So when English law was imported to most parts of colonial America, the law regarding costs was rejected. [81] Where costs were allowed, it was usually only as an indemnification for disbursements (and, even then, usually only court fees). Those jurisdictions which also required the payment of counsel fees undermined that rule, first by failing to set up a reasonable tariff and, thereafter, by failing to ensure that the tariff kept pace with inflation. [82] As a result, costs awards made in the United States are generally nominal and therefore virtually useless as either a compensatory or regulatory mechanism.

There may, however, be a further and more persuasive explanation of the American position: that the results of litigation are essentially unpredictable. [83] If, as Frank suggests, "facts are guesses", can we be any more certain about the law itself? [84] Roscoe Pound suggests that there is neither actual nor jurisprudential foundation for such a position. [85] The general wisdom is that no legal system can operate without a modicum of predictability. In Canada, the reluctance of the courts to legislate, to make new law or to divert from precedent reinforces that view and may distinguish our courts from their American counterparts. However, the difference may not be sufficiently great to be of any practical importance; in Canada as in the U.S., as any litigant "knows", the legal process is not "certain". It is undoubtedly retrograde to deny less than full recovery to a person with a just claim by making him pay his lawyer to litigate on his behalf. The making of a full costs order is an essential element of complete justice. But if this is a discouragement to litigation, is it fairer to the litigants and in the best interests of the legal system to let the costs lie where they may, except in cases of abuse, vexation or misconduct? Perhaps the most apposite question is not whether costs orders should be made, but rather, who should pay and under what circumstances?

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[80] This "frontier" mentality drastically affected the American psyche in the litigation process: *see* Goodhart, *supra* note 24, at 873, and Pound, *supra* note 2, at 127.

[81] *See* the First Report of the Judicial Council of Massachusetts (1925), where an English-type costs system for that Commonwealth is advocated. No action of any kind was taken for over 25 years. *See* Comment, *Use of Taxable Costs to Regulate the Conduct of Litigants, supra* note 48, at 93, n. 25.

[82] For the New York situation, see Distler, *The Course of Costs of Course*, 46 CORNELL L. REV. 76 (1960-61).

[83] The argument is made that the courts are often wrong and losers should not be doubly penalized. This view gives no credence to the final authority of decisions.

[84] J. FRANK, *supra* note 1.

[85] R. POUND, *supra* note 2.

D. *Basic Principles*

A theory of costs may be evaluated not only in light of regulatory and compensatory functions, but also according to first principles. It is clear that the state provides machinery for the resolution of private conflicts in order to avoid the anarchy which might well follow unresolved hostility among individuals. Although the state has no "personal" interest in the outcome of law suits, it is in its interest to channel conflicts by providing a ready forum for the determination of disputes and the enforcement of decisions. For a number of reasons [86] our legal system has sought to limit the resort to legal process to those cases which cannot be settled privately. The psychological ramifications of legal combat are important in this context. The courts provide a forum for combat but restrict access to it in the name of dispute resolution. Put simply, the law encourages settlement. [87] Nevertheless, substantial injustice is condoned by a system which discourages the bringing of just suits or the assertion of bona fide defences. The state cannot afford to allow every dispute to be dealt with through the legal system; but neither can it afford to promote injustice by permitting the system it has created to apply harsh sanctions against those who seek reasonable access to the system. The risk of a costs order upon defeat inhibits the bringing of *all suits*, just and otherwise. [88] Bringing an action should not be too easy, but is it just to discourage a reasonable suit by the threat of costs when the conduct is both bona fide and reasonable? [89]

One American author has shown that there is a direct correlation between the decision to litigate (including an acceptance of the expense that

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[86] See the discussion in text, *supra*.

[87] *See, e.g.*, Erickson v. Webber, 58 S.D. 446, at 448, 237 N.W. 558, at 559 (1931); Johnson v. Great N. Ry. Co., 128 Minn. 365, at 370, 151 N.W. 125, at 125 (1915); Bakke v. Bakke, 242 Iowa 612, at 618, 47 N.W. 2d 813, at 817 (1951). In Kuenzel, *supra* note 50, it is pointed out that settlement is favoured for three basic policy reasons: (1) to limit the expensive and wasteful operation of the legal system; (2) to encourage party satisfaction (there is a greater likelihood that both parties will be left satisfied after a settlement than after a decision of the court); (3) because any other policy stimulates court calendar congestion. *See also* Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406, at 413 (1968), where it is suggested that the adversary system helps to promote the settlement of disputes by improving the perspective of the parties as issues are raised in preparation for the trial.

[88] "This [the allowance of attorney's fees to a successful party] is not a satisfactory approach because it could discourage the litigation of legitimate claims or defences." Eighteenth Biennial Report, Judicial Council of California, 65. This policy clearly encourages participation in law suits. It also takes no account of the injustice done by depriving plaintiffs of reasonable indemnity and defendants of the cost of their unnecessary troubles.

[89] "The excitement of suits is an evil when suits are unjust; but when right is withheld, and the object of the suit is just, to promote the suit is just, to promote the suit, is to promote justice . . .". 3 Cow. 623, 15 Am. Dec. 308 (N.Y. 1824), as quoted in 61 CORNELL L. REV. 683. This view is not entirely consonant that the Anglo-Canadian one. Nevertheless, it can hardly be doubted that English and Canadian courts are equally interested in the just determination of issues raised between private parties. The Roman law maxim, *Interesse republicae sit finis litem*, however, has also been internalized, favouring early resolution.

involves) and the litigant's perception of his chance of success. [90] In other words, if you think you can win, you will fight. If this is so in the United States, where no costs awards are made, it would be doubly so here in Canada. Granted, "perception of success" may be conditioned by many factors —lawyer's advice, one's relationship with the opposing party, economic status, personality and "principle". But the "more right" a party is, the freer he ought to be to pursue his position. In such cases the courts could perhaps respond differently. As Mause points out:

> [N]otions of both justice and deterring litigants from maintaining unreasonable positions suggest that indemnity is most compelling when the defeated litigant actually realized that his position had no merit, and least compelling when he was justifiably surprised by the result because of a determinative fact unknown to him or a change in the law. [91]

Ideally, courts would be able to deal with such considerations more effectively.

In summary, in a truly comprehensive scheme, costs might validly serve the following purposes:

(1) Idemnification of the expenses of litigation.
(2) Regulation of the institution and conduct of litigation.
(3) Penalizing of mala fides and misconduct.
(4) Encouragement of private settlement.
(5) Achievement of a just result following free entry to the legal system (with or without adjudication) and the resolution of disputes on their merits.

E. *Toward an Ideal Solution*

In a certain class of cases there is a ready and reasonable solution to the costs problem. These would include cases in which "new law" has been made or an appeal has reversed the order or judgment of first instance. In the first case it may be argued that the state is always interested in law-making and therefore should bear the burden of its creation. In the second case: "a suitor ought not [to have] to pay for the error of a judge." [92] In these cases the state has a major interest in compensating the litigant for the costs of his litigation.

> [A] citizen is entitled to a correct decision from the court to which he first comes or is brought. If through some error of law on the part of the court, or through some shortcoming in the legal system or some chance happening not attributable to fault on his part, he does not get what is due to him, then he should be entitled to be paid the cost of getting the correct decision or of otherwise having the matter put right. [93]

It is not unusual for an Ontario court to refuse to order costs in a case

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[90] *See* Mause, *supra* note 74, at 37.

[91] *Id.* at 48.

[92] Denny v. Hancock, 40 L.J. Ch. 193, at 194 (1870) (Mellish L.J.).

[93] Winneke, *An Indemnity for the Costs of Litigation*, 5 AUST. LAWYER 161 (1964), cited in WATSON, BORINS & WILLIAMS, CANADIAN CIVIL PROCEDURE 115 (1973).

involving a new or contentious point of law. [94] However, a court has no jurisdiction to order compensation of any party from the public purse. Yet at least two Australian jurisdictions have recognized that, on the contrary, the public interest requires that where an appellate court reverses the decision at trial, or orders a new trial, the parties' costs in making the appeal or bringing the new trial (or both) should, upon application of the respondent in the appeal, be paid out of a special fund. It should be noted that the primary obligation to pay costs still rests with a party. This Australian solution may, however, be the first step to dealing with the problem.

Indemnity can be viewed as a function of justice; regulation and punishment also serve the ends of justice by assisting the speedy and economical resolution of disputes. How can these principles co-exist without coming into conflict with each other? It will probably be accepted that no man should be penalized for the reasonable prosecution or defence of his case; and a winner who has acted reasonably also should not be deprived of full indemnity. The balancing act of weighing partial indemnity against avoidance of undue hardship to one of the parties, so often performed by the court, is neither a good compromise nor conducive to the well-being of the legal system. [95]

Where both parties have acted reasonably (that is, where the results of the suit were not reasonably foreseeable at its institution, and there has been no misconduct), *neither party* should be ordered to pay the other's costs. [96] Rather, the state should bear the burden of this expense; for it is in the state's interest to provide the forum and to resolve the dispute. Those cases in which new legal principles are determined or in which an appellate court reverses the decision below fall into this category, a fortiori. Put succinctly, reasonable actions ought not to be treated as if they were unreasonable. On the other hand, where it was unreasonable to prosecute or defend a law suit, the unreasonable party should certainly be liable to indem-

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[94] In *Re* Davmark Developments Ltd., 5 O.R. (2d) 17, at 23 (H.C. 1974) (Goodman J.), no costs order was made in light of the fact that the parties had merely sought the court's interpretation of an agreement prior to any breach thereof. In *Re* Orangeville Highlands Ltd., 5 O.R. (2d) 266 (H.C. 1974), the Ontario Divisional Court made no order as to costs in a proceeding where a municipality brought an application to be added as a party to proceedings relating to the development of property adjacent to the Municipal Corporation. See also *Re* Whealy, 5 O.R. (2d) 318, at 320 (H.C. 1974) (Keith J.), where no costs order was made "[i]n view of the fact that this case is brought forward as, in a sense, a testing of the strength of the Regulations . . .".

[95] "It will always be difficult to balance the need to provide adequate partial recovery, through party-party costs for the successful litigant with the need to protect the unsuccessful litigant from heavy financial burden." Sullivan v. Riverside Rentals Ltd. (N.S.S.C. Mar. 14, 1973), cited in WATSON, BORINS & WILLIAMS, *supra* note 93, at 88. Similarly, in Evaskow v. International Bhd. of Boilermakers, 71 W.W.R. 565, at 571, 9 D.L.R. (3d) 715, at 720 (Man. C.A. 1969) (Freedman J.A.), it was stated: "Our system accordingly seeks for a just compromise or balance by requiring, or at least expecting, that the costs of litigation will be shared or distributed between the parties. Since costs normally follow the event, the heavier burden will be upon the loser."

[96] This would very likely necessitate the trial of an issue on a voir dire.

nify his opponent without contribution by the state. Where the balance is equal (for example, where there has been equal misconduct, or where a split decision is predictable), neither party should be either liable for costs or entitled to costs. [97] Under this system, reasonable cases will be tried and unreasonable ones discouraged. Cases of misconduct and clearly vexatious proceedings should result not only in liability for costs, but also in liability to the state for misuse of public resources. Still, the problems which such a system would create are numerous. How would it be financed? What difficulties will courts encounter in applying the general test? In what procedural manner should the costs question arise?

1. *Financing a New Costs System*

The system proposed will be a costly one. The funds may come from a number of possible sources, aside from those already dedicated to the administration of justice. Under the system itself penalties for misconduct would be collected. These penalties should be determined with reference to court-time wasted, nuisance to court officials and undue oppression of the opposing party, in accordance with prescribed tariffs geared to the incidence of such activity and its seriousness. The court making the order ought to retain almost plenary discretion over the question of liability and quantum, since it is adjudging the activity at first hand. Furthermore, an increase in the present court fees (payment of some of which might not be totally indemnified), coupled with the institution of a filing fee calculated on the basis of the quantum claimed, might have impact on the development of a fund. [98] While it is true that this effectively taxes litigants, there is no reason why modest sums should not be forthcoming from those who actually use a legal system rather than from, as in the past, the non-users. An irony in this proposal is that the more successful the system is, the less money will be accumulated in the fund. But perhaps the fund will then be less

[97] A variation would provide the court jurisdiction, as now, to apportion costs in accordance with fault: *see, e.g.*, Wenborn v. Pollock, 12 W.W.R. (N.S.) 663 (B.C.S.C. 1954). *See* The Judicature Act, R.S.O. 1970, c. 228, s. 82.

[98] It is clearly quite strange that court fees are the same for all cases within a particular court's jurisdiction. Million dollar law suits produce no more revenue for the judicial system and its administrative structure than those of $7500. Lawyers acting on large cases certainly demand more money. The "big" case often requires more of the court's time and resources throughout the process. Perhaps The Mechanics' Lien Act, R.S.O. 1970, c. 267, ss. 44, 45, could be used as a model. In mechanics' lien actions, the court's filing fee is determined by the amount of dollars in dispute as disclosed by the plaintiff in his statement of claim. While this system poses some difficulties where the claim is other than for money, the value of the other relief may well be calculated in some money-related fashion. This is frequently a difficult task for a court, but it will have to be done, for example, where injunctive relief or specific performance cannot be awarded, and damages ("equitable damages") are awarded in lieu thereof, pursuant to The Judicature Act, R.S.O. 1970, c. 228, s. 21. The difficulty that a court has with this problem may outweigh its utility. Perhaps plaintiffs should be required to evaluate their own claim in cases where claims are made for specific performance, or injunctive or declaratory relief. Wroth v. Tyler, [1974] Ch. 30, [1973] 2 W.L.R. 405 (Ch.), illustrates the difficulty an English court had with quantifying the value of specific performance.

necessary. One further source of funds might well be a portion of the monies in the hands of the Law Foundation drawn from interest on lawyers' trust funds. [99]

2. *A Foreseeability Test*

There will be criticism of a system which imposes liability for costs on the basis of what was reasonably foreseeable at the date of instituting litigation. This criticism can be met. In the first place, the test of foreseeability is fundamental to torts, and it is also roughly the test for quantifying recoverable loss in contract. To say that a court is unable to apply such a test is to question its ability to decide the bulk of the cases which it actually adjudicates. To argue that counsel cannot so predict its outcome is similarly fallacious. The proposal is simply that a plaintiff seriously consider his case prior to suit and that a defendant carefully ponder settlement before filing an answer. This might entail the pleading and proof of bona fide atempts to settle before the action as a condition precedent to the availability of complete indemnity for costs following the action.

One further difficulty presents itself: it is often too easy to make the ex post facto judgment of what should or could have been done at the outset of an action. The court determining the reasonableness of the stance taken by either party should attempt to place itself in the party's position at the time the decision to sue or defend was made. This may lengthen the time required for the making of a costs order, but it ensures a sounder result. Furthermore, any difficulty in making the decision should be resolved by making the order which is least onerous to the loser. Given the possibility of genuine surprise [100] in litigation, this proposal would resolve inequities arising out of determinations made with the benefit of hindsight only. Through this system it is envisaged that courts will be equipped to do real justice between the parties from within a system which provides an indemnity for those who deserve it and which discharges a reasonable litigant from the burden of great expense.

3. *The Procedural Milieu*

While the role of the court has been traditionally characterized as objective and passive, responding only when asked, or on its own motion in outrageous cases (*e.g.* contempts), it is suggested that at the close of every proceeding a hearing on the question of costs should follow automatically at the court's instigation. Every court should be directed to dispose of the costs issue upon argument with or without the taking of evidence; no rule of court or statutory provision should remain which directs a particular result in the absence of a disposition by the court. [101] If the costs are to fall

[99] *See* An Act to Amend the Law Society Act, S.O. 1973 c. 49, s. 3, *amending* R.S.O. 1970, c. 238.

[100] See the lengthy discussion by Frank, *supra* note 1. He makes us wonder about the efficacy of our adjudicative model of fact-finding.

[101] *See* The Judicature Act, R.S.O. 1970, c. 228, s. 82(3), and O.R.P. 656 and 320.

where they may, the court should be required to say "that there shall be no order as to costs";[102] litigants should be precluded from taking out formal orders not containing a direction as to costs.

F. *The Application of Costs in Interlocutory Proceedings*

The frivolous, vexatious and simply harassing law suit is a prime example of procedural abuse, but not the most common one. The Rules of Court provide numerous opportunities for the negative use of mechanisms designed for positive purposes. Costs presently play a role in interlocutory process; in the context of the proposed scheme they could serve an even more productive role.

Once again, the awarding of costs at the interlocutory stage should be based upon the reasonableness of the action taken. The kinds of orders presently made may illustrate the manner in which a court can respond:

1. *No order as to costs, or an order that there be no order as to costs.* The former denotes a situation in which the court fails to make a costs award. This should not be permitted. Rather, the court should order that no one pay the costs, as in the latter example.
2. *Costs in the cause.* The costs of the interlocutory application in this instance abide the order as to costs in the main issue.
3. *Costs to a named party in the cause.* The costs are payable to the party specified by the court by another party to the suit, should that party be awarded the costs in the main issue.
4. *Costs to a named party in any event of the cause.* Here the costs are payable following the determination of the main issue to the named party, whether or not he is awarded the costs in the main issue.
5. *Costs to a named party forthwith after taxation thereof.* The costs are payable to a named party immediately following their assessment by the Taxing Officer.
6. *Fixed costs to a named party.*[103] The court, judge, or judicial officer hearing the application may determine the amount payable and order it paid immediately or following the determination of the main issue.
7. *Costs reserved to the trial judge.* The costs are left to the discretion of the trial judge. Unless he makes an order as to the costs, there is no order as to costs upon which a demand for payment can be based. The party receiving such an order has the onus of escuring an award at the trial, otherwise he will go without costs for the application. This would be avoided were it required that the costs issue be dealt with.

In items 1 to 5 above, the award may be made on any of the scales

[102] Or, that no one is responsible for costs.

[103] Until recently, no sum in excess of $50 was allowed without taxation, save by a judge: O.R.P. 659(2). This rule was repealed by O. Reg. 107/74.

discussed earlier. Of course, if no scale is mentioned, costs are on the party and party scale. The court also has discretion to award costs payable by someone who is not a party to the action, for example the solicitor. [104]

1. *Determining Reasonableness in Interlocutory Applications*

Interlocutory applications are sometimes launched for two money-related purposes. During the depression, and to a far lesser degree today, lawyers who were unsure of their client's ability to pay their fees brought applications in the hope that success would bring a favourable costs order and hence recovery from the opponent. [105] Quite contrarily, when a client has an abundance of resources he may financially weaken an opposing party by launching applications; whether he wins or loses he will be burdening the opposing side by adding to his lawyer's account. Applications are often technically valid but, aside from purely tactical manoeuvres, are of marginal benefit or none at all to the party moving. The following questions, with their implicit values, may well assist the adjudicator in making a decision as to the reasonableness of proceedings, and hence as to costs.

1. Was the application necessary to preserve and protect the just and fair trial of the *real* controversy between the parties?
2. Was the application technically apt but otherwise unnecessary, tactical advantage aside?
3. Was the applicant's motive collateral to the designated purpose of the proceedings?
4. Was the application part of the developing or continuing course of misconduct?
5. Was the respondent instrumental in "forcing" the applicant to move?
6. Was the respondent warranted in resisting the application?
7. Would either party be prejudiced by the making of no order?

Making the manipulation of the court process expensive is only effective in controlling abuse so long as the expense is out of proportion to the ultimate loss. Costs tariffs have been stable and low in an attempt to restrict the building of costs; however, these same low tariffs have the op-

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[104] *See* discussion *infra* of the inherent jurisdiction of the court. *See also* Shorter v. Tod-Heatly, [1894] W.N. 21, 38 Sol. Jo. 239 (Ch.); Lewis v. Cory, [1906] W.N. 95 (C.A.); *In re* Dartnall, [1895] 1 Ch. 474, [1895-99] All E.R. Rep. 890 (C.A.); Batten v. Wedgewood Coal and Iron Co., 31 Ch. D. 346, 54 L.T.R. 245 (1886); Myers v. Elman, [1940] A.C. 282, [1939] All E.R. 484 (H.L.); Danzey v. Metropolitan Bank of England and Wales, 28 T.L.R. 327 (K.B. 1912); Edwards v. Edwards, [1958] P. 235, [1958] 2 All E.R. 179 (P.D.A.); Love v. Pharaoh, [1954] 1 W.L.R. 190, [1954] All E.R. 120 (Ch. 1953); Glanville & Co. v. Lyne, [1942] W.N. 65, 86 Sol. J. 147 (K.B.); and Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd., [1972] 3 O.R. 199, 27 D.L.R. (3d) 651 (C.A.).

[105] It is said that during the depression years motions provided costs and therefore (higher) fees for lawyers. It is clear, however, that if a party makes an application simply for the purpose of obtaining the costs of the motion, and the motion was unnecessary, costs will not be awarded. "[M]otions or objections for the sake of costs only are not to be encouraged." Reinhardt v. Jodouin, 10 O.W.R. 648, at 649 (W. Ct. 1907) (Riddell J.).

posite effect in "big" cases. (With ever rising inflation big cases are becoming much more usual.) Where money is unimportant, only gargantuan costs orders will inhibit applications. In many cases the dollar amount of costs will simply not be an issue; motions will be launched and sanctioned, and still others will be brought notwithstanding the exaction of heavy sums. This is admittedly not "ordinary" litigation, yet it is the kind giving the most scope for abusive tactics. Other sanctions may be required to deal with this problem. [106]

2. *Where a Party Abandons Process*

For a number of reasons, some good and some bad, a party who has instituted an action, launched a motion, or commenced an appeal may decide to stop what he started short of adjudication. It may be that his resort to law has finally convinced his opponent of his seriousness and so brought about settlement. The commencement of proceedings may have had a sobering effect on the party instituting them. On other occasions a party may begin proceedings simply to harass, delay or build expenses. The motives and results of such recourse to legal process may be relevant in determining liability for costs. Proceedings are often discontinued following a settlement. The minutes of settlement will usually deal with the issue of costs. In the absence of such an agreement or where an action has been discontinued, Rule 320 would seem to be apposite. First, the rule provides for a unilateral discontinuance either before defence or thereafter so long as no further proceedings or procedural steps have been taken (interlocutory motions excepted). [107] Second, in such situations the defendant is entitled to his costs to the date of discontinuance without order. If the plaintiff seeks to discontinue after the time prescribed in Rule 320(1), he may do so only with leave and "upon such terms as to costs and as to any other action against all or any of the defendants and otherwise as are proper." [108] While it is clear that the discontinuance obtained as of right does not affect the right to bring a subseqent action, [109] the court might make it a term of the discontinuance, or order the undertaking of the plaintiff that he not reinstitute proceedings. The more interesting question, however, is what is the effect of an order of discontinuance without such a term? It would appear that the discontinuance, not being a decision on the merits, should have no effect as a bar to subsequent proceedings. [110] In cases of discontinuance by notice only, however, the court is apparently confined to taxing costs on a party and party scale; for, in the absence of express jurisdiction as

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[106] *See* discussion *infra.*

[107] O.R.P. 320(1).

[108] O.R.P. 320(5).

[109] O.R.P. 320(4).

[110] Res judicata generally requires that, among other things, the case must be tried on the merits. In any event, it requires the existence of a judgment, and a discontinuance order is not a judgment. For discussion of res judicata, see, *e.g.*, F. JAMES, CIVIL PROCEDURE 549-75 (1965).

to costs, the court cannot make any order, unless the order is made against the solicitor. [111] It is suggested that authority should reside in the court to deal with the matter.

If a motion is countermanded [112] or not set down as required, [113] the rules provide that the respondent is entitled to costs without order. Once again the difficulty is that there is no opportunity for the court to deal with the scale of costs. It would appear that a similar result follows with regard to appeals. [114] However, despite the provisions for deemed abandonment of appeals [115] and proceedings available if an appeal is not perfected, [116] it is not clear whether an appellant has a right, in circumstances falling short of failing to set down or perfect his appeal, to discontinue the proceedings. [117] This seems to depend upon a semantic issue of no moment here. [118] If an appeal can be abandoned (except as aforementioned), then the only proper procedure to follow would be to attend on the date set for hearing, whereupon the court would have authority to deal with the costs issue. In the end it might be best to require appearance in all cases of discontinuance of proceedings.

3. *Admissions and Other Dispository Devices*

In many instances a party may want to delay a case. He may therefore deny allegations boldly or simply say nothing, to avoid admitting a fact dangerous to him. Sometimes it is just a question of obstinacy—keeping the facts out of the other side's reach whether they are determinative of an issue or not. Under the provisions of Rule 678 a party may be ordered to pay costs occasioned by his neglect or refusal to admit anything that he ought to have admitted. [119] The rule is rarely invoked, not because the problem does not exist, but simply because the court is reluctant to apply the rule except in flagrant cases. Section 52 of the Ontario Evidence Act is similarly designed to expedite proceedings. [120] It provides that a party may, at his option, file the report of a medical doctor in lieu of appearing at the trial to give viva voce testimony. [121] If the doctor gives oral evidence and the court is of the view that the evidence could just as effectively have been

[111] See discussion *infra*.

[112] O.R.P. 667(2). If the motion does not need to be set down (*i.e.*, if it is a motion to a Judge in Chambers or before the Master), the proper practice is to appear on the return date: 3 HOLMESTED & GALE 2499.

[113] O.R.P. 667(1).

[114] *Id.*

[115] *Id.*

[116] O.R.P. 502.

[117] O.R.P. 667(2).

[118] It might be argued that one must read the relevant rules, O.R.P. 667(1) and (2), in light of each other and include "notice of appeal" in the definition of notice of motion. However, the matter is unclear.

[119] *See* Dudley, Stourbridge and District Elec. Traction Co. v. Dudley Corp., [1906] W.N. 67 (Ch.), and Crawford v. Chorley, [1883] W.N. 198 (Ch. 1883).

[120] The Evidence Act, R.S.O. 1970, c. 151, s. 52.

[121] Ferraro v. Lee, 2 O.R. 417, 43 D.L.R. (3d) 161 (C.A. 1974).

presented in the form of a medical report, the court may require the offending party to pay costs in an amount "the court considers appropriate", regardless of the ultimate disposition of the case. [122] There are, however, no reported cases on this issue.

4. *Minor Miscellany*

The rules of practice contain still other cost devices to check the efficacy of oppressive activity, but these are of little moment. Rule 666 requires a solicitor whose claim for costs on a specially endorsed writ is more than one-sixth greater than the amount taxed to be personally liable for the costs of the taxation. The rule has been rarely invoked [123] and really prvoides a minimal deterrence to the general practice of inflating costs demands on specially endorsed claims. [124] Rule 671 provides a mechanism for the compulsory taxation of a bill of party and party costs when any party might be prejudiced through the failure or neglect of any other party to deliver such a bill. [125] It is, however, difficult to imagine situations of practical significance in respect of which this provision would be useful.

5. *Payment into Court and Tender Before Action*

Among the most useful rules for the speedy resolution of litigation is the one providing for payment into court by defendants in full satisfaction of the plaintiff's claim. [126] The purpose of this rule and those following it [127] "is to enable litigants who are disposed to act reasonably to bring an end to the litigation and avoid heavy costs of extensive preparation for trial and long trials". [128] Such a payment in is not an admission of liability [129] and does not have the effect of staying the action. [130] The plaintiff is thereafter put to his election; he may take the money in full satisfaction of his claim [131]

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[122] The Evidence Act, Act, R.S.O. 1970, c. 151, s. 52(4).

[123] Only one case is cited in 3 HOLMESTED & GALE 2498: Hoole v. Earnshaw, 39 L.T.R. 409 (C.A.).

[124] The specially endorsed writ procedure provided by O.R.P. 33 is generally designed to deal with claims for liquidated amounts and debts. It provides an efficacious collection procedure. Failure to reply to a writ within 15 days (Rules 35 and 42) gives the plaintiff the right to sign judgment (Rule 51) for his claim and costs (Rule 668(2)). The assessment of costs is not a taxation. Therefore a defendant could theoretically move to have the costs taxed under Rule 666 after notice of judgment. However, notwithstanding what appears to be the utility of this procedure, its effectiveness is foreclosed since the registrar assesses the costs as if it were a taxation. Therefore, the taxation procedure is practically redundant. In cases of settlement after the institution of an action but before judgment, the issue of costs will generally be discussed by the parties and dealt with.

[125] The author was unable to find a single case reported under this rule.

[126] O.R.P. 306. A payment into court in partial satisfaction is not permissible under Ontario rules.

[127] O.R.P. 306-18.

[128] Maines v. Acme Plumbing and Heating, [1952] O.W.N. 91 (C.A.) (Bowlby J.A.).

[129] O.R.P. 307.

[130] Acceptance of moneys paid into court is a stay of the action: O.R.P. 315.

[131] O.R.P. 311. In such a case the plaintiff is entitled to his costs up to the date of payment.

or abide the trial of the action and the order of the court. [132] Should the plaintiff recover a judgment equal to or less than the amount so paid, he will as a general rule receive costs down to the date of payment in, the costs thereafter incurred to be awarded to the defendant. [133] A successful defendant gets all (or if only partially successful, that part) of the money paid into court and presumably a costs order in his favour. [134]

Somewhat akin to the payment-in rules are the rules relating to tender before action. Put simply, a defendant who pleads tender before action must pay into court the amount alleged to have been tendered. [135] If the plaintiff accepts the same, the defendant is entitled to his costs out of the monies held in court. [136] Furthermore, the question of costs will always be determined when the court is informed of a payment in. The failure of a plaintiff to accept an amount equal to or greater than that awarded is certainly an indicator of his reasonableness and so relevant for determining the scale of costs.

A recent development in British Columbia is noteworthy. Pursuant to Rule 57(13)(a) [136a] the plaintiff may, in an action for damages, deliver an offer to settle to the defendant before trial, setting out what the plaintiff would accept in satisfaction of a claim or any part thereof. If the defendant does not consent to judgment for the amount indicated as acceptable by the plaintiff, and the plaintiff recovers a judgment in an amount equal to or greater than his offer to settle, the court is empowered under Rule 57(18) to award "full or partial extra costs to the plaintiff" for trial-related matters. This rule finally equalizes the advantage formerly enjoyed only by defendants in payment into court situations. Now the plaintiff may effectively initiate settlement procedures which, where the defendant has been unreasonable in not accepting a settlement offer, the court may recognize by making an award of costs in his favour. These revisions apply only to actions for damages Furthermore, it is somewhat unclear what "full or partial" extra costs means. The original draft of the rule had indicated that double costs would be awarded in cases conforming with the provisions of the rule. The present form of the rule would appear to encourage the court to make a generous cost award up to but not greater than twice the costs for the prescribed item.

6. *Security for Costs*

The common law practice of requiring a plaintiff to post security for costs has been maintained in our rules, [137] and under specific statutes. [138]

[132] O.R.P. 316(1).

[133] Maines v. Acme Plumbing and Heating, [1952] O.W.N. 91 (C.A.). This is the normal order "unless there is some very cogent reason for not so ordering . . .". *See also* Wedlock v. Mezzil, 62 W.W.R. 190 (B.C.S.C. 1967).

[134] O.R.P. 316(2).

[135] O.R.P. 308.

[136] O.R.P. 313.

[136a] Supreme Court Rules pursuant to Order-in-Council 1627, approved and ordered May 27, 1976, under the Court Rules of Practice Act, R.S.B.C. 1960, c. 83.

[137] O.R.P. 373-82.

[138] O.R.P. 373; The Libel and Slander Act R.S.O. 1970, c. 243, ss. 13, 20; The

Rule 373 provides ten instances in which security for costs may be ordered upon application. These are said to be a complete code [139] of the circumstances in which security for costs may be ordered, notwithstanding earlier authority to the contrary. [140] One must question whether the inherent jurisdiction of the court to control the use and invocation of its own process is not concurrent with this "codification" of the situations in which the established practice had already developed. [141] The effective enforcement of certain types of costs awards necessitates such a provision. Furthermore, security for costs, though intended to be a procedural control, has the effect of securing questionable claims by an amount which will at least partially indemnify the defendant for his trouble. The rule seems primarily directed toward the control of:

(a) a plaintiff from outside the jurisdiction; [142]
(b) multiple proceedings arising out of the same cause of action; [143]
(c) actions taken in the name of a nominal plaintiff so as to avoid costs [144] or by a person who has insufficient exigible property to answer costs and who appears to have been instigated to bring a class action; [145]
(d) proceedings which are frivolous and vexatious. [146]

Public Authorities Protection Act, R.S.O. 1970, c. 374, s. 14; The Quieting Titles Act, R.S.O. 1970, c. 396, s. 18; Winding-up Act, R.S.C. 1970, c. W-10, s. 92; The Corporation Securities Registration Act, R.S.O. 1970, c. 88, ss. 224(2), 340(3).

[139] K.V.C. Electric Ltd. v. Louis Donolo Inc., [1964] 1 O.R. 565, 43 D.L.R. 198 (H.C. 1964).

[140] *E.g.*, Bailey Cobalt Mines Ltd. v. Benson, 43 O.L.R. 321 (C.A. 1918), Bateman v. Nussbaum, 8 O.W.N. 250 (H.C. 1915).

[141] A major revision of the Ontario rules respecting payment into court was made in 1897. The present rules are in substantially the same form as the 1897 version. Certainly there are no words clearly removing the court's inherent jurisdiction. See HOLMESTED & GALE 1624, for its discussion of O.R.P. 373.

[142] O.R.P. 373(1)(a), (b).

[143] O.R.P. 373(1)(c), (d). This is consistent with the principle of res judicata and legislative policy as to the multiplicity of proceedings: *see* Judicature Act, R.S.O. 1970, c. 228, ss. 18(8), 24.

[144] O.R.P. 373(1)(f). This would effectively avoid the problems of reassessing costs against the *real* plaintiff under the Judicature Act, R.S.O. 1970, c. 228, s. 82(2), after the action has been finally resolved: *see, e.g.*, Curry v. Davison, 23 O.W.N. 3 (H.C. 1922); *Re* Sturmer, 25 O.L.R. 566, 2 D.L.R. 501 (Div'l. Ct. 1912). Such a person may well be a maintainer or party to champerty. Although these remain actionable torts, the party must show that he has suffered damages in order to succeed: *see* Neville v. London "Express" Newspaper, Ltd., [1919] A.C. 368, [1918-19] All E.R. Rep. 61 (H.L.); Sheppard v. Frind, [1941] S.C.R. 531, [1941] 4 D.L.R. 497. In a recent decision the Ontario Court of Appeal reversed an order of Parker J. directing the costs of action to be paid by the principal shareholder and operator of an incorporated private company. While Parker J. had held that one Kelner was really the "party", the Court of Appeal refused to look behind the corporate status and held that Parker J. in effect failed to exercise discretion in awarding costs against the shareholder/operator personally. Rockwell Development Ltd. v. Newtonbrook Plaza Ltd., [1972] 3 O.R. 199, 27 D.L.R. (3d) 651 (C.A.).

[145] O.R.P. 373(1)(h). *See also* notes 25-28 *supra*.

[146] O.R.P. 373(1)(a). *See also* the discussion *infra* regarding Rule 126 and the inherent jurisdiction of the court to strike out a statement of claim as disclosing no

The other provisions are of relatively minor importance.[147] An order for security for costs stays the proceedings until the payment is made into court.[148] The amount so paid[149] can be varied at any time by the court.[150] Failure to pay security for costs within the prescribed period[151] permits the defendant to apply ex parte for a dismissal. In all events (except under Rule 374),[152] the amount and liability for the security is within the discretion of the court.[153]

Security for costs is in theory a mechanism designed to forestall the use of Ontario process against residents in questionable causes or in cases where there is an impediment to the satisfaction of all the incidents of litigation, most notably costs. The conditioning element of costs is therefore underscored, requiring the plaintiff to show good faith and forcing him to put his resources on the line for the sake of his principles and his case. In order to avoid an order for security for costs, the plaintiff who is subject to these provisions will have to set up a prima facie case that he has sufficient funds to satisfy the costs order.[154] In other words, residence out of the jurisdiction is prima facie evidence of having insufficient property within the jurisdiction to satisfy the costs. Her Majesty's Ontario Provincial Courts are therefore available with qualifications to non-Ontarians, and similarly to Ontarians if their actions are founded upon a claim which has already been litigated, or are brought by a nominal plaintiff, or are vexatious, frivolous or unmeritorious. A detailed discussion of the law applicable to securing for costs is inappropriate here. However, the following three questions are apt:

1. Does a payment for security for costs deprive the financially weak plaintiff of an opportunity to assert a just claim?
2. How efficacious is the procedure relating to frivolous and vexatious claims?
3. Is the presence of a "nominal" plaintiff ascertainable?

To the extent that the device of security for costs denies a reasonably free

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reasonable cause of action or on the grounds that the claim is vexatious or frivolous. *See also* Jacob, *The Inherent Jurisdiction of the Court*, 23 CURR. L. PROB. 23 (1970).

[147] O.R.P. 373(1)(e) and (j) deal with informer's suits and active claimants in garnishment or interpleader proceedings, who, if they were plaintiffs, would be liable to give security for costs.

[148] O.R.P. 376.

[149] O.R.P. 374(2).

[150] O.R.P. 378.

[151] Where there is a *praecipe* order the period is four weeks: O.R.P. 374(3. The court also has discretion to regulate the period: O.R.P. 375.

[152] The court may vary such an order to provide for a decreased payment: O.R.P. 378. This rule is clear in that *any* order may be varied, but it appears that liability is absolute in respect of those orders which are obtained on praecipe under O.R.P. 374.

[153] *See* Gamble v. Gamble, [1952] O.W.N. 173, [1952] 4 D.L.R. 525 (H.C.), for a discussion of the limits of this discretion.

[154] Mansell v. Robertson, 2 O.W.N. 337 (H.C. Chambers 1910).

access to the courts and due process, [155] it is a negative force in our procedural system; if, in addition, it fails as a regulator of misconduct, its existence is doubly questionable.

The issue is best dealt with by the courts as follows: (a) the defendant must set up a good defence to the claim; once he has done so it must be met by (b) the plaintiff showing a prima facie case. This preliminary "joinder of issue" should be addressed to whether the litigation in question is "reasonable litigation" as previously defined; if both conditions are met, then prima facie neither party shall be liable for the ultimate costs, and therefore ex hypothesi the court should avoid any order for security for costs. [156] Should a defendant be unable to establish a case on the merits, security for costs ought not to be ordered. A plaintiff who cannot establish a prima facie case should clearly be forced to make a payment for security for costs; a fortiori, if he is also impecunious. The question of ability to pay will not arise unless the plaintiff cannot set up a prima facie case. However, if the plaintiff is impecunious and is unable to set up a prima facie case because of his inability to obtain the relevant facts before institution of the action, his impecuniosity should be taken into account as an element militating against the necessity of an order, having regard nonetheless for the speculative nature of the claim. Security for costs, like costs itself, must be ordered only when there is a prima facie indication that the Ontario process will be used or misused to the prejudice of the defendant. Otherwise, ex juris plaintiffs should be allowed access to Ontario courts to obtain compensation for reasonable and rightful claims without the posting of security for costs. On the other hand, any misconduct along the course of any litigation might well be met with an order requiring security for costs not only for the present misconduct but for future misconduct. Such an order for security for costs may well be relevant in the context of the earlier discussion; for those who have shown a penchant for misusing the system might be adjudged liable to pay money into court as security for costs of future abuse. The very presence of such power, if occasionally exercised, would surely inhibit undesirable activity.

III. Inherent Jurisdiction of the Court

A. *Universal Jurisdiction Versus Inherent Jurisdiction*

In the English (and hence the Canadian) tradition, Supreme Court justices stand in the place and stead of Her Majesty in her role as a judge in the resolution of private and public causes. [157] Jurisdiction is thus uni-

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[155] As such, this is an American notion. In fact, the whole concept of security for costs would probably be held in violation of the U.S. due process amendment. However, courts are loath to disallow a rightful claim from the sphere of adjudication where it would be unjust or unfair to do so.

[156] See discussion *infra.*

[157] John Russell and Co. v. Cayzer, Irvine and Co., [1916] 2 A.C. 298, at 302, 115 L.T.R. 86, at 87 (H.L.).

versal, [158] restricted only by the enactments of Parliament, [159] whose directions are sacrosanct if made pursuant to constitutional authority. [160] This jurisdiction is the Superior Court's general jurisdiction. On the other hand, inferior courts possess only that jurisdiction expressly granted to them by statute. [161] Hence, where a substantive right is given, it may be enforced by the order of a Superior Court, whether or not the remedy made available is expressly provided, [162] so long as no other court can make or enforce the order.

The High Court of Justice of the Supreme Court of Ontario is the successor to the English and Canadian Courts of Queen's Bench, Common Pleas, Exchequer, and Chancery, and was first established as possessing "all such powers and authorities as by the law of England are incident to a superior Court of civil and criminal jurisdiction . . .". [163] Through the years, numerous statutes creating and reshaping the constitution of Upper Canada's Superior Court were passed. [164] However, the nature and quality of the jurisdiction changed little. As the years passed, separate divisions of the court developed, as in the mother country. [165] By 44 Vict. c. 5 (Ont.), the divisions were consolidated. In 1897 the High Court was established as a "Superior Court of Record of original jurisdiction . . . possessing all such powers and authorities, as, by the law of England are incident to a Superior Court of civil and criminal jurisdiction . . .". [166] The High Court was to continue the jurisdiction vested in the divisions as at August 22, 1881. [167] Further changes in the divisions of the courts occurred, but they were ultimately consolidated once again under one court only, the High Court of Justice. Since 1913 the High Court's jurisdiction has been substantially the same. [168]

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[158] *Re* Michie Estate, [1968] 1 O.R. 266 (H.C. 1967), approving the early case of Peacock v. Bell, 1 Wms. Saund. 73, 85 E.R. 84 (K.B. 1667). *See also* Mayor of London v. Cox, 2 Eng. & Ir. App. 239; Gosset v. Howard, 10 Q.B. 411, 116 E.R. 158 (Ex. 1845); *In re* Sproule, 12 S.C.R. 140 (1886); *Re* Oshawa, [1963] 1 O.R. 605, 38 D.L.R. (2d) 216 (H.C.).

[159] Authority from this proposition stems from the earliest times: *see* Streater's Case, 5 St. Tr. 365 (Upper Bench 1653).

[160] In the case of Canada, *see* sections 91 and 92 of the B.N.A. Act.

[161] Peacock v. Bell, 1 Wms. Saund. 73, at 74-75, 85 E.R. 84, at 87-88 (K.B. 1667).

[162] Board v. Board, [1919] A.C. 956, at 962, 48 D.L.R. 13, at 17 (P.C.) (Viscount Haldane).

[163] This was the first "Ontario" Judicature Act, 34 Geo. 3, c. 2 (1794) (Can.).

[164] *See* W. WILLISTON & R. ROLLS, 1 THE LAW OF CIVIL PROCEDURE 41-59 (1970).

[165] These divisions were Queen's Bench, Common Pleas, Chancery and Court of Appeal; for a few years after the turn of the 20th century an Exchequer division existed.

[166] The Judicature Act, R.S.O. 1897, c. 51, s. 25.

[167] The Judicature Act, R.S.O. 1897, c. 51, s. 41.

[168] Initially, the Judicature Act, R.S.O. 1914, c. 56, s. 3, provided that the jurisdiction of the court should remain as it existed on the 31st day of December, 1912. This remains unchanged today: The Judicature Act, R.S.O. 1970, c. 228, ss. 13, 14. Section 129 of the B.N.A. Act preserves the jurisdiction of the existing Superior Court "as if the Union had not been made . . .". Thus, issues are left to be resolved with reference to the pre-existing law and authority, subject, of course, to statutory enactments and the reception of the common law.

While Superior Courts have a general or universal jurisdiction which is conditioned and restricted only by statutory enactments and common law and equity regulations, *all* courts possess the jurisdiction to control their proceedings and the conduct of the persons who come before them or affect their dealings. [169] This power is usually referred to as inherent jurisdiction, which should not be confused with general jurisdiction. It is an overriding, supervisory jurisdiction, enabling the court to do what it must to maintain itself, its dignity, and its powers free from abuse by those who would enlist its auspices for purposes inconsistent with its own institutional interests and goals. In doing so it protects not only itself but the public for whom it was created; the just, speedy and inexpensive resolution of disputes is in the public interest. In the words of one author, inherent jurisdiction is the "reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, and to do justice between the parties and to secure a fair trial between them." [170] The inherent jurisdiction possessed by *all* courts is related directly to the jurisdiction *each* exercises. [171] It is

[169] "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction." Connelly v. Director of Public Prosecutions, [1964] A.C. 1254, at 1301, [1964] 2 All E.R. 401, at 409 (H.L.) (Lord Morris of Borth-y-Gest). This statement was referred to with approval in Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd., [1971] 4 W.W.R. 542, at 548, 21 D.L.R. (3d) 75, at 81 (Man. C.A.). *See also* the early authority of Oyles and Marshall, Style 418, 82 E.R. 826 (K.B. 1654). We are therefore talking of a power which is implied in or incidental to a court's specific jurisdiction. As a result, an inferior court is the proper judge of its own practice: *see Ex parte* Morgan, 2 Chit. 250 (K.B. 1820).

[170] Jacob, *supra* note 146, at 51, cited with approval by Freedman C.J.M. in Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd., [1971] 4 W.W.R. at 548, 21 D.L.R. (3d) at 81 (Man. C.A.). His lordship also directs readers to the Address by Mr. Justice Hartt, Canadian Judicial Conference, August 1970. The writer is advised that the Hon. Mr. Justice Hartt delivered a similar paper in a 1972 seminar held in Halifax, N.S. This paper is not available to the public.

Master Jacob of the Supreme Court of England, Queen's Bench Division, has dealt extensively with the subject in the above noted article. Unquestionably his paper has contributed greatly to this analysis in respects which cannot be effectively recognized through footnotes.

[171] The doctrine of abuse of process has been applied in the criminal sphere as well. Generally speaking, criminal courts have sought to avoid the invocation of criminal proceedings where a civil remedy is available and appropriate. In the case of Rex v. Bell, [1929] 2 W.W.R. 399, 51 C.C.C. 388, at 392 (B.C.C.A.), the court took *See also* Regina v. Leclair, [1956] O.W.N. 336 (C.A.) 23 C.R. 216, 115 C.C.C. 297. In these cases and others, *e.g.*, Rex v. Leroux, 50 C.C.C. 52 [1928] 3 D.L.R. 688 (Ont. C.A.), the information was laid by the individual seeking "redress", and not at the instigation of the Crown or its law officers. Although in *Leclair* the court refused to prevent the abuse complained of, it did reassert the jurisdiction to do so. The fact that it is settled that the court has inherent power to prevent abuses seems to have led to the invocation of inherent jurisdiction in criminal matters: "it would be odd if the inherent jurisdiction were not available in cases concerning the liberty of the subject where it is available in mere civil cases." Connelly v. D.P.P., [1964] A.C. at 1264, citing counsel in the English Court of Criminal Appeal. It might be argued that the invocation of this

not limited to Superior Courts, though the inherent powers of a Superior Court are ex hypothesi those necessarily incidental to the effectuation of its jurisdiction. [172] Hence, judicial review and the creation and enforcement of prerogative writs are extensions of the Royal prerogative to supervise subjects, or, in this instance, inferior tribunals. [173] However, inferior as well as superior courts have control over their process. Similarly, each court of record has authority over its officers. [174] Thus all courts possess inherent jurisdiction to do the following:

1. To correct errors in a formal judgment so as to give effect to its real intent. [175]
2. To set aside a final judgment in a proper case; *e.g.*, where fraud has tainted the proceedings. [176]

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jurisdiction interferes with the constitutional right of the Attorney-General and his law officers to initiate and bring forward prosecutions. While the Crown has this power, it is clear that no ancient discretion is interfered with when the complainant is an individual. The quintessence of the matter resolves itself not through an analysis of the court's abrogating the powers of the Crown law officers, but rather by a functional approach to the purposes of the criminal and civil systems of justice. There is no reason for us to condone the invocation of a stigmatizing and essentially penal jurisdiction where there already exists a mechanism for private dispute adjudication and resolution, and criminal process is used for malicious or coercive purposes only. The public does not need the protection that is offered by the criminal process, nor is it desirable that the criminal process be viewed as serving such a function or such interests.

It is important to note that to threaten criminal process is itself a crime: Criminal Code, R.S.C. 1970, c. C-34, s. 305(1), while to threaten civil proceedings is expressly not a crime, s. 305(2). Clearly the criminal process is directed towards something quite different from the civil process.

[172] *See infra* note 290.

[173] *See* 1 REPORT OF THE ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS 35 (McRuer J. Commissioner 1968). Recent legislative enactments have varied the procedural framework and have codified certain substantive law related to orders formerly made through prerogative writs: *see* The Statutory Powers Procedure Act, S.O. 1971, c. 47, and The Judicial Review Procedure Act, S.O. 1971, c. 48.

It is noteworthy that tribunals subject to the Statutory Powers Procedure Act are, by section 23(1), empowered to take such action as is necessary to control abuses of their processes. While many tribunals operate within their sphere of competence as courts would, and while they likewise make "judicial" decisions, they are not courts. It was probably always open to speculation that in the exercise of such powers they had authority to govern their own processes. No decided cases are apparent and the statutory provision makes it clear for those tribunals guided by the Act. The question as yet remains open for those tribunals whose operations are outside the statute's ambit; however, such authority may well be limited to the jurisdiction of courts of record only.

[174] By The Law Society Act, R.S.O. 1970, c. 238, s. 29, every member of the Society (all lawyers certified for practice in Ontario) is an officer of every court of record in Ontario. *See, e.g.*, The County Court Judges' Criminal Courts Act, R.S.O. 1970, c. 93, s. 1(1); The County Courts Act, R.S.O. 1970, c. 94, s. 2; The Provincial Courts Act, R.S.O. 1970, c. 369, s. 17(1); The Small Claims Court Act, R.S.O. 1970, c. 439, s. 6, making each of the above noted courts, courts of record.

[175] Lukow v. Trebek, [1949] O.R. 861, [1950] 1 D.L.R. 469 (H.C.); Spencer v. Peat, 40 D.L.R. (2d) 373, at 377 (B.C.S.C. 1963).

[176] Perfaniuk v. Ladobruk, 34 W.W.R. 166, 26 D.L.R. (2d) 122 (Man. C.A. 1960).

3. To punish for contempt. [177]
4. To issue practice directions. [178]
5. To require counsel to personally pay costs of a misdirected abusive proceeding. [179]
6. To stay or dismiss proceedings as an abuse of the court's process. [180]

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[177] Morris v. Crown Office, [1970] 2 Q.B. 114, 2 W.L.R. 792 (C.A.); Attorney-General of Nova Scotia v. Miles, 2 N.S.R. (2d) 96, 15 D.L.R. (3d) 189 (S.C. 1970); Tilco Plastics Ltd. v. Skurjat, [1966] 2 O.R. 547, [1967] 1 C.C.C. 131 (H.C. 1966).

[178] *See, e.g.*, Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234, [1966] 3 All E.R. 77 (H.L.), wherein their Lordships announced through Lord Gardiner L.C., that England's highest court was no longer bound by the principle of stare decisis.

The Supreme Court of Ontario, in an attempt to decongest the Court Calendar, created an assignment court which convenes weekly in order to set a trial list for the subsequent week's business. Rules relating to adjournments were also provided: *see* [1973] 1 O.R. Weekly Part No. 7 (not found in bound volumes).

The Judicature Act, R.S.O. 1970, c. 228, s. 114, creates a Rules Committee which would apparently have at least concurrent authority to make such a practice mandatory. The practice direction above noted was published by the court's Registrar, presumably on behalf of the court.

[179] *See* Myers v. Elman, *supra* note 10; *Re* Hawrish, 45 W.W.R. 102, 41 D.L.R. (2d) 647 (Sask. Q.B. 1963), *rev'd* (confirming jurisdiction but failing to find facts to support its exercise) 50 W.W.R. 616, 29 D.L.R. (2d) 464 (Sask. C.A. 1964); *Re* Ontario Crime Commission, [1963] 1 O.R. 291, 37 D.L.R. (2d) 382 (C.A. 1962); Boland v. Moog (Ont. C.A. Nov. 6, 1963). *See generally* W. WILLISTON & R. ROLLS, *Supra* note 164, at 107-11 M. ORKIN, *supra* note 56, at 55-56; HOLMESTED & GALE 383, 523-25.

Where a solicitor commences or defends an action without authority he may be ordered to pay costs of the proceedings: *see* Brismil Mines Ltd. v. Globe Exploration & Mining Co., [1970] 3 O.R. 622 (H.C. Chambers).

While the English rules provide a code of procedure in detailed form, Ontario courts must have recourse to The Law Society Act, R.S.O. 1970, c. 238, for their inherent jurisdiction over officers. As well, The Judicature Act, R.S.O. 1970, c. 228, s. 82, gives the court "full power to determine *by whom* and *to what extent* the costs [of a proceeding] shall be paid" (emphasis added). It is noteworthy that by virtue of the decision in Alexanian v. Dolinski, [1974] 2 O.R. (2d) 609, 43 D.L.R. (3d) 479 (C.A. 1973), the court cannot award costs as payable by a non-party, including a solicitor, except under inherent authority. The Ontario Court of Appeal expressly held that the words "by whom" in section 82(1) of The Judicature Act are to be interpreted as "by which of the parties to the proceedings before him". This provides little trouble so long as the inherent authority is virile. In addition, the costs may be awarded on a higher scale, *e.g.*, on a solicitor and client basis. In *Ex parte* Simpson, 33 E.R. 834, at 835 (Ch. D. 1809), Lord Chancellor Eldon ordered a party who had submitted scandalous and irrelevant material to the court to pay costs on a solicitor-client basis. *See also* Vanderclay Dev. Co. v. Inducon Eng'r Ltd., [1969] 1 O.R. 41, at 48, 1 D.L.R. (3d) 337, at 344 (H.C. 1968), where Keith J., without reference to section 82(1), assessed costs on a solicitor-client basis since "the jurisdiction . . . does afford a real deterrent to persons who may be disposed to make wanton, scandalous and vicious charges against persons with whom they are in conflict".

[180] The cases are legion in which the power roughly parallel to Rule 126 (discussed *supra*) has been exercised. Master Jacob, *supra* note 146, suggests the four following tentative categories:

(a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

7. To compel observance of the court's orders by staying or dismissing a proceeding. [181]
8. To suspend from practice or strike off the rolls a solicitor who misconducts himself. [182]

But these powers do not circumscribe the court's authority; as Jacob says, "[t]his peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits". [183] A closer look at the above list will reveal that there are only two real heads of authority: (a) control over process, and (b) control over persons. [184] Our interest here is with the latter.

Nothing much occurs within the procedural system without the impetus of human behaviour. [185] Therefore, the distinction drawn between control over persons and control over process may be fictional: there can be no process without persons. Where control is said to be exercised over process, it is the proceeding that is directly dealt with by the judicial act, and the person is affected only because he is involved in the process. To put it another way, the court in controlling its process redefines the *acts* of the individual; whereas, in controlling persons, it is the *person* who directly bears the penalty. In either event the conduct precipitating the court's action will only indirectly be that of the individual litigant; normally it will be the

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(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose:
(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[181] *See* Davey v. Bentinck, [1893] 1 Q.B. 185, [1893] L.J.Q.B. 114, where the court, perhaps because of the particular circumstances of the case, fairly dismissed an action for failure to particularize the content and receivers of an alleged libel. Lord Esher said: "The conclusion is irresistible that there were no such services and no such publication, and without these there is no cause of action and the action is frivolous and vexatious and oppressive." (Lord Esher is surely only saying that the pleading is no longer viable because there are no facts to support the claim to relief.)

Where a party is unable to provide sufficient particulars of its claim or defence because that information is in the hands of the opposing party or some other source, his case may be placed in jeopardy if a court requires that particulars be supplied as a condition of the continued assertion of his claim or defence. Interesting cases have arisen in Ontario surrounding this issue. Generally speaking, courts are reluctant to deprive an individual of his cause of action: *see, e.g.*, Fairbairn v. Sage, 56 O.L.R. 462, [1925] 2 D.L.R. 536 (C.A.). However, on some occasions the courts have been quite strict. In Riley v. Silex Co., [1942] O.W.N. 124, [1942] 2 D.L.R. 794 (H.C.), the plaintiff was placed in the position of being totally unable to proceed, not having present access to information which he knew existed or could later have ascertained.

[182] *See* discussion *infra*.

[183] Jacob, *supra* note 146, at 23.

[184] *Id.* at 28.

[185] In certain areas of the law we are told that rights and obligations are affected by "operation of law". In time we give up or gain what in the former case we securely had and in the latter case we never contemplated having. In Ontario procedure, for example, where either party has joined issue upon any pleading of the opposite party or where the time for a reply has passed, "the pleadings shall be deemed to be closed" (O.R.P. 122).Regarding abandoned appeals, see O.R.P. 502(2), (3). Generally speaking, fundamental procedural rights and duties (akin to natural justice or due process) are not affected, since this would violate basic principles.

conduct either of counsel or the solicitor of record. This fact is crucial to the analysis and criticism of the available weapons in the court's grasp—if rights are truncated, they are the client's not the lawyer's. Yet it is typically a lawyer's acts that are the basis for judicial displeasure.

B. *Abuse of Process and Substantive Adequacy*

The conduct of litigation, as distinct from the right to a remedy, continues to be the focus of this paper. However, reference must be had to the place at which procedural and substantive matters intersect [186] and where the term "abuse of process" is so frequently employed. Such are the cases dealing with the substantive adequacy of a claim. An action may be dismissed if it fails to show facts giving rise to the right to relief claimed. [187] This jurisdiction, said to have been recognized from early times, [188] should be exercised only in the clearest cases. [189] In *Lawrence v. Norreys*, [190] Lord Herschell described the case before the House as a "myth, which has grown

[186] Another class of actions considered an abuse of process are those which would fail because of the availability of res judicata as a defence. Clearly, any action brought for the same relief sought in a previous action is an abuse. It has been so held in Wright v. Bennett, [1948] 1 All E.R. 227, 92 Sol. J. 95 (C.A.), and in Greenlagh v. Mallard, [1947] 2 All E.R. 255 (C.A.). This notion adds little to res judicata and appears to be an unnecessary engraftment upon it unless one considers the efficacy of summary proceedings, which might be available.

Similarly, two claims arising out of the same cause of action must be dealt with in the same proceeding. Therefore, if two actions exist where one would suffice (*e.g.*, a claim for property damage and a claim for personal injury arising out of the same factual situation), an order will either be made striking one of the actions, or the two actions will be consolidated: *see* Kellar v. Jackson, [1962] O.W.N. 34 (H.C. 1961), and Cleveland v. Yukish, [1965] 2 O.R. 497, 51 D.L.R. (2d) 208 (Cty. Ct.), once again having effect to section 18(8) of The Judicature Act, R.S.O. 1970, c. 228. Also note Cahoon v. Franks, [1967] S.C.R. 455, 63 D.L.R. (2d) 274, which held that the claim for personal injury and property damage arising out of one tortious situation must be brought within the context of one action. This decision is a two-edged sword. Since the claim for property damage and personal injury arising out of one transaction constitute one cause of action, all other matters aside (*e.g.*, surprise, prejudice, undue delay, etc.) an amendment will be allowed at any time, notwithstanding the passage of the relevant limitation. On the other hand, a judgment for one claim (personal injury or property damage) will result in the entire cause of action being treated as res judicata.

[187] *See* Metropolitan Bank, Ltd. v. Pooley, 10 App. Cas. 210, at 215, 220-21 (H.L. 1885); Chatterton v. Secretary of State for India, [1895] 2 Q.B. 189 (C.A.); Salaman v. Secretary of State for India, [1906] 1 K.B. 613 (C.A.); Haggard v. Pelicier Frerès, [1892] A.C. 61 (P.C. 1891); Orpen v. Attorney General for Ontario, 56 O.L.R. 327, [1925] 2 D.L.R. 366 (H.C. 1924), *aff'd on other grounds*, 56 O.L.R. 530, [1925] 2 D.L.R. 301 (C.A.).

[188] *See* Metropolitan Bank v. Pooley, *supra* note 187 (per Lord Blackburn); Regina v. Osborn, [1969] 1 O.R. 152, 5 C.R.N.S. 183 (C.A. 1968) (per Jessup J.), *rev'd*, [1971] S.C.R. 184, 12 C.R.N.S. 1 (1970). *See also* W. HOLDSWORTH, 3 A HISTORY OF ENGLISH LAW 391 (3d ed. 1923).

[189] "[T]he . . . power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure." Evans v. Barclays Bank, [1924] W.N. 97 (C.A.). *See also*, Lawrance v. Norreys, 15 App. Cas. 210, at 219 (1890) (per Lord Herschell), *aff'g* 39 Ch. D. 213, 59 L.T. 703 (C.A. 1888).

[190] 15 App. Cas. 210.

with the progress of the litigation". [191] The pleading had contained "a tissue of improbabilities". [192] Clearly the court must have reviewed evidence of some kind to come to such a conclusion; they did so in *Remington v. Scoles*. [193] In *Willis v. Beauchamp*, [194] Lord Fry dismissed an action as "almost prima facie vexatious" [195] where an attack on a grant of Letters of Administration had been taken after the death of the grantees, with whom the grant had itself presumably died. In *Reichel v. Magrath*, [196] an issue already litigated was deprived of a second adjudication. While these actions were all clearly abuses, should not the test itself be broader? It should include the notion: "A frivolous action [is] one which on the face of it [is] so unreasonable that no reasonable or sensible person could possibly bring it." [197]

The power of the court to control procedural abuse through its inherent authority is parallelled [198] and replicated in statutory provisions. Vexatious proceedings are governed in Ontario by the Vexatious Proceedings Act. [199] The statute provides for an application to the Supreme Court upon the *consent* of the Attorney-General [200] and Minister of Justice for an order prohibiting a vexatious litigant [201] from instituting or continuing proceedings. [202]

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[191] *Id.* at 220.

[192] *Supra* note 190, at 222 (per Lord Watson).

[193] [1897] 2 Ch. 1 (C.A.).

[194] 11 P.D. 59 (C.A. 1886).

[195] *Id.* at 65.

[196] 14 App. Cas. 665 (1889).

[197] Norman v. Matthews, 32 T.L.R. 303, at 304 (K.B. 1916). This case also held that the County Court could dismiss a case as an abuse of process on the grounds of substantive inadequacy under inherent authority. This is consistent with the position taken above. Also note that with equal consistency the English Court of Appeal confirms it has inherent authority to act in respect of misconduct committed in relation to its process: *see* Aviagents Ltd. v. Balstravest Invs. Ltd., [1966] 1 All E.R. 450, [1966] 1 W.L.R. 150 (C.A.).

[198] *See* the judgment of Bowen L.J. in Willis v. Beauchamp, 11 P.D. 59, at 63 (C.A. 1886).

[199] R.S.O. 1970, c. 481. In England, the Supreme Court of Judicature (Consolidation) Act 1925, 15 & 16 Geo. 5, c. 49, s. 51, *as amended* 7 & 8 Eliz. 2, c. 39, s. 1, governs the issue. These provisions are not, however, identical to the Ontario statute. The English statute carefully regulates procedure, ensuring that a pauper is represented (how paupers litigate without money is a source of wonder!) and heard, or at least given the opportunity to be heard. O.R.P. 215 would require notice of proceedings, and The Legal Aid Act, R.S.O. 1970, c. 239, s. 12, would most likely provide the pauper with counsel.

[200] Vexatious Proceedings Act, R.S.O. 1970, c. 481. This is different from the English statute which requires the Attorney-General to make the application himself: Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49, s. 51(1).

[201] A vexatious litigant is one who "has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings". Vexatious Proceedings Act, R.S.O. 1970, c. 481, s. 1(1). Ormerod L.J. defined vexatious proceedings as follows:

> I suppose most proceedings are vexatious to the persons against whom they are directed, and therefore the further question has to be considered whether, though they be vexatious, they have been brought without any reasonable ground . . . [I]f, in the opinion of the Court the proceedings are vexatious

The reported cases are few, [203] and lead one to conclude that the statutes are unsuited to deal with less obvious and serious abuses. [204] They strike only

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and there is no reasonable ground for bringing them, they are within the category at which this section aims.

(*Re* Vernazza, [1960] 1 Q.B. 197, at 200, [1960] 1 All E.R. 183, at 187 (C.A.)).

[202] In *Re* Mangouni, [1953] O.W.N. 841 (H.C. Chambers), the litigant, prohibited by previous order, applied for leave to continue existing suits. This motion may well have been unnecessary, since a narrow construction of the statute only prohibits *instituting*, not *continuing* proceedings. In fact, the English statute was specifically amended to cope with this problem—but not in time to avoid the "Vernazza Controversy" over the effect of the amendment. The only English case, aside from *Vernazza*, reported in respect of an application to continue proceedings is Becker v. Teale, [1971] 3 All E.R. 715, [1971] 1 W.L.R. 1475 (C.A.).

[203] Attorney-General v. Vernazza, [1960] A.C. 965, [1960] 3 All E.R. 97 (H.L.), *varying* [1960] 1 Q.B. 197, [1960] 1 All E.R. 189 (C.A. 1959), *aff'g* [1959] 2 All E.R. 200 (Q.B.); and *Re* Langton, [1966] 1 W.L.R. 1575, [1966] 3 All E.R. 576 (Div'l Ct.), application for leave to appeal denied [1967] 1 W.L.R. 697 (H.L.); and the cases referred to in note 202 *supra*, are the only cases reported under the Statute.

[204] A chronology of the events in *Re* Vernazza, as outlined in the decision of the Court of Appeal, [1960] 1 Q.B. 197, is of considerable interest as an illustration of the absurd situation in which the statute has been applied.

July 11, 1935	Vernazza institutes action for breach of contract for personal services to be rendered by himself.
June 16, 1937	Vernazza accepts four hundred pounds paid into Court (after trial's commencement) in compromise of the action, and, with the indulgence of the defendant, the action is dismissed.
July 28, 1937	Vernazza appeals to the Court of Appeal from his own acceptance of the money paid into Court.
1937	Employer company (defendant) goes into voluntary liquidation.
February 10, 1938	Originating summons taken out by Vernazza against the company, his proof of claim in the liquidation having been rejected due to the judgment obtained June 16, 1937. Summons adjourned sine die.
March 10, 1938	Appeal launched as to the original action dismissed with costs.
1938	Petition for leave to appeal to the House of Lords dismissed.
June 2, 1938	New action commenced in Chancery Division to set aside judgment obtained June 16, 1937.
November 12, 1938	Declaration sought by Vernazza against company for order that it was guilty of misfeasance and breach of trust. Adjourned sine die.
November 20, 1938	Statement of claim and action commenced in Chancery Division struck out as vexatious.
February 8, 1939	Fresh statement of claim struck out with leave to amend.
June 20, 1939	Summons taken by Vernazza to set aside statement of defence; no order made except as to costs against Vernazza.
March 7, 1949	Vernazza applied to have proceeding dated February 10, 1938, heard and disposed of.
June 25, 1957	Defendant issued summons to dismiss action

at those who have a protracted history of pursuing unreasonable litigation.[205] So long as the proceedings are legally viable, the collateral purpose of the litigant is not relevant. This is also true of proceedings attacked under the Rules of Court, a jurisdiction which parallels that of the court's inherent authority. Under Rule 126 a court may strike out a statement of claim or defence or dismiss an action on the ground that it discloses no reasonable cause of action or defence.[206] In doing so the court always assumes the truth of the facts pleaded. As might be expected, courts are singularly reluctant to extinguish a claim or defence if the position taken therein is arguable.[207] This is reasonable. The rule also gives the court jurisdiction to control frivolous or vexatious proceedings. Courts and lawyers alike have been confused by this part of the rule. Clearly an action which is not capable of success is frivolous, vexes the opponent, wastes the court's time, and hence is an abuse.[208] However, the second part of Rule 126 must

	commenced June 2, 1938, for want of prosecution.
October, 1957	Harman J. dismisses action of June 2, 1938, with costs.
1957	Appeal from Harman J. to Court of Appeal dismissed.
1957	Petition to House of Lords for leave to appeal from dismissal of appeal of Harman J.'s order, dismissed.
July 24, 1958	Third action commenced by Vernazza, the second to set aside judgment of June 16, 1937, on same grounds as that dismissed for want of prosecution in October, 1957.
December 1 & 2, 1958	Proceedings launched February 10, 1938, November 12, 1938, and March 7, 1949, all brought on before Vaisey J. and thereat dismissed with costs.

Incredibly, Vernazza ensured that matters would be protracted even further by opposing the Vexatious Proceedings Act applications all the way to the House of Lords!

[205] Reasonable litigation has usually been defined as litigation for which there is an arguable cause of action: *see* Krouse v. Chrysler Canada Ltd., [1970] 3 O.R. 135, 12 D.L.R. (3d) 463 (H.C.), and Gilbert Surgical Supply Co. v. T. Wittorner, Ltd., [1960] O.W.N. 289 (C.A.).

[206] The rule "allows a Court or a judge . . . to strike out a statement of claim or defence, not upon the ground that it discloses no cause of action or no defence, but upon the ground that it discloses no reasonable cause of action or defence, which is another thing altogether". Dadswell v. Jacob, 34 Ch. D. 278, at 284, 55 L.T. 857 (C.A. 1887).

[207] In Roberts v. Charing Cross, Euston, & Hampstead Ry. Co., 87 L.T. 732, 19 T.L.R. 160 (Ch. 1903), it was said that "there must be nothing to argue". Also, courts are reluctant to decide a point of law, especially a novel one, unless such decision is necessary to resolve the controversy: *see, e.g.*, Attorney-General of the Duchy of Lancaster v. London and North Western Ry. Co., [1892] 3 Ch. 274, 62 L.J. Ch. 271 (C.A.).

[208] "Actions or proceedings which are absolutely groundless are frivolous and vexatious." HOLMESTED & GALE s. 55, and The Judicature Act, R.S.O. 1970, c. 228, s. 18(6): "[A]ny pleading which discloses no reasonable ground of action or defence is damnable at once, and it is something more, it is perfectly frivolous." Dadswell v. Jacob, *supra* note 206, at 284 (1887), 56 L.J. 233, at 237 (per Lindley, L.J.). In the case where no reasonable cause of action was disclosed, it was held that "continuance

surely have been designed for situations where there were *no facts* capable of supporting the claim; that is, where the pleading was false, or the cause had been adjudicated.[209] Lacking true facts giving rise to a claim or defence, the action should not be allowed to proceed.

These rules do not deal with the matter of improper collateral purpose. However, it is clear from a few authorities that the inherent power of the court can cope with such cases. In *In re Norton's Settlement,*[210] the court restrained proceedings in which a non-resident had been served in England with English process in order to secure a more beneficial venue, thereby materially inconveniencing the non-resident and forcing an unmeritorious settlement. Lord Farwell stated the case as follows:

> The point as to the action being frivolous and vexatious has not been urged in this Court, but the application to stay is based on the ground that, *on the assumption that there is a proper cause of action, the action is an abuse of the process of the Court.*[211]

It was clear that His Lordship was concerned, not with whether the action would succeed, but with whether it was brought for a collateral purpose.[212]

While it is convenient to look to specific enactments for guidance, they actually add little to the court's arsenal for controlling abuse of its process and may even make its job more difficult. The great advantage of the court's inherent authority is that it is not confined to specified applications and may be employed flexibly to meet the needs of a variety of situations.

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of these proceedings is in the nature of an abuse of the process of the Court and that as such they are frivolous and vexatious . . .". *Rex ex rel.* Tolfree v. Clark, [1943] O.R. 319, at 331 (H.C.), *aff'd* at 501 (C.A.). In Kellaway v. Bury, 66 L.T. 599, at 602 (C.A. 1892), Lindley, L.J. says: "If the court sees upon the Material before it, that *the cause of action is vexatious and frivolous,* then, and then only, should the court go to the length of saying the action ought to be summarily stopped." (Emphasis added).

[209] In O'Connor v. Waldron, 65 O.L.R. 407, at 409, [1930] 4 D.L.R. 22, at 23 (H.C.), *aff'd* [1931] O.R. 608, [1931] 4 D.L.R. 147 (C.A.); [1932] S.C.R. 183, [1932] 1 D.L.R. 166 (1931), *rev'd on other grounds,* [1935] A.C. 76, [1935] 1 D.L.R. 260 (P.C. 1934), the language employed verifies this position and reflects the Ontario confusion:

> It is quite settled, I think that even where the statement of claim is so framed, as it is here, as not to disclose such facts as if disclosed would justify the dismissal of the action, as unfounded, upon any reasonable ground, the Court may, if the unquestioned *facts* disclose that there is no reasonable cause of action, dismiss the action as frivolous or vexatious, not only by the latter part of the Rule, but by virtue of its inherent power to prevent the abuse of its own process. (Emphasis added).

[210] [1908] 1 Ch. 471, cited with approval by Spence, J. (now of the S.C.C.) in Hollinger Bus Lines Ltd. v. Ontario Lab. Rel. Bd., [1951] O.R. 562, at 567 (H.C.), *aff'd* [1952] O.R. 366 (C.A.).

[211] *In re* Norton's Settlement, *supra* note 210, at 482.

[212] "On the whole the conclusion at which I have arrived is that this action is brought in the tribunal in which it has been brought not bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled." *Supra* note 210, at 484 (per Farwell, L.J.), citing with approval the words of Warrington J. in Egbert v. Short, [1907] 2 Ch. 205, at 214, [1904-07] All E.R. Rep. 1105, at 1109.

Statutes and Rules of Court, on the other hand, must be complied with formally and strictly in accordance with their language.

C. *Tools to Sanction Both Omissions and Commissions*

Abuse of process may consist of acts of omission as well as acts of commission. It is often the failure of a party to do what he is required or ordered to do that clogs the judicial stream. Unfortunately, few Anglo-Canadian cases show the court intervening to deal with such an abuse.[213] However, the rules of practice make some provision for it. A person who fails to attend upon a cross-examination on his affidavit[214] may have his affidavit struck out or "proceedings may forthwith be had for attachment".[215] In the case of an affidavit of merits to a specially endorsed writ,[216] failure to file may result in a judgment being signed against the defendant/affiant.[217] Similarly, any application in support of which the affidavit was filed may be seriously prejudiced because of the ensuing failure of evidence. A party who fails or refuses to attend upon an examination for discovery,[218] or refuses to be sworn or answer a proper question, may be subject to proceedings for attachment, and/or the action may be dismissed or the defence struck out.[219] Failure to comply with any notice or order for production or inspection of documents[220] renders a party liable to attachment, his case subject to dismissal (if he is the plaintiff) or his defence to being struck out (if he is the defendant).[221] In alimony actions, failure to pay in accordance with an interim order may result in postponement of the trial of the action or in the defaulting party's pleading being struck out, provided that the court is satisfied that the party is able to pay.[222] Clearly these sanctioning pro-

[213] *Supra* note 179 and text.

[214] A party has a prima facie right to cross-examine an affidavit under O.R.P. 229. This is contrary to the English practice (S.C.P., O. 39, r. 1), which provides no such opportunity. This right to cross-examine itself provides opportunities for unnecessary delay once the examination is complete. There may be questions left unanswered due to objections which will be brought before the Master for adjudication as to their propriety. Also, transcripts require time for preparation.

[215] O.R.P. 229 (5).

[216] *See* note 124 *supra.*

[217] O.R.P. 51.

[218] *See* O.R.P. 326-344.

[219] O.R.P. 330. In the latter instances this will result in the noting of pleadings closed and a motion for judgment (O.R.P. 56 & 61, so long as the claim is not for damages), the setting of the action down for trial (O.R.P. 56, if the claim is for damages), or the signing of judgment (O.R.P. 53). The threat of final judgment or a judgment nisi is indeed a hefty weapon.

[220] Regarding discovery and production of documents, *see* O.R.P. 347-352.

[221] O.R.P. 352.

[222] O.R.P. 388. Once again, the striking out of the pleading may result in a final judgment for the plaintiff. The noting of pleadings closed under O.R.P. 55 would be followed by a motion under O.R.P. 61. Since an alimony action is not a matrimonial cause (O.R.P. 2(m)) it is not subject to the prohibition against judgment on motion provided for by O.R.P. 57(a).

cedures, and others like them, [223] put teeth into the requirements of the rules. They punish a litigant's failure to act in a manner which is essentially concurrent and consistent with the court's inherent jurisdiction. [224] Yet they are only as effective as courts are willing to make them, [225] and are invoked only with tremendous reluctance. [226] There is reason for this reluctance; to deprive someone of the opportunity to defend or assert his case is to deny him the resort to law; to deprive him of this freedom may well be to punish him out of all proportion to the misdeed. Moreover, such sanctions fail to

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[223] Regarding dismissal for want of prosecution, see O.R.P. 322, 324, 323 and 43. *See also* discussion regarding payment into court *supra*. Regarding committal for failure to attend at an examination of a judgment debtor, see O.R.P. 594 and 595.

[224] In M & P Enterprises Ltd. v. London & Lancashire Guarantee and Accident Co., 54 D.L.R. (2d) 284, at 287-88 (Man. Q.B. 1966), it is made clear that the court is not restricted to the powers set out in the rules. However, any rule or statute inconsistent with previously exercised inherent jurisdiction would likely be paramount. But, in Twinriver Timber Ltd. v. International Woodworkers, Local 1-71, [1971] 1 W.W.R. 277, at 284 (B.C.S.C. 1970), it was held that the court could not use its inherent powers to order a sequestration because "to hold otherwise would be to act outside the Rules and in effect usurp the Rule-Making function". This view quite overlooks the concurrent rule-making and inherent authority of the court. *See also* Judicature Act, R.S.O. 1970, c. 228, s. 114, and discussion *supra*.

American courts have long asserted rule-making power: *see* Meyer v. Brinsky, 129 Ohio 371, 195 N.E. 702 (S.C. 1935). *See also* 28 U.S.C.A. s. 2071, and FED. R. CIV. P. 83. The latter expressly allows the district courts to make rules governing their procedures where the FED. R. CIV. P. do not so provide.

[225] However, once a limitation period has expired, the dismissal of a plaintiff's claim becomes substantially more injurious, for the action cannot be recommenced. Curiously, the courts have held that it would prejudice the defendant if the action is allowed to be recommenced or continued, since he would thereafter be deprived of the benefit of the limitations defence: *see, e.g.*, May v. Johnston, [1964] 1 O.R. 467 (H.C. 1961). However, Laskin J.A. (as he then was) viewed the matter differently in Clairmonte v. Canadian Imperial Bank of Commerce, [1970] 3 O.R. 97, at 112 (C.A.). The following paragraph is so germane as to merit full reproduction:

> A good deal of time was spent in arguing the limitations point, and I confess to considerable mystification as to its relevance, even assuming that the defendant is correct in its submission that the substance of the relief sought is by way of an action on the case for recovery of money wrongfully diverted by the defendant. The fact is that on any assessment of the nature of the plaintiff's cause of action, it was brought within any possibly applicable limitation period. To dismiss her action for want of prosecution might, accordingly, *prejudice her rather than the defendant.* This appears to me to be relevant in weighing the respective possibilities or probabilities of prejudice; *and I give it as my opinion that a very strong case, much stronger than is shown by the defendant here, must be made out to justify irretrievable demolition of the plaintiff's cause of action,* especially when the defendant can be secured in costs and other terms of expedition can be imposed to avoid further delay. [emphasis added].

[226] The *Clairmonte* case, *supra* note 225, is representative of an anti-technical interpretation of procedural requirements and the development of a policy-based rationale for dealing with procedural errors or misdeeds. Impelling this movement is the firm belief that party prejudice should be the most major determinant in deciding whether to strictly construe a technical provision. Similarly, courts see little point in dismissing an action which may well be recommenced; nor do they wish to dismiss a case for lawyer error or misconduct, to the ultimate prejudice of the client.

take into account the lawyer's responsibility for the wrongful activity or inactivity of his client. [227]

D. *Fixing the Blame Where it often Belongs—the Lawyer*

Perhaps the most interesting discussion concerning dismissal of an action for failure to comply with an interlocutory order is contained in the American case, *Link v. Wabash Railroad.* [228] Counsel had failed to attend a judge-scheduled pre-trial conference because of other business, of which he had informed the court's clerk; notwithstanding, the court summarily dismissed the action with prejudice. [229] There had apparently been a history of manoeuvering in the case. [230] As a result of the court's order, the plaintiff was disentitled to bring a new proceeding since the limitation period prescribed by the relevant statute had run. While the Supreme Court of the United States took the view that the case was one of dismissal for want of prosecution, the Circuit Court of Appeals considered that there had simply been a failure to appear as ordered; *i.e.*, the courts' interlocutory order had not been observed. The ruling court had expressly found its authority to act, not within the Federal Rules of Civil Procedure, but in its "inherent power to enforce its rules, orders, or procedures, and to impose appropriate sanctions for failure to comply". [231] It is noteworthy that the court acted, quite unusually, upon its own motion.

While a court may well possess sufficient authority under the Rules of Court to dismiss an action for wilful non-compliance, [232] it has been held that lawyer neglect does not come within this category. [233] And surely lawyer misfeasance is the crux of the matter. Yet the United States Supreme Court steadfastly held in *Link v. Wabash* that the agency principle made the lawyer's acts those of his client; the client was bound because the lawyer's acts were *his own.* [234] This appears to be a regressive position. [235] In a

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[227] There has been a growing tendency to be concerned with the rights of clients and not "visit on them the sins of their lawyer". This shift has occurred in instances where solicitor neglect has raised the possibility of irreversible prejudice to the client in his action: *see* Simpson v. Saskatchewan Gov't Ins. Office, 61 W.W.R. 741, 65 D.L.R. (2d) 324 (Sask. C.A. 1967); Moffat v. Rawding, 11 D.L.R. (3d) 216 (N.S.S.C. 1970), *aff'd* 1 N.S.R. (2d) 882, 14 D.L.R. (3d) 186 (C.A. 1970); *contra*, Cook v. Szott, 65 W.W.R. 362, 68 D.L.R. (2d) 723 (Alta. C.A. 1968).

[228] 370 U.S. 626 (1962), *aff'g* 291 F. 2d 542 (7th Cir. 1961).

[229] No new action for this claim could be commenced.

[230] 370 U.S. 626, at 633.

[231] *Id.* at 630.

[232] FED. R. CIV. P. 37(d).

[233] United Sheeplined Clothing Co. v. Arctic Fur Cap Corp., 165 F. Supp. 193 (S.D.N.Y. 1958).

[234] 370 U.S. at 633-34 (per Harlan J.):

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the action or omissions of this freely selected agent. Any other motion would be wholly inconsistent with our system of representative litigation, in which each party

vigorous dissent, Mr. Justice Black was outraged at the deplorable injustice foisted upon the plaintiff Link, an innocent layman. [236] One might well ask: Is it up to a client "to try to supervise the daily professional services of the lawyer he chose to represent him?" [237]

> [I]t would be far better in the interest of the administration of justice, far more realistic in the light of what the relationship between a lawyer and his client actually is, to adopt a rule that no client is ever penalized, as this plaintiff has been, because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head. [238]

There must surely be some limitation on the power of counsel to bind his client. [239] In making the agency principle predominant, we fail to retain a "scrupulous regard for the rights of the parties to the action", [240] and disregard the essential purpose of our system of adjudication: the resolution of disputes, not their promulgation. [241] Mechanisms for controlling abuse would best

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is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney".

[235] *See* Note, *Dismissal for Failure to Attend a Pre-trial Conference and the Use of Sanctions at Preparation Stages of the Litigation*, 72 YALE L.J. 819, at 829-30 (1963), where the author points to a series of cases where "courts have been willing to disregard the lawyer-client agency principle which provides that ordinarily parties are bound by the actions of their attorney".

[236] 370 U.S. at 637 (per Black J.):

> I think Judge Schnackenberg was entirely correct in his dissent to the opinion of the majority on the Court of Appeals for the seventh Circuit upholding the dismissal when he said: "The order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action . . . was his property. It has been destroyed. The district court, to punish a lawyer, has confiscated another's property without process of law, which offends the Constitution. A district court does not lack disciplinary authority over an attorney and there is no justification, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel. Because it was neither necessary nor proper to visit the sin of the lawyer upon his client, I would reserve."

[237] *Id.* at 647.

[238] *Id.* at 648. *See also* Padovani v. Bruchhausen, 293 F. 2d 546 (2d Cir. 1961) at 548; Bardin v. Mondon, 298 F. 2d 235 (2d Cir. 1961); Leang v. Railroad Transfer Service, 302 F. 2d 555 (7th Cir. 1962).

[239] Manekofsky v. Baker, 169 A.2d 376 (S.C. Rhode Island 1961).

[240] *Id.* at 379.

[241] In Allen v. Sir Wilfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (C.A.), the result of orders dismissing three separate actions (on appeal one was restored to life) was to preclude two plaintiffs from gaining their remedy against the original defendants because of the expiration of the relevant limitation periods. Diplock L.J. suggests (*id.* at 256, [1968] 1 All E.R. at 554) that in cases where a solicitor delays the prosecution of a case, it is so likely to be prejudicial that the client would be best served through a suit for negligence against his lawyer. He points out that the rules relating to solicitor negligence (which put the onus on the solicitor to show that the original cause would not have succeeded: *see* Armory v. Delamirie, 1 Strange 505, 93 E.R. 664 (K.B. 1722)) actually act to the client's benefit, unless the solicitor is unable to satisfy the judgment. While this course of action leads to the ultimate compensation of the client, it does little to discipline the lawyer who is insured. Furthermore, as the recourse to litigation prolongs the time for recovery and further depletes the client's resources, there are advantages to more summary procedures as far as the client is concerned. It might well be argued that a

be directed toward the cause of the problem, the lawyer, rather than its victim, the party for whom he acts. [242]

Dismissal of the action is really only appropriate where both the lawyer and the client are responsible for the delay or abusive proceeding. And it is appropriate only if the conduct complained of cannot be effectively punished and deterred by any other means: the penalty must fit the crime. It has been suggested that conditional orders, providing for dismissal unless a certain act is done or desisted from within a certain period of time, would be best suited for dealing with mere neglect. [243] Where a lawyer wilfully flaunts a court order or rule without the knowledge of his client, [244] costs and a fine should be imposed upon the lawyer in addition to the conditional order. [245] Furthermore, a lawyer should be required to advise his client of his (the lawyer's) neglect and give him the option of discontinuing services. Where misconduct has threatened to discredit the very process of law, it is essentially consistent with the goals of the system to place conditions on the subject's right of continued access to that process. [246]

Although American courts, exercising either statutory powers or their inherent jurisdiction, have been willing to charge the costs of proceedings against attorneys, [247] the legal basis for the jurisdiction as to costs in the United States [248] is such that American courts must at once feel awkward and reluctant to employ that device as an indemnifier or deterrent. A court's jurisdiction to punish lawyers, on the other hand, is clearly derived in both the United States [249] and Canada [250] from its inherent jurisdiction over its

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special trial of an issue, expedited to attempt to compensate an aggrieved client, could be substituted for the usually lengthy action. Possibly, solicitor liability could be established prima facie by the fact that the dismissal was caused by substantial and inordinate delay by the lawyer. Of course, this presumption of negligence would be rebuttable. In Link v. Wabash R.R., *supra* note 228, at 634, the majority of the court did not hesitate to advocate that the "client's remedy is against the attorney in a suit for malpractice". This is really not a satisfactory result from the client's perspective.

[242] *See* Adams, *Civil Procedure—Power of Federal Courts to Discipline Attorneys for Delay in Pre-Trial Procedure*, 38 NOTRE DAME LAWYER 158 (1963).

[243] *See supra* note 235, at 831.

[244] But the lawyer might well argue that he has his client's express or implied consent, in a written retainer, to act as he did.

[245] The question of costs orders against solicitors personally is dealt with *infra*.

[246] See discussion *infra*.

[247] *See, e.g.*, Austin Theatre v. Warner Bros., 22 F.R.D. 302 (D.C.S.D.N.Y. 1958); 28 U.S.C.A. s. 1927; Toledo Metal Wheel Co. v. Foyer Bros., 223 F. 350 (6th Cir. 1915); *Attorney and Client*, 7 C.J.S. s. 50; F.R.C.P. 37 (a), 85(e).

[248] See discussion *supra* concerning costs.

[249] *See, e.g.*, Harding v. McCullough, 19 N.W. 2d 613 (S.C. Iowa 1945); *In re* Kelly, 243 F. 696, at 705 (D.C. Mont. 1917); De Krasner v. Boykin, 186 S.E. 701 (Ga. Ct. App. 1936).

[250] In England, the Solicitors Act, 1957, 5 & 6 Eliz. 2, c. 27, s. 50, gives the court the same authority over its officers as it possessed in 1873. This jurisdiction is concurrent with that available under inherent jurisdiction as well as that of the disciplinary committee, created pursuant to the Act, under the leadership of the Master of the Rolls. In Ontario, section 70 of The Solicitors Act, R.S.O. 1960, c. 378, provided that "[n]othing in this Act interferes with the jurisdiction over solicitors as officers of the Court". Furthermore, by virtue of section 2 of the statute, the authority of Superior Court

officers. The doctrine is more substantial and deeply rooted in Anglo-Commonwealth than in American legal history. Its principles are important for our present discussion and require attention. The case of *Myers v. Elman*[251] may elucidate the juridical foundation for the exercise of the court's authority over persons, and more particularly, its own officers.

While *Myers* does not expressly so state, it strongly implies that a solicitor's first obligation is to the court before which he practises.[252] The case

Judges as it existed in Ontario prior to August 22, 1881, was preserved. This statute was substantially amended and shortened, and sections 2 and 70 were both repealed, by The Solicitors Amendment Act, 1970, S.O. 1970 c. 20, ss. 1, 4. However, it is doubtful that the repeal of these sections removes inherent powers, which are consistently held to be concurrent unless specifically excised. In the case of *Re* Fitzpatrick, 54 O.L.R. 3, at 7, [1924] 1 D.L.R. 981, at 984 (C.A. 1923), it was said: "Honesty and honourable conduct the court can always insist upon, and can purge the rolls by striking off those who offend unless restitution is made, but not for mere negligence." (One wonders whether the condition of restitution re-installs the lawyer with sufficient integrity.) Mark Orkin suggests, in Some Aspects of Professional Self-Government (unpublished doctoral thesis), that this power is "vestigial" and "[t]hus, although the authority of the Law Society was not expressed to be exclusive, in practice it has become so". This comment was made while the Ontario Solicitors Act contained sections 2 and 70. The Law Society Act, R.S.O. 1970, c. 238, ss. 34, 37, 41, sets up a code of procedure and a committee to discipline lawyers in a fashion not dissimilar to that provided under the English statute. The analysis should be no different in respect of Ontario. In any event, the old New York case of In the Matter of H, an Attorney, 87 N.Y. 521 (1882), expresses what is in every likelihood the Ontario point of view today: "It [the power of the court to regulate attorney conduct] rests upon the relation of the attorney to the court as its officer, and the general control always exercised, founded upon that relation. The Code has not taken it away . . . . The general authority remains, but it is a power which has reasonable limitations . . . ." In the result, one can expect the courts to report grievances to the Society in those instances where suspension or disbarment would be the apposite sanction. The courts will continue to exercise their authority in respect of making costs orders against solicitors. However, in the end result the court's summary jurisdiction over officers of the court remains intact, although it may be irregularly employed: *see* Myers v. Elman, *supra* note 10, at 317-318, where Lord Wright doubts the court would intervene in the face of the presence of the Discipline Committee. *See also* Brendon v. Spiro, [1937] 2 All E.R. 496, at 499 (C.A.).

[251] *Supra* note 10.

[252] This appears to be an accepted position in American jurisprudence. "The lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court . . . ." Nebraska State Bar Ass'n v. Jensen, 171 Neb. 1, at 9, 105 N.W. 2d 459, at 464 (S.C. Neb. 1960), *cert. denied*, 365 U.S. 870 (1961). *See also In re* Kelly, *supra* note 249, at 705, where it is said:

> Counsel must remember they . . . are officers of the courts, administrators of justice, oath-bound servants of society; that their first duty is not to their clients, as many suppose, but is to the administration of justice; that to this their clients' success is wholly subordinate; that their conduct ought to and must be scrupulously observant of law and ethics; and to the extent that they fail therein, they injure themselves, wrong their brothers at the bar, bring reproach upon an honorable profession, betray the courts, and defeat justice.

See also United States v. Landes, 97 F.2d 378 (2d Cir. 1938); Vestal, *A Study in Perfidy*, 35 IND. L.J. (1959); Brody, *The Duty of the Lawyer to the Court*, 11 IOWA L. REV. 224 (1926). This theory, of course, accords with the philosophy of settling disputes, for it compels lawyers to perform in accordance with the goals of the system,

arose out of an application by the winning defendant for an order requiring the plaintiff's firm of solicitors to pay the costs of the actions, the personal impecuniosity of the plaintiffs being apparent. It had been discovered that the supervising solicitor had permitted his clerk to prepare and file an affidavit of documents which he knew or should have known was deficient, evasive and untrue. Although the Law Lords had difficulty in deciding the nature of the Court's jurisdiction to order costs payable personally by the solicitor,[253] they were more or less agreed in their view of the solicitor's obligation to the court. Lord Atkin said:

> The Court is not concerning itself with a breach of duty to the other litigants but with a breach of duty to itself.[254]

Lord Wright, quoting and approving the trial judge, Mr. Justice Singleton, said:

> Nothing ought to be said which may prevent or tend to prevent a solicitor or counsel from doing his best for his client so long as his duty to the Court is borne in mind.[255]
>
> [I]f [a solicitor] is asked or required by his client to do something which is not consistent with his duty to the Court it is for him to point out that he cannot do it, and, if necessary, to cease to act.[256]

Lord Wright said:

> [G]ross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain . . . involves a failure on the part of the solicitor to fulfil his duty to the Court and to realize his duty to aid in promoting his own sphere in the cause of justice.[257]

However, to consider the solicitor's duty to the court and his duty to his client as separate duties is both artificial and wrong in principle. His duty is to assist in the attainment of justice. Perhaps this is best said by Teece:[258]

> The Court exercises a jurisdiction to punish lawyers not merely when they deceive the Court but also when they abuse their function or are culpably negligent in performing it. For example, if a solicitor wilfully causes delay, or takes unnecessary steps in an action for the purpose of piling up costs, either against his client or against the opponent, he is abusing the process of the Court and he is failing in his duty to the Court because as an Officer of the Court it is his duty to assist the Court in its aim of administering justice as speedily and cheaply as possible.[259]

The word "punish" arises often in describing the purpose for which this

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thus distracting them from an adversarial posture. Its real measure of success is infinitely limited by the court's insistence that it will only interfere with what is, on a relative basis, outrageous activity.

[253] See discussion in text.

[254] Myers v. Elman, *supra* note 10, at 303.

[255] *Id.* at 315.

[256] *Id.* at 317.

[257] *Id.* at 319. *See also* Speech of Viscount Maugham, *id.* at 293-94.

[258] R. TEECE, THE LAW AND CONDUCT OF THE LEGAL PROFESSION IN NEW SOUTH WALES 33 (2d ed. 1963).

[259] *See* Attorney-General v. Wylde, 47 S.R. 99 (N.S.W. 1947).

jurisdiction has been used. Punishment itself has many purposes (demonstration of abhorrence of the act, retribution, segregation and stigmitization of the wrongdoer, deterrence of others from like activity),[260] but none of these accounts for the need to indemnify; strictly speaking, a rationale of punishment would require payment into the public till, if any payment at all. Yet their Lordships disagreed as to the rationale for this jurisdiction. Viscount Maugham suggested that its primary function was not penal but compensatory—"to protect the client who has suffered".[261] Lord Atkin took the opposite view: the jurisdiction was for protection of the court and punishment of the solicitor.[262] (What about the client, one wonders?) Lord Wright suggested that conduct which tends "to defeat justice in the very cause in which [the solicitor] is engaged professionally"[263] is reprehensible and that he must "compensate the opposite party in the action"[264] for costs "thrown away". This position is in agreement with that taken by Lord Justice Danckwerts in *Wilkinson v. Wilkinson*[265] and is consistent with the policy of forcing the person responsible for the loss or costs to bear the burden of payment.[266] A solicitor who knows and understands his duties and relationships could never allow such misconduct to occur without personal complicity, notwithstanding client pressure to perform in a manner inconsistent with his duties:[267] It is nevertheless desirable to have an integrated approach, incorporating both the penal and compensatory rationales.

The court in *Myers* was quite sure that the solicitor's conduct was sanctionable. However, it inadequately described the *kinds* of acts which would constitute such conduct. Lord Porter utters an almost meaningless sentence in his attempt to describe the nature of this misconduct:

> It is misconduct in the way in which the work entrusted to his firm is carried on, not the personal wrongdoing of the individual, which gives rise to the exercise of the jurisdiction.[268]

Viscount Maugham could only define the acts generally as "misconduct or default or negligence".[269] Such phrases are open-ended and simplistic, but

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[260] This list is not intended to be exhaustive.

[261] Myers v. Elman, *supra* note 10, at 289.

[262] *Id.* at 303.

[263] *Id.* at 318. *See also* Stephens v. Hill, 10 M. & W. 28, at 33, 152 E.R. 368, at 370 (Exch. of Pleas 1842) (per Lord Abinger, C.B.).

[264] Myers v. Elman, *supra* note 10, at 319.

[265] [1963] P. 1, at 25, [1962] 3 W.L.R. 1, at 20 (C.A. 1962).

[266] It is "the duty of the court to protect litigants from being improperly damnified". Edwards v. Edwards, *supra* note 146, at 248, [1958] 2 All E.R. 179, at 187.

[267] In Edwards v. Edwards, *id.* at 258-59, [1958] 2 All E.R. 179, at 192-93, Sachs J. stated: "It is urged that all that was done was intended for the benefit of the lay client. But, assuming that to be so, how can that justify oppressive procedure running the husband into ever-increasing costs? The jurisdiction of the court is intended to protect defendants from precisely that sort of oppression."

[268] *Supra* note 10, at 335.

[269] *Id.* at 289. Ormerod L.J., in Wilkinson v. Wilkinson, *supra* note 265, at 9, [1962] 3 W.L.R. 1, at 6, suggests that in order to invoke this jurisdiction the activity complained of must amount to more than mere discourtesy. Lord Wilmer, in the

they do provide the court with operating room to deal with the individual circumstances of each case. Perhaps the following passage from *Edwards v. Edwards* [270] will help:

> No definition or list of the classes of improper acts which attract the jurisdiction can, of course, be made; but they certainly include anything which can be termed an abuse of the process of the court, and oppressive conduct generally. It is also from the authorities clear . . . that unreasonably to initiate or continue an action where it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction. [271]

We thus gain a "feeling" of what the courts are talking about; we are unable to clearly define it, because the courts have refused to do so. Flexibility is desirable, but it gives rise to abuse, or at least mismanagement. Here is a short list of situations (selected from *Cordery on Solicitors* [272]) in which solicitors have been ordered to pay costs:

(a) where a solicitor assumed a case would come on for trial later than it did; [273]
(b) where a solicitor underestimated the length of trial; [274]
(c) where a solicitor improperly acted for both sides; [275]
(d) where a solicitor irregularly issued subpoenas; [276]
(e) where the subject matter of the suit was important to the solicitor but not to the client. [277]

In the United States, courts have sometimes gone further than the mere liability for costs. [278] Yet in Canada and England, aside from contempt

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same case, felt that the misconduct consisted of the solicitors' having "deliberately elected to fight an issue on which they must have known that they were almost inevitably bound to fail". *Id.* at 20, [1962] 3 W.L.R. 1, at 15-16. This position squares perfectly with the view that procedures or actions which are unreasonable are prima facie sanctionable.

[270] *Supra* note 146, at 248, [1958] 2 All E.R. 179, at 187 (per Sachs J.). *See also* Peruvian Guano Co. v. Bockwoldt, 23 Ch. D. 225, at 230, [1881-5] All E.R. Rep. 715, at 716 (C.A. 1883).

[271] The power to dismiss is therefore not limited to closed categories, the vexatious suit being but one example: *see* Tringali v. Stewardson Stubbs and Collett Ltd., [1966] 1 N.S.W.R. 354, 83 W.N. (Pt. 2) 393 (C.A.), *rev'g* [1965] N.S.W.R. 416 (S.C.).

[272] G. GRAHAM-GREEN AND D. GORDON, CORDERY'S LAW RELATING TO SOLICITORS 168-171 (6th ed. 1968).

[273] B. v. B., 106 Sol. Jo. 940 (P.D.A. 1962).

[274] Ibbs v. Holloway Brothers Ltd., [1952] 1 All E.R. 220, [1952] W.N. 53 (K.B. 1951) (costs thrown away by adjournment).

[275] Berry v. Jenkins, 3 Bing 423, 130 E.R. 576 (C.P. 1826).

[276] *Re* Sanders, 147 L.T. Jo. 212 (Ch. 1919).

[277] Hirst v. Fox, [1908] A.C. 416, 99 L.T. 624 (H.L.).

[278] It should be noted that where a solicitor is ordered to pay the other side's costs he is usually prohibited from sending out his own account as well. In Smithies v. Smithies, [1973] 1 O.R. 249, at 251, 30 D.L.R. (3d) 669, at 671, successful counsel was deprived of the costs of his statement (factum) and ordered not to charge his client for same.

orders,[279] no direct attack on solicitor activity has been made.[280] In *Gamble v. Pope & Talbot Inc.*,[281] an American court fined an attorney who inadvertently failed to file a pre-trial memorandum within the time limited by

[279] If the conduct is serious enough, the court will impose a fine for contempt: *see* Rex v. Weisz, [1951] 2 K.B. 611, [1951] 2 All E.R. 408. *See also* Rex v. Parke, [1903] 2 K.B. 432, [1900-3] All E.R. Rep. 721, where the High Court is said to have jurisdiction over contempt committed outside the face of an inferior court (an inferior court having contempt jurisdiction only if it is a court of record and if the contempt is committed in its face). Where a court cannot protect itself, the High Court will superintend: *see* Rex v. Davies, [1906] 1 K.B. 32, [1904-7] All E.R. Rep. 60 (1905).

However, English courts have held that the County Court has no authority to order costs payable by a solicitor: *see* Davies v. Coles, 132 L.T. Jo. 577 (Cty. Ct. 1912). In Gain v. Provincial Advertising Co., 117 L.T. Jo. 222 (K.B. Chambers 1904), Bucknill J. issued an order for prohibition against a County Court Judge because the Judge had attempted to make an order of costs payable against the solicitor personally. Prior to the decision in Alexanian v. Dolinsky, *supra* note 37 (see also the discussion in note 179, *supra*), it was generally held that the words of section 82 of The Judicature Act, R.S.O. 1970, c. 228, were broad enough to provide the court with jurisdiction to make a costs order against a solicitor. In light of the *Alexanian* case, courts would have to resort to inherent authority. It is, of course, clear that County Courts have inherent authority over those persons who appear before them. In the result, the English cases would appear to have been wrongly decided. On the other hand, it appears clear that inferior courts of record do seem to have the power to punish for contempt which has occurred in their face: *see, e.g.*, Regina v. Lefroy, L.R. 8 Q.B. 134, 37 J.P. 566 (Cty. Ct. 1873), and Regina v. Staffordshire County Court Judge, 57 L.J.Q.B. 483 (C.A. 1888). This inherent jurisdiction likewise extends to enable inferior courts to punish as a contempt wilful non-compliance with a court order: *see* Martin v. Bannister, 4 Q.B.D. 491, 28 W.R. 143 (C.A. 1879); Hymas v. Ogden, [1905] 1 K.B. 246, 74 L.J.K.B. 101 (C.A. 1904).

In the early case of Miller v. Knox, 4 Bing. N.C. 574, at 594, 132 E.R. 910, at 918 (H.L. 1838), it was said: "It is also a contempt to abuse the process of the Court by wilfully doing any wrong in executing it; or making use of it as a handle to do wrong; or to do any thing under colour or pretence of process of the court without such process or authority." Similarly, see The Debt Collectors Act, R.S.O. 1970, c. 106, s. 1, which provides for a fine of up to $20 (not a great deal!) for simulation of legal process. *See also In re* Dows, 209 N.W. 627, 47 A.L.R. 265 (S.C. Minn. 1926) (*per curiam*), in which a lawyer was suspended for having had recourse to the simulation of legal process.

However, it does appear clear that the power to punish for contempt is limited to a court of record: *see* Greisley's case, 8 Co. Rep. 38a, 77 E.R. 530 (C.P. 1588). *See also* Beecher's case, 8 Co. Rep. 58a, 77 E.R. 559 (Ex. 1588). All civil trial courts are courts of record in Ontario: *see* note 174, *supra*.

[280] The major exception would seem to be the vestigial power of the Supreme Court of Ontario to suspend or disbar: *see* note 250, *supra*.

American courts have held legislative attempts to define the requirements for the admission and disciplining of attorneys to be invalid. In the case of *In re* Splane, 123 Pa. 527, at 540 (1889), it was stated: "Whether [the attorney] shall be admitted, or whether he shall be disbarred, is a judicial, and not a legislative question." *See also Ex parte* Secombe, 19 How. 9, 15 L. Ed. 565 (1857), *approved in In re* Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932); *In re* Bailey, 30 Ariz. 407, 248 P. 29 (1926); People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E. 2d 941 (1937). *See also* Beardsley, *The Judicial Claim to Inherent Power over the Bar*, 19 A.B.A.J. 509, at 510 (1933), where the author condemns, as similar to the divine right of kings, the inherent power of judges. A rebuttal of this view may be found in Miller, *The Illinois View of Judicial Power—A Reply*, 19 A.B.A.J. 616 (1933). *See also* Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635 (1935).

[281] 191 F. Supp. 763 (E.D. Penn. 1961).

court order.[282] This decision was reversed on appeal on the ground that a lawyer cannot be fined for conduct short of contempt; furthermore, this particular lawyer had not been given a hearing.[283] The dissenting judgment, on the other hand, held that the fine was properly ordered as being an incident of the court's inherent power.[284] One cannot be certain, but it is arguable that the court had no intention of punishing for contempt *per se*. The statute in force at the time[285] codified the law of contempt; in the absence of its application it was thought that the court's power had been abrogated, particularly in light of the requirements of due process in the Bill of Rights,[286] which is part of the United States Constitution.[287] However, Adams takes the position that the "mere process of a codification of the power to punish for contempt does not mean the removal of the Court's power to punish for offences where wilfulness is not an element".[288] This approach is entirely consistent with the overriding nature of inherent powers. In one case an American court ordered payment into a library fund to obviate the operation of the rule in *Gamble*.[289] While other methods, as we have seen, are available to deter lawyers from abusing the court's process,[290] the imposition of a fine (when added to the payment of the opposition's costs and the denial of the lawyer's right to bill his own client) would surely serve that end very effectively. It attacks the culprit, compensates the injured, and advances the interest of the judicial system. It protects the innocent client and is not such an overwhelming weapon as to make courts reluctant to use it for fear of abridging the rights of the subject unjustly. Finally, such a means of effectuating the smoother administration of justice has the incidental benefit of providing additional revenue for the system itself.

The stigma associated with criminal contempt need not attach to this kind of procedural attack on a lawyer's conduct. Lawyers ought not to be

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[282] He was ten months late.

[283] 307 F. 2d 729 (3rd Cir. 1962).

[284] *Id.* at 733. *See also* Note, 111 U. PA. L. REV. 846 (1962).

[285] 18 U.S.C. s. 401 (1958).

[286] U.S. CONST. amend. v and xiv.

[287] *See Ex parte* Robinson, 19 Wall. 505, 22 L. Ed. 205 (1873), and *In re* McConnell, 370 U.S. 230, at 233-34, 8 L. Ed. 2d 434, at 437 (7th Cir. 1962).

[288] *Supra* note 242, at 173.

[289] For an interesting discussion of the whole range of powers in the United States, see Vestal, *The Pretrial Conference and Recalcitrant Attorney: A Study in Judicial Power*, 48 IOWA L. REV. 761, at 766 (1962-63), and McIlvaine, *Compliance by Counsel with the Pretrial Procedures*, 29 F.R.D. 408, at 411 (1962).

[290] Jacob, *supra* note 146, at 23, n. 1, suggests that the American courts have not extensively resorted to inherent jurisdiction. This does not seem borne out by the case law. Succinctly put, the American view is that courts have inherent authority over officers (Dekrasner v. Boykin, *supra* note 249); that the courts' inherent powers are derived from their duty to protect the due administration of justice (Fuller v. State, 100 Miss. 811, 57 So. 806 (1912)); and that such powers are necessary for the orderly and efficient exercise of their jurisdiction (Hale v. State, 55 Ohio 210, 45 N.E. 199 (1896)).

frightened into behaving shyly, but they must operate within acceptable tolerances.

It is clearly difficult to define the true nature and scope of the court's inherent jurisdiction and to differentiate it from the general concept of judicial discretion. This paper has advocated a wide decision-making power, but it has also favoured an approach giving the court discretion to determine from the facts before it the best manner of dealing with the particular abuse presented to it. Clearly, the notion of discretion pervades all the decision-making of common law judges; it is their basic power to determine the facts, interpret the law, and apply law to fact. But this discretion is to be exercised within the rules of law and equity, restricting the possible conclusions which the court might arrive at. In opting for a footloose application of discretion, we give the courts *ad hoc* but not *ad libitum* adjudicative authority; this discretion must operate within the scope of the courts jurisdiction. The power to adjudicate is a condition precedent to the exercise of this discretion, as of any jurisdiction. Broad decision-making powers aid the court in exercising its undoubted jurisdiction to sanction abuses in a manner consistent with the severity of the abuse, having regard for the person who is *actually* responsible for it. It is a return to Solomon's justice, and it presents great dangers. But greater dangers are created by definition, which is restrictive and entangling, and ultimately inefficacious. [291]

[291] *But see* Quality Steels (London) Ltd. v. Atlas Steels Ltd., [1949] O.W.N. 110, at 112 (H.C. 1948) (Barlow J.), where it was stated: "It was said by an early writer that: 'The discretion of a judge is the law of tyrants. It is always unknown. It is different in different men. It is casual and depends upon constitution and passion. In the best it is often at times capricious. In the worst it is every vice, folly and madness to which human nature is liable'."