
The Simple Economics of Civil Procedure

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I am very happy to be here because I have been very interested throughout my career in state courts and how they operate. While most of my colleagues at Yale Law School, and in legal academia generally, spend most of their time reading U. S. Supreme Court opinions or, in the case of Yale Law School, the opinions of one or two Justices, that is a much too narrow approach. The U. S. Supreme Court is surely important, but I think it is equally important to try to understand how state courts, and especially state trial courts, operate. So, I have studied state trial courts for most of my career.

I was involved with the Rand Corporation when it first began its civil justice work back in the early 1980s. Rand had raised money to study the civil justice system and asked me for ideas as to how to best use it. I was teaching at UCLA at the time, and went to lunch with them. I said the best thing that you can do is start gathering statistics on state trial courts because nobody in legal academia knows a thing about how the state trial court system operates. There was a book published by Charles Clark, who was then the Dean of Yale Law School, that looked at state trial courts in Connecticut.¹ This was one of the only studies and Clark found the statistics so complicated, that he could come to very few conclusions. The book contains tables and tables of statistics, and concludes that this is a very difficult subject and somebody will have to do more work on it. That book was published back in 1937, and was the last anybody heard of that approach. So, I convinced the Rand Corporation to code up the data on the Cook County/Chicago and San Francisco trial courts.

I want to begin with some economics and then talk about what these empirical studies have done. In *Economic Analysis of Law*,² Richard Posner describes what he calls a model for litigation; that is, he establishes an economic model for when cases will be litigated, as opposed to settled, and then examines what can be derived from that model. This model is very straightforward, and it defines what Posner calls the condition for litigation:³

$$PpJ - C + S > PdJ + C - S.$$

One side of the inequality represents the plaintiff's minimum demand, and the other side represents the defendant's maximum offer. The simple intuition of this inequality is that there will

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be litigation if the minimum amount the plaintiff demands is greater than the maximum amount the defendant offers. On the other hand, if the defendant is willing to pay in settlement more than the reservation price demanded by the plaintiff, or equal to the minimum amount the plaintiff will accept, then they will settle the case. P_p refers to the plaintiff's estimate of the likelihood of success, that is, the likelihood, in the plaintiff's mind, that the plaintiff will win the case. J refers to the expected judgment or stakes of the case. C is litigation costs. The plaintiff knows that the net return is going to be less than the expected amount he can win at trial because there are litigation costs, whether it is a percentage or an absolute amount. These amounts, of course, may not be trivial. There may also be some costs of settlement, S .

Conversely, the net expected cost of litigation to the defendant is the defendant's expectation of the probability of success, P_d , times the judgment, J . We will see here, in this inequality, that the two estimates of the amount at stake are the same. That is usually not true, which is important for the analysis. If the case goes to trial, the defendant will have to pay litigation costs, so the net cost to the defendant includes what the defendant's litigation costs are going to be, minus settlement costs. There is a savings if the parties settle.

By some very simple algebra made possible by having this J constant, the equation can be reorganized:⁴

$$(P_p - P_d)J > 2(C - S).$$

This is the same inequality as above: that is, there will be litigation rather than settlement when the difference between the parties' settlement offers, times the stakes of the case, is greater than the difference between the costs of litigation, C , and the cost of settlement, S . This is the savings in litigation costs from settling, rather than litigating, the case. The point of this economic model of when cases litigate rather than settle is, if the differences in the parties' expectations of success, times the amount at stake, are greater than the savings in costs from settling rather than litigating, then the parties will litigate. On the other hand, if this inequality is reversed and the cost savings from settlement are greater than the difference between the parties' expectations of success, they will settle.

There are a number of different implications of this model. Obviously, one is that the plaintiff's expectation of success has to be greater than the defendant's, that is, the plaintiff has to be more optimistic than the defendant to justify litigation as long as these costs are positive. If P_p were less than P_d , the left term would be a negative number, so it would not be greater than costs because we know litigation costs are greater than settlement costs. As a general matter, and this is an obvious intuition, parties fail to settle cases where plaintiffs are more optimistic than defendants about the expectation of recovery.

Let me talk to you now about some of the empirical work I have done. A lot of economics is simply putting into somewhat more rigorous form common sense intuitions



about how people behave, and what the incentives are to behave one way or another. There is a lot to be learned about how markets operate and how parties interact given different incentives. This inequality, while it simply shows when cases are going to be litigated rather than settled, reflects the determinants of what we might call the market for litigation.

Litigation resembles a market just like the buying and selling of commodities or services. It resembles a market in the sense that there are two parties interacting and there may be a way for them to maximize their returns. One way they can maximize their returns is by settling, that is, when they settle a case, they save litigation costs. We all know how costly litigation is. We all know, furthermore, that as an empirical matter a very small number of cases are actually litigated. I have studied this extensively in the Chicago courts. Between three and four percent of all cases filed proceed to a jury trial in the Cook County courts. That statistic has been estimated as true of other jurisdictions as well. Chicago is not really unique in that regard. Why would that be so? It is because, just as trade in a market, the parties have found it mutually beneficial to agree on some terms of settlement rather than to expend the costs of litigation and have a jury or a court determine who wins or loses.

One paper I did a few years ago looked at court congestion.⁵ The Chicago courts, on and off since the end of World War II, have been plagued by substantial congestion leading to long delays between filing and trial. At various times, there have been efforts to reform the court system and the administration system of the Chicago courts, and also the Illinois courts more generally, over this long period. The question of court congestion in Chicago has been studied by many different scholars, study groups, and centers for the study of state courts. This is because the court congestion, at least through the early 1980s, was substantial: Often four to five years elapsed between the filing of a lawsuit and an actual jury trial.

One of the most important studies was by Hans Zeisel at the University of Chicago, who did the famous study of the American jury with Harry Kalven.⁶ Kalven was not involved in the congestion study, but Zeisel studied the congestion in the Chicago courts.⁷ He had an idea that a way to solve the congestion problem was to think of congestion in the court system as a form of a log jam. He used a log jam metaphor. What he found was that the number of cases filed was increasing dramatically in the Cook County courts, and the number of cases processed, through either settlement or trial, was less. He recommended achieving a form of case load currency, or to use his metaphor, to get the river flowing again, so that the number of cases coming in was no greater than the number of cases being processed.

Zeisel also recommended establishing some special procedures to pick off the extra logs in the log jam to open the flow and have it move again. I do not mean to press the metaphor too far, he did not press it quite this far, but the idea was to get all these cases moving efficiently through the system. Zeisel proposed increasing pretrial settlement efforts, improving the management and administration of current cases, and bifurcating

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trials. He also recommended simplifying jury deliberations and increasing the number of judges. Of course, since then, many other studies have suggested increasing the use of ADR, calendaring, and other forms of docket management.

The group working with Zeisel suggested that substantive changes in the law, and standardization of legal doctrines might help. For example, they thought the adoption of the Uniform Commercial Code might take a lot of cases away and solve problems. In the early days, it was believed that the adoption of strict products liability, as opposed to using the negligence standard, might ease court congestion because it would be easier to try product liability cases.

In most of the jurisdictions where there has been heavy court congestion, the problem has not gone away. More recent analysis of court congestion has derived the theory that there is something in the legal culture, the relationship between the attorneys and the court, that leads to chronic congestion and that some broader mechanism of changing that legal culture might be helpful. So far, no one has figured out how to change the basic legal culture to achieve that end.

I looked at efforts in the Chicago and Illinois courts to deal with congestion and what the effects were, over a twenty-year period during the sixties, seventies, and early eighties. One year, there was the creation of a court administrator. The next year, the adoption of a different set of pattern jury instructions. Zeisel recommended impartial medical experts. I do not think that lasted very long. They built a new courthouse in Chicago. The next year, the adoption of bifurcated trials and a summer pretrial program. The next year, the adoption of seventeen new judgeships. The next year, a total reorganization of the courts. The next year, case management computerization. The year after that, new Chicago courtrooms. The year after that, increased assignments of downstate judges to Cook County. The year after that, new Chicago courtrooms. They adopted, for a while, a specialized malpractice division, although I do not think that survived. The year after that, ten new judgeships, then thirty new judgeships, and eleven new judgeships, and nine new judgeships. Over this twenty-year period, the number of judges was basically multiplied by five in the Chicago courts, and all of these other case management procedures were adopted.

What happened empirically? Because I had these detailed trial data, I was able to measure the time between filing and trial precisely. During the first part of the period, which was 1959, there was a delay of a little less than five years from filing to trial. All of those reforms were instituted in the years after that. Basically, the graph goes up a little, up a little more, there is a bit of a drop in the early seventies, it goes down a little, and then it starts rising again. By the end of the period, the court congestion was no different than it was at the beginning of the period, notwithstanding five times the number of judges plus all of the other procedures that were adopted.

Why would that be true? I think you can learn something about it by going back to the economic model of when cases are litigated and when they are settled. Court congestion, or delay, has the effect of changing J , the stakes of the litigation. In a simple



economic sense, delay puts a discount rate on J , so J is not simply J , but J plus an interest rate, one plus I , or divided by an interest rate multiplied by the period of time, T , the number of years. So J is discounted by interest over the period of time of delay. Posner also discusses this, but I think the economic point is a little different than Posner's. The delay has the effect of depressing the amount at stake in the litigation. The plaintiff's minimum demand is not only what the plaintiff expects to win if the plaintiff goes to trial but also what that is worth when the plaintiff wins, so the present value of a payment to be made five years from now or six years from now is substantially less than the nominal amount of the judgment, depending on the interest rate.

UNIDENTIFIED SPEAKER: First, you are assuming no prejudgment interest on the left side of the ledger. Secondly, you are also assuming that court delays do not run up the cost of litigation on the other side of the ledger.

PROFESSOR PRIEST: That is true. It is simple in a number of ways. Those both are important ways of making the model more complete. You are right, prejudgment interest will offset this. If we really want to deal with prejudgment interest, we could put that into the equation at the start so that the initial demands and the initial offers are based upon an expectation of what that delay will be and what the prejudgment interest will be. That is correct. Given prejudgment interest, however, delay still reduces the expected value of a judgment.

UNIDENTIFIED SPEAKER: Prejudgment interest makes litigation more likely?

PROFESSOR PRIEST: Prejudgment interest increases the stakes and thus increases the difference between the total amount at stake and what the settlement costs would be, that is true. An additional complication is that as time goes on, litigation costs may increase or decrease. They increase to some extent because the lawyer has to monitor the case. How much they increase is a good question as to how much has to be done prior to the time that a legitimate trial date is set or expected. Even building those variables into the expectations, differential delay will have the effect of adjusting this entire process. The point is that court congestion is going to have something of an equilibrium effect, that is, the longer the delay, even given prejudgment interest and the differential costs from additional litigation, the lower the total amount at stake will be. Therefore, the likelihood is greater that the parties will settle the case. The shorter the delay, the greater the amount of J will be, and the greater the chances of litigation by the parties will be because this difference in expectations is more likely to exceed the difference between litigation and settlement costs.

This means that all the various efforts to reduce court congestion have a counterbalancing effect, that is, the more they reduce court congestion, the more they also reduce settlement and, therefore, increase court congestion. This leads to a kind of



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equilibrium. There will be a counterbalancing effect on the existence of court congestion because it has an effect on the expected judgment of the parties, and will then self-correct. Changes in the legal system to address court congestion will affect the settlement decisions of the parties, so that the log jam, if you want to call it that, is continuously recreated.

The log jam is not a perfect metaphor because it is not so much that there are a bunch of cases that hold up all of the other cases. Rather, the decision to keep the case on the river, or in the pipeline, is affected by the long-term court congestion. There is no doubt that when the number of judges is increased by five times, more cases will be processed and more cases will be given the opportunity of going to trial by jury than would be true otherwise. However, there must be a reason that the number of jury verdicts actually did not increase by five times when five times the number of judges were added. This suggests that there are many other things going on with what judges are doing, but it affects the underlying settlement practices of the parties.

In the past, Posner used the example of congestion on a freeway. If you add another lane on the freeway, there will be more cars on the freeway and it will self-correct. I think that is true, but this is a slightly different effect. It is not so much that people decide that now, because there are more judges, they want to have a jury trial. Rather, because there are more judges, or because there are simplified procedures, or because the court administration has been changed to make things process more rapidly, the amount of delay is lowered, which increases the amount of the judgment and increases the likelihood that the parties, in their negotiating in the market over settlement, will fail to settle.

UNIDENTIFIED SPEAKER: I do not say this defensively, but the big problem that we have in Cook County is that there are a limited number of trial attorneys who will come in with their affidavits and say, "You know, we are with a big firm, but there are only three trial attorneys." One attorney is on a complicated 12-week medical malpractice case, or this person is on a products liability case. Surprisingly enough, often it is that the attorneys are not ready.

Then you say to them, "Well, you have to get ready." Then there is some important case where a local official was indicted in federal court, and was forced to trial in less than three months. Now, part of the appeal is that she was denied her own choice of attorney because the judge said, "I don't care what the lawyer is doing, you're going to go to trial." So there is a little balancing.

PROFESSOR PRIEST: I do not disagree at all. It is a lot more complicated. Everything is always more complicated. There are some defendants that have great incentives to delay, even with the existence and availability of prejudgment interest, and that will affect the decisions to litigate as well. It is my view that there is a market feature to all of this, that is, if the returns were greater to trial attorneys in pressing those cases to trial, then there would be more trial attorneys. The large firms would free up people, or hire more,



or recruit from the hinterlands, or find more ways of trying more cases if the incentives were substantially greater for more trial cases. There are markets in many different dimensions. This is just one feature of them.

UNIDENTIFIED SPEAKER: What is your evidence of this theory? Because it is absolutely the opposite of my experience. My experience, in terms of delay, is that the longer you delay, the greater the likelihood of having a trial, and the shorter the delay, the less likelihood. That has been our court's experience as well. The judges who are the most current on their cases and get the cases ready for trial have more of them settle.

PROFESSOR PRIEST: Well, a lot of people have written about this, including me. I would be happy to send you all of this, but the proof of the theory, and of the model, comes in a variety of different ways. It comes through aggregate data, not by looking at any single judge. I do not doubt that there are some sets of judges that resolve cases more rapidly than others. I think they tend to be the decisive judges, meaning both parties can be convinced that the judge is really going to go ahead with what he or she says, and the parties can predict what the effect of the judge on the outcome of the trial is going to be. To the extent that the parties' differences in their expectations of the outcome are reduced by decisive judges, by knowing what the judge is going to do or by being certain that the judge is actually going to have a trial on the date that was set, that will also affect how the parties litigate or settle.

The proof of this comes from roughly thirty or forty large empirical studies. Again, in this empirical study, there was a drop in the seventies because during that period the courts increased the jurisdictional amount for the superior trial courts, as opposed to the lower courts, by a very substantial amount. The amount rose from \$5000 to \$15,000, so there was a big flood of cases out of the superior trial courts into the lower courts, although, over time, that changed and restored the same rate of delay as had been true at the beginning of the period. The period of delay in the lower courts was now much greater because they had many more cases than they had to deal with before, even though that eventually equilibrated as well. So, the support comes from this large set of empirical studies that has generally supported the model. That is not to say that it is not a complex matter and that the incentives of lawyers do not make a difference.

UNIDENTIFIED SPEAKER: This may not be helpful, but I think of the cost of litigation as a tax on some activity. Cases that go to trial are cases where the market fails. Strong cases settle fast. Weak cases go on.

PROFESSOR PRIEST: I agree with that.

UNIDENTIFIED SPEAKER: With more complete knowledge and better information, people know where they are. But, if you do not even include all the cases that never even



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get filed, because they settle, it seems to me to be very difficult. Your formulas are great as a jumping off place to talk about things, but my experience is that generally, the lawyers or the parties have very divergent ideas about *J*, the possible judgment.

PROFESSOR PRIEST: I agree.

UNIDENTIFIED SPEAKER: There is a comment in the materials you passed out about that. Posner kind of blows it off, like if people disagree about what the case is worth, it probably will not settle. That is the case, in my experience.

PROFESSOR PRIEST: I agree. In fact, if you do not mind, let me move to the next set, which relates to this point. This is a more complicated model. I do not want to just spend time on congestion and *J* itself alone, or on the assumption that *J* is equal.

Let me show you some other work I have done to describe some other features of this. One thing I looked at was the case load of the civil jury, that is, what does the civil jury do and how does the civil jury spend its time? Again, in academia, actually, in American life, there is not a lot of attention given to what the civil jury actually does. There is a great veneration for the civil jury. It is one of the most important institutions of our democratic system, but what does it actually do, why is it so important, and how should we think about it?

Putting aside the historical reasons and so forth, there are a number of strong and powerful public policy justifications for civil juries. One is that there is a thought that the civil jury brings some sense of community values to difficult decisions, that the civil jury is important where there is litigation that implicates complicated, difficult, or uncertain public values. Certainly there is a sense that the civil jury is a counterpart to the criminal jury in cases implicating the government, that is, where the government is a litigant. Just as we want a jury of citizens to determine questions of guilt or innocence in the context of a state prosecution of a citizen, we may also want a jury of citizens in the context of litigation involving the government to be impartial or to protect the citizenry from anything the government might do.

Harry Kalven, a teacher of mine, a great man, and a person who is greatly responsible for the modern veneration of the civil jury, used to argue that the civil jury was extremely important in cases where judges may not have any particular expertise as to the effects of a particular harm, but some sample of the citizenry would be able to make that evaluation. He thought the civil jury was extremely important in libel and slander cases where the jury would have a better sense of an individual's loss of reputation. He also argued that the jury is important in a particular set of personal injury cases. When someone is disfigured, for example, the model who had her face slashed, the civil jury would have a sense of what that loss would be in a way that any single judge may not. Of course, the civil jury also serves as a role in training citizens or committing citizens to the legal system.



What does a civil jury actually do? When I studied these Chicago trial court cases over a twenty-year period, I looked at the nature of the cases and particularly the amount of time that civil jurors spent on different types of cases, to see how much aggregate time is spent on these cases for which it is most compelling to have a civil jury. In this study, civil juries spent 0.26% of their time on libel and slander cases; there are not a lot of libel and slander cases. Civil juries spent 0.97% of their time on cases where the government was a litigant. What are the cases where they did spend a lot of time? Auto collisions. Again, these data are somewhat old, but it is reflective of a more general economic process. The civil jury spent 63.17% of its time on auto cases; a little less than ten percent of its time on suits against landlords or suits for being injured on a property; 6.82% on workplace injuries; five percent on products liability; and a little less than three percent on malpractice.

Again, Harry Kalven made the argument that you may need a civil jury to really understand not only disfigurement but also serious pain and suffering. How would a judge have any greater sensitivity of that? Civil juries only spent 1.26% of their time on cases involving death, and only 2.93% of their time on cases involving serious quadriplegia, hemiplegia, or brain damage. Maybe we want a jury of peers, but in fact, most of the jury's time is spent on cases where the injuries are somewhat routine. Juries spend twenty-four percent of their time on cases where the most serious injury claim is a fracture; twelve percent when the most serious injury is a sprain or strain, eight percent on whiplash; and 5.47% when the most serious injury claimed by the plaintiff is a bruise. Why would we have the civil jury resolving not these cases of great democratic moment or these cases that implicate the public values as we describe them, but rather, cases which are, in terms of liability, rather of a routinized nature, such as these auto collision cases?

In other countries, for example Canada, they have something called a collision chart. There is a picture, which sometimes you see on police reports in various cities, where if one car hits the other at a particular angle, there is a liability assignment as between the two. They have all of these different pictures, and that is it. They do not go to trial over these matters.

Why would the civil jury end up with cases of this nature in the United States? I think it relates to the litigation inequality. These types of claims, accidents, or injuries are ones in which the plaintiff has a reason to believe that he or she can get a certain amount and he or she is optimistic about that. The defendant believes, or can prove, that the injury is minimal, or that the accident was routine, and they disagree on the outcome and go to trial. The principal reason these cases are litigated rather than settled is because of the uncertainty that remains over the outcome.

This also affects the delay point, for the same reason as before. If it is clear what the outcome of the case will be, the case is much more likely to settle and will probably settle more quickly than if the case is uncertain. I would not call it a market failure because I do not know that we want to say that there is some ideal of zero litigation or even that



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there is some ideal of litigation of only a few types of cases. I am severely criticized as un-American every time I say something like this, but the notion of restricting the jurisdiction of the civil jury does not seem to me to be anti-democratic on the whole. For example, if we say we should decide auto collision cases in a different way. Unfortunately, the first time I raised this proposal was at an American Trial Lawyers Association convention. It was not very well received. I forgot my American flag pin that I have to wear when I say that.

It is not the failure of the market. It is how the market operates, given the institutional conditions that are created here. I am not a critic of the jury system in terms of democratic values, but one of the features of the jury system is that it creates a great deal of uncertainty because the system picks people at random who are chosen because they know nothing about the subject. If potential jurors do know something about the subject, they are usually challenged or excused from the jury. A process of that nature creates uncertainty by definition which is why it generates and fosters litigation.

There is another study, which I have not yet published, on the different circuits of the federal courts which have different procedures as to whether they announce the panel of judges who will hear a case in advance. For example, in the Second Circuit, the attorneys do not know who will be on the panel of judges until they walk in the courtroom. In other circuits, there is some advance notice of who the judges will be. What is the difference? One thing you can see is that if you know who the judges will be in advance, the cases are more likely to settle than if you do not know who the judges will be. Why? Because there is greater uncertainty. If you are in the Seventh Circuit and you know the panel is Posner, Easterbrook, and it doesn't really matter who else, you can pretty well figure out how your case is going to be decided on the whole. If you have a good strong economic case, your settlement demand goes up. Conversely, the other party's settlement offer goes up. Again, I do not mean to claim this economic model explains everything about litigation, but it does generate implications regarding many features of our system and how they operate.

UNIDENTIFIED SPEAKER: In some of the other sessions, we have talked about risk aversion. Doesn't your theory have to be measured by that kind of a calculation about settlements?

PROFESSOR PRIEST: Sure.

UNIDENTIFIED SPEAKER: The type of personalities in that situation?

PROFESSOR PRIEST: The risk aversion point is a little complicated. Generally, risk aversion will have the effect of depressing the expected value of a case, but it depends on who is uncertain. If both parties are equally uncertain, depending on the direction of the uncertainty, it may increase the difference between the parties' settlement offer or it may



narrow it. If the plaintiff is more uncertain, that will have the effect of lowering the plaintiff's demand by the extent of the risk aversion. If you have a repeat litigant defendant, for example, a product manufacturer or an insurer, there will be less risk aversion by that party, and, therefore, there is a greater likelihood of settlement. It is easy to model risk aversion, but difficult to use it empirically because it is very hard to have anything other than a hunch as to what risk aversion means in one context or another.

Let me show you one other study. It is another implication of the impact of differences between the settlement offers of the parties on the likelihood of litigation. Again, the basic economic point is that the greater the differences between the expectations of the parties, the more likely they will litigate rather than settle. If the parties agree on what the outcome is, they will settle because litigation costs are greater than settlement costs. The less they disagree, the more likely they are to settle.

When the case lies near the decision standard, there is great uncertainty, or there is a greater possibility of uncertainty to the parties as to what the outcome is going to be. This point is really only a variation on what we see in the sports pages every day; the betting line on a football game, basketball game, or any other type of sporting event. A betting line on a football game changes the decision standard from who is going to win to by how much are they going to win. The betting line increases the uncertainty as to the outcome of the game. If the betting line for the Kansas-Colorado football game is seventeen points, most people are confident that Colorado is going to win. The question is, by how many points is Colorado going to win? The betting line creates greater uncertainty about that. That is the effect of how litigation operates, too, but there is an empirical implication of this intuition.

The empirical implication is that this point will hold true whether the decision standard is the negligence standard, with few plaintiff victories, or the strict liability standard where plaintiffs win more cases. Under either of these standards, there will be a similar degree of inherent uncertainty about some set of cases. It follows from this proposition that, holding everything equal, plaintiffs will win at trial fifty percent of the time regardless of the decision standard. I looked at the Cook County courts' rate of plaintiff victories in contested civil cases, and I tried to cull out those cases involving litigation over damages only. Again, the implication of this theory is that the results are, on average, at the midpoint of the parties' expectations. The Cook County courts' proportion of plaintiff victories in contested civil cases is within the range of fifty percent year after year.

This is not true for all types of cases because it is a little more complicated, and there are sets of cases in which parties have different incentives. For example, when there are repeat players or when one of the parties has more at stake than the other, the incentives for litigation are different. In products liability and malpractice cases, the defendant has a greater stake in the case than any single plaintiff. This will lead to a situation in which the defendant will be more likely to settle those cases in which the defendant is going to lose and more likely to litigate those cases in which the defendant thinks he or she is

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going to win.

In products liability cases in the Chicago courts, plaintiffs do not win fifty percent of the time. They only win about forty-two percent of the time. This figure is consistent over the years, under both the negligence standard and the strict liability standard. The strict liability standard did not change the rate of plaintiff victories in the Chicago courts, and there are many other studies that show it has not changed at all anywhere. Products liability standards have changed: that is, we know manufacturers are held liable today for things that are far different from what they were held liable for in the fifties or sixties. The nature of the cases has changed very dramatically, but the actual rate of plaintiff victories has not. In Chicago malpractice cases, thirty-nine percent of plaintiffs won, again, very consistently over time; this is true across jurisdictions, within a percentage point or two. This suggests that the cases that come to trial are not representative of the entire set of disputes in our society but, rather, reflect uncertainty over the outcome.

Again, it is not that the market fails in a sense. Rather, these are the conditions for the market in litigation. One can only say the market fails if we wanted to change those conditions. I am not sure we shouldn't change the conditions in some way, for example, by constraining the scope of the jury. The market is working. According to this model, cases are litigated when there is great uncertainty as to the outcome. Generally, when the stakes are higher and when there are differences between the parties' expectations, different types of cases will be litigated. That will be affected by prejudgment interest, delay, and the prospects of litigation and settlement costs. I think it is not a failure of the market, but rather a definition of the market, and we can learn how the market for litigation operates from this economic model.

Notes

1. See CHARLES EDWARD CLARK, *A STUDY OF LAW ADMINISTRATION IN CONNECTICUT: A REPORT OF AN INVESTIGATION OF THE ACTIVITIES OF CERTAIN TRIAL COURTS OF THE STATE* (1937).
2. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).
3. See *id.* at 609.
4. *Id.*
5. See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U.L.REV. 527 (1989).
6. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).
7. The author is referring to an unpublished University of Chicago Law School study of congestion in the Chicago courts. See also HANS ZEISEL, ET AL., *DELAY IN THE COURTS* (1979) (studying congestion in the Supreme Court of New York County).

