

THE MYTH OF SETTLEMENT

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By Carl Baar

It is a truism in the literature on trial courts that most civil cases settle. In fact, however, most civil cases do not settle. While only a small minority of civil cases go to trial, settlement is one of three major outcomes other than trial. The other major non-trial outcomes are default and abandonment.

This paper will discuss the role of settlement in civil litigation in a number of ways. It will begin with an overall summary of the patterns of civil litigation. It will argue that how civil cases are handled varies sharply by subject matter; therefore the pattern of dispositions across courts depends upon the mix of case types, which is in turn linked to differences in jurisdiction and procedures across courts. Tort cases are handled in the aggregate differently from contract and property cases. By focusing on tort cases as the prototypical class of civil cases, a generation of American research has distorted the reality of the civil litigation process, and the role of the courts more broadly.

This argument will be illustrated by data from a study of civil cases that were commenced in Toronto, Canada, over a 20-year period from 1973 to 1994. The Toronto findings will be compared with data from studies of American state courts.

The paper will conclude by exploring why we have come to see settlement as the predominant if not exclusive alternate to trial. To do so, the paper will draw an analogy between settlement in civil cases and plea bargaining in criminal cases. It will argue that both paradigms consider litigation as a process in which participants are active and engaged, rather than a process in which one or more participants may commonly--and even characteristically--be passive and disengaged. Politically, the settlement story reinforces the dominance of tort litigation as the focus of both civil litigation research and political struggle, even though it often constitutes a minority of civil work, and is

characterized by a level of uncertainty that makes tort case processing different from the processing of other types of civil cases.

PATTERNS OF CIVIL CASE PROCESSING

The importance of settlement in civil cases becomes obvious when one observes the infrequency with which civil cases are resolved following trial. The percentage of civil cases resolved at trial usually ranges from two to ten percent.¹ The figure used for the past generation in caseload management training programs for judges and court administrators is three percent. The percentage increases when a different base is used. For example, some trial courts may have more restricted or exclusive jurisdiction (e.g. U.S. federal district courts, some U.S. state superior courts, Australian Supreme Courts, or the High Court of Justice in London, England), overrepresenting cases more likely to go to trial. Or some trial courts may not consider civil cases to be part of their caseload until those cases have reached a later stage in the process, after the initiation of the claim (e.g. New York).

Settlement has been the dominant if not universal explanation for why so few cases conclude with a disposition at trial.² This view emerged when researchers looked at cases that were proceeding to trial or on the verge of trial. Some percentage of cases that go to trial settle during the trial itself. And until recent years, a substantial percentage of cases did not proceed on the day of trial because a last-minute settlement was reached. Today, the use of pretrial conferences and alternative dispute resolution mechanisms has led to earlier settlements and reduced the number of courtroom-door dispositions, diversifying the whole concept of settlement.

¹ See Brian J. Ostrom and Neal B. Kauder, Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project (Williamsburg, Va.: National Center for State Courts, 1995), pp. 14-15. Some states report trial rates as high as 20 percent.

² A useful starting point is Marc Galanter's essay, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society," 31 UCLA Law Review 4-71; although he was careful to qualify the generalization, others, including Donald Black, have not been. And Galanter more recently assumes that "litigation ends in settlement in the vast majority of cases"; see Marc Galanter and Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements," 46 Stanford Law Review 1339 (July 1994).

When researchers push back to an earlier stage of the process, to the point when the parties, following traditional common law practices, request that the court set a date for trial, a still larger proportion of cases are usually settled before trial. By that stage, once the discovery process has been completed, and cases are on the list for trial, either settlement or trial are the expected and obvious options.

The problem arises because, despite wide variations in case scheduling procedures (even within the same jurisdiction), only a minority of civil cases normally reach the stage at which the parties request a trial date. To get a full picture of civil case processing, it is necessary to start at the beginning of the process, with the initiation of a claim by a plaintiff. Looking from the point at which the court process is first invoked generates the following basic observations:

* A high proportion of civil claims are not defended; that is, the party being sued never files any response to the claim. In some cases, this occurs if the plaintiff does not notify the defendant of the claim; in other cases, the defendant is notified but does not file a defense.

* The most important variable affecting the likelihood that claims will be defended is case type. Cases for the collection of debts are typically undefended; it would be exceptional to find a court in England, Australia, Canada or the United States in which a majority of collection cases or debt claims were defended. A defense rate of 20-40 percent would be common. In contrast, high-dollar tort claims (e.g. medical malpractice, motor vehicle accidents, wrongful dismissal) are more likely to be defended; even those cases, however, are undefended as often or more frequently than they go to trial.³

* The defense rate may also vary depending upon the caseflow management practices built into the court's procedural rules and local practices. Thus, when a jurisdiction shifts from litigant responsibility for the movement of litigation to judicial responsibility, a higher proportion of claims will be defended, since the parties cannot reach a

³ See John A. Goerdts et al., "Litigation Dimensions: Torts and Contracts in Large Urban Courts," 19 State Court Journal 3 (1995) at 42 (Appendix 5, "Percentage of Cases with an Answer Filed"). The table shows that 49 percent of the tort claims in Maricopa County (Phoenix), Arizona, go unanswered.

mutual agreement to discuss issues before moving to the stage of filing the defense.

* Debt collection and property cases that are undefended are commonly resolved by a default judgment, by which the court (often through an administrative official rather than a judge) renders a judgment for the plaintiff when the defendant fails to respond within a prescribed period, and the debt at issue (e.g. a mortgage) is eligible for the procedure.

* The default judgment is thus the earliest disposition reached by most courts. It will take months and perhaps years before dispositions by settlement gradually outnumber dispositions by default.

* The overall proportion of dispositions by default or settlement varies with the mix of cases in a particular court. The higher the percentage of debt collection cases and the lower the percentage of tort cases, the higher the proportion of default judgments. Thus in small claims courts, where tort cases are few in number (and may even be excluded), settlements are so much less likely that they may not even outnumber trials.

* There remains a potentially substantial but largely undefined set of claims that has not been disposed of by default judgment or trial, and for which no settlement has been recorded. Researchers and practitioners generally assume these cases too have been resolved by settlement, but the court either has no record of any disposition or has dismissed the claim, or the parties have asked that the action be discontinued. Dismissals and discontinuances may occur following a settlement even if the court file shows no evidence of that settlement. Settlements could have been reached in cases in which no defenses had been filed. On the other hand, however, the record may be correct, and there has been no settlement at all.

* The disposition of some undefined proportion of civil claims may therefore be more appropriately identified as abandoned. A claim may be filed to ensure that a limitation period has not been exceeded, and then the claim is never pursued; the defendant may not even be notified about the suit. Dispute resolution, and even dispute processing, have thus been replaced by dispute storage. Or agreement may consist of one party essentially conceding to the other, by agreeing to pay a claim or declining

to pursue a claim. Is every agreement between disputing parties a settlement, or can some agreed-upon dispositions be more validly termed concessions or discontinuances? The number of cases that fall in this category may be large enough to exceed the number of known settlements. Whether settlements are under-recorded, presenting us with a methodological problem, or over-ascribed, presenting us with an epistemological problem, is an empirical question that requires and deserves further study.

A CANADIAN ILLUSTRATION

This set of assertions about civil litigation is presented in the form of broad statements applicable to a full range of developed common law jurisdictions.⁴ They will be illustrated here by data on civil litigation in Toronto, Ontario, Canada, between 1973 and 1994. While the Toronto data are affected by some distinctive characteristics of the jurisdiction (such as the implementation of partial no-fault automobile insurance late in the period under study), the same may be said about the aggregate pattern of civil litigation in any jurisdiction. What the data show are differences among case types as claims are funnelled through the court process. It is the similarity among litigation patterns across jurisdictions that is the focus here.

The Toronto data base consists of 2,166 civil cases commenced over a 20-year period. Five fiscal years were chosen at five-year intervals, from 1973-74 (427 cases) to 1993-94 (434 cases).⁵ Cases that proceeded by way of statement of claim were examined, excluding family law litigation and probate matters. Cases were filed in the general jurisdiction trial court,⁶ therefore excluding small claims. A senior lawyer and two junior lawyers examined the case files, categorizing the

⁴ And perhaps to civil law jurisdictions as well, as suggested in Portuguese research by a team from Coimbra University and presented at the International Law and Society Conference in Glasgow in 1996.

⁵ See John Twohig, Carl Baar, Anna Meyers and Anne Marie Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994," in Ontario Law Reform Commission, Rethinking Civil Justice: Research Studies for the Civil Justice Review (1996), v. 1, pp. 77-181.

⁶ Named the Ontario Court of Justice (General Division) in 1990, following the merger of the former High Court of Justice and District Court of Ontario (the latter created in 1984 to replace an existing set of County and District Courts). Pre-1990 cases were sampled in proportion to those filed in the two courts.

case types and the dispositions. Given the small percentage of cases that went to trial, a separate sample of 1,320 trials (i.e. cases in which a trial commenced and witnesses were sworn) was collected for the same time periods.

Table One shows the distribution of major case types. Contract cases (both collection cases and commercial cases) constitute a majority of 53.8 percent, with tort cases (negligence and motor vehicle) next at 29.3 percent, and property cases rounding out the major categories. The right hand column also breaks down the five major case types in the separate sample of 1,320 trials. Note that tort cases then become the largest number, almost a majority at 48 percent, entirely at the expense of collection cases. Thus, even within the same jurisdiction, civil courts show a different face when they judge claims than when they receive claims.

To ensure that changes in jurisdiction over time do not distort the findings, Table Two breaks the five case types into the five time periods. This allows us to see the dramatic decline in motor vehicle claims in 1993-94 following the implementation of a partial no-fault regime. It also shows the decline in collection cases in the 1980s after an increase in the jurisdiction of the small claims court (from \$1,000. to \$3,000.). Also notable is a doubling of the proportion of negligence cases and property cases; it is tempting to attribute the former to a shift in personal injury work after changes in automobile insurance.

If the pattern of dispositions (e.g. the mix of settlements and default judgments) is a function of the balance between tort and contract cases, the representativeness of the Toronto case mix becomes critical. In fact, the Toronto study concluded that the province of Ontario was much less litigious than American states. Compared with the 50 states, Ontario would rank eighth in population and fifteenth in total civil cases; its per capita filing rate is lower than all but three states (Mississippi, Nevada and Tennessee).⁷ So how does its case mix compare with other jurisdictions?

⁷ Twohig et al., pp. 142-144. The American figures are drawn from Brian J. Ostrom et al., State Court Caseload Statistics: Annual Report 1992 (National Center for State Courts, Feb. 1994), p. 10.

For the United States, the most extensive research on civil litigation has been done in the last decade by the National Center for State Courts. A 1987 survey of 36 general jurisdiction urban trial courts shows a civil case mix of 48 percent tort cases, 35 percent contract cases, and 17 percent property and other cases.⁸ Yet a study of trends from 1984 to 1993 in 23 state general jurisdiction trial courts showed contract cases outnumbering tort cases in both years.⁹ The discrepancy may be a result of the latter study aggregating data from all courts, thus giving more weight to courts with a much higher proportion of contract cases (traceable in turn to lower dollar limits in those states' limited jurisdiction courts).¹⁰

While the Toronto case mix has a higher proportion of contract cases than in U.S. state courts, it has a substantially higher proportion of tort cases than in English trial courts, where collection cases are surprisingly dominant.¹¹

Table Three focuses on whether or not civil claims were defended. Over a 20-year period in Toronto, 65 percent were not. While only one out of three civil claims was defended, the proportion increased from 25 to 40 percent during that period. More recent data indicate that the defense rate has continued to rise, particularly for cases governed by a set of case management rules that provide for court supervision of the early stages of civil litigation.

⁸ John A. Goerd, Chris Lomvardias and Geoff Gallas, Reexamining the Pace of Litigation in 39 Urban Trial Courts (Williamsburg, Va.: National Center for State Courts, 1991), p. 45.

⁹ Ostrom and Kauder, note 1 above, p. 11. In U.S. federal trial courts, with much smaller caseloads than their state counterparts, tort cases were more than double contract cases from 1984-86, but fell below by 1993 (see Goerd et al., State Court Journal, note 3 above, p. 7, drawing on the 1993 Report of the Administrative Office of the U.S. Courts).

¹⁰ For example, California superior courts consistently rank among the highest in their percentage of tort cases, but the lower court civil jurisdiction extends to cases up to \$25,000., eliminating a disproportionate number of collections cases in comparison to Toronto. See Goerd et al., State Court Journal, note 3 above, p. 40.

¹¹ Twohig et al., p. 145, using data from the 1988 Report of the Review Body on Civil Justice (London: HMSO, Cmnd. 394, at pp. 6-7).

Table One.
Distribution of Major Case Types, Toronto Civil Cases, 1973-94

Case Type	Sample of Cases Commenced		Trial Sample
	#	%	%
Collection	810	37.4	18
Contract/Commercial	356	16.4	21.1
Motor Vehicle	463	21.4	32.2
Negligence	170	7.9	15.8
Property/Other	366	16.9	13
Total	2,165		

Source: John Twohig, Carl Baar, Anna Meyers and Anne Marie Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994," in Ontario Law Reform Commission, Rethinking Civil Justice: Research Studies for the Civil Justice Review (1996), v. 1, pp. 111-113.

Table Two.
Major Case Types by Fiscal Year, Toronto Civil Cases Commenced, 1973-94

Case Type	Fiscal Year (%)				
	73-74	78-79	83-84	88-89	93-94
Collection	44.1 %	42.9 %	35.4 %	30.1 %	33.6%
Contract/Commercial	11.5	18.1	17.7	18.5	16.4
Motor Vehicle	26.3	17.9	23.1	31.5	9.0
Negligence	4.2	5.7	8.5	6.1	15.0
Property/Other	13.8	15.4	15.4	13.8	26.0

Source: Ibid., p. 113.

Tort cases (motor vehicle accidents cases and negligence cases) in Toronto show higher defense rates than collection, contract and property cases, both in the 20-year sample and in current data on case-managed cases. While American state courts report a higher percentage of cases answered, the data also show a consistently higher proportion of tort cases answered.¹²

Table Four summarizes the dispositions of the Toronto civil cases. Dispositions following a judgment at trial constitute only 3.5 percent of the total, reinforcing the notion that trials are unusual events in civil litigation. Settlements, however, are neither the only nor the dominant alternative. In fact, defaults outnumber settlements 611 to 466.

At the same time, these figures almost certainly understate the number of settlements. For example, while the 222 dispositions coded as discontinuances provided no indication of settlement in the court file, the fact that a notice of discontinuance was filed by the parties indicates that some resolution was reached by them. Similarly, the 80 dismissals that reflected “want of action” or were struck from the trial list¹³ are likely to have some settlements among them. The seventeen “partial trial” dispositions indicate that a settlement had been reached after the opening of trial and before the judgment.

This leaves the largest and most frustrating category--“no disposition”. This category includes some cases that are still pending, and are therefore likely to increase the number of settlements more than the number of default judgments, since the latter normally occur at the earliest stage of litigation. The category also includes cases for which there is no record, even many years after the claim was initiated, of any further action.

To understand whether the “no disposition” category consists mainly of pending cases from the more recent time period,¹⁴ Table Five

¹² Geordt et al., State Court Journal, note 3 above, p. 42. The percentage of tort cases answered exceeded the percentage of contract cases answered in 41 of 44 counties surveyed--by more than double the percentage in ten counties.

¹³ These and other definitions of the types of disposition may be found in Twohig et al., p. 166.

¹⁴ The data were gathered in February 1995, less than a year after the last sampled case could have been filed (March 31, 1994).

Table Three.
 Number of Defenses Filed by Fiscal Year,
 Toronto Civil Cases Commenced, 1973-94

Fiscal Year	Number of Defenses		
	Zero	One	Two or More
1973-74	321 (75%)	95 (22%)	11 (3%)
1978-79	325 (67%)	136 (28%)	26 (5%)
1983-84	253 (65%)	115 (29%)	22 (6%)
1988-89	253 (59%)	146 (34%)	29 (7%)
1993-94	261 (60%)	143 (33%)	30 (7%)
TOTAL	1413 (65%)	635 (29%)	118 (5%)

Source: Ibid., p. 122-23

Table Four.
 Dispositions, Toronto Civil Cases Commenced, 1973-94

Type of Disposition	Number	Percent
No disposition	685	31.8%
Default	611	28.3
Dismissal	80	3.7
Discontinuance	222	10.3
Settlement	466	21.6
Partial trial	17	0.8
Trial	75	3.5
TOTAL	2156	

Source: Ibid., p. 126.

breaks down the dispositions by the fiscal year in which the original claim was filed. As expected, a disproportionate number of “no dispositions” were found in 1993-94. At the same time, however, a uniformly high percentage of claims in the four previous fiscal years--27 to 30 percent--still showed no disposition, including 30 percent of the claims initiated in 1973-74. The number of “no dispositions” in the first four fiscal year periods still outnumbered cases identified as settled by a margin of 482 to 407, and slipped just behind defaults at 488.

These large numbers of orphaned cases may hide unreported settlements. Interviews with Toronto lawyers reveal a pattern of not notifying the court when cases are no longer active. Current counsel attribute this practice to the institution of a \$75 fee to file a notice of discontinuance, but that fee was not in operation until the 1990s, and the failure to report the outcome of a claim has taken place consistently over time.

Table Six, reporting dispositions by case type, also shows that cases with no disposition were found in large numbers in all five major case categories. Negligence cases had a slightly higher proportion of “no dispositions”, perhaps reflecting the increased number of recent (1993-94) negligence claims.

What Table Six shows most dramatically is the relationship between case type and disposition. Default judgments are far and away the most common disposition in collection cases and property cases. Settlements are far and away the most common disposition in the other three categories. Interestingly, the split is not simply between tort and contract cases, since commercial cases (contract matters other than collecting a liquidated debt) show a disposition pattern more like tort cases--including a higher trial rate than both categories of tort cases.

Table Six also shows that discontinuances are most important in motor vehicle accident cases, suggesting that many of those dispositions are likely to reflect some kind of settlement agreement even though the court file fails to reveal it.

Table Five.
Type of Disposition by Fiscal Year,
Toronto Civil Cases Commenced, 1973-94

	73/74	78/79	83/84	88/89	93/94	Row Totals
No disposition	127 30.0%	129 26.6%	109 27.9%	117 27.5%	203 47.1%	685
Default	132 31.1%	146 30.1%	114 29.2%	96 22.5%	123 28.5%	611
Dismissal	10 2.4%	42 8.7%	7 1.8%	17 4.0%	4 0.9%	80
Discontinuance	47 11.1%	51 10.5%	37 9.5%	59 13.8%	28 6.5%	222
Settlement	87 20.5%	80 16.5%	112 28.7%	128 30.0%	59 13.7%	466
Partial trial	1 0.2%	1 0.2%	0 0.0%	2 0.5%	13 3.0%	17
Trial	20 4.7%	36 7.4%	11 2.8%	7 1.6%	1 0.2%	75
Column Totals	424	485	390	426	431	2156

Table Six.
Type of Disposition by Case Type,
Toronto Civil Cases Commenced, 1973-94

	Motor Vehicle	Negligence	Collection	Contract/ Commercial	Property/ Other	Row Totals
No disposition	134 29.1%	68 40.2%	221 27.5%	128 36.0%	134 36.8%	685
Default	10 2.2%	4 2.4%	452 56.1%	31 8.7%	114 31.3%	611
Dismissal	17 3.7%	8 4.7%	13 1.6%	25 7.0%	17 4.7%	80
Discontinuance	99 21.5%	26 15.4%	46 5.7%	30 8.4%	21 5.8%	222
Settlement	180 39.0%	57 33.7%	60 7.5%	112 31.5%	57 15.7%	466
Partial trial	1 0.2%	0 0.0%	6 0.7%	3 0.8%	7 1.9%	17
Trial	20 4.3%	6 3.6%	7 0.9%	27 7.6%	14 3.8%	74
Column Totals	461	169	805	356	364	2155

Source: Twohig et al., p. 127.

UNDERSTANDING DISPOSITIONS IN CIVIL CASES

This critical discussion of the quality of the Toronto data on dispositions seems to undermine my original argument that settlement is not the dominant mode of dispute resolution in civil cases. At the same time, however, it reveals two ways in which American research may have distorted our view of civil litigation, and exaggerated the role of settlement.

First, the National Center for State Courts' most important trial court research has used dispositions rather than filings as its unit of analysis. Thus while the Center has published a number of caseload reports, its pioneering research on the pace of litigation and its subsequent research on patterns of civil litigation has focused on dispositions. Thus cases with no disposition are excluded. This is a sound strategy in a number of ways, but it contrasts with the data collection strategy commonly used in Canada. Canadian research has started with cases filed, since court filing systems (based on chronological numbering of claims) ensure more uniform and accurate samples of cases filed rather than cases disposed. This has meant that Canadian data bases are likely to be either out-of-date or replete with cases that are still pending--or both.

However, while American research has been more timely, it has also painted a potentially distorted portrait, since it is quite likely that many U.S. jurisdictions would also have a substantial minority of civil filings that show no record of a disposition, and therefore would not be counted. If so, American figures for trial rates would be inflated, since a trial disposition is the one kind for which the court is most likely to have a record. Cases for which there is no record of a disposition are highly unlikely to include any matters resolved at trial. Thus, because the Toronto data includes cases with no disposition, the Toronto trial rate is lower than the figure reported by most American jurisdictions.

Furthermore, the extent to which a court's dispositions will exclude some part of its original filings depends upon the extent to which caseload management principles have been implemented in that court. Thus courts that monitor their caseload from the point of filing, as prescribed in caseload management, will report a higher proportion of dispositions to filings--and as a result a lower proportion of trials.

Similarly, the presence of a dismissal rule at some stage of the proceedings will dispose of cases in which the parties have failed to report a disposition on their own initiative.

The second distortion built into our view of civil litigation is more epistemological in nature. Under what conditions do we characterize a non-trial disposition as a “settlement” and under what conditions would it be more appropriate to conclude that a civil claim or a defense has been abandoned? For example, looking at the two columns on the left hand side of Table Five, showing dispositions in the 1970s, reveals 278 default judgments, 56 trials, and 167 settlements. The two partial trials should be added to the settlement total, but what about the 406 other cases--98 discontinuances, 52 dismissals and 256 “no dispositions”? If these cases were identified as abandoned, that disposition would be larger than any of the other three categories. Even if the 98 discontinuances were attributed to settlements, abandoned cases would still outnumber settled cases, 308 to 267. But what if an action was discontinued by a plaintiff in exchange for a promise by the defendant not to proceed with a counterclaim? Is that a settlement, or have both parties simply abandoned their claims? What if one of the parties has gone bankrupt? Is the claim “settled” when one party is required to accept a certain number of cents on the dollar?

Note also that a majority of the undefended claims in Toronto did not result in default judgments. There were 611 default judgments, but 1,413 undefended claims. Toronto records do not show what proportion of the remaining 800 claims had even been served by the plaintiff on the defendant. American data on tort cases in 44 urban counties show defense rates as high as 87 percent, but conversely, between 13 and 49 percent of tort claims that were never answered--including 48 percent of the tort claims in Los Angeles County.¹⁵ Settlement discussions may take place in those cases, but likely not as universally as our rhetoric and scholarship suggests.¹⁶

Compare this discussion of the role of settlement in civil cases with the popular and academic debates on plea bargaining. Plea bargaining

¹⁵ See Goerdt et al., State Court Journal, note 3 above, p. 42.

¹⁶ But see Ibid., p. 41, Appendix 4, reporting settlement rates as high as 93% in tort cases, consistently ahead of the percentage of cases answered.

has become the paradigm for non-trial dispositions in criminal cases. But in practice, criminal case dispositions may be more appropriately analogous to the four types of civil case dispositions proposed in this paper:

- * Judgment at trial.
- * Settlement by means of its criminal court counterpart, plea bargaining.
- * Abandonment, when a claim or charge is not pursued. While increased use of prosecutorial screening mechanisms has likely reduced the proportion of criminal cases in which charges are dropped, cases in which the prosecution does not go forward after initiating a case in court could properly be termed abandoned. Given that civil plaintiffs are more diverse in character than the prosecution in criminal cases, the systematic screening of civil matters before filing may be less likely, and the abandonment of claims more likely.
- * Default, when the defendant fails to put forward any defense. On the civil side, default judgment follows formally after the defendant, notified of the claim, submits no answer at all to the court. The closest analogy in criminal proceedings may be a failure to appear,¹⁷ but I would also include pleas of guilty that are not accompanied by any meaningful negotiation between prosecution and defense, even if a charge against the accused is dropped. For example, an individual accused of drunk driving in Canada is normally charged with both impaired driving and failing a breathalyzer test. If the accused pleads guilty to impaired driving, the breathalyzer charge is normally dropped, without the accused taking any action or agreeing to any particular sentence.

The routine nature of charge reduction in Canadian criminal cases, without explicit or even implicit plea bargaining, was reported by Ericson and Baranek over a decade ago in their book, The Ordering of Justice.¹⁸ The

¹⁷ If followed by issuance of a bench warrant or a similar procedure, the failure of the defendant to appear for trial may be reported as a “no disposition” outcome, or included as an incident in an eventual disposition by plea or trial. Geordt et al., note 8 above, p. 12, reported failures to appear in 19 percent of felony cases.

¹⁸ Richard V. Ericson and Patricia M. Baranek, The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process (Toronto, 1982).

authors characterized defendants as dependents, as passive and often unwitting participants in a criminal court process they did not understand.

Ericson and Baranek's analysis reenforced the disparity between the prosecution and the defense in normal criminal case processing. A comparable analysis of civil litigation would observe passivity on the part of plaintiffs as well as defendants. Passive defendants are typically individuals who are being sued by businesses but do not respond and are found in default. Passive plaintiffs would be those who have abandoned claims; whether those plaintiffs are individuals or businesses or both remains for future research.

We know less about passive plaintiffs because they seem to be a contradiction in terms. Someone who initiates a lawsuit has engaged in a form of active participation in the legal system that belies the characterization. Perhaps the eventual abandonment of the claim is a product of other later circumstances and pressures. But we must ensure that our concepts do not distort reality, that our definitions do not preclude empirical inquiry. This is especially important, given the politicization of civil litigation, the transformation of tort law into a site of political struggle.

In the dominant paradigm of tort litigation, plaintiffs are an active force to be reckoned with. Their supporters see tort litigation as a method of redistributive justice; their critics see tort litigation as an irrational and unaccountable process that jeopardizes the economy and sound public policy. Both sides rely on a paradigm of interventionist plaintiffs actively pursuing individual and collective justice on their own terms.

Because tort cases in the aggregate, throughout the common law world, are more likely than other kinds of civil cases to proceed to negotiation and trial, and thus more likely to require judicial resources, they have been the dominant focus of civil litigation research. The National Center for State Courts' earliest studies of the pace of civil litigation, directed first by Tom Church and later by Barry Mahoney, focused exclusively on tort dispositions. Studies of contract litigation in general and collection cases in particular have often focused on the work

of small claims courts.¹⁹ Even as the Center has expanded its data base to include collection cases, it remains ambivalent about how to interpret the outcomes of those cases:

About one-third of civil cases end in a default judgment, and there is some question where these cases fit in the debate over the “litigiousness” of the American people. While these cases are filed with the court, they are quickly terminated or never fully pursued by the parties.²⁰

While these cases may be less important to court administrators planning for and allocating scarce judicial resources, they are every bit as important to students of the judicial process trying to comprehend the role of the courts and litigation. If they do not fit into the debate over litigiousness, it is because that debate has focused only on tort cases. The reason is obvious. In tort cases, individuals are normally suing businesses or other individuals. In collection cases where default judgments are commonplace, businesses are normally suing individuals. Expanding the focus of debates on the role and scope of civil litigation might lead members of the public to borrow a leaf from the book of those who support decriminalization, and advocate the decivilization of contractual relations. Their slogan could be “caveat creditor.” However, their movement would be unlikely to gain support from advocates of so-called tort reform.

As students of law and society, we would be wise to take a broader view of civil litigation, not only when it serves as a battleground for individual claims against corporate power, but also when it serves as a continuing source of support for the economic order. That a substantial quantity of civil litigation does so by means that go largely unnoticed and require minimal resources of our trial courts does not ^{make} it marginal, but may identify it as even more entrenched, and therefore even more important to a full understanding of the political, economic and social roles of legal institutions.

¹⁹ See the two-part article by Craig Wanner in Law and Society Review a generation ago.

²⁰ Ostrom and Kauder, note 1 above, p. 15.

