AWARDS OF COSTS AND ACCESS TO JUSTICE

Research Paper

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AWARDS OF COSTS AND ACCESS TO JUSTICE

1. Court costs and access to justice

Any individual or corporation considering whether to launch or defend a lawsuit has to consider the cost of litigation. In Saskatchewan, the unsuccessful party in a lawsuit is usually ordered to pay costs to the successful side. However, the costs awarded will usually be substantially less than the full legal bill incurred by the successful party. Several effects follow from this "partial indemnity" costs regime:

1. The successful litigant will be out-of-pocket for the shortfall, reducing the actual compensation recovered.

2. The unsuccessful litigant will have to pay part of the other side's legal fees, which may discourage a party with a good but uncertain case from risking litigation.

3. Both plaintiffs and defendants may seek to avoid the cost of litigation by settling without going to court.

Because a trial in the Court of Queen's Bench is an expensive proposition, the costs regime can have a substantial effect on the behaviour of litigants. The traditional rationale for the partial indemnity regime focuses on the third effect: it is desirable to encourage parties to settle their claims, and to deter frivolous litigation by awarding costs against unsuccessful litigants. But partial indemnity has been questioned. Concern about access to justice has grown in recent years.[1] The impact of the costs regime on access to justice during a time when legal costs in general have been rising has been flagged by both lawyers and courts. In a recent address, Chief Justice Beverley McLachlin told the Canadian Bar Association that the cost of litigation is an access to justice issue. She noted a press report that the average cost of a three-day trial in Ontario is about

[1] See Canadian Bar Association, "Canada's Crisis in Access to Justice". Submission to the United Nations Committee on Economic, Social and Cultural Rights, Ottawa, Ont.: Canadian Bar Association, April 2006.

$60,000. “The price of justice should not be so dear,” she said.[2]

However, there is disagreement about the effect of the partial indemnity costs regime on access to justice. As the Alberta Law Reform Institute has observed, “there are a number of conflicting considerations” to be taken into account when assessing the impact of partial indemnity.[3]

On one hand it has been suggested that the expense of litigation discourages clients with valid claims from going to court. They will settle for substantially less than a court would award to avoid legal fees or, if they go to court, they may end up with inadequate compensation for loss after paying legal fees. Individuals are put at a disadvantage when litigating with a large corporation or insurance company that may be able to force a settlement.

On the other hand it is argued that the risk of being ordered to pay costs of a successful opponent, even if assessed at only half of the full costs, deters clients from pursuing lawsuits. In this scenario, the individual litigant is again at a disadvantage when litigating with a large corporation or insurance company that may be able to force a settlement. In addition, public interest lawsuits are discouraged because of the possibility that an organization may be penalized by a costs award if it takes legal action.

Not surprisingly, the Alberta Institute found that opinions within the legal profession vary:

> There was a significant divergence in opinion as to what constitutes an appropriate level of compensation. Generally, plaintiffs’ lawyers viewed present costs as too high and expressed concern about the “chilling effect” that significant costs could have on meritorious claims. Conversely, defence lawyers suggested that costs were not high enough and should be increased to defeat frivolous claims.[4]

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[2]“Canada’s Chief Justice decries high costs of access to justice,” *The Jurist*, August 12, 2007.

[3]Alberta Law Reform Institute, “Alberta Rules of Court Project: Costs and Sanctions,” Consultation memorandum No.12.17, February 25, 2005, pp. ix and 3.

[4]Ibid, p.5.

The costs regime operating in Saskatchewan is not universal. While the partial indemnity approach is favoured in all the common law provinces and in England, the general rule in the United States is to award no costs to indemnify for legal fees. In the civil law nations of Europe, on the other hand, a successful litigant can expect to be fully indemnified by the other party. Each costs regime has its defenders.

While the Law Reform Commission has decided not to proceed with further work on this issue, this paper is intended to encourage discussion of the effect of the costs regime. It raises issues rather than possible solutions to this difficult problem. The next section of the paper briefly describes the cost regime in Saskatchewan and other jurisdictions that award costs on a partial indemnity basis, and contrasts it with full and no indemnity systems. The final section of the paper canvasses arguments that have been advanced in favour of each system.

2. Costs regimes: a survey

2.1 Partial indemnity regimes

In common law jurisdictions, awards of costs are authorized by statute. The modern costs rule can be traced to the English *Supreme Court of Judicature Act*, *1873*[5], which has been adopted in substance in provincial judicature legislation or the rules of court. Rule 545(1) of the Saskatchewan *Rules of the Court of Queen's Bench* states the basic rule:

> Subject to the express provisions of any statute or regulation, and notwithstanding any other rule, the court has discretion respecting the costs of and incidental to a proceeding or a step in a proceeding, and may make any direction or order respecting costs that it considers appropriate.[6]

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[5] 36&37 Vict., c.66. See 23 *Halsbury's Laws of England* (1st ed.), 178.

[6] Saskatchewan is unusual in placing the costs rule in the rules of court rather than in *The Queen's Bench Act. 1998*. Most provinces place the rule in their judicature acts. For example, the equivalent to Saskatchewan's rule 545 is contained in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. 43.

Rule 545(2) to (4) lists a series of factors that the court may consider in exercising its discretion.[7] Similar lists are found in the rules of court in some other provinces[8]. Although the court's discretion is broad and the listed factors appear to dilute the principle that a successful litigant is ordinarily entitled to costs, the practice is otherwise. Not long after the passage of the *Supreme Court of Judicature Act, 1873*, the courts established the principle that, in exercising discretion,

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[7]545(2) The court in exercising its discretion as to costs may determine:
(a) by whom costs are to be paid, which may include a successful party;
(b) to whom costs are to be paid;
(c) the amount of costs;
(d) the date by which costs are to be paid; and
(e) the fund or estate or portion thereof out of which costs are to be paid.

(3) In awarding costs the court may:
(a) fix all or part of the costs with or without reference to the Tariff;
(b) award a lump sum instead of or in addition to any assessed costs;
(c) award or refuse costs in respect of a particular issue or step in a proceeding;
(d) award assessed costs up to or from a particular step in a proceeding;
(e) award all or part of the costs to be assessed as a multiple or a proportion of any column of the Tariff;
(f) award costs to one or more parties on one scale, and to another party or other parties on the same or another scale;
(g) direct whether or not any costs are to be set off;
(h) make any other order it considers appropriate.

(4) In exercising its discretion as to costs, the court may consider:
(a) the result of the proceeding;
(b) the amounts claimed and the amounts recovered;
(c) the importance of the issues;
(d) the complexity of the proceedings;
(e) the apportionment of liability;
(f) any written offer to settle, or any written offer to contribute;
(g) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding;
(h) a party's denial of or refusal to admit anything that should have been admitted;
(i) whether any step in the proceeding was improper, vexatious or unnecessary;
(j) whether any step in the proceeding was taken through negligence, mistake or excessive caution;
(k) whether a party commenced separate proceedings for claims that should have been made in one proceeding or whether a party unnecessarily separated his or her defence from that of another party; and
(l) any other matter it considers relevant.

[8]For example, Rule 57.01 of the Ontario *Rules Of Court*.

the court should deprive a successful litigant of costs only if there are clear reasons to do so.[9] The factors listed in the rules of court derive from the case law that developed under this principle. They recognize some factors the courts have referred to in exercising discretion but do not introduce anything new.[10] The courts have guarded their discretion, but the principle that ordinarily "costs follow the cause" is well established. An English Court of Appeal decision summarizes the law thus:

> A successful defendant . . . has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order [of] payment of . . . costs by the plaintiff; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must . . . be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected [to] the case.[11]

The rules of court and *The Queen's Bench Act, 1998* contain numerous special rules governing costs in particular circumstances. The only potentially significant departure from the general rule is contained in Rule 496, which allows causes involving less than $50,000 to be tried in a summary manner. This is intended to save time and costs, and a successful plaintiff who failed to take advantage of the procedure when it is appropriate to do so may be penalized by the costs award:

> Unless the action was under this Part at the time of the trial, or the court is satisfied that it was reasonable for the plaintiff to have commenced and continued the action under the general procedure, the plaintiff shall not be entitled to any costs and may also be ordered to pay all or part of the defendant's costs, when the plaintiff obtains a judgment for:

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[9]See for example *Jones v. Curling* (1884), 13 Q.B.D. 262 (C.A.); *Civil Service Co-operatives Society v. General Steam Navigation Co.* (1903), 2 K.B. 756 (C.A.), referred to in 23 *Halsbury's Laws of England* (1st ed.), 179.

[10]See discussion in Janet Walker et al., eds., *The Civil Litigation Process: Cases and Materials,* 6th ed, Toronto, Ont.: Emond Montgomery, 2005, p. 111.

[11]*Donald Campbell and Company Limited v. Pollak*, [1927] AC 732 (C.A.) at pp. 811-812.

> (a) an amount of $50,000 or less, exclusive of interest and costs [or involves property of less than $50,000 in value etc.].

Ordinarily, the costs awarded are those termed "party and party costs." In these cases, the costs award is calculated using the Tariff of Costs in *The Rules of the Court of Queen's Bench.* The tariff is detailed, setting out the costs to be awarded for each step in the proceedings and varying according to the amount in dispute. For example, the cost of preparing a statement of claim or defence to initiate an action varies from $150 for a claim under $5000 to $400 for a claim over $100,000. The tariff was devised in part as a guide to reasonable costs, to prevent charges for unnecessary or inflated legal fees from being shifted to the unsuccessful party. But the tariff has never been intended to reflect the actual costs of litigation:

> The general rule is that recoverable costs (those ordered on a "party-and-party" or "partial indemnity" scale) should provide only a partial indemnity for the costs incurred by a litigant. This represents a compromise on the part of our legal system. While it is felt that as a rule the loser should be ordered to pay the winner's costs, it is realized that, in most cases, to require payment of all an opponent's costs will normally be too severe a sanction. Consequently, in general, the loser will be required to pay only what amounts to a reasonable proportion of the winner's expenses[12]

Full reimbursement for a legal bill ("solicitor-client costs") is rarely awarded by the court. They are only granted in cases, for example, where one side has been fraudulent or where there was a document such as a mortgage in which the borrower agreed to pay the lender's full legal costs. Even in these cases, there may be limitations on the costs allowed.[13]

The partial indemnity principle has been adopted in all jurisdictions that derive their costs practice from the English *Supreme Court of Judicature Act, 1873*. This includes all Canadian common law

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[12]Walker et al., p. 120.

[13]Walker et al., p. 134ff.

provinces, Great Britain, Australia, New Zealand and India.[14] Because costs are usually calculated according to fixed tariffs that are only changed at long intervals, the extent to which party and party costs awards fall short of full indemnity for actual costs is not easily determined. Most assessments appear to be based on anecdotal information or limited sampling. *The Report of the Ontario Courts Inquiry* (Zuber Report) estimated indemnification to be between 40% and 50% of actual costs.[15] The Alberta Law Reform Institute suggested a lower figure, 30-50% for Canada as a whole.[16] Another source suggests a higher figure for Canada as a whole, between 2/3 and 3/4 of actual costs.[17] Costs awards in Great Britain may be higher than in Canada, usually 70-80% of actual legal fees[18], while Australia appears to be closer to the English practice.[19]

2.2 No indemnity regimes

In the United States, it is the general rule that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser."[20] The costs recoverable by a successful litigant are limited under this rule to court filing fees. This is frequently referred to as the "American rule" in the United States, and contrasted with the fee-shifting "English rule." The American rule is a product of the courts. Traditionally, American judges have held firm to the idea that each party should pay its own attorney's fees.

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[14]See survey in Mary V. Capisio, *Awards of Attorney Fees by Federal Courts, Federal Agencies and Selected Foreign Findings,* New York: Nova Publishers, 2002.

[15]Ontario Attorney General, "Report of the Ontario Courts Inquiry", The Honourable T.G. Zuber, Commissioner, Ont.: Attorney General, 1987.

[16]Alberta Law Reform Institute, p.4.

[17]Stephen Clarke, "Canada", in *Awards of Attorney Fees by Federal Courts, Federal Agencies and Selected Foreign Findings*, Capisio.

[18]Alberta Law Reform Institute, p.5.

[19]See survey in Capisio.

[20]*Alyeska Pipeline Service Co. v. Wilderness Society* (1975), 421 U.S. 240.

The courts have recognized only narrow exceptions to the American rule. Most notably, the bad faith exception, applicable primarily in cases against insurance companies, allows a plaintiff to collect attorneys' fees if the defendant breached a covenant in bad faith.[21] Since the 1960s exceptions have been created by statute, particularly at the federal level. By 1981 there were 125 federal statutes allowing the court to order payment of the winner's attorney's fees by the loser.[22] However, in most cases, the statutes are limited to allowing the courts to award costs in favour of a successful plaintiff. This reflects the rationale of the cost-shifting statutes: they are intended to encourage lawsuits deemed to be in the public interest.[23] Thus, for example, plaintiffs may be awarded attorneys' fees under the *California Consumer Legal Remedies Act*[24] and the federal *Fair Labor Standards Act.*[25]

The new exceptions are purely statutory. It has been held that there is no authority to shift attorneys' fees to the losing party in the absence of statutory authorization. However recent decisions, perhaps reflecting the policy in favour of encouraging public-interest litigation, have held that the authority may be inferred even if not specifically articulated in the statute creating the right of action.[26]

The American rule is followed in relatively few countries. In Japan, China and Taiwan, the losing party is expected to pay the court fees, but not lawyer's fees of the successful party. In Mexico,

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[21]*Brandt v. Superior Court* (1985), 37 Cal.3d 813.

[22]John Leubsdorf, "Toward a History of the American Rule on Attorney Fee Recovery," *Law and Comtemporary Problems*, 47:1 (Winter 1984) 9-36. In addition, awards of attorney's fees against the federal government were barred by the doctrine of sovereign immunity prior to enactment of the *Equal Access to Justice Act* in 1980.

[23]Henry Cohen, "Awards of Attorney Fees in Federal Courts, Federal Agencies" in *Awards of Attorney Fees by Federal Courts, Federal Agencies and Selected Foreign Findings,* Capisio, pp.1-134.

[24]*California Civil Code*, Section 1780(d).

[25]29 U.S.C. 201.

[26]*Key Tronic Corp. v. United States* (93-976), 511 U.S. 809 (1994).

the American rule is the norm, but the courts may depart from it in exceptional cases.[27]

2.3 Full indemnity regimes

In civil law systems, full indemnity for the legal costs of the successful party by the losing party is the prevailing rule. The Civil Codes of France, Germany, Netherlands, Sweden, Poland, Italy and Greece all expressly provide that costs shall be imposed on the losing party. There is, of course, considerable variation among European countries. Typically, however, there is little judicial discretion so that costs awards are essentially *pro forma*. In Germany, something like a tariff of costs is used to simplify calculation of costs. In most regimes costs can be split if a party succeeds in proving some claims but not others. In Poland and Italy there are broader exceptions to the general rule than elsewhere in Europe.[28]

3. Discussion

3.1 The effect of costs awards on losses and gains in litigation

Because of the diversity of opinions about the effect of cost regimes on access to justice, it is useful to begin a discussion of the issues by identifying the more immediate effect of costs awards: the impact of costs awards on the net compensation and net losses of litigants, taking into account damages and costs awards and other legal expenses. The example below is adapted from Janet Walker, *The Civil Litigation Process*.[29] Walker based her example on an actual case; the facts are not important except that it is assumed that the outcome of litigation was uncertain, so that neither party felt compelled to settle because of the substantive law. Assume that $35,000 in possible damages are in issue, and both lawyers will charge $10,000 in fees.

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[27]Cohen, "Awards of Attorney Fees in Federal Courts, Federal Agencies".

[28]See survey in Capisio.

[29]Walker, p. 134ff.

	Full indemnity	Partial indemnity (50%)	No indemnity
1. Plaintiff wins			
Damages collected	**$35,000**	**$35,000**	**$35,000**
Costs collected	**10,000**	**5,000**	**n/a**
Recovery	**$45,000**	**$40,000**	**$35,000**
Less fees to own lawyer	**10,000**	**10,000**	**10,000**
Net recovery	**$35,000**	**$30,000**	**$25,000**
2. Plaintiff loses			
Damages collected	**$0**	**$0**	**$0**
Costs paid	**10,000**	**5,000**	**n/a**
Fees to own lawyer	**10,000**	**10,000**	**10,000**
Net loss	**$20,000**	**$15,000**	**$10,000**

Thus, under a full indemnity system, the plaintiff risks losing $20,000 against a possible gain of $35,000. Under partial indemnity (50% of actual costs), the plaintiff's risk is reduced to $15,000, but the gain is also reduced, to $30,000. If there is no indemnity, the risk is reduced further to $10,000 and the gain to $25,000.

As Walker observes, one certain conclusion that can be drawn from the example is that litigation is a risky business under any costs regime. However, the risk appears to be greater under an indemnity system than under a no indemnity system — while the possible gain is higher, the possible loss is also higher. Contingency fees would obviously alter the equation but the impact is greater in a no indemnity system. The plaintiff would risk nothing to gain $25,000 (or less, depending on the contingency fee arrangement), while under the full indemnity system the plaintiff would risk $10,000 (in the event of an adverse costs award) against a gain of $25,000 (or less depending on the contingency fee arrangement). Thus, the risk remains greater under an indemnity regime.

These then are the bare facts. Interpreting them is difficult. For example, should it be concluded that costs indemnity regimes discourage litigation because they are riskier for plaintiffs than no indemnity regimes? Or does the potential for greater gain when costs are indemnified in whole or part actually encourage plaintiffs to litigate? Interestingly, Richard Posner, one of the leading advocates of economic analysis of the law, initially reached the first conclusion but later revised his opinion and concluded that costs indemnity discourages negotiation and settlement.[30] The next section of this paper will summarize some of the arguments for indemnity and no indemnity regimes.

3.2. Arguments for and against indemnity for costs

3.2.1 Introduction

Until the recent growth of interest in access to justice, the partial indemnity regime was not very controversial in Canada or elsewhere in the Commonwealth. Rationales for the partial indemnity regime established by the English rule had not been elaborated but some explanations for it could be found in decisions of the courts. This contrasts with the American experience. Perhaps because the American rule is out of step with the costs rules in other common law jurisdictions, it has long been debated. There is extensive academic commentary in the United States on the effect of costs rules on litigation.[31] The arguments for and against indemnity can be summarized under two headings:

1. Principle: these arguments rest on concepts of fairness and justice, with little direct attention to the practical effect of costs rules on the behaviour of litigants.

2. Access to justice: these arguments focus the question on whether a particular costs regime

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[30]Richard A. Posner, Economic Analysis of the Law, 3rd. ed. (1987) 586. More recently, it has been proposed that settlement is equally likely under the American and English regimes: John J. Donahue, "Commentary: Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?", *Harvard Law Review*, 104:5 (March 1991) 1093-1119.

[31]See the references listed in Walker and Donahue.

encourages or discourages potential litigants from seeking to enforce their claims by litigation.

3.2.2 Principle

The rationales formulated by the courts for both the English and the American rules have relied primarily on statements of broad principle. Henry Cohen suggests that a central though not always clearly articulated concern has been the philosophical question, "whose expense an attorney should be?"[32] Indemnification for costs may have become the practice in England because the courts formerly regarded the cost of enforcing a claim by litigation as part of the damages resulting from breach of an obligation.[33] Partial indemnity rather than full indemnity is analogous to the principle that damages are never full compensation for loss.

This justification for indemnity has had some American advocates. In 1925, the Massachusetts Judicial Council criticized the American rule by asking "on what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill?"[34] But this argument has been countered by defenders of the American system by appeal to another principle. Perhaps reflecting American individualism, the courts in the United States have tended to take the view that individuals are responsible for their own bottom line. The American rule has been defended on the ground that "the expenses of litigation are not the natural and proximate consequences of the wrongful act, . . . but are remote, future contingencies." Individualism may also be detected in the proposition advanced in the same case that costs awards are wrong in principle because "one should not be penalized for merely defending or prosecuting a lawsuit. . . ."[35] This contrasts with concern in Commonwealth courts to deter unnecessary and vexatious lawsuits with the costs rule, and to determine "an amount that is fair and reasonable for the

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[32]Cohen, "Awards of Attorney Fees in Federal Courts, Federal Agencies", p. 65.

[33]Walker, p. 134.

[34]Judicial Council of Mass., *First Report*, 11 Mass. Law Quarterly 1, 64 (1925). See also *St. Peter's Church v. Beach*, 26 Conn. 355 (1857).

[35]*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 S.Ct. (1967) at paragraph 718.

unsuccessful party to pay [in costs] in the particular proceeding."[36]

Statements of principle like those set out above should not be dismissed, but are perhaps of less value to those interested in reform of costs rules than arguments that focus more directly on the consequences of costs rules as factors influencing the behaviour of litigants.

3.2.3 Access to justice

Recent concern in Canada about costs rules has centred around the question: does the costs regime currently in place discourage potential litigants from going to court to pursue valid claims? There appears to be little agreement about the answer to this question.

On one hand, rising legal fees discourage litigation and if only 50% of actual legal costs are apt to be covered by a costs award, litigation may appear to be too expensive to risk even if success seems very likely. A critic of both partial indemnity and the American rule argues that:

> Current practice tends to deter the prosecution of even clearly meritorious small claims by litigants who could at best recover less than the often high expenses of counsel. . . . And what is true for plaintiffs [is also true] for defendants: the cost of defending against an unjust small claim may easily exceed the cost of simply paying what is demanded. [The] result is distasteful, for it ranks legal rights by dollar values. . . .[37]

The increasing number of statutes in the United States allowing the court to order payment of the winner's attorney's fees by the loser are intended to encourage lawsuits deemed to be in the public interest.[38]

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[36]*Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (Ont. C.A.) at paragraph 26. The court in *Boucher* referred to the traditional rationale for indemnity as a means to discourage vexatious litigation but thought it less important than encouraging access to justice.

[37]"Comment: Court Awarded Attorney Fees and Equal Access to the Courts," University of Pennsylvania Law Review 122: 636-713 (1973-74), p.650.

[38]Ibid.

On the other hand, fear of a large adverse costs award is a deterrent to taking legal action. The outcome of a lawsuit is rarely certain. Even if the claim is a good one, the possibility that pursuing a lawsuit may only turn a bad situation into a worse one is real. Since the risk of litigation is higher under indemnity regimes,[39] this argument will have merit if risk-aversion is an important consideration for potential litigants. Defenders of the American rule adopt this point of view. In particular, it has been suggested that an indemnity rule would discourage lawsuits that are uncertain because they involve novel legal arguments.[40] Since these lawsuits are often in the public interest, this argument appears to flatly contradict the policy of cost-shifting statutes. A low or uncertain probability of success coupled with the probability of a large costs award if the lawsuit fails are certainly a deterrent. However, it may be that the American rule both deters and encourages public interest litigation depending on the circumstances. An action mandated by statute is less likely to be uncertain than one that relies on an untested legal theory.

The consequences of costs regimes may depend on a variety of factors and thus fail to fit any general theory. For example, rising legal fees that threaten to place legal services out of reach for many people may affect attitudes. Donahue suggests that an argument can be made that rising legal costs will deter litigation, and particularly so in a costs indemnity regime.[41] The different economic circumstances of litigants are also important determinants of litigation behaviour. A corporate or business litigant may be able to deduct the costs of litigation for tax purposes. When an individual sues a large corporation, the corporation's resources make the possibility of an adverse costs award less threatening than for the plaintiff. This may force the plaintiff to abandon the action or settle on unfavourable terms.[42]

Economic analysis of the law may be able to resolve some of the conflicting assumptions discussed above. The question of whether costs indemnity encourages settlement of claims or discourages settlements and encourages litigation has been extensively investigated by economic

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[39]Ibid.

[40]Cohen, "Awards of Attorney Fees in Federal Courts, Federal Agencies", p. 65.

[41]Donahue, 1093.

[42]Walker, p. 132.

analysis. The discussion of risk in this paper suggests that partial indemnity encourages settlements and full indemnity has an even greater effect in this regard. Richard Posner initially concluded that this is the case (and settlement rates are higher in Canada than under the American no indemnity rule). However, he later developed (with Stephen Shavell) a more sophisticated model that suggested that costs indemnity discourages settlement. More recently, Donahue has argued that factors left out of both of Posner's models undermine them both. Unfortunately, it appears that economic analysis offers no clear solution to costs issues.