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## Incomplete Justice: The Costs of Partial Indemnity

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Article abstract

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## Incomplete Justice: The Costs of Partial Indemnity

Adil Abdulla\*

*In the mid-twentieth century, Ontario abandoned a simple, full indemnity costs rule in favour of a discretionary, partial indemnity costs regime with hundreds of sub-rules. This article argues that this was a mistake. Partial indemnity has no doctrinal, principled, or practical benefits that cannot be incorporated into a full costs regime. Additionally, partial indemnity carries significant costs to access to justice. Instead, this article proposes a costs regime that incorporates the best features of both the old rule and the new regime. In brief, it proposes a full indemnity rule; capped at the losing party's costs; with exceptions for divided success, impecuniosity, and public interest cases; and discretionary fines for engaging in misconduct or dilatory tactics. Collectively, these rules would advance access to justice more than the existing costs regime.*

*Au milieu du vingtième siècle, l'Ontario a abandonné la règle simple de l'indemnisation complète des dépens en faveur d'un régime discrétionnaire fondé sur l'indemnisation partielle des dépens et comportant des centaines de sous-règles. Le présent article fait valoir qu'il s'agissait d'une erreur. L'indemnisation partielle ne présente aucun avantage doctrinal, fondé sur des principes ou pratique qui ne puisse être intégré à un régime d'indemnisation complète des dépens. De plus, l'indemnisation partielle entraîne des coûts importants pour l'accès à la justice. Le présent article propose plutôt un régime d'indemnisation des dépens comprenant les meilleures caractéristiques de l'ancienne règle et du nouveau régime. Bref, il propose une règle d'indemnisation complète des dépens, plafonnés aux dépens de la partie qui succombe, avec des exceptions en cas de succès partagé ou d'indigence et dans les affaires d'intérêt public; il propose également des amendes discrétionnaires pour inconduite ou tactiques dilatoires. Collectivement, ces règles amélioreraient l'accès à la justice davantage que l'actuel régime d'indemnisation des dépens.*

### I. INTRODUCTION

Ontario has a partial indemnity costs jurisdiction. This means that, at the end of almost every motion, trial, and appeal, the court will order the losing party to pay some, but not all of the winning party's legal expenses. The fraction of legal expenses awarded is at the court's discretion.<sup>1</sup> In theory, courts choose how much to award based on a series of legislated hourly rates, and then adjust the award based on a dozen

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\* Associate, Sotos LLP. He thanks Ian Godfrey, Susan Heakes, Paul-Erik Veel, and Albert Yoon, in whose classes the ideas were developed, as well as the editorial staff of the *Windsor Yearbook of Access to Justice* for their insights and for helping this project through to publication.

<sup>1</sup> *Courts of Justice Act*, RSO 1990, c C-43, s 131(1) [CoJA].

legislated factors.<sup>2</sup> In practice, courts have developed hundreds of additional rules and exceptions,<sup>3</sup> and the courts end up picking a number based on whatever they think is “fair and reasonable”.<sup>4</sup>

It was not always this way. At least until 1925, Ontario had a full indemnity costs rule: as long as the winning party had not engaged in misconduct, the court had to order the losing party to pay all of the winning party’s reasonable legal expenses.<sup>5</sup> The court technically had discretion to depart from this rule,<sup>6</sup> but that was only meant to be used in exceptional circumstances.

So why did Ontario shift from an extremely simple costs rule – award full costs absent exceptional circumstances – to a costs regime so complex that an entire textbook is devoted to it? This article argues that there was no justifiable reason. Ontario should return to a full indemnity rule, albeit with modifications to advance access to justice.

This article is split into five parts. Part II traces the history of first England’s, and then Ontario’s costs rules to identify the doctrinal basis for costs. It shows that, when Ontario courts chose partial indemnity, they did so contrary to this doctrine, and possibly by accident. Courts then changed the doctrine, but partial indemnity is still not optimal under the new doctrine.

Part III assesses whether there is any principled basis for preferring a complicated partial indemnity regime to a simple full indemnity rule. It shows that a partial indemnity regime benefits unmeritorious parties at the expense of meritorious parties, which is not justifiable. It also shows that a partial indemnity regime benefits the most risk averse parties at the expense of less risk averse parties and allows the court to tailor awards based on divided success and the conduct of the parties. These effects could be incorporated into a modified full indemnity rule.

Part IV assesses whether there is any practical basis for preferring a complicated partial indemnity regime to a simple full indemnity rule. It shows that a partial indemnity regime increases the burden on courts. It wastes time on costs submissions, which is not offset by any statistically significant effect on settlement, even after accounting for rule 49.

Part V synthesizes the best parts of partial and full indemnity into a proposal for how to improve and simplify costs in Ontario. In brief, it proposes a full indemnity rule, capped at the losing party’s costs, with exceptions for divided success, public interest cases, and impecuniosity, plus a discretionary power for courts to fine parties that engage in misconduct or dilatory tactics.

Part VI addresses two alternative proposals for wholesale reform of the costs regime. It shows that each of these proposals has a place within the wider proposal in Part V.

Before diving in, there are two important caveats. First, the only way to be sure what effects a costs regime will have, is with empirical data. There is a wealth of economic and econometric literature

<sup>2</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194, rr 1.03(1) *sub nom* “partial indemnity costs”, 1.03(1) *sub nom* “substantial indemnity costs”, 57.01(1), 57.01(3), 57.01(3.1), 58.05(1), 58.06(1) [*Rules*].

<sup>3</sup> See generally Mark M Orkin, *Orkin on the Law of Costs*, 2nd ed (Toronto: Canada Law Book Limited, 1968) (loose-leaf updated 2020, revision 96), ch 205.2(2), 210.1 [Orkin, *Law of Costs* (2020)].

<sup>4</sup> *Boucher v Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (Ont CA) at paras 24, 37 [Boucher].

<sup>5</sup> James MacLennan, *The Ontario Judicature Act, 1881, and Subsequent Rules of the Supreme Court of Judicature, and the High Court of Justice, with the Orders of the Court of Appeal and Other Acts, Orders and Rules Relating to the Practice in the Supreme Court of Judicature, with Practical Notes*, 2d ed (Toronto: Carswell & Co, 1884) (“a plaintiff who successfully enforces a legal right, and in no way misconducts himself, may not be deprived of costs, but is entitled to them as of right” at 526); *Ryan v McGregor*, 1925 CanLII 460 (Ont CA) (if a winning party had incurred legal expenses, the losing party would have been under an “obligation to pay full costs” at 482).

<sup>6</sup> *The Judicature Act*, 1914, c 56, s 74(1): “Subject to the express provisions of any statute, the costs of and incidental to all proceedings shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid.”

comparing full costs to no costs, but none comparing full costs to partial costs. If someone were to produce that data, it might change the conclusions of this article.

Second, the conclusions in this article do not apply to class actions, the economics of which are fundamentally different than the economics of individual civil litigation.

## II. IS PARTIAL INDEMNITY DOCTRINALLY JUSTIFIED?

This part has three sections. Section A summarizes the three models of costs theory in place by the mid-20<sup>th</sup> century, when partial indemnity was adopted. Section B examines how Ontario became a partial costs jurisdiction, and how the level of indemnity continued to fall thereafter. It shows that many of these authorities run counter to the three original models of costs theory. Section C introduces that new model of costs theory. Partial indemnity fares no better under it.

### A. The Original Models of Costs

The first precedent for costs was a form of punishment levied against plaintiffs who brought unmeritorious claims. If a plaintiff failed to prove their case, the Crown would levy an amercement – a fine to be paid to the royal till for having made a false accusation.<sup>7</sup> The underlying rationale was that bringing unmeritorious litigation was a wrong. It impugned the defendant unfairly, wasted the defendant's time, and wasted the court's time. The last of these was an injury to the Crown which the Crown should recover with a fine. Below, I refer to this as a “costs as punishment” model. This was the first of three models of costs theory.

Amercements paid to the Crown were gradually replaced by costs paid to the winning party. Starting in 1278, the English Parliament passed eight statutes to introduce modern costs rules, and then to increase awards because “damages were frequently inadequate to the plaintiff's expenses”. By the mid-18<sup>th</sup> century, it was well settled that costs were supposed to be full indemnity.<sup>8</sup>

To understand why Parliament adopted a full costs rule, it is worth looking at the form of costs awards. Costs awards in favour of plaintiffs were “included in the *quantum* of damages ... always entered on the roll as increase of damages by the court”.<sup>9</sup> In other words, a full costs award is a form of expectation damages.<sup>10</sup> The underlying rationale was that the winning plaintiff would not have incurred any legal expenses but for the defendant's illegal conduct. This is the same formula as the one for exceptional damages. Similarly, a winning defendant would not have incurred any legal expenses but for the plaintiff bringing an unmeritorious claim. Below, I refer to this as a “costs as damages” model. This was the second model of costs theory.

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<sup>7</sup> William Blackstone, *Commentaries on the Laws of England*, vol 3 (Birmingham, AL: Legal Classics Library, 1983) (“The security here spoken of ... was to answer for the plaintiff; who in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown for raising a false accusation” at 275) [Blackstone, *Commentaries*, vol 3]; Neil Gold, “Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority,” (1977) 9:1 *Ottawa L Rev* 44 (“This amercement seems to have been paid into the ‘royal till’. Defendants, however, paid no such sum, although they would be held *in misericordia* for their wrongful defence” at 51, footnote 32).

<sup>8</sup> Blackstone, *Commentaries*, vol 3, *supra* note 7 at 399 (“it being now as well the maxim of ours as of the civil law, that *victus victori in expensis condemnandus est*” at 399).

<sup>9</sup> *Ibid* at 339, Appendix N<sup>o</sup> 2 at xii.

<sup>10</sup> *Ryan v McGregor*, 1925 CanLII 460 (Ont CA) (“The costs which are under discussion are in the nature of damages” at 478). See also *London Scottish Benefit Society v Chorley*, [1881-85] All ER Rep 1111, Sir Baliol Brett MR at 1112; Lara Friedlander, “Costs and the Public Interest Litigant” (1995) 40:1 *McGill LJ* 55, 1995 CanLIIDocs 73 (describing the “damage theory of costs” at 59).

In 1729, the English Parliament introduced tariffs to regulate how much lawyers could charge their clients.<sup>11</sup> Costs would be calculated as a function of tariff rates and hours worked. Note that these tariffs were initially designed for assessing how much a client owed to their own lawyer (“solicitor and client costs”), not how much the losing party owed to the winning party (“party and party costs”). However, over time, these tariffs came to be used interchangeably to “tax” both types of costs, with one exception.

When taxing solicitor and client costs, the court would include reasonable and unreasonable costs. The rationale was that the client had ordered their lawyer to incur all of these costs, so it would be unfair to allow the client to avoid paying for the unreasonable costs. By contrast, when taxing party and party costs, it would be unfair to order one party to pay for the unreasonable expenses incurred by the other party. Thus, solicitor and client costs were full indemnity for all expenses, whereas party and party costs were full indemnity only for reasonable expenses.<sup>12</sup>

In theory, both types of costs represented a full indemnity, but in practice clients often had their lawyers incur some unreasonable expenses, so solicitor and client costs were larger. Courts recognized this fact and used it to regulate the behaviour of lawyers and clients by ordering “solicitor and client costs” against losing parties that had engaged in misconduct. Below, I refer to this as a “costs as regulation” model. This is the third model of costs theory.

## B. The Shift to Partial Indemnity

By 1961, legal expenses had increased substantially with inflation, but the tariff rates had not kept pace. Thus, in theory, the court was supposed to order full costs, but had to make an award for an amount much lower than full indemnity for reasonable expenses. In *Berry*, the United Kingdom Court of Appeal was confronted with this contradiction. To square this circle, the court created a legal fiction that the tariff rates were full costs.<sup>13</sup> In other words, courts sanctioned partial indemnity costs awards, but only because Parliament had forgotten to update the tariffs and there was not another way to make theory consistent with practice. There was no doctrinal reason for the shift.

It is unclear whether the outcome in *Berry* was adopted in Ontario. However, given that Ontario had tariffs,<sup>14</sup> it stands to reason that a similar effect may have occurred in Ontario. In any case, two subsequent authorities legitimized partial indemnity. They went further than *Berry* in that they changed not only the practice, but also the theory of costs.

<sup>11</sup> Orkin, *Law of Costs* (2020) *supra* note 3, ch 101.

<sup>12</sup> Mark M Orkin, *The Law of Costs* (Toronto: Canada Law Book Limited, 1968) at 3 [Orkin, *Law of Costs* (1968)], summarizing *Goodwin v Storrar*, [1947] 1 KB 457 (“The distinction is based on common sense, for if a client authorizes his solicitor to incur an unusual or unnecessary expense it is only right that he should reimburse his own solicitor for it, but it does not follow that he should be able to recover it from the opposite side”); *Magee v Board of Trustees of Roman Catholic Separate Schools for City of Ottawa* (1962), 32 DLR (2d) 162 (Ont H CJ) at 163-166 (“if the client instructs the solicitor to do certain things or to take certain action, which is unnecessary, for the proper presentation of the case, the client is liable to pay ... On the other hand, where the costs are to be paid by a third party, only those costs that are necessary for the proper presentation of the case may be recovered” at 165-166).

<sup>13</sup> *Berry v British Transport Commission*, [1961] 3 All ER 65 (citing *King v Hoare* (1844), 13 W & M 494 at 51-52: The taxed costs are intended to be a full indemnity to the plaintiff for his expenses ... That is the principle; whether it be fully carried out in practice is another matter ... If the taxed costs are not a full indemnity, they ought to be made so”) (citing *Barnett v Eccles Corporation*, [1890] 2 QB 104 at 109: “The law does not recognise the difference between the sum which it gives as costs, that is, costs taxed as between party and party, and the larger sum which in practice a litigant has to pay”).

<sup>14</sup> There are no cases from this era explaining how the magnitude of a party and party costs award was made. However, there are several cases awarding solicitor and client costs which calculate costs as a function of the “party and party tariff”: see e.g. *Re Solicitors*, 1945 CanLII 398 (Ont H Ct J) at 384-386.

First, Mark Orkin published the first edition of *The Law of Costs* in 1968. In that book, Orkin found that solicitor and client costs represented full indemnity for actual expenses.<sup>15</sup> Separately, he stated that solicitor and client costs were “substantially a party and party taxation, although on a more generous scale.”<sup>16</sup> Those reading Orkin’s book might have concluded that, if solicitor and client costs were full indemnity and party and party costs were less generous, then party and party costs had to be partial indemnity. In other words, these statements might suggest that party and party costs were intended to be less generous than full indemnity as a policy, rather than simply because the party and party tariff was designed to exclude unreasonable expenses.

Second, the Court of Appeal for Ontario [ONCA] released *Foulis* in 1978, holding that party and party costs were intended to be only a partial indemnity. The court gave only the briefest of explanations for this holding:

Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser.<sup>17</sup>

This statement is inconsistent with the costs as punishment model. That model holds the losing party as having committed a wrong by maintaining an unmeritorious position. By contrast, this statement rewards the losing party by reducing the level of indemnity awarded against them from full indemnity to partial indemnity. *Foulis* did not consider the costs as damages or costs as regulation models directly, but cited *Evaskow*, which arguably adverts to each.

In *Evaskow*, a majority of the Manitoba Court of Appeal held:

The learned trial Judge based his very unusual order on the theory that the award of damages to the plaintiff should reach him intact. No doubt every plaintiff would like to receive his damages intact, without at all assuming any portion of the costs of the litigation which he instituted. Perhaps in an ideal system (for plaintiffs), such a hope might be realized. But in the process it would result in the imposition of intolerable burdens upon defendants.<sup>18</sup>

The first two sentences of this paragraph reflect the costs as damages model. The balance of this paragraph rejects that model on the basis that requiring the losing party to pay full indemnity would be an “intolerable burden”. The court cites no authority for the proposition that the leading model of costs theory was “intolerable”, or on the question of costs generally.

Dickson JA (later Chief Justice of Canada) dissented on this point. He agreed that full costs were not appropriate on the basis that “the plaintiff should not be out of pocket”.<sup>19</sup> However, he held that full costs were appropriate because the losing party had a “hubristic attitude” and its actions were “calculated to

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<sup>15</sup> Orkin, *The Law of Costs* (1968), *supra* note 12 (Solicitor client costs are “intended, so far as is consistent with fairness, to provide complete indemnity to the party to whom they are awarded as to costs essential to and arising within the four corners of the litigation” at 5).

<sup>16</sup> *Ibid* at 2.

<sup>17</sup> *Foulis v Robinson*, 1978 CanLII 1307 (Ont CA) at 13.

<sup>18</sup> *Evaskow v International Brotherhood of Boilermakers*, 1969 CanLII 711, 9 DLR (3d) 715 at 720 (MBCA) [*Evaskow*].

<sup>19</sup> *Ibid* at 722.

harm the plaintiff”.<sup>20</sup> In effect, he was rejecting the costs as damages model while adopting the costs as regulation model. Again, no authorities are cited on either point.

Thus, *Foulis* effectively rejected all three models of costs theory to adopt a rule of partial indemnity. It rejected the costs as punishment model directly. It adopted *Evaskow*, which rejected the costs as damages model. And it implicitly rejected Dickson JA’s dissent, thereby implicitly rejecting the costs as regulation model. Even more confusingly, the sole policy basis on which the court relies is a concern that it would be unfair to *defendants* to require them to pay the winning plaintiff’s costs. At no point in these cases, or since, has the court explained why defendants should be immunized from paying for these expenses, which their improper conduct forced on the plaintiff.

Since *Foulis*, no reported Ontario case has seriously questioned the appropriateness of a partial indemnity rule. At first, that was probably because most costs work was done by taxing officers. That changed in 2002, when amendments to the *Rules of Civil Procedure* “shifted the burden of dealing with costs back onto judicial shoulders”.<sup>21</sup> But by that time, the price of legal services had increased dramatically. Judges unaccustomed to taxing costs were now being asked to sanction six figure costs awards, and became concerned “that litigants with legitimate claims should not be cowed by the possibility that the bringing of a simple motion might have catastrophic financial consequences should they lose”.<sup>22</sup> Thus, in 2004, ONCA held that it no longer had to determine “the actual costs incurred by the successful litigant”. Instead, it could fix costs by reference to a new “overriding principle of reasonableness”.<sup>23</sup>

Note that this holding is a further attack on the costs as damages model. In effect, the court is saying that one form of damages has gotten so large that the court should arbitrarily impose a cap on those damages at whatever level it deems appropriate. The idea of a cap on certain types of damages was not new,<sup>24</sup> but the idea that the cap might be different in each case was new. The court’s only basis for introducing this rule was that making a large award of costs might have a “chilling effect”,<sup>25</sup> though the court does not explain what would be chilled. Altogether, there is no clear doctrinal basis for choosing a partial indemnity rule, and even if there is, that basis would have conflicted with the three original models of costs theory.

### C. The New Model of Costs

Having repudiated the three original models of costs theory, courts gradually built a new model. The clearest expression of this new model was made by the Supreme Court of Canada [SCC] in *Okanagan*. The court recognized five purposes of costs:

“to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed);  
to facilitate “access to justice”;

<sup>20</sup> *Ibid* at 721-722.

<sup>21</sup> *Moon v Cher*, 2004 CanLII 39005 (Ont CA) at para 25.

<sup>22</sup> *Ibid* at paras 24-25.

<sup>23</sup> *Boucher, supra*, note 4 at paras 26, 37. The court’s holding was driven by being uncomfortable making an award of “partial indemnity costs of nearly \$100,000” at para 40. It therefore recast the law, saying, “While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable” para 24. This was “the overriding principle of reasonableness” at para 37. See also *Zesta Engineering Ltd v Cloutier*, 2002 CanLII 25577 (Ont CA) at para 3.

<sup>24</sup> See e.g. *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 233.

<sup>25</sup> *Boucher, supra*, note 4 at para 37.

“to encourage settlement”;  
“to deter frivolous actions and defences”; and  
“to discourage unnecessary steps in the litigation”.<sup>26</sup>

Within this framework, “the principle of indemnity is a paramount consideration”.<sup>27</sup> This should be unsurprising given that Parliament intervened no fewer than eight times to make it so. It is also fundamental to the costs as damages model, and advances the costs as punishment model. Meanwhile, purposes (2)-(5) are all special cases of the costs as regulation model.

It should be self-evident that full indemnity indemnifies the successful party more than partial indemnity. Thus, relative to full indemnity, partial indemnity cannot be justified based on the paramount purpose of costs. Part III will show that partial indemnity also cannot be justified on the basis of facilitating access to justice. Part IV will show that it also cannot be justified on the basis of encouraging settlement, deterring frivolous litigation, discouraging unnecessary steps, or other practical considerations. If all of these statements are correct, then there is no doctrinal basis for preferring partial indemnity to full indemnity.

### III. IS PARTIAL INDEMNITY PRINCIPALLY JUSTIFIED?

This Part assesses whether partial indemnity advances access to justice, or is justified for any other principled reason. It is split into two broad sections. Section A assesses the purported principled benefits of partial indemnity, and shows that none have a significant effect on access to justice. Section B identifies principled reasons that partial indemnity actively undermines access to justice, showing how these outweigh the purported benefits.

#### A. The Purported Benefits

##### 1. The Losing Party Has Better Access to Justice

As explained above, courts chose a partial indemnity rule primarily to ensure that the losing party has access to courts without devastating financial consequences. Before assessing whether partial indemnity achieves this goal, it is worth considering whether this outcome is desirable.

There are two problems with enhancing access to courts for losing parties. First, making it easier to maintain unmeritorious claims and defences could encourage vexatious litigation, which is a well-documented and growing problem in Canada.<sup>28</sup> This runs counter to one of the new doctrinal purposes of the existing costs rules: to disincentivize “frivolous actions and defences”.<sup>29</sup> However, the vast majority of losing parties are not vexatious litigants, and there are other ways to address this problem.<sup>30</sup> Thus, the fact that partial indemnity encourages frivolous litigation may be worth the increase in access to justice for the broader set of non-frivolous but non-meritorious claimants. Unfortunately, there is a bigger problem.

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<sup>26</sup> *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paras 21, 23, 27 [*Okanagan*]. See also *1465778 Ontario Inc v 1122077 Ontario Ltd*, (2006) 82 OR (3d) 757 (CA) at paras 26, 45.

<sup>27</sup> *Fellowes, McNeil v Kansa General International Insurance Company Ltd*, 37 OR (3d) 464, 1997 CanLII 12208 (Gen Div) at 6 [*Fellowes*].

<sup>28</sup> See *Meads v Meads*, 2012 ABQB 571 at paras 67-198; *Unrau v National Dental Examining Board*, 2018 ABQB 874 at paras 7-15; Donald J Netolitzky, “Lawyers and Court Representation of Organized Pseudolegal Commercial Argument [OPCA] Litigants in Canada” (2018) 51:2 UBC L Rev 419.

<sup>29</sup> *Okanagan*, *supra*, note 26 at para 23; *Fellowes*, *supra*, note 27 at 14.

<sup>30</sup> See e.g. *Rules*, *supra* note 2, rr 2.1.01, 2.1.02, 21.01(3)(d), 25.11(b), 37.16, 56.01(1)(e), 61.06(1)(a).



Second, every dollar that the losing party does not have to pay in costs is a dollar for which the winning party is not compensated. The issue is not whether losing parties should have access to justice, but whether the losing party's access to justice should be prioritized over the winning party's access to justice. By definition, the winning party was more justified in making their claim or defence. Since this is a zero-sum situation, where one party's access to justice must come at the other's expense, should priority not go to the party who was more justified?

Even if you believe that the losing party's access to justice should be prioritized over the winning party's access to justice, it is unclear whether partial indemnity achieves that goal. Under a full indemnity rule, the losing party would have to pay their full legal expenses plus the full legal expenses of the winning party. Suppose that each party would spend \$50,000. Under a partial indemnity rule, the losing party would have to pay their full legal expenses plus a fraction of the winning party's legal expenses. Suppose that the fraction is 60%. Thus if they lost under a full indemnity regime, they would have to pay \$100,000 in adverse costs, whereas if they lost under a partial indemnity regime, they would have to pay \$80,000.

For the average litigant, is there any meaningful difference between having to pay \$100,000 and having to pay \$80,000? How many litigants would feel comfortable making a claim or defence if they faced \$80,000 in adverse costs, but would not if they faced \$100,000 in adverse costs?

Both sums are large enough to bankrupt the average Ontarian, and there is little meaningful difference between being bankrupt and being even more bankrupt. That would suggest that the change to partial indemnity would have no meaningful effect on incentives. Still, these questions can only be answered definitively with empirical data, and as mentioned above, there is no such data comparing full indemnity with partial indemnity. However, there are three American studies comparing full indemnity with no indemnity. One of those studies found that cases were dropped – a proxy for avoiding unmeritorious litigation – slightly more frequently under a full costs rule.<sup>31</sup> The other two studies found no statistically significant effects.<sup>32</sup>

This conclusion – that changing the level of indemnity has minimal effect on incentives to bring unmeritorious claims and defences – is also consistent with economic theory. In general, law and economic scholars have shown that moving from no indemnity to full indemnity increases the incentives to drop unmeritorious litigation for risk neutral parties, but that effect is smaller, or even reversed, for very risk averse parties.<sup>33</sup> In a population with potential litigants of various risk tolerance levels, those two effects would be counterbalanced.

Both the empirical and theoretical research suggests that a 100% increase in the level of indemnity – no indemnity to full indemnity – is associated with a small decrease in unmeritorious litigation, if any at all. By that logic, a smaller increase in the level of indemnity – partial indemnity to full indemnity – should have an even smaller effect, if any at all.

In sum, partial indemnity probably does not significantly enhance losing parties' access to justice. Even if moving to a full indemnity rule results in some unmeritorious claims and defences being dropped, that might be a good thing, as the cases most likely to be dropped are the ones with the lowest chance of success: vexatious claims.

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<sup>31</sup> Edward A Snyder & James W Hughes, "The English Rule for Allocating Legal Costs: Evidence Confronts Theory" (1990) 6:2 J L Economics & Organization 345 at 362, 368.

<sup>32</sup> Stewart J Schwab & Theodore Eisenberg, "Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant" (1988) 73 Cornell L Rev 719 at 758; Susanne DiPietro & Teresa W Carns, "Alaska's English Rule: Attorney's Fee Shifting in Civil Cases" (1996) 13 Alaska L Rev 33 at 63.

<sup>33</sup> See generally Steven Shavell, "Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs" (1982) 11:1 J Leg Stud 55 at 59-64.

## 2. The Award Can Reflect Divided Success

Another common argument for partial indemnity is that it gives the court discretion to tailor the award to the unique facts of each case. The usefulness of discretion is most apparent where one party wins but the other party was successful. For example, suppose that a defendant admitted liability but won on damages. They technically lost, so a pure full indemnity rule would make them pay full costs. A judge with discretion could reverse this because the defendant's case succeeded.

The usefulness of discretion is also apparent in cases of divided success – that is, where each party succeeded on some issues but not on others. There are innumerable ways that this can happen. For instance, a plaintiff can win some, but not all of their claims, win against some defendants but not others, or win their claim but lose a counterclaim. A defendant can lose on the claim but win on a crossclaim or claim for contribution and indemnity. Parties can bring a variety of motions and win some but not others, or only get some of the relief sought in each.

Under a pure full indemnity rule, it is not clear how to split up the expenses between the issues on which a party was successful and the issues on which they failed. It may not even be possible to do so, as many expenses are incurred to advance submissions on both successful and unsuccessful issues. Discretion offers a convenient way to avoid getting into that messy analysis. Judges can weigh the relative importance of the issues and the amount of effort that the parties devoted to each issue, and then apportion costs accordingly.<sup>34</sup> In short, arbitrariness is a reasonable price to pay to not have to minutely dissect every bill of costs in cases of divided success.

But if we accept that arbitrariness is a problem, and only acceptable because it is outweighed by practical benefits, then it would be even better to avoid both arbitrariness and dissecting bills of costs. Part IV, Section C proposes a relatively simple algorithm that achieves both goals.

## 3. The Court Can Exempt Impecunious Parties

Under the existing costs regime, impecuniosity is a factor in fixing costs.<sup>35</sup> However, the standard for impecuniosity is high. Courts will not consider the “respective financial positions of the parties” or the winning party’s “financial ability to absorb costs” because doing so would “leave it open to litigants to believe that because of their weaker financial position costs would not be awarded against them.”<sup>36</sup> It must be proven by sworn evidence. Even if that is proven, this factor does not apply if the impecunious party “ignored court orders, acted in an unreasonable manner, or engaged in an abuse of process.”<sup>37</sup>

In short, the existing costs regime has an exemption for impecunious parties, but very few litigants qualify, those who do may not be able to afford to prove as much, and even if they do, the court is reluctant to exercise its discretion to grant the exemption. *Quaere* whether this exemption has any meaningful effect on access to justice in its current state.

Part V, Section D proposes a more robust exemption for impecunious litigants. That section will address whether a more robust exemption is desirable.

## 4. The Court Can Exempt Novel and Public Interest Cases

Under the existing rules, courts can exempt parties from costs if they made novel claims, which includes test cases, cases that seek to clarify ambiguous statutory provisions, and cases that seek to resolve

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<sup>34</sup> Orkin, *Law of Costs* (1968), *supra* note 12 (“Where liability is apportioned, another method is to lump the costs of both parties together and divide the lump sum in the same proportion as was fixed for liability” at 43).

<sup>35</sup> Orkin, *Law of Costs* (2020), *supra* note 3, ch 205.2(2).1 at fn 380.1.1-380.1.2.1 and accompanying text.

<sup>36</sup> *Ibid* at fn 378-328.2 and accompanying text.

<sup>37</sup> Norm Emblem & Ara Basmadjian, “Impecuniosity or Hardship as a Factor in the Award of Costs: Towards a Coherent Framework” (2016) 45:4 Adv Q 420 at 435.

conflicting jurisprudence.<sup>38</sup> Similarly, they can exempt parties bringing public interest litigation – that is, claims against the government on issues of public importance, such as the *Charter*, elections, the environment, and Aboriginal rights and title. This is a one-way rule, pursuant to which the government still pays costs if they lose, but they get no costs if they win.<sup>39</sup>

Unfortunately, the standard for finding that a case is a public interest case is high, though the test varies from case to case. Here are some common requirements and factors:

- The issue must involve “matters of public interest that are truly exceptional”;
- The issue must be novel and unsettled in law;
- The issue must be “of practical importance” to the public;
- The stance taken by the public interest litigant must:
  - Carry broad public support;
  - Have “some degree of merit”; and
  - Not cause any adverse effects to the public;
- The public interest litigant must be in the best position to bring the claim;
- Those with a pecuniary interest in the outcome would find a lawsuit uneconomical;
- The public interest litigant must be acting for “manifestly unselfish motives”;
- The public interest litigant must have no pecuniary interest in the outcome, or that interest should be “modest in comparison to the cost of the proceedings”;
- However, the public interest litigant must have a “genuine interest in the matter as opposed to being a mere busybody or interloper”;
- The public interest litigant should be marginalized, powerless, or underprivileged;
- The defendant should be the government or other public body or actor; and
- The defendant must have a “clearly superior capacity to bear the costs of the proceeding”.

Finally, even if all of these factors and criteria are satisfied, the court retains discretion to refuse to immunize public interest litigants, or merely reduce costs instead.<sup>40</sup>

In short, the existing costs regime has an exemption for novel and public interest cases, but the standard for finding such a case is so high that it is rarely met. *Quaere* whether this exemption has any meaningful effect on access to justice in its current state.

Part V, Section E proposes a more robust exemption for novel and public interest cases. That section will address whether a more robust exemption is desirable.

<sup>38</sup> Orkin, *Law of Costs* (2020), *supra* note 113, ch 205.2(2), notes 357-377.1 and accompanying text. See also Orkin, *Law of Costs* (1968), *supra* note 12 at 25-56; Chris Tollefson, “Costs In Public Interests Litigation: Recent Developments and Future Directions” (2009) 35:2 Adv Q 181 at 191-192; Martin Twigg, “Costs Immunity: Banishing the Bane of Costs from Public Interest Litigation” (2013) 36:1 Dal LJ 193 at 206-213.

<sup>39</sup> Chris Tollefson, Darlene Gilliland & Jerry DeMarco, “Towards a Costs Jurisprudence in Public Interest Litigation” (2004) 83:2 Can Bar Rev 473 at 491-496; Twigg, *supra* note 38 at 233 (referring to *Farlow v Hospital for Sick Children*, 2009 CanLII 63602 (Ont Sup Ct)); David Gourlay, “Access or Excess: Interim Costs in Okanagan” (2005) 63 UT Fac L Rev 111 at 114.

<sup>40</sup> See Tollefson, *supra* note 38 at 190-197; *Incredible Electronics Inc v Canada (Attorney General)* (2006), 80 OR (3d) 723 (Sup Ct) at paras 86-100; *St. James’ Preservation Society v Toronto (City)*, 2006 CanLII 22806 (Ont Sup Ct) at paras 17-33; Orkin, *Law of Costs* (2020), *supra* note 3, ch 219.5.2 at notes 1263.1-1263.1.3, 1265.9 and accompanying text.

## 5. Standards are More Flexible than Rules

The previous three sections described special cases of a broader argument: that discretion allows judges to take a more holistic view of the equities of each case and fashion a costs award that is more responsive to the full picture. This in turn is one application of the broader debate in legal theory on whether laws should be written as rules or standards.<sup>41</sup>

Simplifying enormously, the conclusions of that debate are that:

Standards are easier and cheaper to promulgate because the legislator does not have to think through all of the possible ways that it might be applied, which may not even be possible;

Rules are easier and cheaper to enforce because less is left to the adjudicator's interpretation;

The difference in enforcement costs will outweigh the difference in promulgation costs if the law will be applied often;

This effect is diminished where the first precedent decided under a standard makes the law so clear as to effectively turn it into a rule;

Rules are easier for the public to understand the law, reducing the cost of legal advice and increasing compliance with the law; and

Simple rules result in more mistakes than complex standards (they can be both over- and under-inclusive), but that does not necessarily mean that a complex rule would result in more mistakes than a complex standard.<sup>42</sup>

The upshot of these conclusions is that a standard should be preferred if (1) the law will not be used often; or (2) it is impossible to create an acceptable complex rule. In this case, given that there are hundreds of contested costs cases every year, (1) clearly does not apply. Meanwhile, the proposal in Part IV proves that (2) does not apply.

## B. The Drawbacks

### 1. Meritorious Plaintiffs Lose Access to Justice

The absence of full indemnity prevents at least some plaintiffs from suing, even if they are 100% certain that they would succeed at trial. There are two mechanisms for this effect.

First, in some cases, the uncompensated legal expenses incurred to win at trial and enforce the judgment would exceed the maximum possible damages from that victory. Thankfully, this effect is rare because claims worth less than \$35,000 can be brought to the Small Claims Court,<sup>43</sup> so claims requiring full legal expenses generally involve larger damages than legal expenses.

Second, lawyers know that, even if they win outright, the client might not be in a position to cover their full legal expenses at the end. As a result, lawyers almost invariably demand large retainers upfront, pricing out most Ontarians from accessing legal services. By contrast, under a full indemnity regime, lawyers would be confident that, if they won, the client could pay them. For obviously meritorious claims, some lawyers might be willing to structure their fees such that a client can pay nothing upfront, but must

<sup>41</sup> For a comprehensive law and economics analysis of this question, see Louis Kaplow, "Rules Versus Standards: An Economic Analysis" (1992) 42 Duke LJ 557.

<sup>42</sup> *Ibid* at 572-575, 578-579, 588-590, 599-601.

<sup>43</sup> *Small Claims Court Jurisdiction*, O Reg 626/00, s 1(1). Note, however, that costs at the Small Claims Court are severely restricted: *CoJA*, *supra* note 1 (15% of amount sought at s 29); *Rules of the Small Claims Court*, O Reg 258/98 (\$100 for case conferences at s 13.10; \$100 for motions at s 15.07).

sign over the costs award if they win. To be clear, the vast majority of lawyers will not change their billing practices in response to the costs rules. However, if even a small fraction does, it could meaningfully advance access to justice.

The analysis above relates to access to courts. But access to justice is broader: “where courts are unjust, access to them can perversely lead, not to access to justice, but *access to injustice*”.<sup>44</sup> Analogously, where the result of a court proceeding only remedies some of the injustice, access to them only leads to partial justice. That is arguably the outcome of a partial indemnity rule.

No matter how meritorious a claim is, the plaintiff can never end up in the position they would have been in had the defendant’s misconduct not occurred. They will always be out of pocket at least the difference between their actual legal expenses and the magnitude of the costs award. In turn, the fact that plaintiffs cannot get back to their starting position if they win, pressures plaintiffs to settle their claims for less than those claims are worth.

Worse still, the pressure to settle does not affect all parties equally. The most powerful entities in society – governments and large corporations with in-house counsel – see legal services primarily as fixed costs. The latter can even deduct legal expenses as business expenses. Thus, unless the case is large enough that pursuing it will require the entity to retain more lawyers, the fact that they will not get full indemnity if they win is essentially irrelevant to their calculation. Thus, these entities have a stronger bargaining position in settlement negotiations with parties who pay for legal expenses as variable costs, and must factor that into their bargaining position.

In short, partial indemnity prevents some plaintiffs with relatively small claims from suing at all. It also encourages lawyers to structure legal fees in a manner that prices out poor prospective litigants. And even if a plaintiff sues, they will never get full justice – something which the most powerful entities in society are in the best position to exploit.

## 2. Meritorious Defendants Are Pressured into Settling Strike Suits

Defendants can also be short-changed by partial indemnity. If a plaintiff seeks less than the uncompensated legal expenses that the defendant would have to incur to get to a final disposition, a rational defendant would settle, even if they have done nothing wrong and the claim has no chance of success at trial. It is unclear how often this occurs given that, by definition, these cases do not go to trial, but there are good reasons to believe that it occurs at least occasionally.<sup>45</sup>

As in the previous section, pressure to settle does not affect parties equally. This is why the court is supposed to grant full indemnity if a defamation claim is found to be an attempt to limit debate on matters of public interest.<sup>46</sup> In that context, courts recognize that lawyers need to be encouraged “to take on the defence of such actions even if the defendant will not likely be able to pay them”.<sup>47</sup> In a society where

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<sup>44</sup> Joshua Sealy-Harrington, “Access to (In)justice: A critical race reflection” (24 March 2021) *The Lawyer’s Daily*, online: <<https://www.thelawyersdaily.ca/articles/25551>>. See also Trevor CW Farrow, “What is Access to Justice” (2014) 51:3 *Osgoode Hall LJ* 957 and the many sources it cites at notes 1 and 2.

<sup>45</sup> Consider *Hadani v Toronto Standard Condominium Corporation No 2095*, 2016 CanLII 58944 (Ont Sm Ct Ct), where the defendant had to spend \$32,993.35 to defend against a claim of \$16,599.68. The court awarded costs of only \$3,085.91, so the defendant ended up out of pocket \$29,907.44. The defendant would have been \$13,307.76 better off had they simply paid the plaintiff’s unmeritorious claim. Admittedly, this outcome was driven by the Small Claims Court’s limit on costs, which is lower than the usual partial indemnity rate. Still, it shows that legal expenses can vastly exceed the amount at stake. In that case, uncompensated legal expenses can exceed the amount at stake.

<sup>46</sup> *CoJA*, *supra* note 1, s 137.1(7).

<sup>47</sup> *Niagara Peninsula Conservation Authority v Smith*, 2018 ONSC 127 at para 12.

justice prevails, no defendant with a meritorious position should be unable to pursue their defence for a lack of a willing lawyer.

ONCA has held that costs should be used to “reduce the financial sacrifice associated with taking on pro bono work”.<sup>48</sup> A full indemnity rule allows pro bono counsel for both plaintiffs and defendants to take on cases for meritorious parties unable to pay at no financial sacrifice besides the time value of money. It is hard to imagine a clearer way to satisfy ONCA’s request. This benefit to access to justice for meritorious parties outweighs the only principled benefit unique to partial indemnity, namely a marginal increase in access to justice for losing parties.

#### IV. IS PARTIAL INDEMNITY PRACTICALLY JUSTIFIED?

This part assesses whether partial indemnity advances the efficiency of courts, or is justified for any other practical reason. It is split into two broad sections. Section A assesses the purported practical benefits of partial indemnity, and shows that none have a significant effect on the efficiency of courts. Section B identifies practical reasons that partial indemnity actively undermines the efficiency of courts, showing how these outweigh the purported benefits.

##### A. The Purported Benefits

###### 1. It Incentivizes Settlement

There are two plausible arguments for how partial indemnity incentivizes settlement. The first argument is that it ensures that every party is better off settling for the amount which would be awarded at trial than to go to trial. By contrast, under a full indemnity rule, the winning party would be in the same position whether they settled or went to trial. Thus, some might argue that the winning party would have no incentive to settle under a full indemnity rule.

There are three problems with this argument. First, parties do not know with certainty who is going to win – if they do, the losing party would pay the claim – so even a party who thinks that they have a high probability of success would benefit by avoiding the risk of losing at trial. Second, taking a case through trial often takes years. Even if a party knew with certainty that they would win at trial eventually, they would benefit from getting the same amount in a settlement earlier. Third, the fact that the winning party is more incentivized to settle under a partial indemnity rule must be balanced against the fact that the losing party is less incentivized to settle because they expect to have to pay less in costs. Which of these effects will predominate is complicated, raising a variety of issues that have been canvassed at length in economic literature.

Once again, there is no empirical data comparing partial indemnity with full indemnity. However, there is one relevant study comparing settlement rates after Florida moved from a no indemnity rule to a full indemnity rule. The study found that if you use a bivariate probit regression, switching from no costs to full costs was associated with an increase in settlement. Meanwhile, if you use a nested logit regression, switching from no costs to full costs was associated with a decrease in settlement.<sup>49</sup> For the sake of readability to a legal audience, this article will not weigh the merits of these econometric models. Suffice it to say that the empirical evidence is mixed.

Since the empirical analysis is inconclusive, the next best option is to look at economic theory. Unfortunately, that is also inconclusive. Early economic literature suggested that the primary variables were the parties’ expectations of success and relative risk aversion. In short, risk averse parties who largely

<sup>48</sup> *1465778 Ontario Inc v 1122077 Ontario Ltd.*, (2006) 82 OR (3d) 757 (CA) at para 45.

<sup>49</sup> Snyder & Hughes, *supra* note 31 at 362, 368.

agree on who was more likely to win should be more likely to settle under a full indemnity rule.<sup>50</sup> By contrast, if they each think that they are more likely than not to win, then they are more likely to settle under a partial indemnity rule.<sup>51</sup> Later economic literature added that the effects may be different if the parties have asymmetric information,<sup>52</sup> if there are multi-phase trials (e.g. liability and damages),<sup>53</sup> if the costs rules change how much parties would spend on litigation,<sup>54</sup> or if there are offer-of-settlement rules,<sup>55</sup> like Ontario's rule 49.

That brings us to the second argument, namely that partial indemnity makes it possible to have rule 49, pursuant to which:

- (1) Plaintiffs who offer a settlement and beat their settlement offer at trial get a higher level of indemnity – but not full indemnity – for expenses incurred after their offer,<sup>56</sup> and
- (2) Defendants who offer a settlement and lose at trial, but are ordered to pay damages of less than their settlement offer, get partial indemnity for expenses incurred after their offer.<sup>57</sup>

Collectively, (1) and (2) create three pro-settlement effects. First, both (1) and (2) incentivize parties to make settlement offers. By contrast, there is no added benefit to making a settlement offer under a full indemnity rule, over and above avoiding time-consuming litigation.

Second, once the plaintiff makes a reasonable offer, (1) effectively increases the level of indemnity to closer to full indemnity, on the assumption that the defendant will be more likely to settle if they face a risk of larger adverse costs. Clearly, this effect cannot incentivize settlement more than full indemnity because it only works by emulating full indemnity.

Third, once the defendant makes an offer, (2) allows the defendant to recover costs if they are found liable but only for a small amount. It therefore puts pressure on the plaintiff to settle if the plaintiff believes that they will win on liability but lose on damages.

Collectively, these three effects are probably of limited impact. There is no empirical data on rule 49, but there has been one study on New Jersey eliminating a \$750 cap on cost-shifting for settlement offers. This was analogous to (1) but with bigger effects: it went from negligible indemnity to full indemnity, and applied to both plaintiffs and defendants. This was associated with only a 0.09% increase in settlement, which was not statistically significant.<sup>58</sup>

Thus the empirical literature suggest that neither the level of indemnity nor the existence of an offer-of-settlement rule, like rule 49, is likely to have any meaningful effect on the rate of settlement. Even if it

<sup>50</sup> Richard A Posner, “An Economic Approach to Legal Procedure and Judicial Administration” (1973) 2 J L Studies 399 at 428.

<sup>51</sup> Shavell, *supra* note 33 at 65-66.

<sup>52</sup> See generally Lucian Ayre Bebbchuk, “Litigation and Settlement Under Imperfect Information” (1984) 15:3 RAND J Economics 404.

<sup>53</sup> See generally Jef De Mot, “Sequential Trials and the English Rule” (2012) 34 European J L Economics 31.

<sup>54</sup> John C Hause, “Indemnity, Settlement, and Litigation, or I’ll Be Suing You” (1989) 18:1 J Leg Stud 157 at 176.

<sup>55</sup> See generally Kathryn E Spier, “Pretrial Bargaining and the Design of Fee-Shifting Rules” (1994) 25:2 RAND J Economics 197 at 202; Geoffrey P Miller, “An Economic Analysis of Rule 68” (1986) 15:1 J Leg Stud 93 at 105.

<sup>56</sup> *Rules*, *supra* note 2, r 49.10(1).

<sup>57</sup> *Ibid*, r 49.10(2).

<sup>58</sup> Albert Yoon & Tom Baker, “Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East” (2006) 59 Vand L Rev 155 at 187.

does, these studies used data from changes in costs regimes that were much larger than the difference between Ontario's original full indemnity rule and Ontario's current partial indemnity regime. Presumably, this much smaller change would result in much smaller effects, if any at all.

## 2. It Disincentivizes Misconduct

The final argument in favour of having partial indemnity as the default rule is that the court can increase costs if a party has engaged in misconduct. There are three broad types of misconduct which carry adverse costs consequences:

- Misconduct which harms the court, including:
  - Contempt of court or failure to comply with court orders; and
  - Misleading the court or giving untruthful evidence;
- Misconduct which harms other parties, including:
  - Bringing a claim to harm the defendant, or otherwise acting in a way calculated to harm the other party;
  - Making unfounded allegations that impugn the other party's character, such as allegations of dishonesty, fraud, theft, or forgery; and
  - Attempting to intimidate, exhaust, or financially drain the other party, or otherwise trying to take advantage of a power imbalance; and
- Misconduct which wastes the court's time and hurts other parties, including:
  - Being confrontational or overly litigious;
  - Bringing frivolous, vexatious, or oppressive claims or motions;
  - Introducing irrelevant evidence, making unduly long arguments, failing to provide information promptly, failing to proceed promptly, or otherwise causing delay;
  - Refusing to accede to reasonable requests or to provide discoverable information; and
  - Making procedural mistakes, such as bringing the action to the wrong court.<sup>59</sup>

It is unclear whether these rules are effective at preventing misconduct. Assuming that they are, there are still two reasons to be sceptical that this regime produces optimal incentives – that is, incentives that are large enough to affect behaviour but not so large as to be unfair.

First, under the existing rules, misconduct by the losing party generally results in substantial indemnity costs, which is defined as 1.5 times the level that would have been awarded as partial indemnity costs.<sup>60</sup> There is no reason to believe that the best sentence for all types of misconduct is always 50% of partial indemnity. For example, in a large commercial case with hundreds of thousands of dollars in legal expenses, the penalty might be disproportionately large. Meanwhile, in a small case with only a couple thousand dollars in legal expenses, the penalty for even the most severe infractions might be so low that it does not affect behaviour at all. Admittedly, the court has discretion to reduce costs in the high-value

<sup>59</sup> Orkin, *Law of Costs* (2020), *supra* note 3, ch 205.2(2), notes 230, 231-231.1, 233-241, 242-244, 245, 246.1-247, 249.1, 269-270, 272-276, 279, 281, 284, 289-302, 325-325, 336-338, 340, 346, 350, and ch 210.1, notes 694-696; Orkin, *Law of Costs* (1968), *supra* note 12 at 19, 21, 23-24, 53; *Kim v Hong*, 2013 BCSC 2248 at para 10; *1307347 Ontario Inc v 1243058 Ontario Inc*, 2001 CarswellOnt 492, [2001] OJ No 585 at para 5; *Foulis v Robinson*, 1978 CanLII 1307 (Ont CA) at 11, citing *Evaskow*, *supra* note 18, Dickson JA dissenting at 721-722; *Unisource Canada Inc v Hongkong Bank of Canada*, 1999 CarswellOnt 3447 (Gen Div) at paras 24-25, *aff'd* 2000 CarswellOnt 893 (CA); *Mastracci v 1882877 Ontario Inc*, 2019 ONSC 3814; *Rules*, *supra* note 2, r 57.05(1).

<sup>60</sup> *Rules*, *supra* note 2, r 1.03, sub nom "substantial indemnity costs".



case. However, its hands are tied in the low-value case because costs cannot exceed the winning party's actual expenses.<sup>61</sup>

Criminal sentencing is an instructive analogy. In that context, the principle of proportionality of the sentence to the offence is a "constitutional obligation".<sup>62</sup> As such, courts could not sanction an attempt to impose the same sentence for every conviction. And yet, that is essentially what happens with costs. No matter what type of misconduct a losing party engages in, the penalty is always supposed to be 50% of partial indemnity. Of course, the stakes in criminal sentencing are much higher, which is why proportionality is only constitutionally mandated in that context. Still, there is no reason to ignore proportionality entirely in setting penalties for misconduct in court.

Second, under the existing rules, substantial indemnity costs are almost invariably awarded against the party whose agents engaged in misconduct. The court technically has both statutory and inherent jurisdiction to award costs against lawyers personally,<sup>63</sup> but this power is rarely used. This makes perfect sense if the client instructed the lawyer to engage in misconduct. However, that is not always the case, especially where the misconduct is lying about jurisprudence, presenting unnecessary evidence or arguments, or making procedural mistakes. The fact that the penalties for misconduct are part of costs awards means that, at least occasionally, the penalties are paid by an innocent party, such that the person who engaged in the misconduct is unaffected.

Part V, Section F proposes an alternative way to target misconduct that can be tailored more specifically to both the type of misconduct and the party responsible for the misconduct.

## B. The Drawbacks

The practical drawback of discretionary partial indemnity is that it fails to set a clear rule. As a result, courts have developed hundreds of rules for how to apply costs in different situations.

First, the default rule is the partial indemnity rate, but courts have adopted three different ways to calculate this rate:

- (1) Using Tariff A, as mandated in the *Rules of Civil Procedure*;
- (2) Using Tariff A, but adjusting for inflation since it was last modified in 2005; or
- (3) Multiplying actual legal expenses by 60% – often used when the case is complex and the parties are both sophisticated.<sup>64</sup>

Second, there are innumerable reasons that the court can award higher costs (usually but not always at the substantial indemnity rate), lower costs, or no costs. This article has already discussed the rules for divided success (III.A.ii), impecuniosity (III.A.iii), novel and public interest cases (III.A.iv), public participation (III.B.ii), settlement offers (IV.A.i), and various types of misconduct (IV.A.ii). There are also rules for

<sup>61</sup> *Mantella v Mantella*, 2006 CanLII 17337 (Ont Sup Ct) ("so long as the total of the indemnity does not exceed the fees actually charged" at para 7).

<sup>62</sup> *R v M(CA)*, [1996] 1 SCR 500 at para 41.

<sup>63</sup> For statutory jurisdiction, see *Rules*, *supra* note 2, r 57.07. For inherent jurisdiction, see: Gold, *supra* note 7 **Error! Bookmark not defined.** at 87-88; Paul Lantz, "Costs as a Regulatory Device" (1981) 2:4 Adv Q 396 at 399.

<sup>64</sup> See Ravi Amarnath & Louise James, "Cost and Consequence: Assessing the Divergent Cost Streams in Ontario's Loser-pays Regime" (2017) 35:4 Adv J 40 at paras 3-9; *Rules*, *supra* note 2, r 1.03, sub nom "partial indemnity costs".

conduct prior to the litigation,<sup>65</sup> having inadequate records,<sup>66</sup> suing on illegal contracts,<sup>67</sup> excessive preparation,<sup>68</sup> failure to attempt to settle,<sup>69</sup> statements to the press,<sup>70</sup> passing of accounts and estates litigation,<sup>71</sup> specific statutory claims,<sup>72</sup> and a catch-all category for “reprehensible, scandalous or outrageous conduct”.<sup>73</sup> In addition to these rules, the court can consider a dozen legislated factors, the last of which is “any other matter relevant to the question of costs”.<sup>74</sup> It is hard to imagine a wider discretion or a more complex regime.

The following two sub-sections describe two consequences of this complexity, namely that it wastes time and money for all participants in the justice system – litigants, lawyers, and courts – and that it makes at least some costs decisions unpredictable. These are access to justice barriers and unnecessarily make it harder for the average person to navigate civil procedure.

### 1. Complexity Wastes Time & Money

Almost every motion, trial, and appeal in Ontario ends with some form of costs submissions. In the vast majority of cases, these are not complex. The parties either state the amount they seek in costs orally or present their bills of costs. Sometimes they write a sentence or two with respect to the legislated factors, arguing that costs should be little higher or a little lower. The judge decides costs as part of their judgment on the merits, and limited time is wasted.

However, in a minority of cases, the parties strongly disagree about costs. In that case, the parties will each treat costs submissions as a motion. They conduct voluminous legal research and draft factums. Occasionally, they present oral submissions, and in the rarest cases the losing party on the costs motion appeals that decision. It is unclear how often parties make full submissions on costs, but there have been hundreds of reported appellate decisions opining on costs over the past decade,<sup>75</sup> so there have probably

<sup>65</sup> Orkin, *Law of Costs* (2020), *supra* note 3, ch 205.2, note 203 and accompanying text and, ch 205.2(2), notes 227, 232.1, 255, 266, 288.1 and accompanying text.

<sup>66</sup> *Ibid*, ch 205.2(2), notes 237, 246, 252 and accompanying text.

<sup>67</sup> *Ibid*, ch 205.2(2), notes 285-287 and accompanying text.

<sup>68</sup> *Manning v Herb Epp*, 2006 CanLII 35631 (Ont Sup Ct) [*Manning*] at para 15.

<sup>69</sup> Orkin, *Law of Costs* (2020), *supra* note 113, ch 205.2(2), note 254 and accompanying text.

<sup>70</sup> *Ibid*, ch 205.2(2), notes 245, 279 and accompanying text.

<sup>71</sup> *Rules*, *supra* note 2, rr 58.08, 74.18(10)-(11.4), 74.18(13); *Estates Act*, RSO 1990, c E-21, s 44(7); *Estates Administration Act*, RSO 1990, c E-22, s 26; Kimberly A Whaley, “Costs in Estate Litigation” (28 May 2019), online: <<https://welpartners.com/resources/WEL-Costs-in-Estate-Litigation.pdf>>.

<sup>72</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 197; *Bankruptcy and Insolvency General Rules*, CRC, c 368, ss 18-25; *Business Corporations Act*, RSO 1990, c B-16, ss 136(4.2), 185(21), 189(13); *Canada Business Corporations Act*, RSC 1985, c C-44, s 124(5); *Civil Remedies Act, 2001*, SO 2001, c 28, ss 1.9(8), 6(3.4), 11(3.4), 11.4(8), 15(3.2); *Costs of Distress Act*, RSO 1990, c C-41, ss 6(2)-(5); *Creditors’ Relief Act, 2010*, SO 2010, c 16, Sch 4, s 5(2)(b); *Election Act*, RSO 1990, c E-6, s 4; *Libel and Slander Act*, RSO 1990, c L-12, s 11(2); *Land Titles Act*, RSO 1990, c L.5, s 29(2); *Securities Act*, RSO 1990, c S-.5, ss 135(3)-(5), 138.11, 149; *Trespass to Property Act*, RSO 1990, c T-21, s 12(2); *Trustee Act*, RSO 1990, c T-23, s 64.

<sup>73</sup> See *Young v Young*, [1993] 4 SCR 3 at 134; *Davies v Clarington (Municipality)*, 2009 ONCA 722 at para 40.

<sup>74</sup> *Rules*, *supra* note 2, r 57.01(1).

<sup>75</sup> This is a rough estimate. It was obtained in three steps. First, I searched (“party and party costs” or “solicitor and client costs” or “partial indemnity costs” or “substantial indemnity costs”) on CanLII, assuming that courts rarely distinguish between the different costs rates if the parties did not argue about which rate applied. Second, I filtered the jurisdiction to “Ontario”, the court level to “Appeal courts”, and the date to between May 23, 2011 and May 22, 2021. This resulted in 371 cases. Third, to ensure that the search terms were not too over-inclusive, I read the cases which showed up in the search until I had identified at least 100 which had detailed analysis on costs.

been thousands of reported first instance decisions on costs submissions,<sup>76</sup> and many more unreported decisions.

This is a colossal waste of money and time. On money, litigants have probably spent more than a million dollars on costs submissions over the past decade.<sup>77</sup> In other words, justice could be made at least a million dollars cheaper over a decade by introducing a simpler, or at least less discretionary costs regime. Every litigant who goes to a hearing, trial, or appeal would benefit by not having to pay their share of this expense.

On time, costs submissions have probably wasted hundreds, if not thousands of hours of court time over the past decade. This delays all litigation. Parties who are not contesting costs have to wait as costs submissions are made in other cases. Meanwhile, parties who are contesting costs have to wait for a hearing. There is no empirical data on how long that currently takes, but in the 1990s, parties had to wait three to four months after the decision on the merits to get a hearing for costs submissions,<sup>78</sup> and presumably longer until they had a decision on that issue. Not only does this delay relief, but also it exacerbates the emotional toll associated with having to devote mental energy to ongoing litigation. Again, a simpler rule would avoid costs submissions, thereby making litigation faster and cheaper for everyone.

## 2. Complexity Undermines Predictability

At the beginning of any civil litigation case, it is difficult to predict the amount that you will spend on legal expenses, much less what the other party will spend. Thus, costs awards will always be unpredictable to some degree. However, the existing costs regime unnecessarily adds to that unpredictability in two ways. First, there are no clear rules, so even a party who thinks they have a strong chance of qualifying for one of the exceptions may not ultimately qualify. Second, while there is a cap on adverse costs, it is set at the winning party's actual expenses,<sup>79</sup> which the losing party cannot predict because they have no right to see how much the opposing party is spending. Thus, lawyers cannot estimate a limit on costs for their clients when they are first retained.

Perhaps because costs are so unpredictable, lawyers do not have to turn their minds to costs until late in the process. Unless they have a contingency fee agreement,<sup>80</sup> they have no professional obligation to

<sup>76</sup> Using the first two steps listed in the previous footnote, but removing the court level filter, results in 4,744 cases. This suggests that the ratio of first instance costs cases to appellate costs cases is a little bit larger than 10:1. However, verifying that number would require performing the third step, or reading at least 1,000 cases.

<sup>77</sup> I assume, conservatively, that there have only been 4,000 contested costs cases in the past decade – less than the number listed in the previous number, even though this number also includes cases not reported on CanLII. I further assume, conservatively, that the average legal expenses associated with all parties making costs submissions in any given case – including any appeals – is only \$2,500. In that case, the total spent would be \$1,000,000.

<sup>78</sup> Robert D Malen, “To Assess Costs or to Fix Costs: That Is the Question” (1998) 20:1 Adv Q 85 (“Judges very often ask counsel for written submissions and then hear oral argument. By the time these are scheduled and completed, several months have passed. ... The current waiting period in Toronto to hear a one-day assessment is approximately three months; to hear a two or three-day assessment, the wait is four months” at 94).

<sup>79</sup> *Mantella v Mantella*, 2006 CanLII 17337 (Ont Sup Ct) (“so long as the total of the indemnity does not exceed the fees actually charged” at para 7).

<sup>80</sup> *Contingency Fee Agreements*, O Reg 195/04, s 3(3).

tell their clients about the possibility of a costs award at any time.<sup>81</sup> Parties must file a bill of costs, but only after trial,<sup>82</sup> or in some regions at the same time as motion materials.<sup>83</sup>

As a result, when clients are making the types of decisions that costs rules are designed to affect – such as whether to file a suit, or whether to settle – they cannot fully incorporate the risk of costs into their calculation. Even after a judgment on the merits has been made, the complexity of costs sometimes makes it hard to agree on how much to settle on for costs.<sup>84</sup>

Part V, Section B proposes a way to ensure that parties can not only predict, but also control the maximum magnitude of adverse costs. They can therefore fully incorporate this amount into their decision-making, which should make the incentive effects of costs more salient and powerful.

## V. A BETTER ALTERNATIVE

Parts II-IV have shown that, if there exists a full costs regime that incorporates the benefits of partial indemnity, then there is no doctrinal, principled, or practical reason to prefer a partial indemnity regime. This part proposes such a full costs regime. That regime has six rules:

- (1) Subject to (2)-(5), costs must be a full indemnity for the winning party's actual expenses;
- (2) Costs awards cannot exceed the losing party's actual expenses;
- (3) In the case of divided success, the court should determine each party's success rate to the nearest 25% and then award that party that fraction of its actual expenses, subject to (2);
- (4) Impecunious parties cannot be made to pay costs;
- (5) Parties bringing public interest cases cannot be made to pay costs; and
- (6) In addition to costs, courts can assess fines against anyone – parties or lawyers – who engage in misconduct or dilatory tactics during litigation, to be paid to the court.

The six sections below address each of these rules in turn, first discussing the benefits and then addressing the possible counterarguments.

Note that these rules are intended to operate together. If rule (1) is introduced without also introducing rules (2)-(6), it could detract from access to justice. On the other hand, rules (2)-(6) could each be introduced on their own, without rule (1), and each would still advance access to justice to a limited extent.

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<sup>81</sup> The closest duty is probably *Rules of Professional Conduct*, Rule 3.2-2, Commentary [2], which states:

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

However, lawyers can interpret “results” as merely the legal results, not the financial results.

<sup>82</sup> *Rules*, *supra* note 2, r 57.01(5). In theory, only the winning party must file a bill of costs, but the courts have been pushing for both sides to do so since at least 2011: see *Smith Estate v Rotstein*, 2011 ONCA 491 at para 50.

<sup>83</sup> See e.g. Notice to the Profession – Toronto at para B(22), online: <<https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to/>>.

<sup>84</sup> See Malen, *supra* note 78 (“It makes predictability of result much more difficult. This has a direct effect on the ability of the lawyer to advise the client on whether to settle the issue of costs” at 99).

### A. Default Full Indemnity Rule

The first proposed rule is a return to full indemnity. That would be consistent with all of the original and modern models of costs theory and avoids all of the principled problems with partial indemnity described above (III.B). Intuitively, it is the simplest rule, and least likely to result in the practical problems with partial indemnity described above (IV.B). It was also the dominant rule in the Commonwealth for centuries and remains the dominant rule in much of continental Europe, including in France, Germany, Greece, Italy, the Netherlands, Poland, and Sweden, so it is clearly a workable rule.<sup>85</sup>

Still, some logistical difficulty remains in determining which expenses are to be indemnified at any given step in the proceeding. Normally, this is clear: any costs incurred for the purpose of presenting one's case at that step in the proceeding are covered by the costs award for that step. However, this simple rule does not work where a motion for summary judgment is dismissed or an appeal is allowed. In each of those situations, a different rule is required.

When a motion for summary judgment is dismissed, much of the losing party's expense on the motion will be used at trial, and may ultimately prevail at trial because the standard of proof is less stringent. Thus, in that situation, costs should be in the cause, meaning that no costs are awarded on that motion, but whoever wins at trial will get costs for both the trial and the motion.

Similarly, when an appeal is allowed, the expenses incurred by the party who lost in the court below were ultimately vindicated. In that situation, the appellate court should both award costs to the winning party for the appeal and reverse the direction of the costs award made at trial.

### B. Cap at Losing Party's Actual Costs

The second proposed rule is a cap on costs at the losing party's actual costs. This rule carries two principled and two practical benefits.

First, a cap prevents wealthy parties from weaponizing costs to prevent lawsuits. Under the existing regime, it is possible for an institutional litigant to develop a reputation that they will spend whatever it takes to drag out litigation. They can avoid rules relating to excessive preparation by filing multiple motions, sending lots of lawyer-written correspondence, or putting substantial time into document review. By overspending, the institutional litigant increases the potential costs award they would get if they won. Knowing this, a prospective opponent might not be willing to sue – even if their claim is meritorious – because they have no way to limit the downside risk. By contrast, a cap allows the prospective opponent to neutralize this strategy by simply spending less.

Second, a cap partially levels the playing field for self-represented litigants. Under the existing regime, self-represented litigants can receive costs even though they did not pay a lawyer, but only if and to the extent that they show that they “incurred an opportunity cost by forgoing remunerative activity”.<sup>86</sup> Presumably, if a self-represented litigant could not afford a lawyer, any remunerative activity which they forwent would have been worth less than the price of retaining a lawyer. Thus, under the existing rules, a costs award to a self-represented litigant will essentially always be for much less than a costs award against that litigant to a litigant with a lawyer. In other words, the costs regime pressures the poorer party to settle more than the wealthier party. One might imagine that, on average, this differential in pressure to settle pushes settlement amount to be less favourable to the poorer party. By contrast, a cap equalizes the pressure to settle.

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<sup>85</sup> Law Reform Commission of Saskatchewan, “Awards of Costs and Access to Justice” (2011) at 9, online: <<https://cfcj-fcjc.org/inventory-of-reforms/awards-of-costs-and-access-to-justice/>>.

<sup>86</sup> *Benarroch v Fred Tayara & Associates PC*, 2019 ONCA 228 at para 18.

Third, as mentioned above (IV.B.ii), a cap allows litigants to limit their own exposure to adverse costs, and if they do so, the risk of adverse costs becomes predictable and quantifiable. The prediction can then be factored perfectly into decisions on whether to sue, defend, or settle. One might imagine that making adverse costs concrete, and so increasing their salience, could prevent some unmeritorious litigation and shorten other cases.

Fourth, a cap makes it easy to define “reasonable” costs. Under the existing regime, courts examine bills of costs to identify days where a person has billed for more than 24 hours of work,<sup>87</sup> billed multiple times for the same work, or spent too much time on a given task.<sup>88</sup> That is time intensive. By contrast, a cap would be the level of reasonable costs – that is, any spending you do above what the other party spent is implicitly deemed unreasonable. That allows courts to avoid reviewing bills of costs at all, saving even more court time.

There is also one possible problem with introducing a cap: the losing party might lie about their actual expenses. One partial solution to this problem is that every party should be required to submit their bill of costs before the hearing, trial, or appeal in question. At that time, they do not know whether they will win or lose, so they should have less incentive to lie. Still, if a party thinks that they have a low chance of success, they might still have an incentive to lie. One would hope that professional obligations of lawyers would act as a check on lying to the court. If the deception is discovered, the Law Society of Ontario could sanction the lawyer. A fine could also be issued against either the lawyer or the client under the sixth proposed rule, described below. This is not a complete answer, but collectively these solutions should limit lying enough for the vast majority of parties to get the benefits of a cap.

### C. Proportional Recovery for Divided Success

The third proposed rule is an algorithm for apportioning costs in the case of divided success. Before getting into the algorithm, however, it is important to address what divided success means. After all, the number of ways that success can be divided are uncountable. For instance, they include winning on some claims or defences but not on others, winning on some terms of the order but not on others, winning a claim but losing a counterclaim or vice versa, winning on liability but losing on damages or vice versa, and winning against some parties but not against others.

To cover all of these possible examples, this article proposes the following definition:

As between two opposing parties, there has been divided success if:

- (1) they each pressed an argument that was accepted by the court; and
- (2) neither received all aspects of the disposition they were seeking.

There are three main parts to this definition. First, divided success is defined on a pairwise basis. For example, a plaintiff can be fully successful against one defendant, but only have divided success with another defendant. Second, each party must have made a successful argument. For example, if the court refuses to grant some relief sought by the plaintiff but for reasons not raised by the defendant, then the defendant did not do anything that should be rewarded in costs. Third, success must be reflected in the disposition. For example, if the court finds that a plaintiff was right on the law but wrong on all the facts, such that they have no claim, then the plaintiff has still lost outright. The fact that they wrote a correct commentary on the law is irrelevant to success.

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<sup>87</sup> *United States of America v Yemec*, 2007 CanLII 65619 (Ont Div Ct) at para 51.

<sup>88</sup> *Manning*, *supra* note 68 at para 15.

This definition may not be perfect in every situation. However, the purpose of defining divided success is not to perfectly capture the complexity of litigation outcomes. It is to set a rule that is clear and simple enough to avoid costs submissions, thereby reducing legal expenses and court time wasted. The definition above achieves both of those objectives, with one exception.

The definition above fits poorly with interveners, who often seek a result in the reasons for decision, rather than in the outcome. Based on the definition above, they cannot succeed without putting forward a disposition to be accepted, but they also cannot fail for lack of a disposition to be rejected. Meanwhile, if success was defined in terms of the degree to which their arguments were adopted in the reasons, it would cease to be a clear rule. Thus, in line with the existing regime, this article proposes that interveners should not pay or receive any costs for the intervention. However, they should still pay or receive costs on the motion for leave to intervene because success is easy to determine in that case. They should also be liable to paying fines under the sixth proposed rule, discussed below, with respect to either step of the proceeding.

Turning to the algorithm, it proceeds in three steps:

- (1) Split the case into pairwise relationships, including only the relationships where the parties disagreed on something;
  - (a) For pairwise relationships with divided success, go to (2).
  - (b) For pairwise relationships with no divided success, set a preliminary costs award in favour of the successful party equal to 100% of the successful party's actual costs, and go to (3).
- (2) For each relationship, determine whether one party was more successful than the other.
  - (a) If so, set a preliminary costs award in favour of the more successful party equal to 50% of the more successful party's actual costs, and go to (3).
  - (b) If not, set no costs award between the parties, and go to (3).
- (3) Once you have all of the pairwise preliminary costs awards, add them all up and determine whether any party is being ordered to pay more than they spent.
  - (a) If so, reduce all of the preliminary costs awards they owe proportionately until the sum of all costs awards they owe equals their actual expenses. The preliminary costs awards are now the final costs awards.
  - (b) If not, the preliminary costs awards are now the final costs awards.

This algorithm looks confusing in the abstract, so here is a simple numerical example to show just how easy it is to apply. A plaintiff ("P") sued five defendants ("D1", "D2", "D3", "D4", and "D5"). Every party spent \$100,000. P lost outright against D1, mostly lost against D2, had roughly even success against D3, mostly won against D4, and won outright against D5. None of the defendants sued each other, but rather they presented a united front against P. Note that, in this situation, the defendants collectively outspent the plaintiff 5:1.

At step (1), there are five pairwise relationships: (i) P vs. D1, (ii) P vs. D2, (iii) P vs. D3, (iv) P vs. D4, and (v) P vs. D5. Two of these relationships involved outright success: (i) and (v). Thus, there are two preliminary costs awards at this step:

P owes D1 \$100,000; and  
D5 owes P \$100,000.

At step (2), there are two pairwise relationships where one party succeeded more than the other party: (ii) and (iv). Thus, there are two preliminary costs awards at this step:

P owes D2 \$50,000;  
D4 owes P \$50,000;

At step (3), P is the only party who owes more than they spent (\$150,000 vs. \$100,000).

Thus, their total costs are reduced to \$100,000, broken up as \$66,666 to D1 and \$33,333 to D2. In the end, the final payouts are:

P receives \$50,000 more in costs than they pay in costs, defraying half of their litigation expenses – appropriate given that overall they won about half of their claims;  
D1 receives \$66,666, or roughly two-thirds of their litigation expenses – appropriate given that they won outright but the defendants collectively outspent the plaintiff significantly;  
D2 receives \$33,333, or roughly one-third of their litigation expenses – appropriate given that they mostly won but the defendants collectively outspent the plaintiff significantly;  
D3 neither receives nor pays any costs – appropriate given that they won and lost evenly;  
D4 pays \$50,000 in costs – appropriate given that they mostly lost and spent twice that;  
and  
D5 pays \$100,000 in costs – appropriate given that they lost outright and spent that much.

This algorithm eliminates the need for any party to ever make legal submissions on divided success. Once each party submits their bill of costs, and as long as it is clear whether any party won more than any opponent, costs can be calculated with mathematical precision.

Some may argue that this algorithm is a blunt tool. In effect, it can only set success rates at 0%, 50%, or 100%. By contrast, they might argue that under the existing regime, judges have – in rare cases - set more specific success rates,<sup>89</sup> which are arguably more responsive to the equities. However, in practice, when faced with divided success, courts almost invariably abdicate their role and order no costs.<sup>90</sup>

Thus, even though this algorithm is a blunt tool whose outcome may not be the best reflection of the equities of the case, the outcome may still be more responsive to the equities than the *de facto* existing regime. In any case, the benefits in reducing complexity, increasing predictability, and eliminating submissions on divided success more than outweigh the small minority of cases where the outcome is not perfect.

#### **D. No Costs Payable by Impecunious Parties**

The fourth proposed rule is a blanket exception to costs against impecunious parties, as long as their claim is not frivolous. Before explaining the value of this rule, it is important to clarify what impecuniosity means. As discussed above (III.A.iii), the need to prove impecuniosity is itself an access to justice barrier. Thus, it would be preferable to have a bright line rule. Unfortunately, it is not clear what the best bright line rule would be. Some candidate rules, in order of increasing wealth, include: (i) qualifying for legal aid; (ii) having income below Canada's official poverty line; or (iii) being self-represented, excluding those whose counsel sought to be removed from the record. Each of these is relatively easy and cheap to prove, so any would be a good rule.

<sup>89</sup> See *Shelley v Shelley*, 2009 CanLII 23879 at para 5; *Gioia v Bissallion*, 2011 ONCJ 716 at paras 29-30.

<sup>90</sup> See e.g. *Balogun v Deloitte & Touche, LLP*, 2013 ONCA 592 at para 3.



Regardless of which bright-line rule is chosen, the benefit of the rule is that it eliminates a barrier to access to justice for the poorest members of society. Specifically, there is a risk under the existing regime that the wealthier defendant will move for security for costs. If the wealthier party succeeded, the impecunious party would fail to pay, the wealthier party would bring a motion, and the claim would be stricken.<sup>91</sup> In short, the impecunious party would have lost their day in court merely because they were too poor to post security for costs, even if they had a meritorious claim such that they would never owe costs.

The drawback of this rule is that it denies wealthier – but not necessarily wealthy – litigants of costs, even when they have a meritorious defence. The exception to frivolous claimants partially addresses this issue, but that is not a full answer. A more complete answer is that a wealthier defendant would never have recovered in any event. By definition, these plaintiffs could not have paid a costs award. In practice, there is no meaningful difference between having a costs award you cannot enforce and not having a costs award, except that the prior required costs submissions.

The fact that this is a basis for adopting an exception for impecuniosity may feed back into deciding which threshold to use. You want the highest line (biggest access to justice benefit) such that everyone under that line is judgment proof (smallest cost to opposing parties). Where that threshold lies is an empirical question beyond the scope of this article, but if we could find that line, it would be optimal. Impecuniosity would never be a basis for losing one's day in court, while defendants would not lose any right that they could have actually enforced.

### **E. One-Way Costs in Public Interest Cases**

The fifth proposed rule is a blanket exception to costs against parties bringing public interest cases. Before explaining the value of this rule, it is important to clarify what constitutes a public interest case. As mentioned above (II.A.iv), the current threshold is so complex – depending on more than a dozen factors – that it requires costs submissions, and so high that it is rarely met. For a public interest exception to meaningfully advance access to justice, both of these problems would have to be resolved. To that end, this article proposes the following definition:

A public interest case is one:

- (1) which is not frivolous; and
- (2) whose resolution will significantly clarify:
  - (a) the rights of an individual against the state;
  - (b) the obligations of an individual to the state; or
  - (c) the meaning of any public law terms in legislation.

This definition removes several limitations in the existing regime because none of the reasons for having a public interest exception – described below – depend on these limitations. First, the issue must only be unsettled, not novel, because it is the fact that the law is unsettled that makes it valuable to litigate. Second, the plaintiff does not need to prove that they have no pecuniary interest, or sufficient demonstrated interest, because these cases should be litigated regardless of the identity of the plaintiff. Third, and for the same reason, the plaintiff need not prove that there is no person better suited to bringing the claim.

Still, this definition has three significant restrictions. First, the case must have a reasonable chance of success. Without this restriction, bald allegations of state misconduct could be included in pleadings to

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<sup>91</sup> *Rules, supra* note 2, r 56.06.

avoid costs. Second, resolution of the case must “significantly” clarify the law. If the claim only seeks a minor clarification of the law, or the court disposes of the case on the facts, then there is limited to no public benefit in having litigated the case. Third, it is limited to specific subject matters that implicitly limit the definition to claims against government bodies and actors.

There are strong reasons for extending the definition to claims against other powerful entities in society, like financial institutions or multinational corporations. Their decisions often affect the public at least as significantly as government decisions. Like governments, these entities also have significant power imbalances relative to individual litigants, and seemingly inexhaustible capacity to spend on legal services, at least compared to the individual litigant. However, the two primary benefits of public interest litigation only apply to government defendants.

First, eliminating adverse costs for public interest litigation allows individuals to challenge abuses of government power without the implicit threat of punishment in costs. It incentivizes parties to maintain suits through to a decision on the merits, creating precedents that help others understand their rights in the face of state power, and preventing future litigation on these issues.

This rationale for a one-way costs rule has a long pedigree in costs reform proposals in Canada. It was first proposed in the 1974 Report of the Ontario Task Force on Legal Aid, adopted in the 1989 Report on Standing of the Ontario Law Reform Commission, and supported by articles by half a dozen academics.<sup>92</sup> Some form of this rule is also in use in the United States, the United Kingdom, Australia, New Zealand, and South Africa.<sup>93</sup> The fact that this rule is used in many jurisdictions for this reason suggests that there is a broad consensus that costs awards should be used to enable individuals to challenge abuses of government power.

Second, the government has the burden of ensuring that laws it creates are clear, especially those which affect the rights and obligations of individuals with respect to the state. Just as it has the obligation to fund the salaries of judges and the operations of courts, it should bear the costs of litigation that clarifies public law when there is an arguable case that its position is wrong. In particular, if a case satisfies part (2) of the definition above, then it is either a constitutional issue or there is a law that the government can rewrite to resolve the ambiguity, even after the claim is filed. If the government chooses not to clarify the law, then it should be responsible for the consequences of that decision, namely litigation to resolve the ambiguity.

This explanation pre-empts the counterargument that government would be forced to spend more on litigation. Courts have debated at length when it is appropriate to force the government to spend public funds, even to vindicate constitutional rights.<sup>94</sup> Why should we prioritize holding harmless plaintiffs who lose public interest cases over any other use of public funds? The fact that the government has an obligation to clarify the law is one good reason. There are two others.

First, the rule of law – or at least the perception thereof – is a public good fundamental to the success of the state. If citizens cannot afford the risk of an adverse costs award, and therefore do not sue on perceived abuses, an impression might develop that the government is above the law. It may also be seen

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<sup>92</sup> Tollefson, Gilliland & DeMarco, *supra* note 39 at 484-487; Tollefson, *supra* note 38; Twigg, *supra* note 38 at 215; Friedlander, *supra* note 10 at 102.

<sup>93</sup> Tollefson, *supra* note 38 (United States at 184; United Kingdom at 197); Twigg, *supra* note 38 at (United Kingdom at 197); Tollefson, Gilliland & DeMarco, *supra* note 39 at (Australia at 501-504, New Zealand at 504-505; South Africa at 505-506).

<sup>94</sup> See generally Micah B Rankin, “The Improbable Rise and Fall of *Auckland Harbour Board v The King*” (2019) 97 Can Bar Rev 43, 2019 CanLIIDocs 1598. Note that the prohibition in *Auckland Harbour* is not engaged for two reasons: (1) this rule does not require the government to “spend” anything new – it simply prevents the government from recovering money it had authority to spend; and (2) it would be implemented by amendments to legislation, such that the government authorized the expenditure.

as implicit permission for the government to engage in small-scale abuses of power. Immunization from adverse costs counters that impression and incentive.

Second, the government can change the rule if necessary. If taxpayers strongly believe that the government should receive costs in certain types of proceedings, say in proceedings under a particular statute, then the legislature could amend that statute to eliminate the public interest exception in that case. At least in that case the government would have to explain, on the record in Hansard, why it wants to make it harder to challenge its own alleged abuses of power.

#### **F. Discretionary Fines for Misconduct**

The sixth proposed rule takes the costs as regulation model and spins it off into a separate power for the court to issue fines for misconduct in court. The fines would cover the same types of misconduct that are penalized under the existing regime (see IV.A.ii above). In practice, there would be four differences between this rule and the analogous rules in the existing regime.

First, the fine would be levied against the person most responsible for the misconduct. For instance, fines for lying to the court would be levied against the lawyer personally unless they had specific instructions from their client to do so. This improves accountability.

Second, the fine would be itemized. For instance, if a lawyer lied to the court and abused witnesses on cross-examination, and the client brought unnecessary motions to financially exhaust the opposing party into settling, there would be three separate fines. This improves transparency.

Third, the magnitude of the fine would not be tied to the amount of legal expenses incurred by the opposing party. This allows the court to consider principles of proportionality.

Some might argue that this flexibility will make fines less predictable than the existing costs regime, or that this article's proposal as a whole merely moves the uncertainty from setting costs to setting fines. There are two good responses to this. First, misconduct does not occur in the vast majority of cases, so even if the magnitude of fines remained as uncertain as the magnitude of costs currently is, uncertainty would be eliminated in most cases. Second, since the fines will be itemized, courts will develop a consistent range of fines for each type of misconduct. It may take a few years of uncertainty for the magnitude of fines for each type of misconduct to converge, but at least there is a mechanism for that to happen, unlike under the existing costs regime.

Fourth, the fines would be paid to whoever was harmed most by the misconduct. If the misconduct occurred entirely in the courtroom – such as lying to the court or abusing witnesses – then the fine would be paid to the court. If the misconduct occurred entirely out of court – such as sending excessive documentary production to financially drain an opposing party – then the fine would be paid to the opposing party. If the misconduct harmed both the court and the opposing party – such as bringing frivolous or vexatious motions – then the fine would be paid to the court. This limits the risk of overcompensating the opposing party and partially compensates for the problem of government spending more on litigation overall due to the fifth proposed rule.

Collectively, these six proposed rules would radically simplify the law of costs in Ontario. As compared with the existing regime, the proposed rules would fit better with the doctrinal purposes of costs described in Part II, advance access to justice more and better satisfy the principled purposes of costs described in Part III, and eliminate the need for costs submissions in almost every case, better achieving the practical purposes of costs described in Part IV. Thus, the proposed rules would be preferable to the existing regime. Still, that does not necessarily make the proposed rules the best regime. Thus, alternative proposals are considered below, in Part VI.

## VI. ALTERNATIVE PROPOSALS

This part summarizes two alternative proposals to reform the costs regime to advance access to justice. Section A considers Erik Knutsen's proposal to eliminate costs for "everyday litigants". It shows that some parts of his proposal are incorporated into the cap and public interest exception proposed in Part IV. Section B considers contingency fee agreements. It shows that the proposed rules can encourage lawyers to gradually start using more contingency fee agreements, and that the proposed rules can be modified to work with these agreements.

### A. No Costs

Knutsen proposed a reform to the costs regime under which plaintiffs would never have to pay costs, but would receive costs unless the defendant is a non-isolated litigant, i.e. someone who will face serious financial consequences from a large costs award because they are not insulated by wealth or insurance. He argues that this proposal would reduce the uncertainty associated with costs and allow parties to make more meritorious claims and defences. Meanwhile, he accepts that this proposal requires an additional procedural step at the beginning of litigation to determine whether each party is an isolated party, and an ongoing duty on defendants to inform the court if their status changes.<sup>95</sup>

With respect to certainty, Knutsen's proposal might partially succeed for plaintiffs, but the existing uncertainty would remain when plaintiffs win. It also creates uncertainty with respect to which parties count as isolated. The proposal in this article makes costs rules at least as certain.

With respect to encouraging meritorious claims, Knutsen's proposal eliminates the risk of adverse costs for plaintiffs and non-isolated defendants, which is a real barrier to some meritorious claims and defences. However, the proposal can also be weaponized by isolated plaintiffs. For instance, wealthy individuals or corporations may start suing for defamation more frequently. The defendant would know that they cannot get costs to offset their legal expenses, so they might be forced to settle. Admittedly, Knutsen may have intended that his proposal would not affect the rules relating to costs in defamation cases,<sup>96</sup> but even if defamation is excluded, smart lawyers could surely find other causes of action.

A better form of Knutsen's proposal would be to only exempt isolated parties – plaintiffs or defendants – from adverse costs. That might increase the number of meritorious claims and defences brought by isolated parties. But it might not. How many parties believe in their case enough to pay their own lawyer tens of thousands of dollars, but would not be willing to bring the same claim or defence if they also had to pay a smaller amount in costs if they lost? The empirical data and economic theory described above (III.A.i) suggests that the answer might be, "not many".

Nevertheless, Knutsen provides an important insight when he argues that uncertainty about the potential magnitude of adverse costs might itself be a deterrent to making meritorious claims and defences.<sup>97</sup> To the extent that uncertainty – rather than risk – is preventing parties from bringing meritorious claims and defences, the cap proposed in this article addresses that concern.

Additionally, the public interest exception proposed in this article is effectively the same as Knutsen's proposal in that context. Those are the cases that are most important for courts to have a decision on the merits for, so even a marginal increase in cases is worth it.

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<sup>95</sup> Erik S Knutsen, "The Costs of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36 Queen's LJ 113 at 130-131, 152-156.

<sup>96</sup> See *CoJA*, *supra* note 1, s 137.1.

<sup>97</sup> Knutsen, *supra* note 95 at 118-119.

Finally, even if Knutsen is correct about the effects of his proposal, there are two reasons to prefer the proposal in this article. First, it gives effect to all of the doctrinal bases for costs rules described above (I.A and I.C), whereas Knutsen's proposal reverses them entirely. Second, it creates a possibility that some lawyers will take on clearly meritorious cases in exchange for the costs award, helping litigants too poor to afford a lawyer now but not so poor as to qualify for legal aid. By contrast, Knutsen's proposal only benefits those wealthy enough to be able to pay a lawyer, which is, sadly, an ever-shrinking part of the population.

In short, Knutsen's proposal would probably advance access to justice for non-isolated litigants as compared with the existing regime. The proposal in this article may not be as favourable to that demographic. But it is arguably better for everyone else.

## **B. Contingency Fee Agreements**

Law reformers in Ontario have proposed shifting away from the billable hour since at least 1911. Ontario courts have repeatedly recognized the problems of the billable hour, such as encouraging excessive work, discouraging efficiency, and creating a conflict of interest between lawyers and clients.<sup>98</sup> The obvious alternative is a contingency fee agreement, pursuant to which the client pays the lawyer nothing unless and until they win a judgment or settlement, at which point they pay the lawyer a fraction of the amount recovered. Not only does this model avoid all of the problems of the billable hour, but also it allows plaintiffs with potentially meritorious claims to sue even if they cannot afford the retainer they would usually have to pay under a billable model.

The proposal in this article can facilitate a transition away from the billable hour by creating an intermediate step to get lawyers comfortable with contingency. As mentioned above (II.B.i), the prospect of full indemnity should incentivize at least some lawyers to accept a fee structure whereby they are simply paid the costs award if they win.<sup>99</sup> This is technically a contingency fee agreement, allowing lawyers to get comfortable with only being paid if and when their client recovers, but it is still based on the billable hour. Once lawyers are comfortable with this intermediate step, they should realize that a full contingency agreement – in which they are paid a percentage of the recovery – can be much more profitable. In effect, the proposal in this article makes it financially viable for lawyers to take a first step towards contingency on the faith that they will be fully compensated for their billable hours, and once they have taken that step, it should be much easier for them to feel comfortable abandoning the billable hour.

That still leaves the question of how costs would be assessed in the presence of contingency fee agreements structured other than on a billable hour model. This is easy to determine after trial if the party with the contingency fee agreement (“A”) wins: costs would be set to the percentage of the recovery which the lawyers would get under the contingency fee agreement. But if an opposing party who does not have a contingency fee agreement (“B”) wins, A has no obligation to pay their lawyer. Should that mean that the cap is \$0, denying B all costs? Also, what happens after a pre-trial motion? A has no obligation to pay their lawyer yet. Does that mean they had no actual expenses on the motion? Should this deny A costs for the motion if A wins? Due to the cap, should this also deny B costs for the motion if B wins? There is no perfect answer to these questions, so instead this article proposes a simple solution that is good enough:

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<sup>98</sup> *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para 36; *Savin v Granite Club*, 2016 ONSC 4671 at para 11; *Waywell v Waywell*, 2004 CanLII 7577 (Ont Sup Ct) at para 6; *Empire Communities Ltd and Her Majesty the Queen in Right of Ontario*, 2015 ONSC 5183 at para 12. See also *RGM v LG*, 2020 NLMA 1 at para 43; *A Taxation*, 2016 NSSM 44 at para 29.

<sup>99</sup> Note that this is currently prohibited by sections 28.1(8)-(9) of the *Solicitors Act*, RSO 1990, c S.15 [*Solicitor's Act*]. However, those provisions are set to be repealed on July 1, 2021.

If any party has a contingency fee agreement:

- (1) all costs should be in the cause;
- (2) for the purpose of the cap, A's "actual expenses" should be deemed to be the amount they would have to pay their lawyer if they got the full amount they sought in their pleadings; and
- (3) for the purpose of divided success, courts should consider not only the result at trial but also the results on pre-trial motions.

## VII. CONCLUSION

This article has shown that the existing costs regime, founded on partial indemnity, is sub-optimal as a matter of doctrine (Part II), principle (Part III), and practice (Part IV). There is a clearly superior alternative on all three counts. As compared with the existing regime, the proposed rules improve access to courts for meritorious, poor, and public interest litigants, make the law simpler and more predictable, and speed up the court system for everyone (Part V). There are alternative proposals for costs reform, but the most important features of those proposals can be incorporated into the proposal presented in this article (Part VI).

However, the proposed rules are not a panacea. They will not give every Ontarian the ability to pursue civil litigation. Even if they did, access to courts is not synonymous with access to justice. No costs regime will fix the inequalities that underlie society's biggest injustices.<sup>100</sup> But at least the proposed rules ensure that, in the small fraction of cases that get litigated to a judgment, the court is able to provide a just result. Full indemnity to the party in the right signals that we will not be satisfied with a system of incomplete justice. We have a long way to go to reach true justice, and eliminating partial indemnity is one small step along that path.

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<sup>100</sup> See generally Sealy-Harrington, *supra* note 44.