

CIVIL PROCEDURE

The civil justice system: If it ain't broke, don't fix it—but is it broke?

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Is the civil justice system broken? Given the extra time many of us have on our hands these days, compliments of COVID-19, I have come across some articles commenting on the problems of access to justice.

Common themes are that it is adversarial, not affordable, mired in procedural rules, and above all, it takes years to get your day in court. Is this anything new or unexpected?

I started my civil litigation practice back in the mid-1970s, and I recall the complaints were the same. I would tell clients my hourly rate was \$50 per hour, and some would hem and haw. I thought it was reasonable, saying that inflation was high: citing the examples of having to pay \$3,000 for my new first car, a Plymouth Duster; 50 cents per gallon for gas; and a recent increase to 19 cents for a single scoop of Baskin-Robbins

ice cream. They still hemmed and hawed.

As for getting your day in court, the 1970s here in Canada did not yet see pretrial/resolution conferences or alternate dispute resolution processes such as mediation. This meant that many more cases went to trial. The silver lining in the cloud was that the lawyers got trial experience. The rest of the cloud, however, meant the clients had to wait for ages until the lawyers got to enjoy that silver lining. At my initial meeting on a personal injury case, I would point out the window to an old maple tree, saying to my client, "Those leaves will fall off and regrow and fall off and regrow a few times before your case ever gets to trial."

Although I thought all along the clients appreciated my candor, I now realize it may have rattled them a bit. I know my own patience is quite finite; I get annoyed when I bring home an avocado that is hard like a rock and I have to wait three to four days for it to ripen. I am definitely more emphatic with my former clients now.

The problems, of course, are only confined to the civil justice system per se, which does or should not include solicitors' corporate/commercial work. I have yet to see a client saying, "I needed a will. I had to wait three days to see my lawyer and another week or so until it was completed. The justice system is in shambles."

What does this tell us? Maybe the problem is that we are too litigious. Is the multitude of lawyers part of the problem? The province of Ontario, where I live—with a population of more than 14 million— has about 55,000 lawyers. That’s one lawyer for every 254.5 people. (I guess two of those halves with a similar issue have to get together and see the same lawyer.)

Japan, with a population of more than 126 million has approximately 40,000 lawyers. That’s one lawyer or “bengoshi” for every 3,150 people. (Even number!)

I cannot speculate why this is, but from my deep research (Wikipedia), it seems there is a cultural aversion in Japan to resolving disputes via lawsuits. Historically, Japanese customs instituted an avoidance of legal involvement as it disrupted harmony.

I can attest to this theory 100%: I got sued once, and when the process server handed me the claim, it certainly disrupted my previous harmonious state.

I also note that Japan has more than 60,000 people over the age of 100. Okinawa, with its many fishing villages, has the highest concentration of centenarians in the world. Could it be that many lawyers or would-be lawyers decide on forgoing a legal career and choose a shot at longevity, opting for a career of catching mahi-mahi? I will admit that while in practice, this theory never crossed my mind.

Speaking of longevity, what are some of the notable causes of delays in getting a case to court?

I doubt there is any one responsible culprit. A shortage of judges? A lack court space? Maybe. I would point the finger firstly at procedural hurdles. One such hurdle is the jury system for civil cases. I know it is a time-guarded tradition going back to the Dark Ages, but it does eat up time. Imagine something similar in medicine, where 12 lay people take a seat in the operating room and provide directions to the surgeon. I would sooner see doctors resorting to leeches.

Then there are other procedural wrangles that burn time. I am not talking necessarily about the court registrar opening the session with the call of “Oyez, oyez, oyez.” I am not sure the public is impressed generally with displays of pomp and tradition, such as judges and lawyers in many jurisdictions wearing robes or wigs, nor would it help much if they cut it down to one oyez.

I am talking about the lengthy delays suffered in moving a case forward, given the rules of discovery, depositions, interrogatories, production of documents, etc. You just hope opposing counsel will comply with the rules and disclose. But if they decide to play hardball, we are left with the costly alternative of bringing motions for disclosure. And often, win or lose, the adversarial element rears its nasty head and the parties become more polarized. This gets me back to Japan.

I note there is no automatic right there to disclosure. If you really need some information, you have to ask the court to order the opposing party to disclose it. However, I would think it would be difficult to ask for something you may not know exists.

Of interest also is that there is no provision for the courts to award the successful side compensation for their lawyer’s fees. This gap in jurisdiction might certainly discourage that fishing expedition (the proverbial one, not the one for mahi-mahi).

Another problem in our system might be the frivolous case. These are numerous, and they must impact the court resources. I recall one by a prison inmate in New York state who sued because his ice cream had melted. He claimed this was “cruel and unusual punishment.” I can say I was a victim of this unfortunate event, too, as it happened to my 19-cent cone. However, I did not resort to the courts. I bore the punishment stoically.

There was also that case where a customer sued a dry cleaner in Washington, D.C., for \$54 million following the disappearance of his pair of pants. Fortunately for the dry cleaner, the action was dismissed. But I am sure the case must have thrown off his harmony.

How do we control these types of bizarre cases? It's hard to say.

With COVID-19, we have seen the courts resorting to technology to keep matters moving somewhat. With the help of Zoom and similar zooms, parties are conducting mediations, discoveries and even court motions. Our highest court in the land, the Supreme Court of Canada, has recently started to conduct virtual hearings. As the Chief Justice Richard Wagner cautioned, "Nothing is perfect the first time." He was right on. There were hitches and glitches, such as images freezing, voices going mute and occasionally, the background image of the ornate courtroom gave way to a glimpse or two of the judge's real backgrounds.

I suppose given that everyone was likely at home, they could be a bit discretionary about their attire, especially if they are behind a desk. It reminds me of that Groucho Marx character's comment in the movie *Duck Soup*, where he discusses military strategies, saying something like, "Dig the trenches big enough, the soldiers won't need pants." That is almost a line that dry cleaner might have used in defense of that lawsuit.

I do not recommend during a virtual hearing that anybody ever ask a judge for disclosure about that one.

Will increased use of technology help the situation? It might here and there. It will certainly cut down on travel time. All we can say is, it's a good start. And maybe the courts can even make the system catch frivolous cases and toss them out. Perhaps a robot can identify them, noting, "No pants, no case."

And so, is the system broke? It ain't perfect. But as my favorite philosopher, Yogi Berra, said, "If the world were perfect, it wouldn't be."

Marcel Strigberger, after 40-plus years of practicing civil litigation, closed his law office and decided to continue to pursue his writing and speaking passions. Read more of Strigberger's work at marcelshumour.com.

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