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The Procedural Evolution of Conflict towards Litigation and Implications for Legal Publishers

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February 2010**

This paper will summarise three topics found repetitively in the research of Professor Marc Galanter, namely –

- The pyramids of conflict
- The decline of “full-blown” trials
- The increase of “law”

The goal is to promote brainstorming about the consequences of these analyses for legal publishers.

The pyramids of conflict

- Injuries and Unperceived Harm
- Naming
- Blaming
- Claiming
- Disputes: claim denied
- Managing disputes informally in “many rooms”
- Involving lawyers as advisors and negotiators
- “Filing” (claiming) in a court
- Post-filing settlement pressures
- Judicial Decisions on paper
- Post judgment conflict

Conclusion and key questions

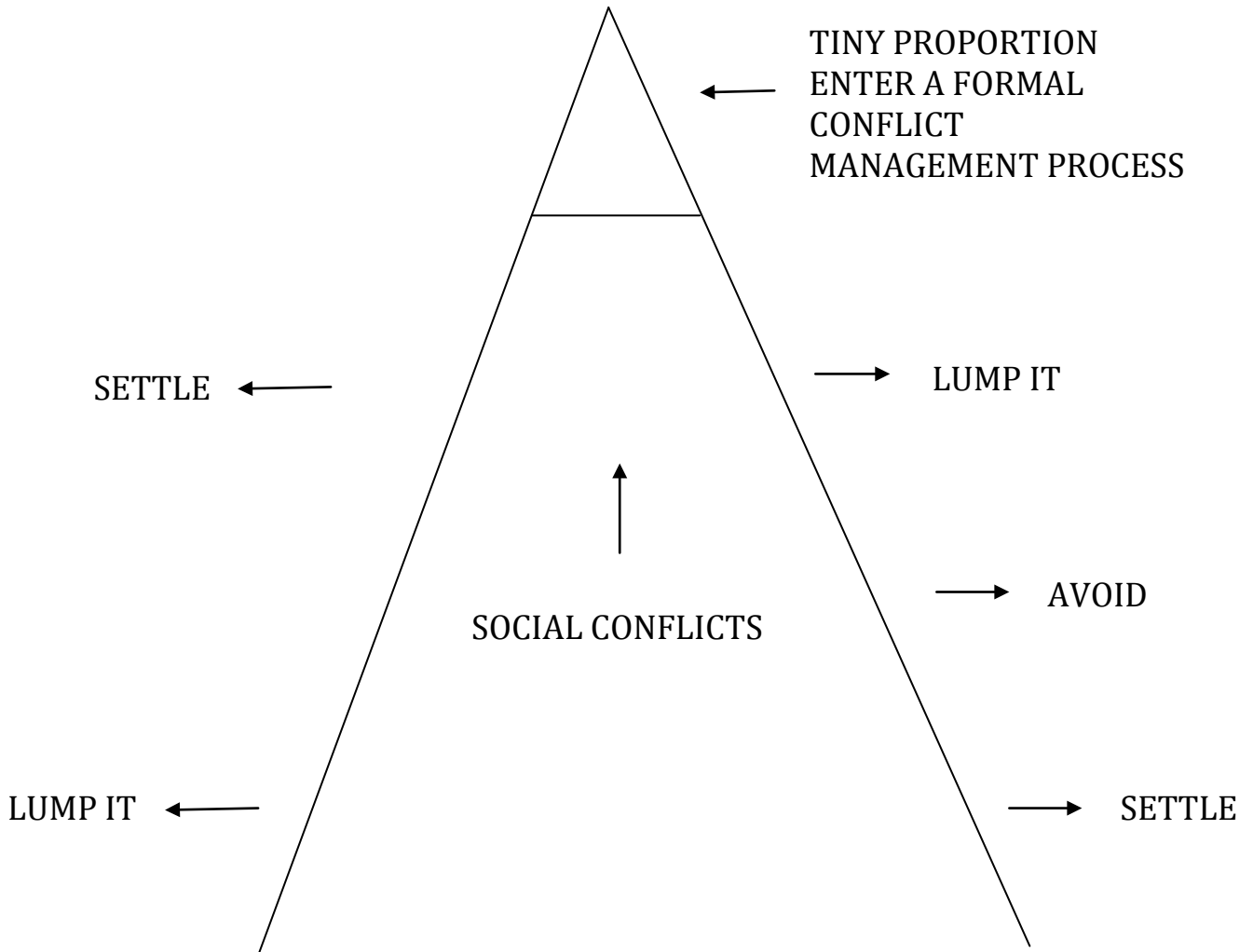
The pyramids of conflict

(To repeat, these reflections are based substantially upon the inspirational work of Marc Galanter).

A repetitive diagrammatic model used in the conflict management industry is the pyramid. The writer has found this diagram useful for many purposes, including to demonstrate that we as lawyers “own” so little of the conflict management industry. It is similar to brain surgeons realising that they touch only a tiny fragment of the many existing health industries. With other more confident lawyers, this diagram has proved to be educationally useless!

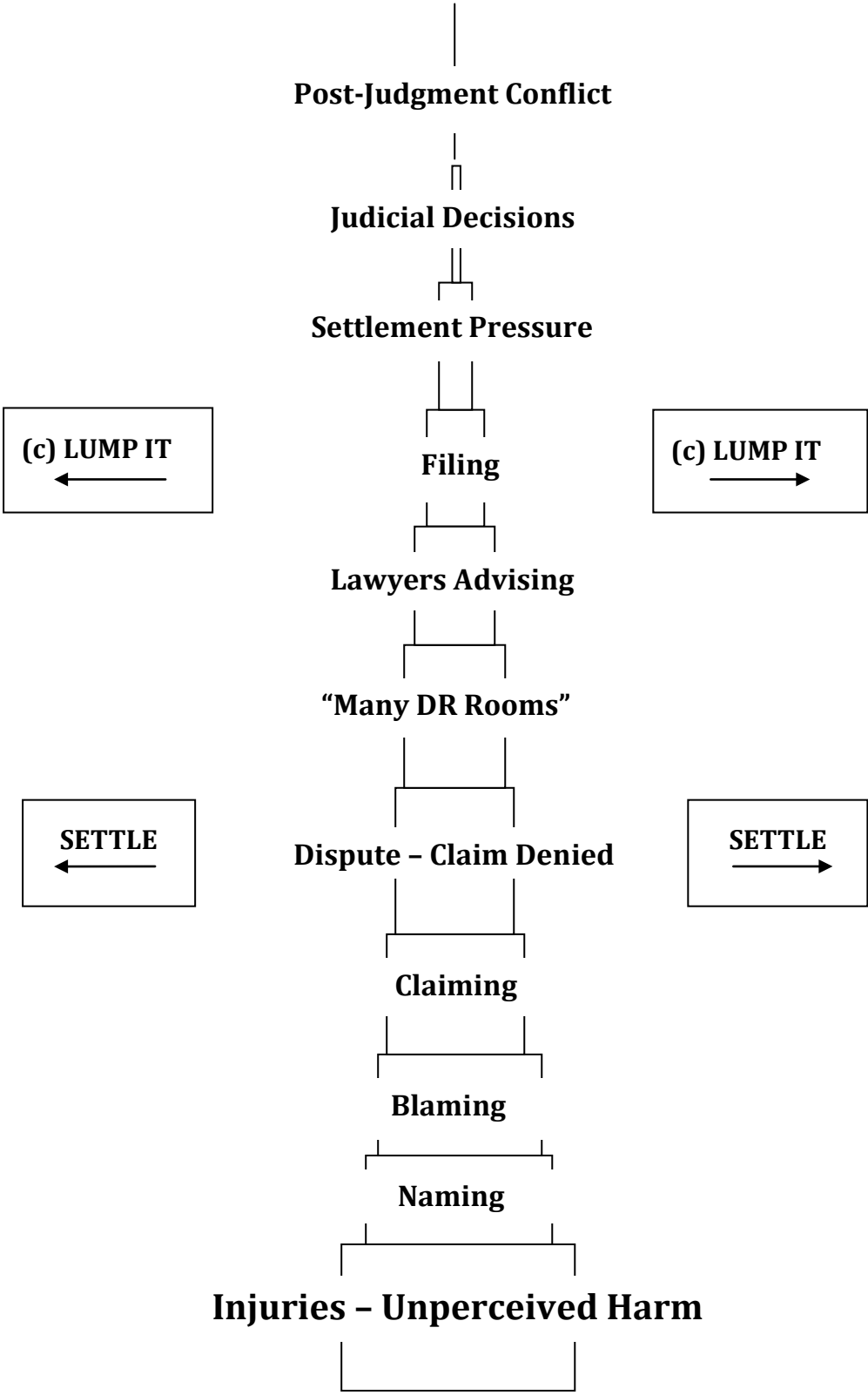
This **procedural** evolution of conflict can be distinguished from the overlapping helpful studies of **psychological** and **systemic** transformation of conflict.¹

Figure 1 - Pyramid of Conflict I



¹ eg D G Pruitt and S H Kim, *Social Conflict* (NY: McGraw-Hill 2004).

Figure 2 – Procedural Pyramid of Conflict II



Injuries and unperceived harm

The base of the pyramid represents the vast number of objective “injuries” to health and welfare which occur in any society – for example, falling on the pavement; being frequently criticized by parents or teachers; cruelty to animals; eating an excess of fatty foods; governments hiding personal information about citizens; physical assaults outside pubs; gender discrimination; working obsessively; date rape etc.

These objective injuries are often **unperceived** “harm” as within different **cultures** at different **times** of history such injuries are subjectively considered to be “normal”, or even “helpful”, or stoically just part of the slings and arrows of fickle fortune (eg overwork; overeating; low pay; secret government records; racial discrimination; fist fights; sexual assault; domestic violence; asbestosis etc).

Naming

As any unperceived injury becomes labelled in a particular culture as “wrong”, or reflects an individually or culturally disappointed expectation, then it climbs the pyramid with a new name which indicates fault rather than stoicism – for example “exploitation”; “discrimination”; “sexual assault”; “negligence”.

“TRANSLATE” THESE NEUTRAL OR UNPERCEIVED INJURY PHRASES INTO PERCEIVED INJURY LANGUAGE (OR GRIEVANCE LANGUAGE)

| “MERELY”: | —————> | BECOMES: |
|------------------------|--------|--------------------------|
| UNPERCEIVED INJURY | —————> | “NAMED” PERCEIVED INJURY |
| eg | | |
| SEXUAL HUMOUR | —————> | |
| AVOIDING NEIGHBOURS | —————> | |
| LOGGING | —————> | |
| SALESMANSHIP | —————> | |
| EXAGGERATION | —————> | |
| PUBLICITY | —————> | |
| POVERTY | —————> | |
| DOMESTIC TIFF | —————> | |
| CURRENT INTEREST RATES | —————> | |
| SPANKING | —————> | |
| BUILDING DELAYS | —————> | |
| ABORIGINAL SUICIDE | —————> | |
| REMEDIAL SURGERY | —————> | |

This second stage of the evolution of certain conflicts has been called “**naming**”.² Even when injuries are “named”, the majority of disappointed people give up (“lump it”).

Blaming

Some conflicts go on to a third stage called “**blaming**”. Thereby a particular individual, corporation or government is blamed for the named injury. For example, my poor reading skills are blamed on the education department; or my grade two English teacher; or my parents; or a television obsessed society; or a bit of each. Or the low wages of mine workers in India are blamed on greedy mine owners; oppressive western corporations; or the Indian government; or a bit of each.

Personality type also influences this step in the ladder of conflict transformation – neurotics tend to blame self; sociopaths tend to blame others.

Again, as certain types of conflicts “climb” the pyramid in their millions, greater numbers “drop out” (“lump it”) and no remedy is sought.

Claiming

The further conceptual and real level of the transformation of conflict (beyond unperceived injury, naming, and blaming), is when some allegedly injured or harmed individuals “**claim**” a remedy from someone. “I want a new toaster”; “I want higher wages”; “I want freedom from fear of violence”; “I want a refund for my poor education”; “I want an apology” etc. “Claims” can be made by a phone call to a complaints department; by writing a letter or email to an insurance company; or informally during a conversation over coffee.

At this initial claiming stage, lawyers are rarely involved. Yet millions of such claims are made each day in Australia and elsewhere, at diverse rates, in different areas of conflict, based on different education levels of citizens, and upon the cultural normalcy of “claims”. For example, it is “normal” in Australia to claim a replacement or repair of a defective TV from a department store; it is not (yet) normal to claim a refund from a university for a poorly organised course; or (yet?) to claim damages or sterilisation of a parent for failing to praise and encourage a child; or in a colonial society, for a native farm worker to claim arrears of wages against an employer after years of working for a subsistence living. Compare the emerging claims for wages by thousands of underpaid Aboriginal stockmen and female servants against state and federal governments.

In each area of conflict, and in different cultures, there are different proportions of articulated claims which are quickly addressed and settled. For example, large department stores in western cultures probably settle the vast majority of prompt post-purchase consumer complaints about allegedly defective products. Thereby, these settled claims slip out of the pyramid of conflict.

Disputes – claim denied

At a fifth and “higher” level in the pyramid, once an initial claim is refused, it becomes a dispute. A dispute or conflict can be broadly described as the actual or perceived

² R E Miller and A Sarat, “Grievances, Claims and Disputes: Assessing the Adversary Culture” (1980-81) 15 *Law and Society Rev* 525.

competition of interests. Once a claim is refused, the dispute will normally have some element of publicity.

In many areas of conflict, the pyramid narrows dramatically soon after the dispute stage. Why? This is because the majority of disappointed claimants give up (in the words of Galanter, “clump it”), with a degree of resignation or bitterness. “It is not worth the trouble”; “Insurers will just wear you down”; “I would have to hire a lawyer to take it any further”; “I do not want to become known as a troublemaker etc.”

Payback or resurrected conflict may emerge on some later day, or in another transaction.

At this initial dispute stage, it is still statistically rare for any of the disputants to consult a lawyer. This is still a relatively lawyer-free zone.

Using what criteria or “rules” are the millions of daily claims denied or settled?

What are the precedents for denial or deals? Sometimes market pragmatism prevails (“the customer is always right”); versus the ubiquitous avoidance of floodgate (“If I gave you an extra mark, every student would appeal”; “If we gave you stress leave, there would be a flood of applications”). Sometimes data error is quickly admitted (“Apologies. We made a mistake”) versus data error is quickly asserted (“You don’t have your facts straight”; “That is not what happened”; “My employees/soldiers/doctors do not act that way”; “Where is the evidence to support such a claim?” etc)

These initial bargains in the shadow of the “law”, reflect pragmatic “laws” of power, goals and risks, which are arguably only shadows of those found in legislation and cases at the peak of the pyramid.

Managing disputes informally in “many rooms”

At the next stage, the ongoing “disputes” scatter into “many rooms” (again, Galanter’s phrase) for informal negotiation, mediation or perhaps forms of adjudication (Galanter labels these as “justice in many rooms”). These “many rooms” are usually still lawyer-free, though a predictable “lawyer-as-hovering-coach” and/or “lawyer as dormant-bad-cop” may become visible in some rooms. Thus conflicts in universities are sent to mediation, and then to a senate committee; in the armed forces, to disciplinary boards or to mediation; between employees to the HR department; in sporting clubs, to the coach and then the management committee; in large industry and government services (electricity, water, police, telephone etc) to a “complaints department” or ombudsperson; in some homes, to a grandmother for advice or rulings; in many industries, to the troubleshooting person who has a patient listening ear; in many professions, to a formal list of wise elders or paid counsellors who provide confidential direction, and charismatic clout; in tenancy and child support conflicts, to a troubleshooting hotline; and elsewhere sometimes to a boss who declares “sort it out between you, or else I will impose an arbitrary and probably unwise decision for you”.

Some of these “informal” dispute management processes have evolved in the search for efficiency; others have been imposed by legislative or industry fiat.

Again, the dispute management activity in these many informal venues dwarfs the tiny residue of conflicts which finally may reach a traditional lawyer’s office. This area is a marketer’s dream. Predictably, there is creeping due process, formalism, delay and expense which move into each of these “many rooms”. However, other new informal

alleyways and doors quickly open if the due process becomes “undue” or “clumsy” (which it usually does).

The obvious question arises yet again – what rules or “law” of process and substance are being applied in each of these “many” informal venues?

The number of conflicts which are not settled or abandoned after this plethora of activity and hurdles is rapidly diminishing. Each pattern of diminution, drop out and survival offers a statistician’s delight. Among the conflicted survivors, someone will usually phone a lawyer, at least for some quick and cheap advice.

Involving lawyers as advisors and negotiators

The seventh stage of the evolution of the surviving conflicts involves the employment of one or more lawyers, initially as “**advice-givers**”. Of course, lawyers may have already been consulted, given advice and appeared as advocate representatives in the informal “many rooms” discussed previously. That is, the stages may overlap, or choose another sequence.

A lawyer standardly goes through a cyclical process which causes over 99% of his/her clients to **abandon** the dispute, or **settle**. The cyclical process is data-collection, advice, naming-blaming-claiming (again), and often negotiation via email, letters, phone calls, or face-to-face meetings. This cycle may take one appointment, or hundreds, before the client exits the pyramid to settlement or “lumping” the dispute.

Again, it is a fascinating question to ask – what “advice” do public and private lawyers in different areas of conflict and culture give to their clients during this cycle of activity? What is the “law of the law-office”? This is arguably far more important law than the law of the judges or of parliament. That is because the “law of the law-office” is effectively deterring over 99% of clients from taking their disputes to a full-blown trial.

A few rare systematic studies of the “law of the law-office” have occurred in the area of family disputes. What do family lawyers advise their clients?³ Namely that the legal system is slow, irrational, mystical, expensive and uncertain, and clients **must** settle their disputes rather than risk their finances, families and mental health in such a system.

Where are the published legal precedents for such harsh advice? The unpublished versions of this vital form of “law” are repeated in chorus in the confidential offices of experienced lawyers.

“Filing” (claiming) in a court

The eighth level of conflict management involves lawyers “filing” a formal claim in a court or tribunal. That is, the cycle of data collection, advice, negotiation, and abandonment or settlement is continued, though now in the shadow of formal and institutionalised procedural rules of court. Even at this late stage of “filing”, court

³ Eg A Sarat and W Felstiner, *Divorce Lawyers and Their Clients* (NY: OUP, 1995); “Law and Strategy in the Divorce Lawyers’ Office” (1986) 20 *Law and Soc Rev* 93; J Griffiths, “What Do Dutch Lawyers Actually Do in Divorce Cases” (1986) 20 *Law and Soc Rev* 135; K Kressel, *The Process of Divorce – How Professionals and Couples Negotiate Settlement* (NY: Basic Book, 1985).

statistics almost universally indicate that 85%-95% of filed disputes will settle or be abandoned before a “full-blown” (as compared to interim procedural) trial. No wonder that Galanter states that litigation is a ritualised form of negotiation – and gives the process the indicative title of “litigotiation”.

Filing court documents is diagnostically necessary in some disputes to demonstrate seriousness, create inconvenience, threaten publicity, clarify vague claims, enable subpoenae, or even to avoid a Statute of Limitations.⁴ A certain proportion settle at this stage.

Post-filing settlement pressures

After filing, the survivors are subjected to a nagging cycle of data collection, advice, negotiation and pressure to settle via lawyers and court officials. This cycle is now encouraged further by managerial courts, and pro-settlement court rules.

This continues via mandatory mediation; then at the door of the court; and ultimately, during various “breaks” during actual hearings.

In Australia and elsewhere, there is an increasing number of DIY, LIPS or pro se surviving disputants, who endeavour to process their own formal claims or defences without the assistance or “pro-settlement advice” of lawyers.

In Australia and elsewhere, there has been constant law reform activity over the last 20 years aimed at these post-filing disputes which are still “caught” in the pyramid.⁵

Many legislative strategies are now in place in an attempt to force post filing disputants out of the queue, and into tolerable settlements.

“Standard” features of legislation (apart from mandatory mediation) include routine attempts to change what is perceived to be a dysfunctional culture of aggressive or “positional” negotiation and litigotiation.

Legislative Attempts to Change Negotiation Culture

| Perceived “Problem” in Culture of Negotiation and Litigotiation | Standard Legislative Response |
|--|---|
| 1 Opening negotiations with a positional or “ambit” (ambitious) offer. | 1 Only <i>one</i> offer must be filed in court with a short time limit after a formal claim is made. |
| 2 Employing “duelling experts” who inevitably are paid to give opposite conclusions. | 2 Only one joint expert can be initially appointed. |
| 3 Client ignorance of transaction costs of continued conflict or of a “court” hearing. | 3 Mandatory forms filed setting out a range of estimated client costs. |
| 4 Filing formal claims as a routine and inflammatory method to open negotiations. | 4 Once filed, strict time limits and case management push the conflict quickly towards a hearing (ie client loses control). |

⁴ J H Wade, “Don’t Waste My Time on Negotiation or Mediation: This Case Needs a Judge. When is Litigation the Right Solution?” (2001) 18 *Mediation Q* 259.

⁵ See ALRC, *Managing Justice* Report No 89, 2000.

| | |
|--|---|
| 5 A junior person attends formal negotiations. | 5 Mandatory attendance by a senior officer with authority to settle. |
| 6 Lawyer or skilled helper unnecessarily escalating conflict due to ambit claims, emotional entanglement, jargon, “no-stone unturned” discovery and cross-examination or sloppiness. | 6 Traditional “lawyers” excluded from the hearing and mediation rooms. |
| 7 Chaotic data. | 7 Mandatory filing at an early stage of alleged facts, supporting evidence and issue summaries. |
| 8 Withholding of key information and witnesses in order to “ambush” later. | 8 Mandatory early disclosure; mandatory exchange of witness statements; exclusion of all undisclosed evidence. |
| 9 Strategic stalling and inaction in order to avoid facing a problem, or to cause inconvenience, expense or attrition. | 9 Mandatory time limits; regular costs orders against lawyers. |
| 10 Unwillingness to <i>focus and</i> make or respond to a “reasonable offer”. | 10 Vigorous awarding of costs in favour of reasonable offers; against ambit offers; mandatory single, filed, early written offers. |
| 11 Filing a court application as opening negotiation move. | 11 Mandatory written notice of intention to start a case. |
| 12 Production-line opening offers by filing a claim in court. | 12 Duty to notify about dispute <i>before</i> filing in court. |
| 13 Insult zone opening offers. | 13 Statutory caps on damages; tables or formulae for damages; abolition of punitive damages. |
| 14 Fear of ever offering an “apology” as it may be construed as weakness. | 14 Statutory encouragement of “apology” or “regret”. |
| 15 Claims or cross-claims, which have few prospects of success. | 15 Split the lawyer-client team by professional sanctions or costs orders on lawyers who make claims without “reasonable prospects of success”. |
| 16 Wild claims based on unpredictable jury outcomes. | 16 Limit jury trials. |
| 17 The experienced team member (the lawyer) is paid his/her full fees no matter what is the outcome of the negotiation/or litigation. | 17 The lawyers’ “full” fees are reduced by statute where negotiation or litigation produces a “low” outcome. |

As an example, the Federal Family Law Rules introduced in Australia in 2004 have attempted to modify common conflict and negotiation dynamics as follows:

1. Don’t ambush with an “official” court application
 - a. Sch 1; r 1.05 – must give notice of INTENTION to START A CASE

- b. Must TALK (Primary Dispute Resolution) before filing (subject to exception in r.1.05(2))
- 2. Don't start negotiations by a cheap ambit claim in a court application as:
 - a. There will be strict!!! Time limits which will force expensive compliance (Rule 9, 12, 13 and 15)
 - b. Failure to observe time limits can/will lead to cost orders against LAWYERS!! (ie split the team)
- 3. Don't hide facts due to laziness, cost-cutting, deception or selective hearing – Part 13.2.
- 4. Don't ever try duelling experts' dynamics! – Part 15.5. and Sch 5. The Common strategy of appointing duelling experts is prohibited. Court permission is required for duelling experts; no such permission is required for a single joint expert.
- 5. The common strategy of avoiding making offers, and waiting for the other side to offer first, is partly prohibited. Under Div 10.1.2, each party must make a compulsory offer to settle within 28 days of a conciliation conference.
- 6. The clients and lawyers have a tendency to engage in positional bargaining, aggressive correspondence and filing litigation claims without clarifying the costs of conflict in writing. This can lead quickly to "entrapment" ("We've spent so much in costs already --- we cannot withdraw now"). This practice is deterred as an initial and ongoing estimate of costs must be provided to clients in writing.
- 7. Undermining joint ventures by prohibiting them! No win/no fee agreements, or contingency fee agreements are prohibited (Rule 19.14(4)).
- 8. There is a standard negotiation tactic for a lawyer to be a bad-cop (or 'bomber'), wearing down the other side by delay, attrition and non-disclosure. This tactic has become more risky as court powers are increased to make cost orders against lawyers (Rule 19.10).
 Additionally, lawyer-client contracts which exclude liability for negligence of lawyers are also prohibited (Rule 19.14). That is, the aggressive bomber has some clearer risks arising out of his/her behaviour.

Judicial decision on paper

Probably less than 1% of disputants who **enter** a lawyer's office for advice, actually complete a "full-blown" trial. Certainly, in the vast majority of government funded courts in Australia, less than 15% of disputes actually "filed" reach a "full-blown" hearing. Moreover, the number of full blown hearings in all courts in Australia and USA appear to be steadily declining over the last 20 years.⁶ With final adjudication, another group of disputes exit from the pyramid.

⁶ See M Galanter, "A World Without Trials" (2006) *J Disp Resol* 7; D Spencer, "The Vanishing Trial Phenomenon" (2005) 43 *NSW Law Soc J* 58.

Post judgment conflicts

However, having obtained a paper decision from a judge, what proportion of conflicts “end”? Does the pyramid have a sharp point at the end of the full blown trial? Definitely not! An unknown number, probably more than half of the paper judgments are never enforced effectively due to bankruptcy, death, insanity, relationship breakdowns, inefficient enforcement methods, satellite litigation as pay back, occasional appeals to a higher court, changes in relationships which make enforcement counter-productive (eg custody; employment; patent disputes) etc. The full-blown litigation becomes yet another round in the life of the dispute.

Where are the precedents about post-judgment events? These are a vital part of the “law” in which every client is interested, or ought to be. Usually the law reports stop, as though the tale has ended. The precedents definitely need at least one updating footnote entitled “Now let us tell you what really happened after the paper judgment was handed around – you won’t believe it.” Electronic footnotes could facilitate this key service. These epilogues would fundamentally alter the ratio decidendi extracted from these cases.

Conclusion

The use of pyramids as an image to trace the evolution of injuries and disputes is helpful to the courts, policymakers and to practitioners alike.

It leads to the following practical questions –

- 1. What are the various reasons that some “injuries” stay in the conflict process; and some drop out by abandonment or settlement?**
- 2. Can these factors be manipulated, (eg by money, rules, tactics, education and/or new ideologies and institutions), within certain ethical boundaries, to *encourage* certain injuries and conflicts to “stay in” the process; and others to “exit”? This is the daily work of government, litigation lawyers and vast dispute resolution services.**
- 3. Following (2), how to change the shape of the pyramid in each area of conflict? How to get more “injuries” *into* the dispute management system, and then to get them *out again* quickly, cheaply and informally!⁷**
- 4. (a) What versions of “law”; rules and principles of pragmatic problem-solving are being applied at each level of the pyramid of conflict?
(b) How can those many versions of “law” be discovered with some degree of accuracy?
(c) How can those versions of precedent be recorded, updated and published?**

The Decline of Trials – Why?⁸

What follows is a summary of a current narrative. Such summaries are attractive to the human brain, though after about three points, they become decreasingly useful.

⁷ See the recurring and important “access to justice” debates; eg Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* September 2009.

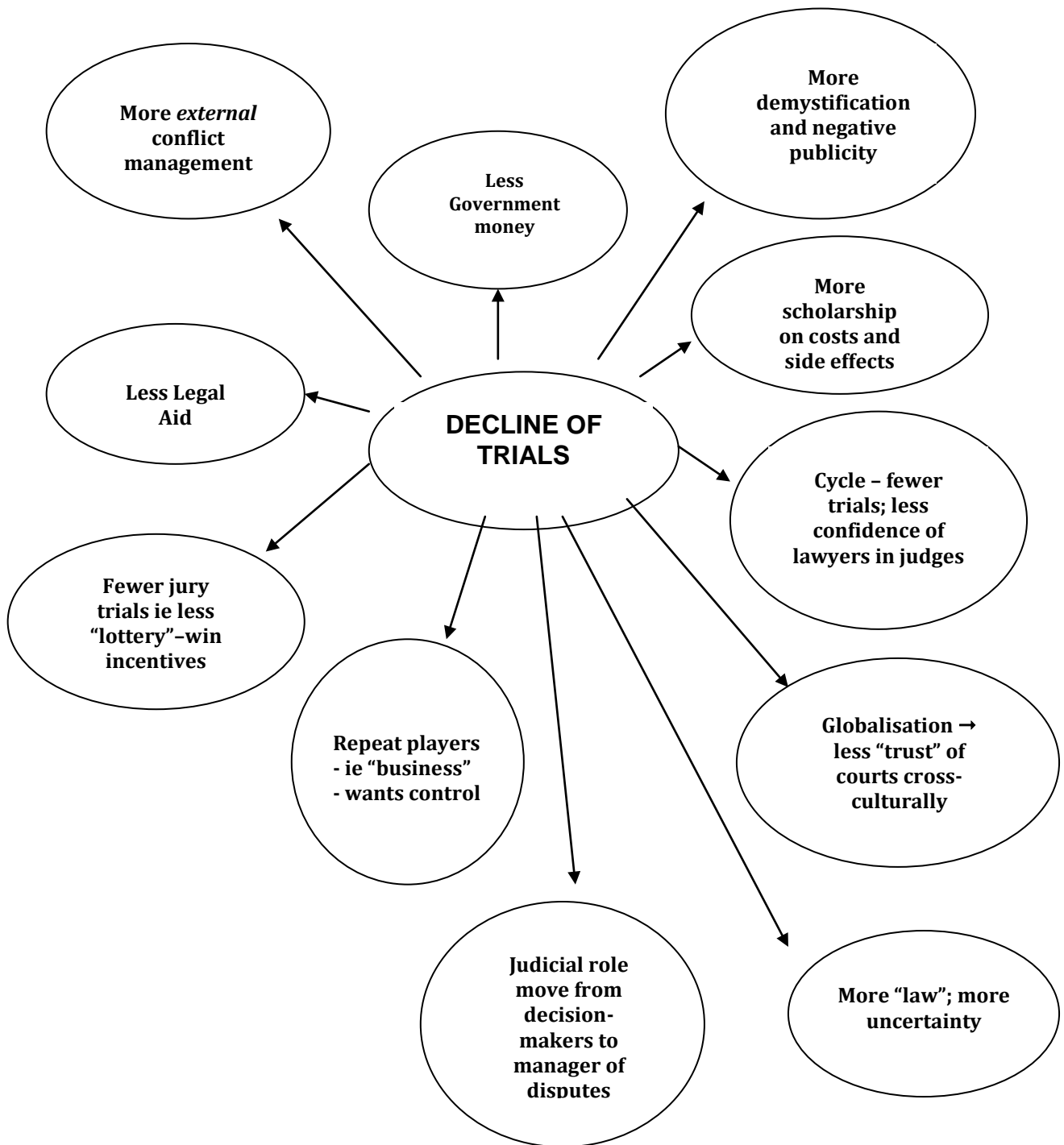
⁸ See generally M Galanter, “A World Without Trials” (2006) *J Disp Resol* 7.

The steady decline of full-blown trials in all areas of dispute (including criminal) over the last 20 years in “first world” industrialised countries is probably based on many factors including:

- The decline of government funding of courts, so that there are insufficient resources to allow full blown trials to increase with growing populations.
- A lack of appreciation by citizens and government of the importance of well-resourced and independent courts in a democracy.
- An ideological and real change to the primary role of judges from being adjudicators of disputes, to managers of the settlement of disputes (“litigation is bad; settlement is good”).
- Case management means that a dispute has many “mini-trials” – phone calls, procedural directions, emails between disputants and the same managerial judge (sometimes called the “docket” system). No longer is the grand performance trial available, where the actors arrive and play out their roles and ambushes once only, before an uninformed and previously unknown judge. Although the case management (or “Continental”) system is labour intensive for a judge, it also triggers many settlements as the judge is educated and assertive via the many events and encounters with disputants before any theatric “final” trial date is reached.
- A stream of publicity and research on the *disadvantages* (rather than the advantages) of “going to court” for both disputants and their lawyers – such as loss of control, uncertainty, expense, delay, and unwanted publicity.
- A flow of legislative and court rules taking control of litigation away from lawyers, and emphasising the pro-settlement managerial role of the judge.
- A corresponding increase of government funding for multiple “dispute resolution” processes; and standard legislative requirements that post-filing mediation is mandatory in all civil courts.
- Steady reduction of government funding for legal aid thereby loss of an historical training ground for young litigation lawyers; and loss of a flow of disputants towards full-blown trials.
- As fewer disputes are fully litigated, a cycle of loss of confidence begins. Few junior lawyers and fewer judges gain daily or weekly full blown litigation experience.
- The “law” in almost every field of conflict has exploded into billions of internet words about legislation, case law, tribunal reports and commentaries, plus incomprehensible legislation; and a growing number of “inter-disciplinary” insights. This “law” is unknowable, even by an experienced judge. An experienced judge therefore frequently hints at or suggests a “range” of possible outcomes based on the scrambled shopping list of factors and factettes; and slippery possible reconstructions of “facts”. Thereby, an experienced judge usually becomes a supervisor of negotiations within that range, rather than an adjudicator of an allegedly “correct” legal answer. Or the judge adjudicates in the shadow of common bargaining methods (eg “define the range and split the difference”).

- Courts are reputed to be unfriendly places for lawyers, as stressed judges push for settlement, and unrepresented clients create procedural chaos.
- A noticeable ideological and linguistic change whereby lawyers, governments, individuals and corporations, who file in court or go to a full court hearing, are labelled “adversarial”, “aggressive” and “unreasonable”; whereas those who settle are labelled as “responsible”, “problem-solving” and “sensible”.
- Widespread policies and practices of corporations and management schools to both prevent and resolve conflicts early, before they escalate, or progress towards litigation.
- An explosion of training of various categories of mediators, human relations officers, conciliators, counsellors, therapists, arbitrators, personal coaches, negotiators and ombuds officers. Out of all this training and supervision, many niches of dispute resolution expertise have emerged. These primary dispute resolution services offer confidentiality, speed and flexibility off the alternative litigation path.
- An explosion in the number of, and resources of, specialised “tribunals”. These allegedly fast, inexpensive, informal, specialised and accessible judges, on limited term contracts, provide diversionary dispute resolution services in competition to (and perhaps displacement of) the tenured state courts. Predictably, it appears that the vast majority of disputes filed in tribunals, also settle before a full hearing!

All these above factors contributing to the decline of “full” trials in traditional courts are unlikely to abate.



See M. Galanter, "A World Without Trials" (2006) 1 *Journal of Dispute Resolution* 8.

Questions

1. What are possible implications for publishers of the decline of full-blown trials at the peaks of various pyramids of conflict?

The Increase of “Law”

Galanter and other researchers emphasise that as trials *decrease*, the “law” *increases* in size and complexity.

For example:

- Millions of words about “the law” are written onto the internet per minute of every global day in multiple languages, probably dominated by the English-language.
- Raw and wordy legislation spews forth each year in Australia multiples of each preceding year.
- Internet sites breed like rabbits with “information” and “advice” about the new, old or revised legal rules, procedures and dispute resolution services.
- Reports also proliferate of the written judgments of tribunals, child support officers, taxation boards, international arbitrators and the various other non-confidential camel stops up the conflict pyramid. There seems to be no discernible trend for written judgments to become short, pithy, readable or memorable.
- The diverse sources of “oral” law multiply. For example, the Child Support Agency in Australia, received 2.6 million phone calls last year and in each one some legal “advice” is usually given. Ironically, these calls were all recorded, and lie as a waiting research gold mine on “what is the law about child support for the majority of Australians?”
- At all levels of conflict management, advisers, mediators, adjudicators and disputants are referring to an increasing range of “non-legal” authorities – eg judges quoting statistics on patterns of poverty; mediators educating parties with child development studies.
- In 2009, the Family Law Council recommended to the Federal Attorney General that a bank of “common knowledge” about family conflict be assembled yearly under the supervision of the Australian Institute of Family Studies, and then made available to all sectors of the family dispute resolution industry.

What are some of the consequences of this data avalanche in “law”? More data, less knowledge?

- **What experts are accessible who can collect and summarise the complexity at any single level of dispute resolution?**
- **For how long can an individual or organisation sustain expertise?**
- **How is complexity summarised into degrees of simplicity at different levels of the dispute resolution pyramid?**
- **Does it matter whether the “simple” summaries are correct?**

The Various Versions of “the Law”

What are the various versions of the law, lore, norms or guidelines applied as conflicts evolve and progress up the pyramid?

What different principles guide disputants to lump, settle or continue the conflict? The answers are found in the practical “advice” given at the different stages of processing of each conflict (whether such advice is “correct” or not). This is a rich and largely unexplored field of research.

These various versions of law are not what is *written* in legislation, or promulgated in reported bases, but what is *done* in practice at various stages of conflict, and then is abstracted into principles of advice.

For legal publishers, the above questions pose challenges. How to find insiders at each level of the different kinds of conflicts who can systematise into writing the standard “advice” given by internet site, word, email or written judgment? How to hire and fire alleged insiders? How to keep inside knowledge up to date? Are these tasks too difficult? Should publishers stick to systematising of the less relevant though more conveniently published “law” from trial and appellate court judgments?

What follows are some of the categories of written or unwritten but nevertheless influential “law”. Some of these overlap and are partly shaped by another category:

- Law Depicted in the Media
- Gossip law
- Street law
- Settlement law
- Local law
- Cultural adaptations of law
- Trial judge law
- Emerging law
- Appellate judge law
- Text book (systematic) law⁹

The “Law” as Depicted in the Media

Journalists selectively report sensational “law stories”. These media versions of the law probably influence decisions made at all stages of the conflict pyramid – especially whether to name, blame and claim; to go to an informal dispute resolution venue; to interview a lawyer; or to file a formal claim. The dominant journalistic and Hollywood narrative about conflicts influences expectations of disputants, lawyers and even judges.

What “law” do journalists report? Galanter comments from studies in the USA that “the media are far more likely to report verdicts for plaintiffs and large awards than defendant verdicts, small awards, or the reduction or reversal of awards”.¹⁰

⁹ See J H Wade, “Forever Bargaining in the Shadow of the Law – Who sells solid shadows? (Who advises what, how and when?) (1998) 12 *Aust J of Family Law* 256; also at http://epublications.bond.edu.au/law_pubs/261. Some of the categories which follow are taken from that article.

Thus, if such studies were replicated in Australia, the media's version of law would be that:

- little people who are injured
- and who doggedly work for years towards a full court hearing
- have a high statistical chance of being compensated in court
- with a lot of money
- paid by large defendant corporations or their insurers.

However, law of the law office, settlement law, trial judge law, and appellate judge law almost certainly say the opposite. Yet this more statistically realistic view of conflict outcomes is unlikely to attract readers and viewers.

Gossip Law or Folklore

"Gossip law" or folklore is the code of rules developed in any community from repeated conversations or gossip. "I have heard that..." Of course, this version is influenced by the law in the media. Gossip law causes millions of people to name, blame, claim, dispute, go to mediation, seek advice from lawyers, the internet, lump or settle claims.

Current examples of "gossip law" include:

- "As a parent I am entitled to have my children for half of their time"
- "If a parent gives up a job, (s)he does not have to pay child support"
- "Matrimonial property is usually divided equally"
- "The Tax Department does not negotiate any deals with defaulting taxpayers"

The transaction costs associated with dragging an entrenched disputant off his/her version of folklore, means that folklore often gives a better net result than a long negotiation over another version of "rights" or "law".¹¹

Street Law

Street law consists of the strategies and uses of power which may give a disputant a measure of success. Thereby power often prevails over the legal outcomes predicted in a full-blown trial. Street law is an informed use of Hobbesian "fear, force and fraud", and usually hovers on the boundaries of illegality.

For example, a disputant may choose:

- to "lose" key documents
- to "bury" his/her opponent in paper
- to empty bank accounts
- to be sick on certain key meeting dates
- to manufacture a number of spurious cross-claims
- to fail to answer correspondence; or to answer in rambling generalities

¹⁰ M Galanter, "A World Without Trial" (2006) *J Disp Resol* 21.

¹¹ From J H Wade, *ibid* note 9.

- to add extra facts or claims or reports at the last minute
- to send junior and ignorant representatives to meetings.

What are other standard practices in “street law”?

The time, cost and aggravation of trying to have a skilful “street lawyer” or disputant punished and controlled often wear out his/her opponents. They give up.

Settlement Law

“Settlement law consists of guidelines developed by experienced lawyers and accountants to provide a framework for negotiation. Settlement law has a life of its own and may resist judicial precedent particularly if precedents are inconsistent, vague or offend common commercial understanding. For example, despite formal precedents in law reports, common settlement guidelines around Australia in family property disputes allow approximate realisation costs to be deducted from the value of property; allow national capital gains tax to be deducted from the value of property.”¹²

In several states of Australia, in disputes over deceased estates, there has emerged “clubs” of mediator barristers. These clubs apply their own shared oral “going rates” in order to settle a steady stream of succession disputes. Similar clubs of mediators used their own shared oral “law” to settle de facto couples’ property disputes in the eastern states of Australia between 1984 and 2009.

These allegedly expert groups emerged partly due to lack of confidence in the less experienced judiciary in these areas of dispute – a self fulfilling prophecy.

Presumably, there are similar groups of alleged experts applying oral “going rates” to settle disputes in many areas of law and life.

Local Law

“Local law consists of powerful influences which apply and within legal cultures in particular areas. Again, local law is sometimes immune to centralised precedent even though legislation such as the Family Law Act are national acts. For example, judges and settlement lawyers apply different percentage division of property according to the price of rehousing in a particular area in Australia. In some suburban and country areas of Australia, lawyers, locals and judges are reluctant to award homemakers (usually women) more than 60 per cent of the pool of assets; or to order the sale of farms; ¹³ to award predominant caring responsibilities of children to males; or to leave a home-maker without ownership of a modest home. A city slicker lawyer enters these local jurisdictions at his/her peril.”

Could these local laws and practices be studied, identified, systematised and published? Locals may have a variety of reasons to keep local laws relatively secret, including fear of ridicule, legislative interference, and loss of local business.

¹² cf the vague “rules” emanating from case law on this topic – *In the Marriage of Rothwell* (1993) 18 Fam L R 454; (1994) FLC 92-511 (uncertainty over whether a notional capital gains tax debt can be deducted from the value of an asset).

¹³ Compare *In the Marriage of Lee Steere* (1985) 10 Fam LR 431; FLC 91-626 (the Full Court held that there was no exception to national property division principles for local farmers in Western Australia).

Cultural Adaptation of Law

One working description of culture, is a pattern of beliefs and behaviours within a group – such as practising lawyers, recent Sudanese immigrants or motor-cycle gangs.

Overlapping with local law, there are many cultural adaptations in legal procedures and practices at all levels of the evolution of conflict.

What cultural adaptations have you seen at what levels of the conflict pyramid which lead either to settlement; or lumping; or continuation of disputes?

Are these patterns published and made accessible to enquirers?

Trial Judge Law

Trial judge law is made up of the guidelines surrounding particular judicial personalities and evidenced by gossip, reported and unreported decisions. Trial judges are generally influenced by the reputation and skills of trial lawyers; a desire to avoid being overruled on appeal; a need to encourage settlements wherever possible;¹⁴ a tendency to give everyone something by middle-of-the-roadism; caution about making policy leaps. More particularly, different personalities of umpires are more or less interested in or disturbed by detailed facts, detailed affidavits, marital “fault”, litigants-in-person, women’s, men’s or children’s interests, long hearings, lengthy cross-examination, unprepared lawyers, reports of certain experts, evidence of legal costs and so on. Clearly, expert lawyers and witnesses are employed because they have insider knowledge of the predilections and personalities of registrars and trial judges.¹⁵

Emerging Law

Emerging law is made up of trends or directions in which trial judge law is moving. This anticipatory direction will eventually have a flow-on effect to most of the other rules and guidelines mentioned above. Emerging law is found in the hints dropped by judges in their written judgments (and at dinner parties); in the critiques of judge-made law found repetitively in law journals; in the papers delivered to and by judges at learned conferences; in the seminars conducted by visiting overseas judges and teachers (the power of foreign anecdote and research -- “men and women from Mars”); in what is perceived to be politically correct; and in the research of social scientists which identifies repetitive patterns of facts and injustice (for example, female poverty, violence in the home, paternal absence from children, non-payment of child maintenance, undervaluation of superannuation and small businesses, customer satisfaction with service from lawyers, judges, counsellors and mediators). By serendipity or good judgement, a disputant may enter the arena of negotiation or arbitral decision at a moment when emerging law crystallises (either to his or her gain or loss). For example, in recent years judicial action and reaction has gradually or suddenly developed

¹⁴ For a remarkable list of common methods used by judges to pressure a settlement see J A Wall et al, “Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediation Techniques”, (1984) 83, *Am J of Trial Advocacy*; M Galanter and M Cahill, “Most Cases Settle: Judicial Promotion and Regulation of Settlements”, (1994) 46 *Stanford L Rev*, 1339; D A 1pp, “Judicial Intervention in the Trial Process” (1995) 69 *ALJ*, 365; J Resnik, “Whose Judgement? Vacating Judgments, Preferences for Settlement, And the Role of Adjudication at the Close of the Twentieth Century” (1994) 41 *UCLA Law Rev*, 1471.

¹⁵ See Sarat and Felstiner n 3 for illustrations of the emphasis by family lawyers on insider knowledge.

tortious damage awards for battered spouses and children;¹⁶ increased percentage property awards for homemakers in wealthy families;¹⁷ and more importantly for homemakers in middle class and poor families;¹⁸ confusingly modified a custodian's freedom to relocate away from a contact parent;¹⁹ and provided more frequent separate legal representation for children.²⁰ Once again, it requires a level of expertise and luck to catch the wave of emerging law as it peaks."

Appellate Judge Law

Appellate judge law is found in the principles to be extracted from the pages of written reasoning emanating from appeal courts. These guidelines are often influenced by common "managerial" pressures such as a willingness to discuss policy openly; by a desire to minimise the number of appeals; to divert and anticipate criticism from the many vociferous lobby groups interested in particular fields of conflict; to create a degree of uniformity of approach across a multi-cultural nation; to balance tradition and change.

Many negotiations are immune from the principles of appellate judge law. The disputants do not have the energy or funds to employ expert lawyers, let alone go to an umpire, and even less to reach an appellate body.

Text Book (Systematic) Law

"Text book (Systematic) law consists of the attempts of a commentator to systematise a "wilderness of single instances" of reported and unreported judicial decisions. Most lawyers and clients do not have the time and money to spend researching the vast meanderings of judicial writing in order to make educated guesses about possible future patterns of judicial behaviour. Instead they hope that a learned commentator will reduce the maze to a few manageable guidelines."

Pervasive Management Principles (an "Interdisciplinary Insight")

At each layer of the conflict management pyramid, decisions to abandon, settle or continue each dispute are influenced by what can be labelled as "management principles". These principles are the rules of efficiency and fairness which managers and leaders apply consciously or subconsciously in order to process a large number of clients. These principles are also hidden in many traditional rules of law – for example, limits on *rights* of appeal; on time in which to file a claim; on judicial willingness to interfere with decisions of middle managers²¹; on amounts of damages; time available for meetings etc.

¹⁶ *In the Marriage of Marsh* (1994) 17 Fam LR 289; FLC 92-443; *Re Q* (1994) 18 Fam LR 442; (1995) FLC 92-565 (\$ 100,000 damages against father for assault on daughter); Family Law Council, *Financial Remedies for Violence in Families*, 1998; J Behrens and K Bolas, "Violence and the Family Court: Cross-Vested Claims for Compensation", (1997) 11 *AJFL*, 164.

¹⁷ For example, *In the Marriage of Ferraro* (1993) 16 Fam LR 1; FLC 92-335 (37.5 per cent of \$ 11m to homemaker); *In the Marriage of McLay* (1996) 20 Fam LR 239; FLC 92-667 (40 per cent of \$ 16m to homemaker).

¹⁸ For example, *In the Marriage of Best* (1993) 16 Fam LR 937; FLC 92-418 (100 per cent to homemaker and mother -- wife of a lawyer); *In the Marriage of Mitchell* (1995) 19 Fam LR 44; FLC 92-601 (over 90 per cent to wife of lawyer). Lawyers are at risk when they litigate their personal conflicts!

¹⁹ For example, *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676; FLC 92-755; *In the Marriage of R* (1998) 23 Fam LR 456; FLC 92-820 (mother of four denied request to relocate in Scotland); R Kaspiew, "B and B and the Family Law Reform Act", (1998) 12 *AJFL*, 69.

²⁰ For example, *Re K* (1994) 17 Fam LR 537; FLC 92-461.

²¹ *House v The King* (1936) 55 CLR 499.

What are some of these “management principles”? Are they more instructive than traditional legal rules? Which publishers are collecting and weighing these management principles?

Here are a few:

“Beyond the case law -- a study of the behaviour of decision makers

Expert family lawyers focus heavily upon insider knowledge, gossip and anecdotal stories about patterns of behaviour of individual judges.²² These principles or patterns are rarely recorded in books or systematically studied in law schools. They are usually more important than the doctrinal rules assembled and packaged from judicial self reflections and found in esoteric reported cases.²³

Aubert has noted that the nature of any conflict is dramatically altered as soon as a third party -- such as a boss, umpire or judge -- is introduced.²⁴ This is because the judge’s interest adds to the layers of complexity of the already escalated dispute. A judge or umpire has an interest (overlapping yet different to the disputants’ interests) in:

(1) Managing the logistics, expense and attempted objectivity of discovering a single historical version of facts (whereas the disputants may not be interested in such historical research).

(2) Deciding the conflict consistently with decision-making patterns of the past (one version of fairness). Conversely, the disputants themselves may have no interest at all in a bureaucratic need for consistency.

(3) Avoiding a floodgate of further claims. Bosses and judges are not usually looking for business and have an administrative need to shorten the queue at their doors.

(4) Avoiding any perception of being biased, or having pre-judged the dispute. This leads to a strong tendency to “split the difference”, “middle-of-the-roadism”, or “always make sure that everyone walks away with something”. This decision-making tendency is often contrary to the disputants’ desire to “win”, to see “justice” done, and to make the courtroom or boss’s office a terrifying venue for perceived wrongdoers, (that is, people other than me).

Understanding these four third party dynamics is arguably an essential part of “legal” advice. These dynamics are expanded in what follows to indicate common interests of decision makers, together with a colloquial expression which reflects such an interest. More comprehensively, some examples of behavioural principles extracted from anecdotal observation of (judicial) decision makers are as follows:

(1) Go away -- sort it out yourself.

(2) Go away -- I might get it wrong.

(3) Go away -- I’m too busy; join the queue.

(4) Go away -- come back when you have more information.

²² For example, see Sarat and Felstiner, note 3.

²³ “A case is the written memorandum of a dispute or controversy between persons, telling with varying degrees of completeness and accuracy, what happened, what of each of the parties did about it, what some supposedly impartial judge or other tribunal did in the way of bringing the dispute or controversy to a supposed end, and the avowed reasons of the judge or tribunal for doing what was done” -- adapted from W Twining, *Law in Context*, Oxford, Clarendon Press, 1997, 226.

²⁴ See classic and dense V Aubert, “Competition and Dissensus: Two types of Conflict and Conflict Resolution” (1963) Vol VII *Conflict Resolution* 26.

- (5) “Shunting” -- I’ll refer you to someone else.
- (6) First I’ll consult with the influential -- come back later.
- (7) Middle-of-the roadism -- I’ll split the difference.
- (8) Any decision must not create a floodgate for the future.
- (9) Any decision must be consistent with past decisions.
- (10) I’ll make a quick decision -- but don’t confuse me with litanies of facts.
- (11) I’ll make a quick decision if I trust this supplicant from past experience.
- (12) I’ll make a quick decision if the paperwork looks satisfactory.

“Go away -- sort it out yourselves”

This common response of decision makers reflects multiple concerns and interests of the decision makers including:

- The disputants need to learn some decision-making skills; there will be many similar crises in their future relationship which will need such skills. They must not become dependent on an outsider.
- The disputants know many more “facts” than the decision-maker ever will. They are far better qualified to craft their own solution.
- The decision-maker is busy and under-resourced.
- Legal categories and remedies are very narrow.
- This dispute needs a broader definition of the problem, and more a creative range of possible remedies than are available in a courtroom.

“Go away -- I might get it wrong”

This conscious or subconscious response of a judge reflects all of the interests and concerns mentioned in the first “go away” response.

Go away -- I’m too busy; join the queue”

A constant game which supplicants play before bosses or judges is to allege a crisis. This appearance or reality of urgency arguably justifies queue jumping. All bureaucrats understand this game and have strong interests:

- not to alienate disputants who have been waiting patiently in the queue;
- to discourage a floodgate of queue jumpers;
- to manage the organisation with a degree of routine -- not constant crisis management;
- to give alleged crisis cases a heavy onus of proof and a short moment in time to identify whether they really are crisis cases;
- then to give “real” crisis cases a short hearing, rough justice or a holding pattern of the status quo until their turn comes up in the longer queue;²⁵

²⁵ For example, *In the Marriage of Cilento* (1980) FLC 6 Fam LR 35; 90-847 (short term “crisis” children’s orders should hold the status quo unless danger of harm to the children can be proved). P A Doolan, “Cilento and Cilento Revisited -- In the Best Interests of the Child?”, (1996) 10 *AJFL*, 86; A Rowlands, “Status Quo, not Always Fair Procedure in Interim Residence Matters”, *Law Soc J (NSW)*, April 1998, 52.

- to encourage many alleged or real crises to “resolve” themselves or go into a holding pattern. The passage of time then hopefully enables the cooling of emotions, avoidance, lumping of the grievance or “door of the court” deals.

“Go away -- come back when you have more information”

This response of judges (or any decision maker) reflects many of the interests already mentioned, and additionally:

- As courts are arguably under resourced, it is a more cost effective division of labour for the disputant to collect and categorise information, rather than bring chaotic data into a courtroom to be “sorted” through by a judge via a labour intensive and expensive process.
- The very process whereby disputants are required to collect and categorise information will lead to some disputes settling, or being abandoned. Factual clarity means that some “rights” are weakened (for example a “right” to maintenance; to more property; to more time with a child).

“Go away -- I will refer you to someone else”²⁶

Judges (and other managers) are aware that:

- Other experts are likely to diagnose the causes of conflict and suitable interventions more accurately than in an arbitral setting. This applies particularly in family law where the complexity of disputes over children leads to mandatory reference to counselling, mandatory appointment of children’s representatives and mandatory completion of a home study by an expert witness.
- Other experts cost less than court proceedings (both to the parties and to shrinking court budgets). Disputants often have a fantasyland image of what a court can do to resolve a conflict between people in an ongoing relationship.
- There are a large number of “routine” disputes which can be handled effectively by mandatory mediation or case appraisal²⁷ thereby leaving decision makers with more time to handle difficult cases in the queue.
- Obviously this bureaucratic habit of avoiding decisions by referring disputants to committees or other people will encourage customers to bypass the bureaucrat.

First I’ll consult with the influential -- come back later

This is a wise practice in management. However, for some judges it leads to a long delay between a hearing and delivering a written outcome. Meanwhile they have been consulting with senior colleagues on how to write the judgment.

²⁶ This process is sometimes referred to as “shunting”: see Australian Law Reform Commission, *Contempt and Family Law*, DP 24, 1985 11-12.

²⁷ For example, see *Supreme Court of Queensland Act 1991* (Qld) ss 100A-100Y. In some jurisdictions, a pattern of referring disputes from court lists to private arbitration has emerged; see S Davidson, “Court-Annexed Arbitration in the Sydney District Court”, *Aust J DR*, 1995, 195. Whether such cultural referral or diversion practices will emerge in family property disputes is unclear: see *Family Law Act 1975* (Cth) ss19D-19 Q (provisions for use of arbitration in family property and spousal maintenance disputes).

Middle-of-the-roadism

Decision makers have an anecdotally common tendency to either split the difference between two claims or to give both disputants something.²⁸ For example, in matrimonial property disputes, a husband will be awarded his low valuations and a wife her claimed high percentage; a husband will “win” his claimed percentage, but have to pay all his own legal costs and interim spousal maintenance. In children’s disputes, a wife will be permitted to relocate with the children, but will be ordered to contribute to their travel expenses to visit their father; a father will gain more visitation or contact time, and in return will be ordered to pay higher child support for private school fees.

Commercial litigation is replete with similar anecdotes. These patterns of judicial and arbitral behaviour need systematic research. The interests of decision-makers who adopt middle-of-the-roadism include:

- Reduction of the risk of totally alienating one disputant who loses everything. Everyone has a psychological sense of leaving with some small degree of success.
- It replicates common patterns of negotiation which lawyers and disputants understand -- namely “if you give a little, you get a little”.
- It reduces the likelihood of a successful appeal as a decision in-the-middle, is less likely to be outside the range of probable outcomes.²⁹
- It reflects a rough guess at one measure of justice, as disputants commonly calculate what is a likely market or precedent-directed outcome and then make ambit claims on either side of that figure. Splitting the ambit claims tends to move both disputants back towards a figure which their lawyers advised them anyhow as a likely “objective” range.

Any decision must not create a floodgate for the future

This floodgate factor is a profound influence in the thinking of decision makers and judges. “If I give you an X, then many other people will clamour at my door for an X.” The X factor could be a car, computer, native title, late night out, damages for smoking, promotion, reduction of child support, legal aid, damages for assault etc. Judges and decision-makers usually do not have either the time or resources to deal with a flood of novel claims.

Negotiators need to be well aware that if their claim includes something novel, or which risks floodgate in subsequent decisions, then their claim, both inside and outside the negotiation room may be very weak. In response to the floodgate interest, wise negotiators often attempt to convince everyone that the outcome arises out of such unique, never-to-be-repeated facts, and/or will be oh-so confidential so that the risks of floods of subsequent claims are reduced. Decision-makers are occasionally convinced by these arguments.

Any decision must be consistent with past decisions

Another strong interest of a decision maker or judge is to make decisions consistently with the past. This enables an organisation to:

²⁸ See Aubert, note 24.

²⁹ *House v the King* (1936) 55 CLR 499; *In the Marriage of Norbis* (1984) 9 Fam LR 385; FLC 91-543.

- have a measure of control over unruly “Lone Ranger” judges or managers (“you must follow established policy”).
- dissuade large numbers of *past* disputants from emerging again disgruntled that the new policy was not applied to them. “We have enough new customers without resurrecting the old ones.”
- reflect one measure of “justice” -- namely consistency -- in its decision making.
- avoid the resource intensive exercise of reconsidering what is an appropriate policy balance in every new dispute which occurs.

Negotiators need to understand this pressure towards conservatism before readily putting their lives in the hands of an umpire in the hope of receiving an out-of-the-ordinary decision.

I’ll make a quick decision -- but don’t confuse me with litanies of facts.

For a disputant, the detail of the dispute is often important. However, a decision maker wants to convert the impassioned detail into a bland category: “This is a traditional marriage with an asset pool of between \$ 350,00 and \$ 400,000”; “This is a relocation case where the custodial mother has a job offer and relatives in another city.”

The conflict details are unique for the individual disputants, but are part of a routine daily grind for the decision maker. (“For you, this is your life; for the judge, it’s just another standard dispute in his/her long list.”) Thus mandatory short written summaries of conflicts, required either by courts or mediators can be very powerful to transform the conflict from the particular to the general; from chaos to category; from boisterous to banal; from impassioned to impersonal.

I’ll make a quick decision if I trust this supplicant from past experience

Judges and decision makers are more likely to believe a story, take a risk, and make a quick decision if the supplicant standing before them is a trusted and respected person. Experienced lawyers, valuers or counsellors who appear regularly before a particular judge (or manager) have a valuable but fragile ongoing relationship which greatly enhances their credibility. Many other litigants and lawyers are non-repeat players before a particular judge. The judge has no particular reason to trust their version of history, or their problem-solving skills.

Therefore, the reputation of a skilled helper is of profound interest to a judge or manager if any quick remedies are to be awarded. Similarly, a skilled helper has a strong personal interest in cultivating his or her capital value and credibility by being scrupulously honest, clear and organised before a decision maker. This personal interest may be in conflict with a client’s interest to stretch the facts, push ambit claims, and hide evidence.

I’ll make a quick decision if the paperwork looks satisfactory

There are a number of obvious managerial interests behind forms being filled in accurately. They include:

- Sloppy forms suggest lack of experience by the disputants or their “helpers”. This may imply other mistakes.

- -- Similarly, inaccurate forms suggest undue haste and possible mistakes elsewhere in the facts, evidence, arguments, options or conclusions presented to the court.
- Inaccurate forms cause extra work for the resource stretched umpire who must elicit extra information, and possibly endure the wrath of the cost-cutting court administrator.
- The safest option for an umpire is to slow down the decision making process (for example by an adjournment) until the forms are filled in accurately. Once again a negotiator needs to be aware of the relative expertise of form fillers and wordsmiths before falling back too quickly upon the option of “I’ll take you to court”, or more subtly, “We seem to be sliding towards ‘let’s leave it to the umpire’.”

Complexity and Simplicity of “Rules”

At each stage of the evolution of conflict, there is a tension between the complexity and simplicity of the “rules” which may apply to influence lumping, settlement or continuation of the dispute. This paper emphasised the *complexity* of the rules.

In some legislative areas, the rules are so complex that only a few experts have achieved considerable and momentary mastery. The rest of us work with rules of thumb, summaries and charts. These summaries fill the experts with horror, and mutterings about “professional negligence”.

Nevertheless, few disputants have the time, inclination and skill to cope with complexity. Rules of thumb dominate.³⁰

Where are studies to discover the rules of thumb at each level of the pyramid of conflict? Where are the publishers who publicise and update these “going rates” and “basic practices”, before the reader clicks to complexity?

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³⁰ For example, see the one page charts setting out the *Cost of Children in Australia*, as developed by Lovering and Lee, and published quarterly by the Australian Institute of Family Studies. This “simplicity” has been superseded by a “black box” of child support calculations under the *Child Support (Assessment) Act 1989* (Cth).