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An Analysis of the Effect of a Loser-Pays Rule on the Decisions of an American Litigant

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AN ANALYSIS OF THE EFFECT OF A LOSER-PAYS RULE ON THE DECISIONS OF AN AMERICAN LITIGANT

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Abstract

Decisions made by litigants often do not reflect those most beneficial to society. A rule governing fee allocation in tort cases should encourage meritorious suits and discourage frivolous suits. America is one of the only countries in the world that does not use a loser-pays rule to assign legal costs. Employing a loser-pays rule could make the legal system more efficient and more equitable. The effect of a loser-pays rule is analyzed by economic theory and empirical evidence, while considering possible limitations of the rule. A carefully applied system of loser-pays may positively affect the U.S. legal system.

I. Introduction

In 1994 there were over 88 million tort cases filed in the U.S., or about one case for every third person in the country [Shavell, 1997, 610n]. One would expect the figure to be even more startling today, considering the double-digit annual growth rate of litigation in recent years [Tillinghast, 2003, 1]. Most Americans feel that the number of lawsuits in the country is excessive and that legal activity should be curbed. Fewer realize that some areas of law are considered under-litigated because too few incentives exist to encourage filing smaller meritorious claims [Shavell, 1999, para.2]. The challenge is to structure the legal system in such a way that the choices made by individual litigants coincide with those most beneficial to society. Because there are several externalities of any given legal decision, it is doubtful whether a system could be developed to continuously equate an individual's choice with the best collective decision. Nevertheless, certain reforms should be made in an attempt to reduce the harmful divergence between private and publicly optimal usages of the legal system.

Many reforms have been considered to alleviate the tort "crisis" in America. One of the most commonly suggested reforms is a loser-pays system of assigning legal costs. Under the current American system each party bears his own legal fees regardless of the trial outcome. A loser-pays rule allows the winning party to shift at least a portion of his legal expenditures to the losing side. This paper will attempt to determine whether adopting a loser-pays rule would be an effective method of tort reform. That is, could a loser-pays rule improve social welfare by making the legal system more efficient and perhaps more just? The relative efficacy of the rules can be judged based on the effect each has on individual microeconomic decisions made during critical junctures in the legal process, and on the predicted macroeconomic consequences arising from individual decisions. An underlying component of equity or justice should also be considered to determine the best overall system to allocate court costs.

Often called the English or British rule, a system of loser-pays is actually used by virtually every common law country in the world, except for the U.S. Loser-pays is labeled the "English rule," in contrast to the "American rule," because the two countries have very similar rules of law, and because the general and legal cultures of England most closely resemble those of the U.S. Although the difference in the legal systems exists almost exclusively in the assignment of legal fees, the consequence of the disparity is significant. The number of suits filed in 1992 per 100,000 people in England was 117.4, compared to 327.2 in the U.S [Posner, 1997, 478]. In order to establish whether a specific fee-allocation rule is responsible for promoting a particular level of litigation in a country, it is necessary to understand how such a rule affects individual decisions. But

first, it is worthwhile to examine the magnitude of the effect the legal system has on the U.S. economy.

II. Macroeconomic Implications

To understand the significance of choosing a proper fee-allocation rule as a method of tort reform, one should have an idea of the total cost of litigation in America. In 2002, the U.S. tort system cost the country $233 billion dollars, or $809 per citizen, which would have been equivalent to a 5% tax on wages at the time [Tillinghast, 2003, 1]. Over the past 50 years, tort costs in the U.S. have increased more than one hundredfold, while GDP has grown only by a factor of 35 [Tillinghast, 2003, 1]. In 2002, the growth rate of tort costs was 13.3%, compared to an economic growth rate of 3.6% [Tillinghast, 2003, 2]. The Council of Economic Advisors estimates that if the total burden of the tort system were to fall on consumers, it would result in a 2% price increase on all goods and services purchased in the U.S. [Kennedy, 2003, 247]. Measurable costs of the legal system include attorney fees, court fees assigned to litigants and those borne by society, and awards given by the judge or jury.

The exact economic impact of the tort system, beyond monetary fees and awards, is virtually impossible to calculate. Most of the actual costs of the current system stem from the way court rulings influence behavior. The mere threat of liabilities to companies manifests itself in price increases, product modifications, and product cancellations. When a defendant is able to pass on a jury verdict to his insurer, consumers face higher premiums on their own policies, along with higher prices on the defendant's products and other similar goods. Certain industries are particularly plagued by the cost of protecting themselves from litigation. The cost of liability accounts for

one-third of the price of an airplane, one-half of the price of a football helmet, and over 95% of the price of a vaccine [Kennedy, 2003, 247]. The threat of liability also affects the country's international competitiveness. The comparatively higher rate of litigation in America results in higher prices on American goods, which reduces the demand for domestic products in international markets. The greater chance of being sued in America also increases the perception of risk to overseas investors and lowers the rate of return on American companies, both of which dissuade foreign investment.

III. Microeconomic Analysis

A fee-shifting rule has the ability to change the macroeconomy by influencing individual choices. There are three decisions made by the litigant during the legal process that have the potential to substantially affect the aggregate American economy: whether to file suit, whether to settle or proceed to trial, and how much to spend during trial.

A. The Decision to File Suit

The primary goal of a rule governing fee allocation is to discourage frivolous lawsuits and encourage meritorious lawsuits. The reason to deter all frivolous suits, in which the plaintiff's case has no basis in law, is self-evident. On the other hand, some may question the wisdom of promoting a lawsuit, even one that is clearly meritorious. Most economists agree that certain low-award suits must be encouraged so that similar defendants have an incentive to avoid like violations of proper conduct. For instance, if an individual suffers harm as a result of a company's negligence, but decides not to file suit because the potential award is small, the company and others like it will have no incentive to act differently to prevent similar injuries in the future.

Under the American rule, a plaintiff will file suit if his expected judgment would be at least as large as his own legal costs. The requirement is met when pA-X is greater than zero, where p is the expected probability of success, A is the expected award, and X is the cost of the plaintiff's legal fees.

Under the English rule, a plaintiff will file suit if his expected judgment would be at least as large as his expected legal costs, which are equal to the total legal costs of both sides discounted by his probability of losing. The requirement is met when pA – (1-p)(X+Y) is greater than zero, where p, A, and X are the same as above, and Y is the defendant's legal fees.

It is useful to first establish the outcome of each rule assuming perfect information, in which both sides' expectations and the decision of the court directly align with reality. In a perfect world, the American rule is thought to deter all frivolous lawsuits because the litigant knows that he has no chance of success and will bear his own legal fees. I question whether American rule adequately deters a frivolous suit, even in a perfect world, when the plaintiff values revenge, in the form of inflicting legal fees upon the defendant, more than he values his own legal costs. Furthermore, simple reasoning shows that the American rule falls short of encouraging all meritorious suits. The plaintiff has no incentive to file suit if his own legal costs exceed his expected award, despite the assurance that he will win.

Alternatively, the English rule is always able to arrive at the socially optimal position under the assumption of perfect information. The litigant would never file a frivolous lawsuit because he would necessarily incur the costs of both sides' legal fees when he loses, therefore inflicting no punishment whatsoever on the defense. The

English rule would also encourage all meritorious suits because, even with a small award, the plaintiff has an incentive to file suit knowing that he will recover all personal legal expenditures along with his award.

It is more useful, but also more complicated, to compare the likely outcomes of both rules in the real world of uncertainty. Ultimately, one will find that neither rule is able to encourage all meritorious suits and deter all frivolous suits when the litigants are unaware of their exact probabilities of success and the courts are known to make mistakes. It is, therefore, primarily useful to evaluate each rule's *relative* ability to arrive at the socially optimal decision.

The supposition that the American rule is able to deter frivolous suits no longer holds true in the real world. Because the judicial outcome is uncertain, the plaintiff may feel that he has some positive probability of success. The plaintiff may file suit, although he has no legitimate basis for his optimism, if he feels that some important factor may weigh in his favor, such as finding an ignorant or prejudiced judge or jury. The plaintiff may also file suit knowing he has no chance in court if he thinks that he could coerce a settlement from the defendant. A defendant may agree to payoff the plaintiff for harm the defendant did not cause if he fears he will be incorrectly found liable, or if he expects high personal court costs. The problem is made worse by the potential for a large award. If an award is sufficiently large, say $100,000, it would only take an expected win rate of 10% to make a marginal plaintiff indifferent between filing the suit with a low probability of success and incurring $10,000 of personal legal fees, and not filing the suit at all. In this case, $(0.1)(\$100,000) - (\$10,000) = 0$. Any increase in either the expected award or perceived success rate will cause the marginal plaintiff to file suit.

The English rule is also unable to deter all frivolous suits, but the added cost of losing under a fee-shifting rule makes filing a low probability suit much less attractive. For example, using the same figures as above, if we include an equal amount of legal expenditures for the defense, the plaintiff is no longer indifferent between filing suit and not filing. (It is common in economic analysis to assume proportionate legal expenditures. As long as the costs for both sides are roughly proportionate, the results are consistent.) In this case, (0.1)($100,000) – (1-0.1)($10,000 + $10,000) = -$8,000. The plaintiff predicts an expected loss of $8,000 for filing the frivolous suit and thus will not file.

The American rule is not able to encourage all meritorious suits in the real world, just as it was unable to do so in a perfect world. The problem is compounded by uncertainty and the perceived probability that even a credible case may fail. A plaintiff with a worthy case, in which the defendant was responsible for real harm, may hesitate to file out of fear that the judge or jury may inaccurately interpret the facts. The plaintiff's reluctance to file suit is even more likely to occur if his court costs are expected to be high. For example, a litigant would be indifferent between filing a case with a 95% probability of receiving a $50,000 award and incurring $47,500 in personal legal fees and not filing the suit at all. In this case, (0.95)($50,000) – $47,500 = 0. A downward movement in the perceived chance of success or expected award will cause the marginal plaintiff to not file suit. A decision not to file can be detrimental to society because it fails deter future harm and does not reimburse the victim for actual harm.

Even under the English rule, when the litigant is unsure of his exact probability of success, he may be discouraged from filing a worthy suit. Nonetheless, in cases where

the suit is clearly valid and the plaintiff is likely to win, he is more liable to file a suit under the English rule than under the American rule. Under the English rule, when a plaintiff has high odds of winning, he is able to discount the expected total costs by the probability of losing, which is necessarily very low. If we use the same numbers as above and include $47,500 as the legal costs of the defense, we will see that the plaintiff has an incentive to file suit. In this case, (0.95)($50,000) – (1-0.95)($47,500 + $47,500) = $42,750. The plaintiff expects to gain $42,750, as it is very unlikely that he will be responsible for paying the court costs and will therefore file the meritorious suit.

Several examples could be offered to demonstrate the outcomes of both rules under different assumptions. Ultimately, one will find that by holding the value of the award and the legal fees constant, it becomes clear that there is a probability, *p*, above which a potential litigant is more likely to file suit under the English rule, and below which, under the American rule. When the plaintiff is relatively optimistic about winning, his expected legal costs will be comparatively low under the English rule, whereas he would have to bear his own costs with certainty under the American rule. To solve for the critical probability of prevailing, one must find when the expected total costs under the English rule, discounted by the chance of losing, equals the cost of the plaintiff's fee under the American rule. Under the basic assumption of identical legal costs, the critical probability is 50%. To illustrate, 0.5($1000+$1000) = $1000. Although this is a very simplified example, the conclusion holds true that the frequency of suit will be greater under the English rule only when the plaintiff believes his likelihood of prevailing is above a "critical level".

The economic analysis seems to demonstrate the superiority of the English rule. Unlike the American rule, the English rule more effectively deters frivolous suits while encouraging meritorious suits. It is important to note, however, that the preceding analysis was conducted under the assumption of risk-neutrality. The results of the analysis may change if one allows for a risk-averse plaintiff. The problem is not the deterrence of frivolous suits. In fact, a plaintiff who is particularly fearful of losing would be even less likely to risk incurring the cost of both sides' fees under the English rule. Unfortunately, a risk-averse plaintiff in a meritorious case may also be discouraged from filing suit if he is overly anxious about the possibility of paying the total court costs. Some critics of the English rule worry that it would dissuade potential litigants in suits concerning new, uncharted areas of law because of the increased penalty of losing under the rule. Furthermore, the decision to file suit is only one piece of the litigation puzzle. The effect of each rule on settlement rates and trial expenditures are also important areas to consider in determining the superiority of either rule.

B. The Decision to Settle

Even if the plaintiff found it worthwhile to file suit, the question remains whether he and the defendant will settle or proceed to trial. It is important to remember that the total number of suits filed under the English rule is predicted to be less than the number filed under the American rule. A comparative economic analysis concerning settlement rates is conditional upon the plaintiff having already brought suit and, therefore, is not indicative of the overall trial rate of either rule. One may assume that there will be a settlement only if there is a settlement figure that both the plaintiff and defendant would prefer over going to trial [Shavell, 1982, 63]. According to Coase's Theorem, the two

parties will mutually bargain to save the total cost of proceeding to court if they can agree on an acceptable settlement amount.

To compare the likelihood of trial under the English and American rules, assume that the parties agree on the magnitude of the potential judgment and that the individual legal costs are known, so that their opinions can diverge only in respect to the probability of success at trial. Under the American rule, there will be a trial if the plaintiff's estimate of the expected judgment exceeds the defendant's estimate by at least the sum of their *known* legal costs. Under the English rule, there will be a trial if the plaintiff's estimate of the expected judgment exceeds the defendant's estimate by at least the sum of their *expected* legal costs [Shavell, 1982, 64]. Essentially, the parties under either rule are motivated by what they perceive themselves as saving if they agree to settle. Under the American rule, they hope to save their own legal costs. Under the English rule, they hope to save their expected legal costs, or their perceived probability of losing multiplied by the costs of both parties.

One will soon discover that the likelihood of trial will be greater under the English rule, conditional on the suit having been filed in the first place. The reason is that in order for litigation to be a possibility under either rule, the plaintiff's estimate of the expected judgment must exceed that of the defendant. This means, under the present assumptions, that the plaintiff's estimate of his probability of winning exceeds the defendant's estimate. When a plaintiff is optimistic about his chances of success under the English rule, he expects lower trial costs because he will discount the total cost by his perceived small chance of losing. He no longer has the same incentive to avoid trial as a plaintiff under the American rule, who has no possibility of avoiding his own costs.

A numerical example can more clearly demonstrate this theory. Assume that the legal costs of each side equal $1500, and the probable judgment is $10,000. The plaintiff is optimistic and perceives a 75% probability of success, whereas the defendant feels that his probability of winning is 50%. Under the American rule, the plaintiff's expected judgment is $10,000(0.75) – $1500 = $6000. The defendant's expected judgment is $10,000(0.5) + $1500 = $6500. There is, therefore, a possible settlement figure between $6000 and $6500 that would make both parties better off than they expect to be at trial. Under the English rule, the plaintiff's expected judgment is $10,000(0.75) – (1-0.75)($3000) = $6750. The defendant's expected judgment is $10,000(0.5) + (1-0.5)($3000) = $6500. There is, therefore, no settlement range under the English rule since the plaintiff expects to receive more at trial than the defendant expects to lose.

Critics of the English rule often cite the potential for fewer settlements as a reason not to adopt the rule in the U.S. It is important to note, however, that the economic analysis focuses on the outcome of each rule considering only a difference in the parties' perceptions of success. If the assumption that the plaintiff and the defendant agree about the magnitude of the judgment is relaxed, the conclusion may be reversed. When a plaintiff is pessimistic relative to the defendant about his probability of success, but feels he will receive a much higher award should he win than the defendant assumes, the English rule makes settlement more likely [Shavell, 1982, 66]. In order for trial to be a possibility under either rule when the plaintiff is pessimistic, the plaintiff must have a much higher expectation of the award than the defendant. The effect of his pessimism, however, increases the plaintiff's expected legal costs and his incentive to settle under the English rule. To illustrate, suppose the defendant still believes his chance of prevailing is

50% and that the probable award is $10,000. The plaintiff now feels that his chance of winning is only 35%, but that he will receive $24,000 if he wins. Under the American rule, the plaintiff's expected judgment is $24,000(0.35) – $1500 = $6900. The defendant's expected judgment remains $6500. The American rule, therefore, no longer allows a negotiable settlement range. Under the English rule, the plaintiff's expected judgment is $24,000(0.35) – (1-0.35)($3000) = $6450. The defendant's expected judgment again remains $6500. Under the new assumptions the English rule allows for a settlement where the American rule does not. Furthermore, the analysis again considers only a risk-neutral plaintiff. Allowing for a risk-averse plaintiff increases the rate of settlement under the English rule, as the litigants have higher total court costs at risk to lose if they proceed to trial under this rule. Some economists claim that the effect of risk-aversion is more influential in determining settlement rates and actually overrides the fact that plaintiffs under the English rule tend to be more confident in their cases than their American counterparts [Shavell, 1982, 68]. In any event, it is difficult to accurately determine the net effect each rule has on rates of settlement.

C. Trial Expenditures

It is well established within economic literature that the English rule tends to cause litigants to increase their legal expenditures [Hughes and Snyder, 1995, 227]. There are two reasons for this. First, each party expects, with some probability, to shift his legal costs to the other side. A litigant who is confident in his ability to shift his fees to the other side is likely to spend more than he would otherwise. Second, the English rule increases the stakes at trial by the amount of the legal costs that are subject to fee-shifting. The stakes of the trial are the difference between winning and losing. The

American rule reduces the reward of winning by holding the litigants responsible for their own costs regardless of the outcome. The English system provides more incentive to increase expenditures to ensure victory because a win allows the litigant to shift at least a portion of his legal fees.

As a rule, a reduction in the benefit of winning relative to losing leads to less vigorous battles in court [Baye, 2000, 19]. One may be tempted to conclude that the American system is a superior litigation system because it reduces the stakes and therefore the incentive to spend additional monies in court. The rule, however, only reduces legal expenditures on a per-trial basis. There is an important tradeoff between per-trial expenditures and the total number of cases brought to trial. Although the American rule may provide comparatively less incentive to spend great amounts to win, the rule also offers more incentive to file suit initially because of the smaller amount at stake if one were to lose.

In summary, economic analysis suggests that fewer cases will be filed under the English rule, and those that are will be of higher quality. The analysis is somewhat ambiguous as to the rate of settlement under either rule, and the English rule is found to increase expenditures at trial.

IV. Empirical Evidence

Although virtually every other common law country in the world uses the English rule, critics may contend that results in foreign nations are irrelevant to the American legal system. Some may argue that differing market environments, economic conditions, social contexts, and other external factors within the countries may influence the English rule's effectiveness. Fortunately, the English rule was applied in the U.S. to medical

malpractice suits in the state of Florida between 1980 and 1985. This allows for a limited direct comparison between the two rules in practice. Economists Hughes and Snyder studied 16,674 Florida cases, some tried under the English rule and some filed before 1980 that were tried under the American rule [Hughes and Snyder, 1995, 234]. Their analysis provides insight into the actual effect the English rule may have on litigant decisions.

One of the key findings of the study supports the prediction that the quality of suits filed increases under the English rule. The average win rate in the subset of American rule cases was 11.4%, while the average for the English rule cases was 21.6% [Hughes and Snyder, 1995, 238]. The average settlement figures and judgment awards indicate that the higher average win rate for cases under the English rule was likely due to a decrease in frivolous suit filings, not an increase in smaller meritorious suit filings. Regression results of the payment in cases settled outside of court confirm that English rule settlements were higher by a factor of 30% [Hughes and Snyder, 1995, 243]. Regression results considering all cases tried in court indicate that awards given by judges were 117% higher under the English rule than those given out under the American rule [Hughes and Snyder, 1995, 240]. Uncertainty remains as to whether the higher plaintiff awards reflect only a better selection of plaintiffs, or if they also signal a censoring of low-value cases due to the threat of higher-cost litigation. This is a critical distinction that the authors claimed they would study further.

The results of the study also show that defensive expenditures rose under the English rule. Critics are often concerned that an increase in defensive outlays would severely disadvantage plaintiffs. This was not found to be true as shown by the plaintiffs'

higher win rate and higher average award under the English rule. The results suggest that greater expenditures may influence a plaintiff's filing decisions but do not govern settlement or trial outcomes. The authors conclude that the higher plaintiff win rate, judgments, and settlements imply that the plaintiffs use a higher expected value threshold under the English rule [Hughes and Snyder, 1995, 245]. They claim that the rule would ultimately serve to limit the frequency of nuisance suits by encouraging plaintiffs to proceed only with higher-quality claims, and that the rule would reduce incorrect findings of liability because of the increase in defensive outlays. Perhaps more importantly, the authors assert that their findings suggest the English rule would reduce the overall probability of litigation in the aggregate.

V. Addressing Criticisms

The English rule raises a few additional concerns beyond those already discussed. As with any proposed change in American policy, the range of criticism in this area is quite extensive. Some of the negative responses have merit, while others seem to be somewhat irrational fears based on misguided opinions or lack of information.

A small but vocal minority argues that the English rule is simply unnecessary because a form of loser-pays already exists in America. In truth, a rule allowing for the punishment of nuisance suits is on the books in the form of Rule 11 of the *Federal Rules of Civil Procedure*. Rule 11 requires an attorney to sign any paper before presenting it in court to certify that, to the best of his knowledge, the document has not been presented for any improper purpose, such as to harass or cause unnecessary costs or delays in an existing case [Legal Information Institute, section b]. In reality, Rule 11 is very infrequently applied, and the purpose of the rule is only to discourage inappropriate

behavior, not to compensate the victims of the wrongdoing. Actual monetary sanctions are extremely rare and, when enforced, go to the court instead of to the other party. Based on real world evidence, it seems that Rule 11 is not able to effectively deter frivolous suits and, furthermore, the Rule makes no attempt to encourage meritorious suits.

Many more people are concerned that the English rule would result in an unjustly severe punishment for the loser of a very close battle. In other words, critics feel that it is unfair to shift the entire burden of court fees to the losing side when the case hinges on a few minor points. This is an aspect of the equity component that I feel should be considered when determining the appropriateness of a fee-allocation rule. English courts have already addressed the concern of inequitable fee-shifting. British fee-allocation is not necessarily all-or-nothing. The courts often divide the fees according to how strong they perceive each litigant's case to be at the end of the trial. Therefore, fee-shifting depends not only on which party prevails, but also on the margin by which they prevail [Bebchuck and Chang, 1996, para. 7]. In very close cases, the parties ultimately have fee responsibilities similar to their American counterparts. In clearly one-sided cases the loser will necessarily bear the total of the winner's fees.

Another concern with the English rule is connected to the economic analysis of litigant expenditures at trial. Critics claim that by increasing the stakes, the rule would also increase the amount of time the parties spend arguing in court. Again, the British system deals with this possibility by allowing for flexibility in fee-shifting. Even a party with a legitimate case risks sustaining an offsetting penalty if he tries to stretch his case by adding less-plausible accusations. For example, if a plaintiff claims that he suffers

from a broken arm, chronically sore back, and recurrent nightmares because of negligence on the part of the defendant, but the judge finds that only his broken bone can be linked to actions of the defendant, he is thought to have lost part of his case. In this situation, the plaintiff would recover the portion of his legal fees associated with establishing the broken bone claim. He will lose the money he spent in court trying to establish causality between the defendant's actions and his other supposed injuries. The English courts similarly discourage the practice of making huge cash demands for routine injuries. A plaintiff who claims millions of pounds in damages, but is only able to prove thousands of pounds in injuries, is considered to have lost in part and is therefore responsible for at least some of his fees [Olson, 1995, para. 15]. In America, the practices of including unwarranted causes of action and claiming huge sums of damages increase the length of stay in court by forcing defendants to spend extra time fending off unreasonable claims and protecting themselves from unnecessarily large demands. Although British litigants may have more at stake in battle, they also have sufficient incentive to avoid this type of inefficient activity.

Finally, some critics of the English rule believe that it is too effective at reducing litigation, especially among lower income groups. They worry that the English rule unfairly disadvantages potential plaintiffs and, in doing so, diminishes basic access to justice [Olson, 1995, para.2]. It is easy to envision a scenario in which powerful corporate defendants are able to hire big name attorneys to defend their case and force weaker plaintiffs to bear their exorbitant legal costs. An appropriate response is to again look at the existing British system. In England, fee awards rarely cover the full cost of litigation. They are instead based on a low set scale depending on many factors,

including the financial position of each party [Bernstein, 1996, para. 43]. In this way, the rule is structured to not unjustly disadvantage any particular group of litigants. Also, a defendant in the British system is not awarded the fees for a first class attorney if a third year law student could have adequately established his case. In fact, overall, the English rule is more likely to *help* plaintiffs by discouraging improper conduct by defendants. Powerful defendants are more likely to be in a position to make costly delays in attempt to coerce a settlement. They have an incentive to avoid doing so under the English rule because delays made against worthy claims ultimately cost them more money by adding to the time and money spent in court by both sides [Bernstein, 1996, para. 45]. Furthermore, one should also consider that a loser-pays rule is used by social democracies such as Sweden and Denmark, countries that would undoubtedly seek to abolish a rule that unjustly disadvantaged the poor [Olsen, 1995, para. 6].

VI. Conclusion

The English rule is shown by theory, and proven by practice, to reduce the overall amount of litigation. A fee-shifting rule should discourage frivolous suits and encourage meritorious suits. By increasing the amount at stake, the English rule is far more successful at decreasing frivolous lawsuits than is the American rule. The innate increased risk under the English rule may also serve to discourage risk-averse plaintiffs with meritorious claims. It may be that one is forced to choose between the lesser of two evils. Under the American rule, neither valid nor invalid claims are discouraged by fee-allocation. Evidence shows that litigants naturally think too highly of their cases; the English rule pushes them to judge their prospects more realistically. If the English rule ultimately caused litigation on the whole to decline, would the country really be any

worse off? The legal system is not the most efficient method to solve conflicts between individuals. Perhaps it would not be such a poor decision to force potential litigants to think twice before they file a suit.

Finally, despite the concern of discouraging plaintiffs, the English rule is considered by many to be more efficient *and* ethically superior. Most people would agree that defendants deserve compensation for the expense of defeating an unfounded claim. Likewise, a plaintiff with a legitimate claim should be able to recover his full loss, including the legal fees paid to defeat the guilty defendant. The bottom line is that nowhere else in the world are there as many resources invested in the legal system as in the U.S., and everywhere else in the world a loser-pays system is used. Foreign politicians and scholars the world over know that the American system exists, and consciously choose to reject it. Perhaps it is time that our country does the same.

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