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Reimbursement of Counsel Fees and the Great Society†

In sorrow and in anger—and in hope

Albert A. Ehrenzweig*

I

SORROW: THE LITTLE MAN’S PLIGHT

W hen I came to this country twenty-seven years ago, I was penniless, did not speak English, had to support wife, children and parents, and was unable to use anything that I had learned and done as a judge and law teacher in my first life. And yet I was permitted and encouraged to rejoin my own profession for a life in freedom and dignity. I knew, I knew deep in my heart, that there was no other country in the world in which this could have happened.

Compared to this knowledge, it meant little that an American moving firm had cheated us out of our last belongings; and it was only a fleeting disappointment when I found out that I had no recourse in the courts of law. I was, of course, directed to a fine lawyer. “Sure,” he said, “you have an airtight claim, and I shall take your case, but you will understand, I must have one hundred dollars as a retainer.” I did not understand. Would he not get his fees from the defendant, as he would anywhere else in the world? I did not have the hundred dollars, and even if I had won, I would not have been made whole for I had to pay my own lawyer. Of course I did not sue. The little man had lost. A fleeting disappointment, true. But I then swore to myself that I would not forget the little man if I should ever cease to be one.

Twenty-seven years have gone by. But only now do I feel that I can, in good taste and good faith, take on the fight and attack an institution which, erroneously, is held in awe by the American legal profession as a sacred common law heritage: the power and, indeed, the right of the losing party in a civil suit to inflict on the winner not only the misery but

† Much of the following material appeared first in my paper, Shall Counsel Fees Be Allowed?, 26 Cal. S. B.J. 107 (1951). See also Potter & Cooper, Attorney’s Fees, 14 Tex. B.J. 579 (1951), borrowing generously from that paper without citation. A recent article, Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966), takes essentially the position advocated in this article, and includes a draft statute.

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also the expense of enforcing his just claim. For I am convinced that my plea for the abolition of that power, made in sorrow and in anger and in hope, has an essential function in the War on Poverty to which every citizen wherever born, every lawyer wherever bred, has the right and duty to contribute.

Reform of criminal procedure has become the central problem of the law reform which is to serve the Great Society. It is of course crucially important for us to protect everybody as well as we can, against the hazards of criminal justice. But most of these hazards will forever remain. For mankind's helplessness in the face of crime and criminals, the persistence of mankind's retributive instincts warring with its curative reasoning and ideals will forever permit only alleviation of this innate tragedy. On the other hand, that other phase of our administration of justice, civil procedure, being infinitely less burdened by psychological trauma and enigma, has proved capable of true reform elsewhere, and that reform is long overdue in this country. Strangely, terribly, intolerably, these United States, this citadel of democracy, which has taken it on itself to play the decisive role in building the Rule of Law throughout the world, has forgotten the little man in his struggle for civil justice.

This fact is incredible to those who, though subjects of foreign dictators, enjoy a truly democratic civil procedure. But lack of such a procedure in this country is, of course, not a sinister product of "capitalism." Rather it is the result of historical accident. That it has, nevertheless prevailed to this day, is due no doubt to the multifarious split in the laws of the several states, which has prevented them from partaking in the progress of civil procedure in other countries, socialist and capitalist alike. It will remain for a future generation of scholars and lawyers with greater leisure and peace of mind, without prejudice and with much self-denial, to approach this general problem. What I can do, what I feel I must do at this time, is to make an urgent plea for the immediate reform of one central facet of our civil procedure which, separable from the latter's body, can and must be destroyed as a pernicious historical relic—unknown in the rest of the world—the rule, I repeat, that the winning party in a law suit (with few and unimportant exceptions) cannot recover his counsel fees from the loser.

True, commercial civil litigation, with its finely honed tools of adversary proceedings between lawyers, has been developed in this country to a perfection not easily equalled elsewhere. And there is scant reason for redistributing the cost of such litigation among the equal partners. True, also, that that travesty of the little man's justice, the personal injury

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suit, with its gamble, delay and expense, will have to await fundamental substantive reform which will replace this suit by new tools for the distribution of losses inevitably caused by modern mechanical enterprise. And until this reform can be achieved against the continuing resistance of the "industries" of the "plaintiffs' bar" and of insurance, the contingent fee, that legitimate sibling of criminal champerty, will have to remain with us as an incurable symptom of an uncured disease. But the little man in his every day dealings with his contracts, his property, his family, and administrative agencies can and must be helped at this time, not by the business of neighborhood referral or the charity of legal aid, but by a reform of our law of counsel fees.

Just a trifle, a little cog in the great wheel of justice? No, a festering cancer in the body of our law without whose excision our society will not be great. Big words, to be sure. I shall try to justify them first in angry terms of personal experience and then in terms of the teacher and lawyer, thus adding hope to sorrow and to anger.

II

ANGER: UNREASON AND HYPOCRISY

As early as forty years ago, the Massachusetts Judicial Council pleaded for reform, asking: "On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill." As long as thirty-eight years ago, Sir Arthur Goodhart urged a comparative and functional study of the problem. Over and again public attention has been drawn to the intolerable consequences of our rule. Yet the American bar has remained satisfied with slogans calling for making its services available to the "poor" through patchwork measures such as referral services and legal aid. Group services may be the next

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2 See Ebenzweig, NEGLIGENCE WITHOUT FAULT (1951); Ebenzweig, "FULL AID" INSURANCE (1954).
4 See, e.g., Carlin & Howard, Legal Representation and Class Justice, 12 U.C.L.A.L Rev. 381, 413 (1965).
7 Id. at 64.
8 Goodhart, Costs, 38 Yale L.J. 849 (1928).
COUNSEL FEES AND POVERTY

reluctant concession.\textsuperscript{10} But even the War on Poverty stops short of the fundamental issue.\textsuperscript{11} And everyone raising it, will run into a stone wall.

I have long had to harden myself against the argument of friends and colleagues that my alien scheme would offend the American sense of fairness. Many, many times I have made my defense as I shall restate it presently. Only once I tried to reach a greater audience. I spent several weeks in tedious research to show how the rest of the world felt about our rule and completed a paper with a great deal of documentation. It remained unnoticed and unanswered in the “Forum” section of the bar journal to which I submitted it.\textsuperscript{12} I did not give up. In 1952, as chairman of a committee of the American Bar Association, I obtained the unanimous consent of my committee to a summary of my research and to a recommendation that a comparative study of the problem be undertaken—only to have our report pigeonholed for almost ten years. To be sure, in 1963 a courageous successor, Mr. Benjamin Busch, encouraged by the then chairman and vice-chairman of the Section, not only sought to bring the report to renewed attention, but actually obtained comparative studies for four countries.\textsuperscript{14} But here the matter rests and will rest unless and until those concerned with the War on Poverty take on the fight.

Why the stone wall? Why must we fight so bitterly for something that is a matter of course in the rest of the world? Is it not obvious that the little man can fight for his right only if he can hope that he and his lawyer will be made whole if he wins? As an American lawyer I know that the little man’s only refuge, the small claims court, is unavailable in innumerable communities; and that where it exists, it is prevailingly a collection

\begin{itemize}
\item \textsuperscript{11} See Shriver, \textit{The OEO [Office of Economic Opportunity] and Legal Services}, 15 A.B.A.J. 1064 (1965).
\item \textsuperscript{12} Ehrenzweig, \textit{supra} note \textsuperscript{1}.
\end{itemize}
agency, and presents otherwise the horrifying spectacle of a court without law, abandoned by the legal profession which, almost everywhere, is excluded from its precincts. And as an American citizen I know that all the law now offers the little man, outside that second-rate court at some places and at some times, is charity. Legal aid, rather than legal right. If access to the court is said to be an inalienable right in the most rigid dictatorship, money then is the way to justice in the world's greatest democracy. But not only the little man is in jeopardy, the legal profession is hurting itself immeasurably by its doting on what it wrongly believes to be a hallowed tradition. From my experience as an Austrian judge I know that these hundreds of thousands of honest claims which now are either contemptuously disposed of by "law-less" magistrates as not worthy of the law's and the lawyer's attention, or condescendingly "aided" by the generosity of the profession and its apprentices, or simply suppressed by lack of machinery, all those hundreds of thousands of honest claims, if made recoverable by a reform of our system of counsel fees, would become the daily bread of a new proud profession of "little lawyers" serving the little man—as they do everywhere else in the world. And yet—the stone wall. Why?

How often have I heard my colleagues' chiding: "You simply have not grasped the American sense of fairness. It is bad enough to see one lose who in justice should have prevailed. To make him pay the winner's counsel would add injustice to injustice, would mean stepping on one who is down, and it would make honest men unwilling to go to court, be it as plaintiffs or as defendants." But is it not obvious that this argument implies the cynical, and most certainly incorrect, belief that judges and juries are more often wrong than right? Indeed, as Arthur Goodhart has said pointedly in answer to this argument: "If New Jersey justice is so much a matter of luck, it hardly seems worthwhile to have courts and lawyers; it would be cheaper, and certainly less dilatory, to spin a coin."

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16 See Comment, 52 Calif. L. Rev. 876 (1964), and for a bibliography, Louisell & Hazard, Cases on Pleading and Procedure 111 (1962).

17 This reasoning is restated in Report of Committee on Comparative Procedure and Practice, 1962 Proceedings of Section of International and Comparative Law, A.B.A. 117, 118 (1963), as the "sincere ... opinion of many practitioners" who maintain "that the right to sue without deterrence [sic] by the specter of the possibility of paying an adversary's legal fees is part of our democratic tradition and a bulwark of equality that reduces the differences in part between the wealthy and the poor and permits the less affluent to press for the redress of wrongs." See also a similar pseudo-historical statement in Conte v. Flota Mercante del Estado, 277 F.2d 664, 672 (2d Cir. 1960), relying on Goodhart, supra note 8, at 872-77. And see the most peculiar argument in Judicial Council of California, 18th Biennial Report 65 (1961).

18 See Satterthwaite, Increasing Costs to be Paid by the Losing Party, 46 N.J.L.J. 133 (1923).

19 Goodhart, supra note 8, at 877. See also Goodhart, Legal Costs As a Subject for Comparative Law, 4 Int'l & Comp. L. Bull. 13 (1960).
Let us concede for the sake of argument that many court decisions should in justice have gone the other way, and that in those cases, if counsel fees were allowed, losing parties would be treated even more unjustly than they are now. But how can we ignore the fact that at the same time we would prevent that great majority of plaintiffs and defendants, who justly lose their cases, from getting away, as they do now, with unjustly burdening their prevailing opponents with the heavy expense of counsel fees? Only if our initial assumption is reversed and we must concede that litigants who should win, more often lose than win their cases, would our argument be incorrect.

Now, it could be argued, of course, that allowance to the victorious party of his counsel fees might, besides inflicting additional harm on losing litigants with meritorious claims, deter an additional number of such claims from even reaching the court—a result particularly undesirable in the ordinary, wholly unpredictable automobile accident case. But this argument, in the first place, is psychologically doubtful since, in view of the very unpredictability of jury assessments, additional uncertainty is unlikely to influence the parties' decision. And secondly, juries in making their assessments now probably quite generally take into account the plaintiff's counsel fees and would be likely to reduce their verdicts correspondingly if instructed as to plaintiff's right to recover his fees in addition to the sum assessed. On the other hand, the fact that allowance of counsel fees might deter a few skeptical defendants who fear that court or jury might fail to recognize their just defenses, would seem less objectionable than the present system under which many more, though confident that the law would properly decide in their favor, now refuse to defend suits in which they would ultimately, though relieved of paying an unjust claim, have to spend counsel fees far exceeding that claim. For similar reasons it cannot be argued that allowance of counsel fees would encourage frivolous plaintiffs who would no longer have to contemplate a possible consumption by counsel fees of their expected spoils. It seems likely that a greater number of such frivolous plaintiffs now only risking their own expense, would properly be deterred by the additional risk of having to pay their opponents' counsel fees. On the other hand, the prospect of recovery of counsel fees on meritorious claims would probably greatly increase the number of clients seeking lawyers' assistance. Be this as it may in the no-man's land of personal injury claims, these arguments are fully conclusive, I believe; for the little man's other claims which alone are the subject of my plea.

Suggestions aiming at a reform of the present law find strong support in the fact, stressed earlier, that this country now is probably alone in failing to allow counsel fees to the victorious litigant. True, the manner
in which this allowance is made in other countries varies widely. In England, Canada, and other parts of the Commonwealth it is subject to the discretion of the court.\textsuperscript{19} Elsewhere, statutory tariffs govern the assessment.\textsuperscript{20} True also that under many systems parties will often choose separately to compensate their attorneys at a rate higher than that conceded by the statute or by the court. But most everywhere else in the world the chance of recovering counsel fees, however modest, from the losing opponent, is a strong inducement for the lawyer to take on a meritorious case without regard to his client’s affluence and thus greatly to increase the number of those served by the legal profession.

Well accepted as allowance of counsel fees may be in other countries, we could not contemplate its adoption, however, without having first assured ourselves that the present American law of fees is not justifiable or even indispensable as the product of legal institutions or attitudes peculiar to this country. But I believe that I have won my case if I can prove that what continues to parade as a token of the American sense of fairness, is nothing but an historical accident. Once this is understood and accepted, we may cease to talk in sorrow and in anger—and have new hope for the future.

\section*{III \hspace{1cm} HOPE: HISTORY AND GOOD WILL}

England, since time immemorial, has permitted the parties to recover their counsel fees from their losing opponents.\textsuperscript{21} It seems beyond doubt that this principle was adopted in this country with the reception of English law. The Revised Statutes of New York of 1829 contain express provisions to this effect.\textsuperscript{22} A Report of the Commissioners on Practice and Pleading of September 25, 1847, took it for granted that “the losing party, ought... as a general rule, to pay the expense of the litigation. He has caused a loss to his adversary unjustly, and should indemnify him for it. The debtor who refuses to pay, ought to make the creditor whole.”\textsuperscript{23} I have tried elsewhere to trace the legislative history leading to our present allegedly ancient rule,\textsuperscript{24} and have submitted on the basis of that study that the rule is not founded on some age-old principle of the common law or a peculiar psychology of the American people; but that it is the result of a more or less accidental statutory history. Indeed, there are good reasons for assuming that what is now so often represented as a noble postulate

\begin{footnotes}
\item[19] The system is described in Goodhart, \textit{supra} note 4, at 854-55.
\item[20] See authorities cited in note 14 \textit{supra}.
\item[21] Goodhart, \textit{supra} note 8, at 851-54.
\item[23] \textit{Commissioners on Practice and Procedure, First Report} 206 (1848).
\item[24] Ehrenzweig, \textit{supra} note 1.
\end{footnotes}
for restraint of the winner in a chance contest, is actually due to the simple fact that the New York legislature in 1848, in attempting to perpetuate what it considered a sound legal rule of recovery of attorneys' fees by the prevailing party, made the fatal mistake of fixing the amount recoverable in dollars and cents rather than in percentages of the amount recovered or claimed. It was this mistake probably that caused lawyers and courts, when rising living costs began to obscure the real purpose of the statutory amounts of "costs," gradually to forget the meaning of those amounts. And it was this process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees.

Once we have recognized this irrefutable fact, and once we share the opinion, supported by much domestic and foreign authority as well as common sense, that the present system denying counsel fees to the prevailing party is a serious threat to our administration of justice, the question of remedy becomes our main concern.

None of the existing schemes constitutes a wholly acceptable solution. The English system, partly adopted in this country by courts of equity and generally in Alaska and Nevada, has been found wanting in view of its undesirable latitude of judicial discretion. Allowance of counsel fees in cases of bad faith, as practiced in Georgia, though less uncertain, does not protect the prevailing party as such. And general recovery of fixed amounts, originally the law of the land, has been abandoned everywhere under the pressure of the devaluation of currency, while uniform percentages with or without maximum limit, as applied in San Francisco from 1866 to 1905 and, within narrow limits, in New York today, have proved too rigid.

What the New York code commissioners suggested in 1848 still holds true: Counsel fees, to be justly recoverable by the prevailing party must be "graduated in part by the necessary labor performed, and in part by the amount in controversy." Nothing else will do, neither the California rule applicable to suits for wages below three hundred dollars and providing


31 COMMISSIONERS ON PRACTICE AND PROCEDURE, op. cit. supra note 23, at 207.
for a straight twenty per cent fee without regard to the services performed,\textsuperscript{32} nor the fixed sums\textsuperscript{33} of the California Practice Act of 1851 which, though taking account of those services, had no relation to the amount in controversy.\textsuperscript{34} But why not combine the two principles in one scheme of \textit{percentage compensation for each service performed}? Would not the most natural solution be to restore the schedule of services under the Practice Act of 1851 and to substitute for the fixed amounts of that schedule percentages preserving their mutual relation? Further to follow precedent, the total of recovery should approximate the twenty per cent of the present rule applicable to suits for wages. In addition, it may be wise to grant the court limited discretion in penalizing parties suing or defending in obvious bad faith or taking procedural steps not reasonably necessary, and increasing the total of recovery in cases of extraordinary difficulty on the pattern of section 8303 of the New York Civil Practice Laws and Rules.\textsuperscript{35} Both principles and details of such a plan would, of course, have to be subjected to much discussion among those who by professional experience and familiarity with local conditions are alone equipped to pass final judgment.

Is there hope? The Great Society is waiting.

\textsuperscript{32} CAL. CODE CIV. PROC. § 1031.

\textsuperscript{33} "Perhaps if the New York code of 1829, instead of providing for a fixed fee in every case, had allowed the successful party a reasonable counsel fee depending on the nature of the litigation, the [U.S.] system would have developed along the lines of the present English one." Goodhart, \textit{supra} note 8, at 874. That the California legislature abolished the allowance in San Francisco of counsel fees to the prevailing party is probably due to a similar mistake of legislative technique, \textit{i.e.}, the establishment in 1866 of a maximum fixed amount of one hundred dollars. Cal. Stats. 1865-66, ch. 91, § 60, repealed, Cal. Stats. 1905, ch. 331.

\textsuperscript{34} Calif. Civ. Prac. Act §§ 494-514, Cal. Stats. 1851, ch. 5. The costs provisions were amended in a few minor details by Cal. Stats. 1853, ch. 178, §§ 8-11. Section 502 of the Civil Practice Act of 1851 did provide for a percentage recovery in certain actions, but the percentage was low (five per cent on the first one thousand dollars, two per cent thereafter) and allowances could in no event exceed five hundred dollars.