

Professionalism and proportionality

THE HONOURABLE WARREN K. WINKLER

Trial lawyers in the United States and Canada have a lot in common. In both countries, we have a strong and independent judiciary, a committed and professional bar and a deep recognition of the importance of the rule of law. As North Americans and citizens of constitutional democracies, we often take our cherished justice systems for granted, while at the same time others, in less stable political systems, struggle for freedom and equality under the law and fight against systemic corruption. We have much to be thankful for and to celebrate in this regard.

Yet, there are pressing justice issues facing both of our jurisdictions.

I begin by observing that virtually every day, ordinary people among us encounter problems in their lives which make it necessary for them to come to the legal system for assistance. For example, a teenager is seriously injured in a hockey game, and her parents need money to build her a wheelchair ramp at home. A couple's marriage breaks down, and they need to manage conflicts about how to raise the children. A seller promises that a house has a brand-new roof, and the buyer needs to fix the unexplained leaks.

Only a lawyer would think of these as legal problems. For everyone else, they are life problems. A good justice system can help people with their life problems. A justice system that loses sight of the people it is supposed to serve and focuses instead on itself and its own process is not worthy of the name. My point is that the courts serve the public.

The civil justice system meets the needs of most people more or less effectively. Unfortunately, though, for a growing number of people, the civil justice system is becoming less and less accessible; instead, they find that the system is too expensive and too slow to provide them with any real help.

I do not wish to suggest that our civil justice systems are a failure. There is no shortage of critics who speak of nothing besides its failings. When they do, they distort and oversimplify. They fail to appreciate the justice system's enormous complexity and its many successes.

Yet I must return to the sombre fact that our justice system fails to be accessible to many and that pressures on the system continue to mount. The number of people who cannot afford a lawyer and who are forced to represent themselves in important legal proceedings has ballooned in the last ten years.

Many people for whom the justice system

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is not accessible do not pursue their rights at all or abandon their case partway through, when their money runs out. This is one of the main causes of the vanishing trial.

Everyone favours "access to justice." The phrase has become a mantra with judges, government officials and bar associations. Nevertheless, like so many other words and expressions, it has become so commonplace that the urgency of its meaning has tended to become blunted or worn. We cannot allow "access to justice" to become a cliché, devoid of meaning and significance.

Access to justice undoubtedly means different things to different people, but for me it simply connotes the laudable notion that people can and should resolve conflicts fairly, affordably and quickly through a court process. The fundamental question is, how do we promote these goals in practice?

In searching for ways to do things better, I suggest that we begin by looking to our successes. What have we done right in the past? Upon what in our existing system can we build?

In Ontario, over 60 per cent of civil lawsuits proceed under simplified procedural rules. These provide faster, less expensive mechanisms for getting cases to trial. Advances have also been achieved for plaintiffs through the increased availability of contingency fees and class actions.

What can we learn from these apparent successes? Are there any overarching principles we can apply more widely across the entire spectrum of civil cases? From the successes we have had, I suggest that the common threads are proportionality and professionalism.

"Proportionality" is a term almost as popular as the phrase "access to justice." Commonly, proportionality, in the civil litigation context, is understood simply to reflect that the time and expense devoted to a proceeding ought to be proportionate – that is, relative – to what is at stake.

Can anyone doubt the logic that a lawsuit should be planned and carried out in a manner that reflects the monetary value, complexity and importance of the dispute? I should think that there exists a strong consensus within the legal community, and among the users of the system, that proportional litigation is pivotal to ensuring true access to justice.

I also believe that lawyers must assess the social impact of the case. For example, the issues that arise in a family breakdown or from the loss of an employee's livelihood have tangible effects of great importance, even if the dollar amounts are modest. It is necessary to specifically identify and balance the social and personal impact of issues with the other criteria that govern any analysis of proportionality.

Therefore, while I heartily endorse a "proportionate" approach

to litigation, I hope that others share my view that the justice system must always be about much more than dollars and cents.

Regardless of how we measure proportionality, there is also the question of what can be done to promote it. The unfortunate truth is that if the adversarial process is left to itself, it often actively discourages proportionality. There is always one more issue that can be raised or one more expert who can be consulted in an attempt to vanquish the other party.

Often, the most effective cross-examinations and the most persuasive legal submissions are the most straightforward ones. I have seen some lawyers accomplish more in two hours of examination for discovery (the Canadian term for depositions) than some other lawyers accomplish in two weeks. The lawyers who get to the point are those who have the expertise to know what works and what doesn't. They do not let their clients take carriage of the case. They listen to and act on cues from the bench about how a case is going. They have enough experience and self-confidence to concede losing arguments and to focus on the winner.

Expert lawyering includes bringing critical judgment to bear, and giving clear and candid advice about settlement options early on, before limited resources are eaten up by unproductive litigation steps. Not every case is winnable. Lawyers need to explain realistically, at the outset, about the prospects of the case. I am, of course, in no way suggesting that lawyers should not be imaginative about novel cases or strategic about how to settle hopeless losers. But they need to recognize the difference at the outset and give clear legal advice before needless litigation steps have been taken (and billed to the client). This is a question of professional training and experience. It is at the core of legal ethics.

At the same time, judges who "get to the point" are the ones who provide the cues and guidance required to keep counsel and parties focused on the real trial issues and, at the same time, keep a truly open mind.

The courts' rules and procedures can, and must, be modified to encourage proportionality, but it is the legal profession which must ultimately address the problem of disproportionate litigation. Lawyers must be better prepared to do what they are trained and paid to do – to provide thoughtful, timely, dispassionate and, indeed, proportionate legal advice to clients

Over the years, there has been a movement toward increased intervention by the courts to assist – case manage – in the progress of individual lawsuits, whether or not they required the court's "firm hand." In my opinion, however, although judges may know more about the system than clients do, counsel invariably have a more detailed and nuanced understanding of the facts, issues and personalities driving each lawsuit. Courts are not institutionally equipped to micro-manage every lawsuit in the system. We do a disservice to all involved when we try. We need to trust lawyers to do their jobs.

When we have judges controlling the courtroom and lawyers moving their cases forward proportionately and professionally, the role of the court in managing cases should be focused on "case management when necessary, but not necessarily case management." Highly complex cases, or cases which have gone "offside," are good examples of the types of cases which require greater amounts of legal and judicial resources. Many cases just need to be heard and disposed of.

The examples of Ontario reforms to which I referred – access to simplified procedures, flexible case management, contingency

fees and class proceedings – are tangible examples of successful reforms from within our system. These were guided, and indeed crafted, to further the principles of proportionate litigation and professionalism. Each was designed to

- simplify procedures;
- reduce litigation steps and costs for litigants;
- ensure legal leadership from the bar;
- achieve dispute resolution more expeditiously; and
- afford the judiciary more time to preside over irresolvable cases.

These initiatives sought to improve and succeeded in vastly improving the way some conflicts are resolved for Ontarians with real-life problems. They have squarely confronted the phenomenon of the vanishing trial. We must not overlook the fact that inability to access the justice system, culminating in a fair trial, is a fundamental denial of justice.

Nonetheless, much more needs to be done. Access to justice continues to be the challenge for the civil justice system. Our justice systems are well served by dedicated and capable judges, lawyers and administrators. Together, we must learn from our recent successes and redouble our efforts to dismantle the barriers that still block true access to justice.

Indeed, we have a professional responsibility, regardless of our specific areas of practice, to ensure that all members of our society can seek and obtain justice within the legal system. With inaction, we risk losing the foundation upon which our justice system is grounded – the rule of law.

By committing ourselves to the values of proportionality and professionalism, we can truly say that we are privileged to be part of a vibrant civil justice system.