Bridgette Toy-Cronin

# Power in Civil Litigation

Abstract
Blindfolded Lady Justice represents the ideal of justice – a system that has no regard for the parties' power and is attentive only to the justice of a case. The reality, however, is that power does influence the course of civil litigation in Aotearoa. This article considers the dynamics of power in civil litigation, including the types of parties involved in disputes. It then surveys and evaluates potential areas for reform, including suppressing lawyers' fees, equalising the legal spend between opponents, removing lawyers from disputes, increasing judicial control, conglomerating claims, and involving the public in procedure reform. It concludes that the most promising areas for reform to be pursued in concert are: regulation of legal fees, increasing judicial control and involving the public in civil justice reform.
**Keywords** civil litigation, power, access to justice

Blindfolded Lady Justice represents the ideal of justice – a system that has no regard for the parties' power and is attentive only to the justice of a case. The reality, however, is that power does influence the course of civil litigation in Aotearoa, and indeed in all countries. This article first considers how power can influence litigation, and then considers policy proposals that might minimise that influence. These policy proposals include some that are already on the table as possible reforms, and some that are not. It considers how successful they might be in eliminating – or at least reducing – the influence of power in civil disputes. Before looking at solutions, however, it is important to understand the dynamics of disputes and how power can influence their course.

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### Dynamics of dispute resolution

When we imagine a dispute, we often envisage two warring individuals. This is a mental model drawn from popular culture – think *Judge Judy*, for example – but the reality of dispute dynamics is much more complex. It is important to first unpack these dynamics as part of the context for consideration of the likely effectiveness of various policy changes.

#### *Parties and their entourage*

First, let us consider the types of disputants, called 'parties' in civil litigation. Parties vary in the power they possess. Individuals have differing levels of economic and other forms of capital (e.g. social, cultural), as well as different life experience, vulnerabilities and strengths. Disputes involving an individual versus an individual are, however, a relative rarity:

for example, 15.6% of cases in a study of High Court civil litigation (Toy-Cronin et al., 2017). Parties can include government (local, central), companies (ranging from publicly listed and multinationals, to one-person enterprises), trusts (from small family trusts to large public entities), and a variety of other entities and actors including body corporates, liquidators, receivers, partnerships, charity and religious organisations, executors and guardians. Litigation involves many permutations of parties.

The parties may be represented by lawyers, which can influence the power they exert. Lawyers have varying levels of professional skill, as well as different styles of conduct, resulting in differing reputations with the bench and bar. They may come with or without marks of prestige, such as a large firm name or the rank of Queens' Counsel. Some parties have no representation, proceeding as litigants in person. They are particularly vulnerable as a result of their inexperience and confusion about the complexities of the legal world – both its written and its many unwritten rules – and the fact that our higher courts are not designed with them in mind (Macfarlane, 2013; Toy-Cronin, 2015). Most judges and some lawyers do what they can to even up this stark power imbalance, but the adversarial system does not easily lend itself to such accommodations. While most litigants in person could be described as vulnerable (e.g. Trinder et al., 2014), it should also be noted that some – and indeed some represented litigants – use the court process abusively. For example, a violent former partner may continue patterns of coercive control that featured in their relationship by using the court process (Douglas, 2018; Miller and Smolter, 2011), or litigants may conduct vexatious proceedings.

It also needs to be kept in mind that parties may be responding to various pressures and incentives from others. For example, behind a company or an individual there might be an insurer who is controlling the litigation. That insurer will in turn be subject to pressures, including the concerns of their re-insurer, the need to achieve certainty about exposure to liability, and the need to maintain reserves.

It is important to note that it is not the absolute amount of power that a party has that matters, but its resources relative to the other party …

This brief survey of some of the dynamics of disputing parties – dynamics that are not always visible – shows the great complexity at play in civil litigation. These dynamics must be taken into account in crafting solutions, otherwise the solutions will fall short in their aims. Before looking at the range of solutions, however, let us look in more detail at how money and power influence the dispute process.

### Power

Power is a difficult concept to pin down, but a useful model for this discussion is Lukes' theory that power has several dimensions (Lukes, 2005). Two of those dimensions are relevant here. First is the visible face of power: who can dominate the other party, allowing their interests to prevail? Second, who has the power to make the rules that shape whose interests prevail? I consider each of these dimensions in turn.

#### *First dimension – power to prevail*

One aspect of the power to prevail is access to financial resources to fund the fight. We know money is unequally distributed, but how does that influence the dispute process? The influence of money stems from the fact that we have 'a market in legal resources [which] enables rich individuals to control outcomes indirectly by stacking the procedural deck' (Wilmot-Smith, 2019). If a party can pay for a lawyer to use all the procedural mechanisms available, they can potentially outmanoeuvre and/or outlast their opponent. They may also be able to retain expert witnesses, whose evidence may be foundational for the case.

This ability to influence outcomes is also a function of the passive court system, as Galanter explained in his seminal article 'Why the "haves" come out ahead'. The courts are passive in that they 'must be mobilized by the claimant', conferring an advantage on the party with not only the money but also with information and 'skill to navigate restrictive procedural requirements' (Galanter, 1974). The adversarial system treats parties 'as if they were equally endowed with economic resources, investigative opportunities and legal skills'. As this is not usually the case, the system advantages the 'wealthier, more experienced and better organised party' (ibid.). It also advantages corporate parties: parties who are individuals bear the emotional and organisational costs of being involved in litigation, while corporate entities will not have the same emotional costs and can spread the organisational costs among a number of people.

These more experienced parties are sometimes what Galanter calls the 'repeat players', parties who have multiple engagements with the system and can play a longer-term game than 'one-shot' players, who engage just for the dispute at hand. Insurers and banks typify repeat players, as they have multiple engagements and can play for the rules (choosing which cases to settle to avoid creating adverse precedent and which to fight). One-shot players are more often small businesses or individuals who will only encounter the system once or twice in their lifetime.

It is important to note that it is not the absolute amount of power that a party has that matters, but its resources relative to the other party: 'what counts as enough legal resources depends on the amount others have … we have enough legal resources only if we have roughly the same amount as those with whom we are in dispute' (Wilmot-Smith, 2019). While the price overall is important – if it is too expensive, you cannot even get in the game – it is not enough to just lower the price. A

wealthy company versus a wealthy individual is not going to engender much sympathy, but the likely imbalance between them is still important if we think in terms of relative power. The nature of litigation encourages outspending the other party as the winner takes all (Hadfield, 2000). The corporation is likely to have greater access to wealth (including greater ability to borrow) and a greater ability to attract high-quality lawyers as they are likely to be repeat players, offering ongoing business. Even though both parties can afford to be 'in the game', one still has relatively greater resources and that more powerful party can potentially outmanoeuvre and outlast the other.

*Second dimension – the power to make the rules*

It is important to understand that it is not just the power to prevail but also the power to set the rules of the game that matters. Those who can influence the substantive and procedural law can use that influence to favour their own interests. The power to change the substantive rules is not equally distributed. Lobbying by interested groups (e.g. industry groups, insurers) can create rules that favour those groups' interests. This type of power is important in the development of civil procedure, the rules that govern the process of dispute resolution. Some of this procedure is governed by legislation and is therefore subject to the political process (e.g. the review of class actions: Law Commission, 2020).

Other procedural rules are governed by the Rules Committee, a group made up almost exclusively of those with legal training, and those who make submissions on procedural reform are largely lawyers. This may not be problematic. After all, lawyers are in the best position to make informed submissions as it is they who have the experience and the training, who work in the system and who have a statutory duty to the administration of justice. It cannot be ignored, however, that they also have a lot of skin in the game when it comes to how litigation is organised.

Given that there is unequal power and money in civil litigation and that it does have an effect on outcomes, what are the options for reform? In this complex environment, how do we work to towards the ideal that all are equal before the law?

> ... [for] real change ... there would need to be a paradigmatic shift from our current concept of 'party control' ... to judicial control and rationing of procedure ....

**The solutions?**

*Suppress lawyers' fees*

As the New Zealand Law Society recently noted, many consider lawyers' fees 'the elephant in the room' when it comes to discussions about money and civil justice (New Zealand Law Society, 2020, p.7.2). The short point is that they are so high that most – especially individuals – cannot pay to begin the fight. This is sometimes called the 'missing middle' or, due to the size of this group, 'the missing majority' (Szczepanska and Blomkamp, 2020). This group includes middle- and even high-income earners who can begin the fight but quickly run out of funds as the costs mount and therefore either have to become a litigant in person, or have to walk away, accepting a settlement that might not reflect the legal merits. At the same time that most struggle to access legal assistance, surplus income before income tax has steadily grown, from $1,071,000 in 2010 to $1,211,000 in 2017 (Adlam, 2019, reporting data from the Statistics New Zealand Annual Enterprise Survey).

This raises questions about whether the market – which has some features that negatively affect competition, such as information asymmetry and restrictions on entry – needs further or different regulation. Reforms of this nature go beyond the regular calls for more pro bono or more legal aid, both of which fall short in addressing the problem (Stewart and Toy-Cronin, 2018, 2020). There does seem to be some, if limited, appetite for pursuing reform in this area, but it is by no means straightforward and is a topic that warrants a separate discussion (Toy-Cronin, 2019). It is no doubt a key component for reform, and other jurisdictions have begun to introduce regulatory 'sandboxes' to experiment with reforms (Utah being the most sophisticated example). This could be a useful initial step for Aotearoa.

*Even up the amount spent on lawyers*

While the ability to pay legal fees is important, as discussed above, so is that ability to pay relative to the opposing party. This suggests that a solution lies in ensuring both parties have roughly equal access to money to fund their fight. This idea was one of the animating concerns of *Biggs v Biggs* [2020] NZCA 231, a relationship property dispute involving high-value property. In that case, the court allowed an interim distribution of relationship property to the wife so she could pay her advisers (lawyers, accountants and experts) in a situation where the wife had access to less of the assets than the husband, pending a final distribution of the property. The wife's lawyer argued that 'The interests of justice require that they be put on an equal footing' (*Biggs* at [29]). Releasing funds does create some equality between the parties, but it is no solution where there are not such funds available. Furthermore, the nature of the adversarial contest encourages outspending the opponent, creating a race to the top (Hadfield, 2000). Indeed, the wife's outstanding accounts at the time of the hearing were just over $1m, not including the further costs as they moved towards trial or the trial costs that were avoided by settlement.

A possibility is a cap on litigation spending (equivalent to a salary cap in sport), ensuring that all the 'teams' are on roughly equal footing. This is not a concept that is currently part of civil justice reform. There are a number of probable reasons for this. One is a sense that personal autonomy demands that there should be no restraint

on legal spending, a claim Wilmot-Smith (2019) disputes. Another is that such a cap would likely further fuel the flight from the public courts to privatised forms of dispute resolution. Many contracts already have an arbitration clause, which requires the contracting parties to use arbitration rather than the public justice system to settle disputes. This trend towards privatised justice is problematic for various reasons (for discussion see Farrow, 2014), and it seems highly likely that if the courts were to cap what could be spent on litigation, this would encourage more parties to avoid the public justice system and 'go private' instead. There are practical problems with monitoring as well. Solutions must therefore be found elsewhere.

*Take lawyers out of the picture*

A popular solution is to remove lawyers. If the biggest cost in litigation is lawyers, ban lawyers; then wealth does not matter. This is the thinking behind calls for an increase in the jurisdiction of the Disputes Tribunal (a lawyerless tribunal) (Rules Committee, 2020, p.16). There are constitutional problems with this proposal (the Disputes Tribunal's independence is not well protected: for example, referees are appointed for a limited term), but for the purposes of this discussion about money and power, there are also problems.

Removing lawyers attends only to the question of money, not other forms of power: for example, the interpersonal power between a tenant and landlord or between a divorcing couple. Furthermore, this proposal attends to the problem of unequal money only in appearance, because parties can still retain assistance behind the scenes. Recall the complexities of different types of parties: for example, insured defendants whose cases will still be run by the insurer, with their experience and in-house and external legal advisers; or a party who is a company, which must instruct a real person (likely a lawyer) to represent its interests.

The proposal is also flawed at a more fundamental level: it does not address the key problem of high legal fees. Rather than questioning what is reasonable to spend on any form of dispute resolution, it simply takes the current market in legal advice and makes the system lawyerless where it is uneconomic to instruct a lawyer. In other words, where the amount a party will pay in legal fees is likely to outstrip the amount they can recover, then the jurisdiction is set at that level. That is currently estimated to be around $100,000: i.e. it will cost close to $100,000 in legal fees to recover $100,000. This uses the legal market as the determining factor in the procedure available, rather than any more principled determination of how resources should be allocated. Nor does it address the question of why a party might be spending $1m to recover $3m. While litigation spending of that magnitude is 'economic', in a strict cost–benefit analysis, it is not a principled basis. A party who is owed $3m should be able to recover it without spending a third of it in lawyer fees, but the incentives in the system dictate otherwise.

The idea of taking lawyers out of the picture also falls into the trap of one of the myths around the role of lawyers. While popular culture tends to present lawyers as fomenters of trouble who encourage litigiousness (Galanter, 2005), there is plenty of empirical research to show that this is not the role most lawyers take (e.g. Mather, McEwen and Maiman, 2001). While there are always some exceptions, lawyers play an important role in reality checking and working towards settlement, a skill which is difficult for litigants in person (Toy-Cronin, 2015; Wangmann, Booth and Kaye, 2020).

> The complexity of the legal market and the disputants that use the system means that there is no silver bullet for addressing the distortion that power can create in our civil litigation system.

*Judicial control and rationing procedure*

An area of reform with significant potential is having judges take greater control of how proceedings are managed. Such reforms allow judges to make decisions about which issues are heard, and to control length of trial and scope of evidence, including the need for expert evidence. These types of measures address unequal power because the judge can limit the steps that can be taken, meaning one party has less power to try and outlast another party.

The Rules Committee is actively considering various models that, if implemented, would increase judicial control (Rules Committee, 2019; see also Kós, 2016) and the response to the consultation suggests broad support (Rules Committee, 2020). To effect real change, however, there would need to be a paradigmatic shift from our current concept of 'party control' (where the parties are responsible for the course of litigation and judges are largely passive) to judicial control and rationing of procedure (where judges determine how much procedure each case is given).

Not all will be in favour of what will be perceived as radical reform; they will point out that judges do not have an omniscient view of what is happening within litigation and that control should therefore continue to lie with the parties. However, of all the actors in litigation, judges are best placed to make decisions about what is necessary and reasonable in a case. Rationing procedure means tolerating a higher degree of inaccuracy in decisions, but this should be tolerable for the benefits it brings to the disputing parties (to control the litigation spend and ensure quick resolution) and for other parties waiting to access the system (protecting scarce court resources for the use of others). Reforms that increase judicial control are therefore a very important element of measures to reduce

the influence of money and power in litigation.

*Conglomerate the claims of many people*

A solution that is currently the subject of a review by the Law Commission is whether and to what extent the law should allow class actions and litigation funding (Law Commission, 2020). The idea behind class actions (from a litigant perspective) is that if many claims can be conglomerated, this reduces the financial and emotional barriers to individuals bringing cases themselves. Class actions increase the plaintiffs' power; they are no longer a lone David battling Goliath, but a whole team of Davids. The difficulty with class actions is that they are, by their nature, very complex. They therefore require expert legal assistance to run, which of course comes at a price. This in turn gives rise to the need for litigation funding. Litigation funding is, however, a profit-driven enterprise which creates incentives that may be at odds with the aims of a justice system. It can also deliver significant profits to investors and lawyers, but may not deliver a great deal into the hands of the plaintiffs.

Representative actions (a close cousin of class actions) and litigation funding are already operating in Aotearoa. It is, therefore, useful to create stronger regulation around them. In particular, creating a regime with strong judicial control over certifying class actions and funding arrangements, and also the legal fees charged, will protect the aims of class actions. However, it is far from clear that there are large numbers of cases that might be suitable to be brought as class actions, so this solution will be a tool in the tool box rather than a complete toolkit in itself.

Another form of conglomeration is charging public watchdogs with the responsibility for bringing claims on behalf of wronged parties. Watchdogs enable the power of the state to be harnessed against repeat wrongdoers or a wrongdoer who has harmed many individuals, rather than relying on individuals or profit-driven enterprises bringing classes of plaintiffs together. To be effective they need to be funded to perform the function, shifting litigation costs from parties to the state. It would be worth considering more use of this form of addressing civil wrongs.

*Involve the disputants in creating the rules and procedures*

One of the types of power discussed above was the power to set the rules under which disputes are conducted. Rebalancing this type of power – currently held disproportionately by lawyers and powerful interest groups – requires the involvement of a broader group of people in the process by which the rules are set.

One aspect of this is creating a structure for greater public involvement in rules consultations. Other jurisdictions (including the United States, Canada and Hong Kong) have developed court users committees that bring together people with experience of the justice system to provide feedback on proposals. This would be a worthwhile development in Aotearoa.

Another promising trend in rebalancing this second form of power is the use of 'legal design' or 'human-centred design' in reforming court procedures. Human-centred design takes the user experience as the starting point and then creates and tests solutions with users (Hagan, 2018). This method has been used in the creation of the much-lauded Civil Resolution Tribunal in British Columbia, which is an online, self-service platform for disputes of small quantum. Deploying this method in Aotearoa can help to rebalance this less obvious but important form of power in our civil dispute system (Pirini, 2020).

**Conclusion**

The complexity of the legal market and the disputants that use the system means that there is no silver bullet for addressing the distortion that power can create in our civil litigation system. The Rules Committee is showing some appetite for introducing what is the most promising type of reform, greater judicial control of proceedings. The regulators now need to engage with difficult questions around how to make legal services more affordable. Together with reforms to introduce greater public involvement in court procedure reform, there is real potential to at least minimise the effect of power in litigation, working towards the aim of equal justice before the law.

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*In a free, open and democratic society, the state has no business telling us what we may or may not feel, think, believe or value. Feeling dislike or even hatred should not be a crime; neither should criticism, satire and offensive or 'hurtful' remarks be a criminal offence. In a super-diverse society, we do not all need to like or agree with each other, but we do need to resolve our inevitable conflicts politically, without recourse to violence*

David Bromell, IGPS Commentary, April 2021

*We are not just bequeathing the death of Lake Ellesmere to the future. When you run the numbers, we are effectively subsidising dairy farming in this catchment to the tune of $350m to $380m every year. We're paying top dollar to have the lake killed.*

Mike Joy, IGPS Commentary, April 2021

*In order to decarbonise transport by 2030 we need to act with urgency and clarity. The solutions are not complex, but they require system change. Achieving this goal will necessitate a wide range of short- and long-term measures. Change needs to occur at many levels*

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