User Beware

An Analytical Critique of Civil Justice in Ontario from a Systems Perspective

by Frank Gomberg

Gomberg
mediation solutions inc.

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1. INTRODUCTION

On a beautiful Saturday, September 16, 2006, Jason Smith[1] went rock-climbing for the first and last time. He signed up for a lesson with the Piton Climbing Academy. Maurice Horst, the owner of Piton, met Jason and five others as pre-arranged at the Milky Way Conservation Authority. Maurice supplied helmets and shoes to the neophyte climbers. He told them never to remove their helmets. He also had them sign waivers in favour of Piton (drafted by Piton) and Milky Way (drafted by Milky Way). The waiver in favour of Piton was comprehensive, but didn't include an indemnity. The waiver in favour of Milky Way was less tightly worded and similarly did not include an indemnity.

Jason was 33 years old, a young lawyer earning $95,000.00 annually, as an employee of an environmental law association. He'd been offered jobs at two law firms, each in the $120,000.00 range, with salary escalation anticipated at about 10% per annum and partnership after 4 years.

Partners at both firms earned in excess of $200,000.00 annually. Jason had written a book on environmental law and co-authored another. He'd been offered, but had declined, the presidency of the bar association's section on environmental law—because he was too busy building his practice.

Maurice Horst took Jason and his five other students 70 feet down into the valley, and to the rock face. He had previously affixed three ropes to trees above the valley so that his six student climbers could ascend these ropes.

1 The factual pattern is based on a case where I acted for the plaintiff. The case has settled. All of the considerations set out herein were integrated into the settlement decisions made by the various counsel. I have, of course, changed the names to protect the anonymity of the plaintiff.

When Maurice had affixed these ropes, the rock face was also being used (and probably overpopulated) by the Army Cadets. This group was under the auspices of the Canadian Military. The Army Cadets were rappelling down in the immediate vicinity of where Maurice's group was to ascend. The ropes were configured as follows:

While sitting at the bottom of line 3, Jason removed his poorly fitting helmet in order to tie the shoelaces on his poorly fitting shoes. A 16 year old cadet on his way to rappel down line 2 kicked a rock at the top of the 70 foot rock face. The rock weighed about five pounds and was the size of a five pin bowling ball (four inches in diameter). The rock sailed over the cliff and struck Jason in the head. It depressed his skull, badly fragmenting it, and inflicted a severe brain injury. Jason was evacuated by helicopter ambulance to the closest teaching hospital. A number of highly skilled trauma surgeons fought to save his life. The nature and extent of Jason's devastating injuries are unchallenged: he suffered significant cognitive impairment, spastic gait, occasional epileptic seizures and an unquestioned inability to work at any job, ever again.

Jason had disability insurance. The disability insurer accepted that he was completely disabled from work and began paying him $6,000.00 per month. Jason's medical care cost OHIP $140,000.00. OHIP would have to pay much more in the future as Jason aged. Jason's private drug plan was paying $130.00 per month for medication. This would continue indefinitely.

Jason was mostly independent in terms of looking after himself and would likely remain mostly independent. He would require housekeeping assistance and some attendant care and probably medical and rehabilitation services. His injuries precluded a normal marriage and a family. His life as he knew it was over. Jason sued Piton, Milky Way and the Federal Government. These defendants cross-claimed against each other and the predictable litigation jousting began.

This factual matrix will form the basis of my discussion of systems of dispute resolution. My thesis is that pre-trial conferences as presently mandated in Ontario are of little value, and that mandatory mediations before roster mediators lacking subject-matter expertise are of even less value. My further view is that if pre-trial and mandatory mediation had not been haphazardly engrafted onto the civil justice system as poorly conceived "add-ons", we could accomplish much more with much less fuss: there are far better ways to resolve disputes in a thoughtfully designed civil justice system. I believe that the "multi-door courthouse" as described by Goldberg, Sander and Rogers[2] is conceptually unsound. In a system based on sensible and widely accepted design principles, judges should judge; mediators should mediate; and both should have subject-matter expertise.

Without a principled and architecturally sound system for mediations, pre-trials (if they are to be retained) and trials, the civil justice system will remain an eighteenth century construct attempting to resolve twenty-first century disputes. A failure to recognize this essential truth and to act on this reality dooms litigants in Ontario to hit and miss justice, much less than they deserve.

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2 Stephen B. Goldberg, Frank E.A. Sander & Nancy A. Rogers, *Dispute Resolution: Negotiation, Mediation and other Processes*, 2nd Ed. (Toronto: Little, Brown and Co. (Canada), 1992) at 10 and at 432-433.

Before I explore these themes, an Issues Chart is appropriate. This chart delimits many of the issues which I will return to in this paper as I articulate a more principled approach to civil justice in Ontario.

A. LIABILITY FROM JASON'S PERSPECTIVE

	Waiver Clause		Indemnity Clause	
	Yes	No	Yes	No
In favour of Government of Canada		X		X
In favour of Milky Way	X (weak)			X
In favour of Piton	X (strong)			X

B. DAMAGES

General Damages	$330,000.00
Past Wage Loss	$300,000.00 - $600,000.00
Future Wage Loss	$5.0 million - $7.0 million
Past OHIP Claim	$140,000.00
Future OHIP Claim	?
Pre-judgment Interest	$100,000.00 - $200,000.00
Past Subrogation of Disability Insurer	$90,000.00 - $300,000.00
Future Subrogation of Disability Insurer	$0.00 - $500,000.00
Past Subrogation of Drug Plan	$25,000.00
Future Subrogation of Drug Plan	?
Future housekeeping and medical care, attendant care and rehabilitation services	$500,000.00 - $900,000.00

C. JOINT AND SEVERAL LIABILITY

If Jason succeeds against the Government of Canada and obtains an assessment of $10 million for his damages, and the Government is only found to be 70% at fault, does Jason recover $10 million or $7 million from the Government? If Jason recovers $10 million, can the Government recover $3 million from Piton and/or Milky Way by way of its cross-claims against them, even though Jason's waivers in favour of Piton and/or Milky Way may be valid?

2. THE PRE-TRIAL CONFERENCE

In my civil procedure class at Osgoode Hall Law School in the spring of 1975, Professor Martin Teplitsky advocated that it was not a sign of weakness for one lawyer to call another lawyer to discuss settlement. This view was hardly universally endorsed, the many dissenters apparently believing that to approach an adversary suggesting compromise was to expose an Achilles heel. Because most lawyers didn't do what Teplitsky advocated, namely negotiate resolution of their cases, pre-trials were applied as a band-aid solution, to force lawyers to do what they should have done in any event.

The introduction of a pre-trial judge into the equation amounted to a "quick fix" which obviated the more challenging task of designing a method to compel lawyers to do what they should do — negotiate their cases. It also precluded operation of the marketplace, which would have dictated which lawyers succeeded (those who realistically evaluate and settle their cases) and which lawyers failed (those who needlessly push all of their cases through to trial). Most significantly, the pre-trial

was a systemic modification which was instituted with little or no attention being paid to the pivotal question: whether the objective is to get the case settled, or whether the objective is to meaningfully and realistically evaluate the likely outcome after trial—if such a judicial evaluation is even possible in the absence of an evidentiary matrix.

The philosophical dichotomy of whether a pre-trial is principally a settlement tool or an evaluative tool continues to this day; and failure to reconcile this essential contradiction means that different judges conduct pre-trials very differently. Judge "A" is like a hockey enforcer who thinks that the main purpose of a pre-trial is to pummel the parties into a settlement. Judge "B" is like a soothsayer who thinks that the main purpose of a pre-trial is to attempt to predict the unpredictable—how a trial judge or a jury will decide the Smith case after hearing six weeks of evidence. It is both a profound systemic failure and logically indefensible to have two judges in adjacent chambers conducting pre-trials in these contradictory ways. This debasement of the judicial function is well known to litigators, but is not as well known to many litigants. Only professional litigants such as insurers, manufacturers and repeat users of the civil justice system understand this dichotomy, while the Jason Smiths are utterly unaware of its existence. I submit that both the pummelling approach and the predictive approach are deeply flawed, and these flaws are magnified beyond repair when specialist lawyers are forced to appear before pre-trial judges and trial judges who have little or no subject-matter expertise.

In the Jason Smith case, Smith's lawyer, the Government's lawyer, Milky Way's lawyer and Piton's lawyer have all practiced negligence/tort/personal injury law for decades. The judge is a newly appointed judge who taught wills and trusts at the law school, or who was a family lawyer until the federal government appointed him/her. It is clear that having this judge "bang heads" at the Smith pre-trial to achieve a settlement is useless; and that having this judge attempt to predict what the trial judge will do is equally so.

Unfortunately, even a judge with extensive subject-matter expertise may not be of much assistance. As discussed above, is this pre-trial judge to be a "head-banger" or a "predictor?" If the judge is to be a "head-banger", then my submission is that this is an inappropriate judicial function. Judges should judge cases on the evidence which is adduced in court. This evidence is subject to admissibility tests, credibility assessments and application of often complex law to difficult fact finding. Because in my view judges shouldn't be "head-bangers," the only possible legitimate role for judges at pre-trials is for them to be outcome predictors. It is submitted that this too is an exercise in futility: it is as impossible to predict a trial outcome as it is to forecast the price of gold twelve months down the road. If each of the four lawyers in the Smith case believes he/she is going to win and if each lawyer knows that a win is hardly a guarantee, then how can any of the lawyers truly believe that even a pre-trial judge with subject-matter expertise can predict a trial result? The inability at pre-trial to predict a trial result is made even more apparent by the proposition that in Ontario the trial judge probably will not have subject-matter expertise and the jury—if there is one—definitely won't have subject-matter expertise.

Having a non-specialist pre-trial judge attempt to predict how a non-specialist trial judge will decide the case bespeaks absurdity. As such, it should be apparent that our pre-trial system in Ontario is in need of significant reform and probably should be jettisoned completely. The question is whether pre-trials should be replaced by anything, and if so, by what? My opinion is that pre-trials are inherently useless for the reasons enunciated above: they should be eliminated and not replaced.

A much more satisfactory approach is to have non-mandatory mediations before non-judge mediators with subject-matter expertise, and trials before judges with subject-matter expertise.[3] I propose to analyse these topics in turn.

3. MANDATORY MEDIATION

Mandatory mediation is an oxymoron. It is a process which has some characteristics of mediation but is lacking its most basic ingredient: volitional attendance. To compel litigants to mediate is like forcing people at gun-point to go on a date. Winslade and Monk discuss this very concept in their book, *Practicing Narrative Mediation*. These authors speak about conversations people have at mediations as follows:

> At the start of the conversation, parties have already made a small commitment, however tentative, to this counterstory. They are in the room. They have come along to participate. To do so they must have some hope in mind for something useful to come of the mediation. We can therefore invite them to speak to this hope early on. "What is your hope for what might come from this meeting?" we might ask. Or, "How do you hope we might talk about things here today?" These questions invite people to speak from their most noble selves. Many will respond by speaking about a desire for respectful conversation or for an outcome that honors both parties or some variation on such themes. Some will hear the question as asking them to speak about what Fisher and Ury (1981) have called their own positions with regard to outcome. That is, they will respond not so much from a position of inclusive hope as from a position of "what I want." In this case we might need to repeat the questions in slightly different words. The effect of asking about people's hopes as the first topic of conversation in mediation is that people's best intentions, their noblest desires, and their ideal values (and not the most painful parts of the conflict) are placed in the forefront of attention. The intention is not to be Pollyannaish about the problem, to focus only on positive thinking or to avoid facing the conflict story, but simply to frame it differently. From this opening we can then move on to ask about the problems that seem to be standing in the way of people's hopes. The problem story then gets constructed as an obstacle to the forward movement of their most hopeful story, rather than as the mountain to be climbed before they even get to that cherished story. The forward momentum of a hopeful story is established early on, and the conflict story is constructed

3 This necessarily requires an examination of the future role of the jury in the civil justice system, a topic well beyond the scope of this paper. It is important to note that every few decades the Ontario Government studies whether civil juries should be abolished. The last such study was in 1994-95. The Law Reform Commission of Ontario prepared a consultation paper on "The Use of Jury Trials in Civil Cases." In response, The Advocates' Society appointed a Civil Jury Review Committee. I chaired that Committee. The Advocates' Society made extensive submissions to Professor John D. McCamus, Chair of The Ontario Law Reform Commission on September 14, 1994. Eventually the Government of Ontario decided to leave the civil jury intact—a highly controversial decision at the time. No doubt this issue will be revisited soon—particularly in these times of economic restraint. Though it is conceded that there is some logical inconsistency in advocating judicial subject-matter expertise while retaining a civil jury system where jurors lack subject-matter expertise, it is submitted that even civil jury results are of higher quality when juries are charged by judges with subject-matter expertise. This discussion of the value of civil juries will have to be deferred to the next Government study of same—whenever that occurs.

> as a restraint that holds it back. Thinking of a conflict as a restraint is different from thinking of it as a mountain to climb. It orients the conversation differently, and we believe it opens up a different quality of talk that leads in different directions.[4]

It is obvious that all of this is only possible when the process is consensual. Even if it is defensible to force litigants to mediate, how is it justifiable to coerce mediations in Toronto, Ottawa and Windsor but not elsewhere in Ontario? Is the litigant in Ottawa to be preferred over the litigant in Thunder Bay? Is the litigant in Kingston or Cornwall somehow less important than the litigant in Toronto or Windsor? To ask these questions is to answer them.

Mandatory mediation in Toronto, Ottawa and Windsor was introduced as a case management strategy because the "inventory" of cases was too large and the "supply" of judges and courtrooms was too small. When civil cases are treated like raw materials to be processed and assembled, then business models are introduced which are appropriate to manufacturing but inappropriate to dealing with people and their disputes. In any event, it is counter-intuitive to treat cases in London differently from cases in Windsor.

To foist mediation on one or more resistant parties is to introduce a costly and ultimately doomed process into the mix; for if a litigant doesn't want to mediate, then the case will almost assuredly not settle at mediation. Anecdotal stories abound about lawsuits being started in Newmarket, Whitby and Brampton and in other jurisdictions near Toronto in order to avoid mandatory mediation in Toronto. Stories are also legion of cases started in Toronto where the parties agree in advance to fail a mediation in order to technically comply with the requirement that the case be mediated, so that a trial date can be secured. In those situations where it is perceived that the mandatory mediation will be unhelpful, many counsel either seek a compliant mediator to do a *pro forma* telephone mediation, or they agree on a roster mediator and attend upon a wasteful one hour "mediation" before him/her. This inevitably failed mediation technically complies with the requirement to mediate, and permits the parties to set a trial date; their objective all along.

All of this breeds cynicism if not contempt for the system—if it can even be called a system. Engrafting mandatory mediation onto a civil justice process already burdened with wasteful and largely unhelpful pre-trials was to take a system with a problem (pre-trials) and to add a second problem (mandatory mediation). It is axiomatic that when one tries to ameliorate one problem by adding another, the problem gets bigger, not smaller.

Furlong addresses the inappropriateness of this helter-skelter approach in his text on conflict resolution. He endorses the necessity to diagnose the conflict and then to take action to manage the conflict. In my submission this by analogy applies to refurbishing our civil justice system. As Furlong states:

> And the nature of every practice profession is that the first critical skill the practice professional must have is the ability to diagnose, to determine the root cause of a specific problem. For example, when a patient sees a doctor, the first thing that the doctor must arrive at is a diagnosis of the problem; indeed, everything flows from the diagnosis, and little is done until a diagnosis is

4 John Winslade & Gerald Monk, *Practicing Narrative Mediation: Loosening the Grip of Conflict* (San Francisco: Jossey-Bass, 2008) at 17-18.

> reached. During the diagnostic process, if there is any doubt about either the diagnosis or the recommended course of action (i.e., treatment) that flows from the diagnosis, a "second opinion" is often sought before any treatment is considered. Similarly in law or engineering, or even car repair, little action can be taken until the professional understands (or believes she understands) what the problem is, and based on that recommends or conducts an intervention. Few of us would accept a dentist saying, "Well, I'm not sure which tooth is hurting, so I'm going to try pulling a few of them out to see if it helps." Few of us would return to an auto repair shop that randomly replaced part after part hoping that this would eventually solve the problem. [5]

Though Furlong's text deals with conflict resolution and systems-design by creating models and maps for the dispute resolution professional to implement, his insights into dysfunctional or substandard systems that require professional intervention are salient to my analysis in this paper.

It is submitted that the only way to advance the administration of civil justice and to deliver quality dispute resolution to litigants in Ontario is to abolish mandatory mediation but to somehow encourage voluntary mediation before mediators with subject-matter expertise: mediators chosen by the parties and therefore by definition respected, valued and trusted by the parties. Before discussing this further, it is important to consider whether judges on the Superior (or on any) Court should mediate.

5 Gary T. Furlong, *The Conflict Resolution Toolbox: Models and Maps for Analyzing, Diagnosing and Resolving Conflict* (Mississauga: John Wiley and Sons Canada, 2005) at 4-5.

4. SHOULD JUDGES MEDIATE?

In the 35 years since Professor Teplitsky taught me civil procedure, we have introduced pre-trials and mandatory mediation. With respect, pre-trials have added little and have removed judges from doing what they were appointed to do—judge disputes on the merits after hearing evidence in court—and from being accountable to the litigants, to the public, and to the appellate courts for their judgments.

Chief Justice Winkler has recently advocated mediation by sitting judges.[6] It is respectfully submitted that judicial mediation is a poor idea which fails to take account of the following:

i. judging and mediating are separate and distinct specialties;
ii. judges are appointed to judge, not to mediate;
iii. judges are not trained to mediate;
iv. many judges do not want to mediate; and
v. some of the judges who do mediate are so bad at it that the lawyers would never have chosen that judge as a mediator—if they had a choice.

In my view, it borders on the absurd to have judges mediate. This is particularly so where the judge has no subject-matter expertise and the case is sufficiently complex to require subject-matter expertise—and a lot of it.

6 See text of Chief Justice Warren K. Winkler's September 14, 2010 Remarks at the Opening of the Courts Ceremony at www.ontariocourts.on.ca/coa/en/ps/ocs.htm. In these remarks, Chief Justice Winkler advocates mediation before trial in family law cases, but does not speak specifically about judicial mediation of these cases. He also talks about case management or judicial mediation "by a judge of the Court" and "accommodating these requests where appropriate in complex civil, commercial and family matters." It seems that Winkler C.J.O. is advocating judicial mediation in the Court of Appeal. If so, when he says "We see this as an area in which the Court's services to the public will be expanded in the future", he is into highly controversial territory. Regardless of the appropriateness of appellate mediation, Winkler C.J.O. has chosen to tone down his earlier enthusiastic support for broad-based judicial mediation as made in his speech to the University of Western Ontario Law School in March, 2010 and as summarized in Cristin Schmitz's September 3, 2010 article in the Lawyer's Weekly (see www.lawyersweekly.ca). My contention is that for the many reasons articulated in the body of this paper, the notion of trial judges mediating civil disputes is poorly conceived and ought not to be implemented.

The Jason Smith rock-climbing case is a perfect example of a case that cries out for a mediator with subject-matter expertise. Liability is highly contentious and the defences and cross-claims embrace issues of joint and several liability, waiver, indemnity, contributory negligence, causation and foreseeability. If Jason has waived his right to claim against Piton and Milky Way and if he recovers from the Government, can he recover 100% of his damages from the Government—as he hasn't waived his claim against the Government? If his damages are $10 million and the liability is 70% against the Government, 20% against Piton and 10% against Milky Way, can the Government—which has signed no waivers—recover $2 million from Piton and $1 million from Milky Way by way of cross-claim (if it pays Jason $10 million), when Jason can't recover these sums directly from these two tortfeasors because of the validity of the waivers which he *has* signed? Is Jason's maximum contributory negligence for not wearing a helmet 25% (as in the car seat-belt cases[7]) or can Jason be more than 25% at fault? Is Jason's failure to wear a helmet causative in law or is the engineering evidence adduced from a helmet engineer (retained on behalf of Jason) credible in establishing that even had Jason worn a helmet, it would not have mattered? What about the present state of Canadian law on waiver? Is waiver to be applied to defeat the plaintiff's claim as per the recent decision of the Ontario Superior Court in *Isildar v. Kanata Diving Supply*[8], or will waiver be narrowly construed as was the law in Ontario prior to *Isildar*? What will the Ontario Court of Appeal do when it has to consider the waiver issue? What about the law of subrogation? Does the disability insurer get 100% of its past payments back? What about the present value of its future payments? Does the disability insurer not recover anything until Jason is fully indemnified? If Jason is 25% at fault and only recovers 75% of his $10 million in damages (a net recovery of $7.5 million), is he fully indemnified? How much does OHIP recover?

All of these vexing questions are grist for the mediation mill and require complex, detailed analyses and a highly technical consideration of legal, insurance and risk management concepts in order to produce a settlement which fairly reflects appropriate principles of litigation risk. Should a sitting judge mediate this dispute? I submit that the answer is a resounding, unequivocal "no". The judge's expertise is in judging—a difficult and onerous job to be sure, but one which is fundamentally different than mediating. Litigants don't attend mediations to have a third party impose a settlement; neither do they attend trials to express their feelings, obtain assistance in their negotiations, or achieve a mutually acceptable result. Litigants expect judges to judge and mediators to mediate. If this expectation is met, then the system is more rational and sensible; and the results it produces will be more predictable and more respected.

In the movie *Along Came Polly*[9], Reuben Feffer, a risk analyst, no less, gets married to Lisa—after duly assessing the risk. Unfortunately for him, within an hour of arriving in St. Bart's for his honeymoon, Reuben catches Lisa in *flagrante delicto* with Claude, the scuba instructor. Claude tries to explain the situation to Reuben as follows:

Click on the image to hear the audio from the film.

7 See, for example, *Snushall v. Fulsang* (2005), 78 O.R. (3d) 142 (C.A.).

8 [2008] O.J. No. 2406.

9 *Along Came Polly* (DVD: Universal Studios, 2004).

> *"Zee heeppopotamoose, he is not born going, "Cool bean. I am a heeppo." No way, Joesay. So he try to paint zee stripe on hisself to be like zee zebra, but he fool no one. Then he try to put zee spot on zee skin to be like the leopard, but everyone know he is a heeppo. So, at certain point, he look himself in zee mirror and he just say, "Hey. I am a heeppopotamoose and zere is nothing I can do about it." And, as soon as he accepts zis, he live life happy. Happy as a heeppo. You understand?*[10]

I contend that the same analysis applies to judges who try to mediate: judging and mediating are two entirely different and mutually exclusive functions. As Claude so eloquently put it, if one is a hippo, one cannot be a zebra.

5. TRIALS AND SUBJECT-MATTER EXPERTISE

Any competent designer of a dispute resolution system must be cognizant of the interplay between different levels of the system, and of the necessity for consistency at any level of the system. For trials to be meaningful as the ultimate evaluative method of dispute resolution, the doctrine of *stare decisis*[11] must be honoured in the observance and not in the breach. One maximizes the governing role of *stare decisis* when the task of deciding the highly technical cases which are presented by specialist lawyers falls to a specialized court comprised of judges with subject-matter expertise.

A specialized Superior Court in Ontario exists already, at least for commercial and family cases in Toronto, and for family cases in Hamilton and elsewhere. It is logically indefensible then, that complex tort, insurance and other litigation should fall to be decided by generalist judges who practised in other areas of the law. Does it make sense for a judge who drafted wills and trusts for 25 years to preside over the Jason Smith rock-climbing case? Surely having a specialist tort/insurance judge decide complex tort litigation makes sense in a rational system which is designed to produce results that are as predictable as is humanly possible. It is beyond the scope of this paper to propose in any detail a methodology for appointing or selecting specialist judges. There are, however, a number of ways for this to be done. The appointing body (for Superior Court judges in Canada this is the federal government) could appoint specialist judges as required by the court from time to time. An alternative is for the Chief Justice, Associate Chief Justice, or the Regional Senior Justice to assign judges to various specialist divisions of the Superior Court. This would ensure that tort specialists would decide tort cases (personal injury, medical malpractice, dental malpractice, legal malpractice), real estate specialists would decide real estate cases, environmental specialists would decide environmental and pollution cases and class action specialists would decide class action cases. The inherent common sense of this approach would serve to engender much more confidence in our civil justice system—on the part of both litigants and counsel—than is presently the case.

If we in Ontario were to move to a specialist bench, this would permit the abandonment of both ill-defined pre-trials (presently mostly handled by non-specialists) and ill-advised mandatory mediations (which exist only in Toronto, Ottawa and Windsor). Litigants would be assured of the highest quality trial humanly possible (not presently the case) before highly specialized and

10 *Ibid*.

11 *Stare decisis* is Latin for "to stand by things decided." Black's Law Dictionary describes this as "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, MN: West, A Thomson Business, 2004) *s.v.* "stare decisis".

respected judges. I suggest that the increased predictability of outcome engendered by this approach would serve to encourage voluntary mediation and thus generate settlements without the necessity of wasteful and expensive pre-trials and mandatory mediations. It would also ensure that when lawyers and litigants opt for mediation, the mediation is useful, as all parties will have agreed to mediate and they will have by agreement selected the mediator. It is trite that agreement on the mediator is a good start, as whatever momentum is generated by consensus on mediator selection is better than what we presently have: non-specialist pre-trial judges and non-specialist mandatory mediators foisted on lawyers and litigants in an unprincipled and disorganized way.

The systemic changes proposed in this paper are undoubtedly controversial. The abolition of mandatory mediations and pre-trial conferences is radical change which will probably generate resistance, and even some hostility. In order to maximize the possibility of change for the better, it is necessary to enlist buy-in on the part of all "stakeholders" in the system. In the case of the civil justice system, this means that we need the Ministry of the Attorney General, judges, masters, lawyers, litigants and legal organizations like the Ontario Bar Association, the Advocates' Society, the Ontario Trial Lawyers Association and others to affix their seals of approval or at least not to oppose these suggested changes. As Costantino and Merchant point out:

> Experienced practitioners have learned to anticipate that there will be resistance to any change effort in an organization's conflict management system. The practice of anticipating that proposed changes will lead to concern and resistance in initial stages of conflict management systems design efforts is useful, particularly for the internal dispute resolution specialist who can get caught up in the energy of the moment. In addition, internal specialists often need to learn to go slowly. The first challenge is to expand the number of organizational participants involved and to share with them all the available information about possible ADR options, refraining from making specific recommendations at this early stage. Rather, the organizational participants are encouraged to focus on what problems there are, if any, and then to identify any likely opportunities for change. Whether this is done with the assistance of an external consultant or internally, this step of widening the scope of organizational members involved in the design effort is critical.[12]

Though Costantino and Merchant specifically address their remarks to organizations, it is submitted that the civil justice system is akin for our analytical purposes to an organization. As such, what Costantino and Merchant say in general and what they say specifically about a drastic approach is useful:

> The drastic approach—"what you now have is dead (or out-moded or unfashionable) and we must change everything and everyone in your current system who is handling x types of disputes"—is inadvisable. Similarly, the "we must create something new (a new structure, a new office, a new division, a new box on the

12 Cathy Costantino & Christina Sickles Merchant, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations (San Francisco: Jossey-Bass, 1996) at 74.

organizational chart) to have an effective system" tactic is also inadvisable. Rather, it is much more useful to make specific observations about the parts of the system where the apparent interests (cost, time, durability of and satisfaction with outcomes) of the organization and its disputants are not being met. Here, the objective is to outline clearly for the organization the opportunities for improvement in parts or the whole of its conflict management system as linked to organizational goals. This allows the organization to choose to approach interest—based conflict management systems design incrementally or experimentally, if need be, by making changes in one particular area as a start. We know that this is not necessarily the result that many practitioners like to see today. However, we have seen many worthy systemwide efforts start and grow from high-quality, high results, limited pilot ADR initiatives. For some reason, conflict systems management change seems very difficult to initiate on a systemwide basis. This may emanate from our Western cultural belief that it is "better to fight than to switch" our methods, processes, or the very culture of engaging in conflict. [13]

Thus, to achieve the necessary "buy-in", and as a more acceptable incremental change, the abolition of mandatory mediation in Toronto, Ottawa and Windsor may be a sensible starting point. We could leave pre-trials alone for now and in an experimental set of cases (say, medical malpractice cases) supply the litigants with trial judges who have subject-matter expertise (i.e. experienced tort judges). This would serve to address the concerns of judges who like doing pre-trials, and are wary of losing their influence should pre-trials, as advocated in this paper, eventually be abandoned. Many of these pre-trial judges would be deployed to do trials within their individual areas of expertise. Though they would lose their apparent influence on pre-trials, they would see that in the new and improved system, their expertise would be tapped much more meaningfully. In this proposal, judges with subject-matter expertise would be doing trials which require this expertise, as opposed to doing pre-trials in other, less familiar legal fields. Going slowly by implementing judge-with-subject-matter-expertise medical malpractice trials would fully address the following resistance to change described by Costantino and Merchant:

> It is thus advisable for the design team to explicitly note "what's in it" for each component of the organizational system: leadership, managers, employees, stakeholders, customers, the public.
>
> The presentation can also identify possible pitfalls and resistance. Of particular concern to leadership will be the disruption that change is likely to cause. The unspoken question in such strategic discussions is who will gain power and who will lose power if the conflict management system is altered. Successful strategic introductions of ADR into ongoing systems require that the design team anticipate these and other questions leaders will have and provide either expertise,

13 *Ibid*. at 112.

> testimony, or other persuasive information about the impact of the proposed redesign on the organization's existing political, cultural, structural, human resource, and symbolic systems, both formal and informal.[14]

The underlying and unstated philosophy of the present non-system of engrafted pre-trial and mandatory mediations seems to be that we should do everything possible to dissuade litigants from going to trial. We impede them from doing so by erecting an obstacle course of pre-trials and mandatory mediations. If the hurdles were removed and highly expert trial judges were made available to resolve the disputes, it would be likely that those parties who need this expertise would embrace it and those who don't, wouldn't. In my view this new system would discourage risky litigation more than our present system does. Who better to sniff out a bad case than a trial judge with subject-matter expertise? Though it is impossible to obviate all litigation risk (like gambling, litigation is inherently risky) at least the risk of having a non-expert trial judge decide a case is removed from the calculus. This would serve to generate more respect for our civil justice system and would also ensure that at least on a regional basis[15] there is expertise available to litigants in Thunder Bay, Stratford and Welland to deal with cases on a basis similar to the way cases are dealt with for litigants in Toronto, Windsor and Ottawa. The regional disparities associated with mandatory mediation and pilot projects in some locales but not others would be obviated, and litigants would be treated similarly no matter where in Ontario the lawsuit was commenced.

The logic to this proposal is compelling. When Jason Smith was taken to the teaching hospital with his devastating brain injury, he was treated by a highly skilled trauma team comprised of a general surgeon, a neurosurgeon, a neuro-radiologist and an anaesthesiologist. He did not get the next doctor in line—who might have been an ophthalmologist or a gynaecologist or a psychiatrist. In comparison to the medical system, the present system of pre-trials, mandatory mediations and trials provides Jason with far inferior legal treatment than the medical treatment he received. Jason may get a pre-trial judge who prosecuted drug cases when she was a lawyer; he may get a trial judge who in practice was general counsel to a cable T.V. conglomerate; and he may get a mandatory mediator who practices workers' compensation law. All of this is truly unfortunate. The civil justice system in Ontario can and should do better. Just as Jason the patient deserves the best medical and surgical care, so too does Jason the litigant deserve the best that we have to offer him in a legal system that is both compassionate and rational.

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14 *Ibid*. at 113.

15 There are seven juridical regions in Ontario: Central East, Central West, East, West, Northeast, Northwest, and Toronto. Although there may be insufficient resources available to ensure that a full range of expertise is available in each courthouse in each region, it is proposed that subject matter expertise should be made available within each of the regions.

6. CONCLUSION

In this paper I have asserted the following arguments quite forcefully, and I hope persuasively:

i. Any civil trial in the Superior Court of Justice should be tried by a judge with subject-matter expertise;

ii. Pre-trial conferences should be abolished and if not abolished then judges with subject-matter expertise should be selected to handle pre-trials in their various areas of expertise;

iii. Mandatory mediation should be abolished in Toronto, Ottawa and Windsor so that there is province-wide consistency. Consistency aside, it is my position that mandatory mediations as we know them are either entirely useless, or very nearly so;

iv. Mediation of civil cases will continue before those mediators who have subject-matter expertise and who are valued and sought after by the parties.

All of these recommendations are made in an attempt to improve a "system" which lacks many attributes of a system and is sorely in need of modernization to meet the demands of contemporary litigation.

If these significant modifications to our present system are implemented, then it stands to reason that the concept of the "multi-door courthouse" is to be rejected. I submit that the courthouse ought to have one door and one door only; and that door ought to open into a courtroom. This is consistent with my argument that judges should judge, and not mediate or preside over unhelpful pre-trial conferences. In the modified system which I propose, mediators with subject-matter expertise would not ply their trade in the courthouse any more than chiropractors ply their trade in hospitals.

These suggested changes are not to be construed as an indictment or critique of the competence, dedication or intelligence of any sitting judge. These suggestions are a reflection of the truism that complex legal matters are best left to specialists. As submitted above, if one has a brain injury, one doesn't go to a gynaecologist or to a psychiatrist. This is common sense, although—again to quote Professor Teplitsky—the thing about common sense is that it's not that common.[16] Why should our recourse to judges be any different than our recourse to health care? Judges hold important aspects of our lives in their judicial hands. Surely those who judge ought to have the best tools available to do the job. I believe that subject-matter expertise is perhaps the most important tool in a judge's armamentarium. To function without it, is to fail the litigants. No one would expect judges to write with quill pens. Why should we expect them to judge cases with what amounts to a deficiency in knowledge?

Medicine is not the only profession or endeavour which channels cases to specialists. The same underlying principle which ought to mandate subject-matter expertise for trial judges informs much of what unfolds in sports. Baseball serves as a perfect example: if a manager requires a pinch hitter, he doesn't pick the player sitting next to him in the dugout. Each situation is different, and the manager's choice is tailored to the circumstances. If the opponent's pitcher is right-handed, the manager will probably

16 In discussing this paper with Martin Teplitsky on October 22, 2010, he clarified that this phrase did not originate with him. It is commonly ascribed to various incorrect sources, but apparently is to be attributed to Voltaire in his *Dictionnaire Philosophique*, (1765).

select a left-handed pinch hitter. If the opposing pitcher is left-handed, the manager will probably tap a right-handed pinch hitter.

If the situation calls for the starting pitcher to be removed, the manager will select the relief pitcher best suited to the task. He won't pick a second baseman to pitch, no matter how good a fielder or a batter the second baseman is. If the question is who pitches to the other team's best hitter in a close game in the bottom of the ninth inning, then the manager will analyze the situation and pick the pitcher who is most likely to succeed. He will not pick a player at random, nor will he pick the next pitcher in line. He will pick the best relief pitcher available—his closer.

If this logic resonates in the baseball context, why should it not apply in the context of civil justice system design and implementation? It was no fluke that then Chief Justice LeSage was assigned to be the trial judge in the Bernardo prosecution. Civil litigants surely cannot deserve less than this; and surely should not be forced to "make do" with some inferior measure of justice.

We clearly require a highly intelligent approach to restructure the civil justice "system." As the Society of Professionals in Dispute Resolution (SPIDR) has stated:

> ...an integrated conflict management system will work only if designed with input from users and decision makers at all levels of the organization. Each system must be tailored to fit the organization's needs, circumstances and culture. In developing these systems, experimentation is both necessary and healthy.[17]

I have suggested that we evaluate my proposal that trial judges must have subject-matter expertise by beginning with medical negligence cases. In conjunction with supplying medical malpractice specialist judges, pre-trials (and mandatory mediations in Toronto, Ottawa and Windsor) should be eliminated for these cases entirely. This approach should be implemented regionally throughout Ontario, to ensure that medical malpractice litigants in Sudbury are treated similarly to medical malpractice litigants in Cornwall—even in the system—evaluation phase. We could then assess "customer satisfaction" by evaluating the success of this approach. If it is found to be successful, then an expansion into other fields could be implemented.

Our civil justice system is accessed by litigants whose own systems of dispute resolution (if they had any) have failed them. It is ironic that the place where people come to have their civil disputes resolved—the civil justice system—is so disorganized and irrational. This may be another example of the truth of the maxim "the shoemaker's children go barefoot."

The civil justice system in Ontario is too important to too many people to permit it to collapse. We must design a modern, effective, made-in-Ontario 21st century civil justice system. Anything less is an abrogation of our ethical responsibility to ensure that the Jason Smiths of Ontario get real and not ephemeral justice.

17 Society of Professionals in Dispute Resolution, *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations* (Ithaca, NY: Cornell/PERC Institute on Conflict Resolution, 2001) at 6.

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About the Author

Frank Gomberg

BA (McGill), JD (Osgoode), LLM (Osgoode), of the Bar of Ontario

Frank Gomberg was called to the Ontario Bar in 1979 and for 20 years acted principally for plaintiffs in wrongful death and personal injury claims. He represented families at a number of landmark Coroners Inquests, including the inquests into the 1995 TTC subway crash and the 1998 in-hospital death of Lisa Shore.

Mr. Gomberg was designated a Specialist in Civil Litigation by the Law Society of Upper Canada in January 1990. He resigned as a specialist in 2005 given his evolving practice to full-time mediator. He now spends all of his professional time mediating civil cases pending in the Ontario Superior Court of Justice. He has mediated over 5,200 such claims since he began mediating in 1995.

Mr. Gomberg is a graduate of the Harvard Mediation Workshop (1995) and of the Advanced Mediation Workshop (1996). He believes in the transformative power of apology as an element in mediated settlements. He has written a major research paper entitled "*Apology for the Unexpected Death of a Child in a Healthcare Facility: A Prescription for Improvement*".

Mr. Gomberg has taught Trial Advocacy for the former Ontario Centre for Advocacy Training (OCAT), The Advocates' Society, to law students at Osgoode Hall Law School and at Osgoode's annual Intensive Trial Advocacy Workshop (ITAW). He has lectured and written extensively on personal injury, mediation, negotiation and related topics. He has chaired or co-chaired numerous Advocates' Society, Law Society and Ontario Trial Lawyers Association programs.

He has taught for the Toronto Police Service and has been on many panel discussions on damages; settlement of civil cases at mediation; ethical considerations at mediation; strategies for success at mediation and related topics.

Mr. Gomberg is an avid downhill skier. He lives in Toronto, though he is a Montrealer at heart.

Gomberg Mediation Solutions Inc.
70 Bond St | Suite 200 | Toronto
ON M5B 1X3 | Canada
O 416.865.5323
E fgomberg@gombergmediation.com
W www.gombergmediation.com