



## “Loser Pays” Doesn’t

When lawsuit losers are forced to pay the legal fees of winners, the cost of litigation for everyone goes up.

By Herbert M. Kritzer

NAOMI CAMPBELL, THE LITHESOME British supermodel, has long coveted public attention. She has been less than thrilled, however, with news reports about her substance abuse. In 2001, she filed an invasion of privacy suit against the *Daily Mirror*, an English newspaper that had published photos of her leaving a Narcotics Anonymous meeting. She won an award of £3,500 plus costs after an initial trial, had the award reversed as a result of an appeal by the *Daily Mirror*, and last year won reinstatement of the award after she appealed to England’s highest court.

The cost of the litigation for both sides was well over £1 million. This is especially significant in England, because, like most other countries, it requires litigation losers to pay the legal fees and expenses of litigation winners. When Campbell won at trial, her lawyer said he would seek £250,000 in costs. When she lost on the *Mirror’s* appeal, Campbell was ordered to pay the newspaper £350,000 in expenses. After ultimately succeeding, Campbell’s lawyers this year claimed costs of almost £350,000.

Advocates for reducing litigation in America often tout “loser pays”—or the English rule, as it is sometimes called—as a way to discourage frivolous cases and make the civil justice system fairer and more efficient.

But Campbell’s case, extreme as it may be, shows that loser pays can work in ways that its supporters do not intend. Rather than discourage the filing of lawsuits, the system allows plaintiffs like Campbell to press potentially strong cases involving

trivial amounts without worrying about the expense. As a result, the policy has helped increase the cost of litigation in Britain and has added another layer—fee disputes—to the process. It has also discouraged settlements. In the United States, where each side typically pays its own costs, decisions about whether to proceed or settle are made in light of anticipated expenses. In a system where the loser pays, a party with a strong case has less incentive to compromise because costs are shifted to the other side. The defendant can no longer cut losses by convincing the plaintiff to weigh the costs of proceeding and accept a discounted settlement.

In practice, then, life is not as simple as loser-pays advocates would like to believe. England has had a loser-pays system for centuries. While there have been some changes recently, overall the system’s results have varied according to the litigants’ wealth and the source of funding for lawsuits. For example, before the changes, English law prohibited a successful defendant from recovering its costs if the plaintiff was receiving legal aid from the government. A litigant who had legal insurance under a homeowner’s or auto policy or even, in effect, through union membership could expect the insurer to cover the risks of losing. Generally, loser pays makes little difference to people who have few resources and therefore little to lose, or to those like Naomi Campbell with substantial resources who can easily afford to lose. For them, the impact of loser pays is to increase their cases’ value, which

includes actual damages as well as recoverable expenses.

There is no doubt that a loser-pays rule can discourage some people from filing lawsuits—for example, middle-class workers who have something to lose but can afford to lose only so much. A few years ago, a law professor in Ontario, Canada, which has a loser-pays system, told me of a case that he decided not to pursue. He had a contract to sell his house for a given amount, but at the closing the buyer demanded a reduction in the purchase price because the housing market had softened. The seller went through with the deal because he had already bought another house, and because no one was likely to buy his old house for the contracted price. While he could have sued for the difference, the seller decided not to after his lawyer warned him of the risks of litigation. If the seller lost, he would be out not only the amount in controversy but probably triple that amount when his and the buyer’s legal costs were taken into account.

The one place in the United States that has had extensive experience with a loser-pays system is Alaska. Under Alaska’s rules, losers have to pay a portion of the winning side’s costs. A study of the rules found that rather than reducing litigation, they often increased the amount of settlements, because the expenses at stake increased the value of a winning case. Litigation did not decrease, in part because so many Alaskan plaintiffs were poor. They were not dissuaded from suing by loser-pays rules, because they could not in any event pay a victorious defendant’s costs.

Despite the failure of loser pays to achieve the desired results, the system attracts a lot of support from critics of litigation. One reason is that it appeals to people on an intuitive level: Why should someone who has been injured bear the cost of seeking redress, and why should someone who is wrongly accused of having caused injury bear the cost of securing vindication?

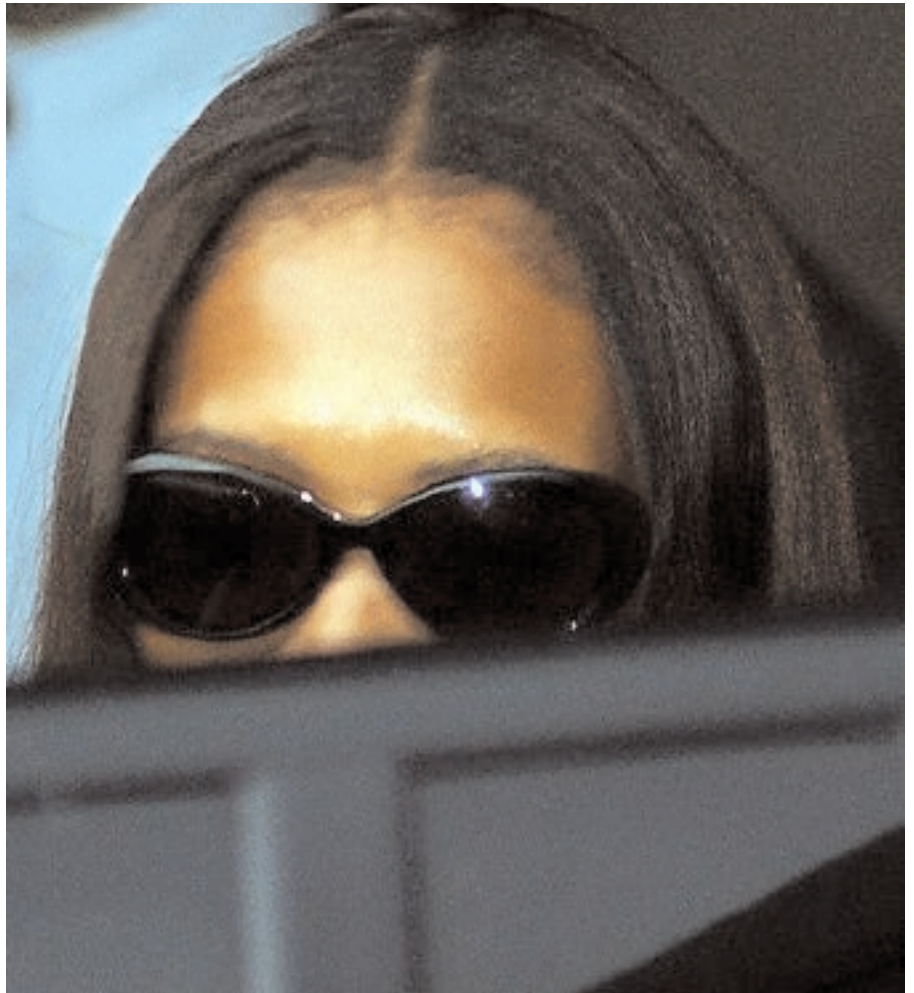
But much of the support for a loser-pays system in the United States is based on the perception that there are many frivolous

cases and that a loser-pays rule would discourage them. No research has shown that a substantial portion of lawsuits is frivolous. There are certainly many defendants who feel that they have been unfairly sued, but that does not mean the suits were frivolous. Lawyers paid through a contingency fee are unlikely to take a case that has little merit, because they do not want to waste their time or money. Research shows that at least half, and probably more, of the potential cases brought to contingency-fee lawyers are declined.

IF LOSER PAY BECAME THE STANDARD in the U.S., it would probably create a market for insurance covering the plaintiff's risk of losing and having to pay a winning defendant's costs. That is what happened in England, where many injury victims protect themselves against the threat of losing by obtaining after-the-event legal insurance, the cost of which can be transferred to the defendant if a victim wins. As a result, loser pays has had little effect on these litigants. If successful plaintiffs in the U.S. could collect attorneys' fees from defendants, the value of their claims would rise and more than offset the cost of insurance. Attorneys might advance the cost and absorb it in the relatively rare event that they lost the case.

Proponents of making loser pays the policy in the U.S. rarely talk about its administrative costs. The court systems in England and other countries with loser pays have processes for determining the expenses payable by a losing party. The winner does not simply bill the loser for legal costs. There are established standards for what can be recovered, and in common law countries such as Britain and Canada, there are specific officials who resolve disputes over legal costs. U.S. courts lack any comparable systems and would be, at least initially, ill-equipped to resolve disputes over legal fees in routine cases.

And how would loser pays work in a case involving multiple defendants? A surprisingly high number of lawsuits involve finger-pointing among defendants. There may be no doubt that a plaintiff was



Model Naomi Campbell demanded a shade under £350,000 in legal costs after winning only £3,500 from a newspaper that had photographed her leaving a Narcotics Anonymous meeting.

injured due to one or more parties' negligence, but it may be unclear which of several defendants is responsible, or what share of responsibility each defendant should assume. Who should bear the costs of litigation among defendants? What happens when some defendants are exonerated and others held liable? Should the successful defendants' costs be paid by the plaintiff or another defendant?

In a lot of American lawsuits, the party with the actual financial interest in the plaintiff's case is his insurance company. It may be a health insurer that has paid for medical treatment or a casualty insurer that has covered the cost of property loss, but the company wants to recover its payment from the defendant. If the plaintiff loses, though, should the insurer

be responsible for any of the defendant's costs? How should responsibility be allocated between the named plaintiff and the insurance company?

Loser pays sounds like a silver bullet for a costly litigation system, particularly to defendants who believe they have been wrongly sued. It also looks simple: Someone wins, and the other side pays his costs. But experience reveals a far more complex reality, one full of disputes over fees and related issues, and with plaintiffs like Naomi Campbell who can win paltry awards and still be owed astronomical legal fees. ■

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