

“IT’S NOT ABOUT THE MONEY!”: A THEORY ON
MISCONCEPTIONS OF PLAINTIFFS’ LITIGATION AIMS

*Tamara Relis**

This Article examines from a new angle a long-standing debate on two central questions of the legal system: why do plaintiffs sue, and what do they seek from litigation? Legal research has documented various extra-legal aims or non-economic agendas of plaintiffs who commence legal proceedings for various case-types.¹ However, current debates have failed to address this issue in depth from the perspectives of plaintiffs themselves, subsequent to lawyers conditioning them on “legal system realities” and translating their disputes into legally cognizable compartments. Nor have understandings of plaintiffs’ aims been examined from the perspectives of defense lawyers. These are significant gaps in the knowledge, as plaintiffs’ objectives directly impact their experiences in litigation and litigation-linked processes such as mediation. Likewise, attorneys’ approaches and conduct throughout litigation and mediation processes are premised upon their basic understandings of what those who commenced these suits want.

In providing new empirical research, I offer disconcerting evidence of the surprising degree to which disparate perceptions of plaintiffs’ litigation aims exist as between plaintiffs and attorneys—at times even between attorneys and

* Dr. Tamara Relis, Fellow, Columbia University Law School and London School of Economics, Department of Law. This work has been presented at the American Law & Society Association Annual Meeting (2004), the London School of Economics and the Kyoto Law School Symposium on “The Participation of Non-legal Professionals and Citizens in Judiciary” in Japan (2004). I would like to thank Simon Roberts, Richard Abel, Michael Palmer, Kendall Thomas, Howard Erlanger, and Craig McEwen for their insightful comments and suggestions. I am indebted to the lawyers, disputants and mediators involved in this project. Although their names must remain confidential, without them this research would not have been possible. I would also like to thank Columbia/LSE and the Economic & Social Research Council for their financial support: award PTA-026-27-0979. This article supersedes any other prior published version.

1. I have termed non-monetary objectives “extra-legal” as monetary damages are discussed within legal rules and the traditional world of legal practice. Some of the literature on legal policy, victims’ rights, mediation and legal consciousness refers to a number of the non-monetary litigation aims I have termed “extra-legal” as “legal,” e.g. plaintiffs’ desires to obtain acknowledgment of error. *See generally* PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW* (1998); David Engel, *The Oven Bird’s Song: Insiders, Outsiders and Personal Injuries in an American Community*, 18 *LAW & SOC’Y REV.* 551 (1984). However, I have used this term to highlight an important recurrent theme within this work and to reflect the views and perceptions of the lawyers within my sample. In their opinion, these aims are not within the province of the law or legal practice, and thus are “extra-legal.”

their own clients. As such, this article presents a picture of discontinuity where there appears to be little understanding of plaintiffs' motivations amongst the lawyers involved in their cases. Employing a novel angle of juxtaposing the views of all sides within the same or similar fatality and medical injury cases, I show that irrespective of allegiances the bulk of attorneys understand that plaintiffs sue solely or predominantly for money. Even many plaintiff lawyers, who are more aware of their clients' extra-legal aspirations, swiftly translate these objectives into finance alone, as "that is all the legal system can provide." Yet simultaneously, virtually all plaintiffs vehemently insist, "it is not about the money!" with only a minority saying financial compensation was even a secondary aim. Instead, plaintiffs' articulations of why they sued and what they sought from the legal system—irrespective of whether their cases had been litigating for months or years—were thickly composed of extra-legal aims of principle. Yet, notwithstanding any needs or desires for monetary compensation, plaintiffs' objectives of obtaining admissions of fault, prevention of recurrences, retribution for defendant conduct, answers, apologies and acknowledgments of harm remained invisible to virtually all lawyers throughout the duration of the processing of their cases.

To explain this phenomenon, I present a theory that argues that these "parallel worlds of understanding" occur largely due to the institutional framework of the civil justice system coupled with the practical and economic realities of legal practice that result in dispute transformation. In offering two proposals to increase attorneys' understanding of plaintiffs' extra-legal agendas and needs within litigation processes, this Article implicitly argues that the operating economic premises of the civil justice system require urgent and serious reevaluation.

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I. INTRODUCTION

The phenomenon of dispute transformation, formulated now long ago,² is generally accepted and remains largely unchallenged within legal scholarship.³ I present it here as a twofold process. First, notwithstanding plaintiffs' dispute descriptions and initial expressed desires, lawyers condition clients on "legal system realities" and persuade them to aim for what they view as legally realistic.⁴ Attorneys then reframe litigants' dispute

2. See William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 631-32, 650-51 (1981).

3. Although dispute transformation in medical malpractice cases has not been examined in depth, it has been found in various other case types. These include divorce, poverty law, consumer, general injury, small claims and harassment. See, e.g., JAMES WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 20-21, 260-61, 269 (1990); Carl Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going To Happen: Lawyer-Client Negotiations Of Reality*, 26 SOC. PROBS. 600, 600-04 (1979) (utilizing solely observation data); Clark Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1339-57, 1367-85 (1992); Tamara Relis, *Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know About the Litigation Experience of Individual Litigants*, in STUD. L., POL. & SOC'Y 162-63, 167-68, 193 (Austin Sarat & Patricia Ewick eds., 2002). See generally Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2111 (1991); Christopher Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 883 (1992); Austin Sarat & William Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 116 (1986); Jerome Bruner, *A Psychologist and the Law*, 37 N.Y.L. SCH. L. REV. 173, 182 (1992); JOHN CONLEY & WILLIAM O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990); MAUREEN CAIN, THE GENERAL PRACTICE LAWYER AND THE CLIENT: TOWARDS A RADICAL CONCEPTION (1983). Legal transformation has also been found in various jurisdictions. For instance, in discussing the Kenyan legal system it has been noted that lawyers have "elaborated highly sophisticated techniques for explaining disputes in terms of the norms involved . . . diverging from that employed by society at large." See Richard Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 234, 271 (1974). Likewise, utilizing case studies from both western and non-western settings (e.g. Tanzania), it has been found that "disputes altered as they were processed in response to the interests of various participants . . ." with "narrowing being the most common process of dispute transformation." See Lyn Mather & Barbra Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775, 778, 780, 789, 796 (1981). The legal narrowing of disputes "determined by the needs and purposes of the legal process" was also noted in Pasargada. See Boaventura de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 12 LAW & SOC'Y REV. 5, 18 (1977).

4. Divorce clients have been found to repeatedly attempt to broaden the dialogue with their lawyers. However, lawyers' dispute interpretations reflecting their own sense of legal reality generally prevailed. See AUSTIN SARAT & WILLIAM FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS 85, 106-07 (1995) [hereinafter SARAT & FELSTINER, DIVORCE LAWYERS] (relying upon observations of conversations between divorce lawyers and clients in two U.S. states); Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737, 741-42, 766-67 (1988) [hereinafter Sarat & Felstiner, *Law and Social Relations*]; Sarat & Felstiner, *supra* note 3,

experiences, feelings and extra-legal aims to fit into legally cognizable compartments suitable for processing within the legal system.

I argue here, however, that current debates have failed to address two important issues within this phenomenon. First, as with many aspects of litigants' perspectives, there has been little investigation from plaintiffs' viewpoints during case processing how, if at all, dispute transformation affects their understandings of their cases and what they seek from the justice system, how they perceive what they hear from their lawyers, and whether their objectives change throughout the litigation process.⁵ Second, there is little knowledge of defense lawyers' understandings of plaintiffs' aims, and of whether dispute transformation plays any part in their comprehensions.⁶ This is significant, as attorneys' approaches to their cases and their conduct during litigation and litigation-linked processes such as mediation are premised upon their basic understandings of what plaintiffs want. Likewise, for plaintiffs, their motivations to sue and consequent litigation aims have a marked impact upon their experiences during litigation and litigation-track mediations.⁷ Thus, understanding plaintiffs' objectives is particularly important if civil justice evaluations or reforms are to be responsive to their needs.

In offering findings from new empirical research into lawyers' and plaintiffs' understandings within the same or similar medical malpractice cases, this article argues that dispute transformation does affect defense lawyers' understandings of opposing plaintiffs' objectives, yet it does little to

at 116-17.

5. Little is known about what litigants really want from the civil justice system, what they aim to achieve and how their objectives may change. Consequently, we have little knowledge of whether litigants' real aims are met by the realities of civil litigation. See generally HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* (1999) [hereinafter GENN, *PATHS TO JUSTICE*]; Hazel Genn, *Access to Just Settlements: The Case of Medical Negligence*, in *REFORM OF CIVIL PROCEDURE: ESSAYS ON "ACCESS TO JUSTICE"* (A. Zuckerman & R. Cranston eds., 1995) [hereinafter Genn, *Access to Just Settlements*]; JOHN BALDWIN, *SMALL CLAIMS IN THE COUNTY COURTS IN ENGLAND AND WALES* (1997). Even Sarat's & Felstiner's research into divorce lawyers and clients lacks much input from clients on their understanding of what was occurring during their attorney-client relationships. Nor does it tell us whether clients absorb and internalize what they hear from their lawyers and if they do, how they feel about this. See Cunningham, *supra* note 3, at 1339-57, 1367-85.

6. Research has failed to examine in depth the practical effects of dispute transformation. See Relis, *supra* note 3, at 193.

7. Procedural justice studies and legal research suggest that the manner in which litigation processes are subjectively perceived is affected by litigants' expectations, which are linked to their aims. See generally CONLEY & O'BARR, *supra* note 3; Tom Tyler et al., *Maintaining Allegiance to Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629 (1989); William O'Barr & John Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137 (1988).

extinguish plaintiffs' own extra-legal litigation aspirations. I show how plaintiffs interpret their lawyers' explanations of the "monetary realities of the legal system." I also provide evidence of plaintiffs intermeshing "principles" with pecuniary recompense. Thus, there may be some transformation in plaintiffs' goals, particularly on the surface. However, challenging a central tenet of transformation theory, that a transformed dispute can actually become the dispute,⁸ this article demonstrates that plaintiffs' extra-legal aims of principle do not dissipate after dispute transformation by their lawyers, nor with the passage of time.⁹ In terms of the effects upon lawyers, the findings here suggest practical consequences of dispute transformation, something questioned in previous literature.¹⁰ Indeed, it has been argued that transformed legal descriptions of conflicts commonly alter the nature of disputes and may hold little meaning for litigants, resulting in remedies that do not deal with their needs as they perceive them.¹¹ The findings here shed further light on this issue, which has generally been neglected.¹²

In comparing attorneys' and plaintiffs' comprehension of plaintiffs' aims, I provide disconcerting evidence of the degree to which perceptions are largely diverse. I demonstrate that, notwithstanding their different allegiances, the bulk of lawyers for both plaintiffs and defendants have similar conceptions of why plaintiffs have sued in particular cases—the reason being solely or predominantly for money. Concurrently, I show how, notwithstanding any needs or desires for pecuniary recompense,¹³ plaintiffs' own articulations of their litigation objectives are thickly composed of extra-legal aims of principle, regardless of whether their cases have been in litigation for three months or five years. However, claimants' desires for acknowledgments of harm, retribution for defendant conduct, admissions of fault, prevention of

8. Felstiner et al., *supra* note 2, at 650.

9. It has been argued that litigants' goals may change over time. See GENN, *PATHS TO JUSTICE*, *supra* note 5, at 11. Others have noted that litigants' perceptions of their cases and needs may change during litigation. See Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 *LAW & SOC'Y REV.* 341, 342, 342 n.7 (1976); SARAT & FELSTINER, *DIVORCE LAWYERS*, *supra* note 4, at 53. As a separate issue, litigants' perceptions of case facts have been found to change over time. Felstiner et al., *supra* note 2, at 631. See generally CONLEY & O'BARR, *supra* note 3.

10. Relis, *supra* note 3, at 193.

11. See generally TAMARA RELIS, *PARALLEL WORLDS OF DISPUTES AND MEDIATION: LITIGANTS, LAWYERS AND GENDERED ACTORS' PERSPECTIVES* (forthcoming 2007) (which illustrates how this, in fact, is the case); CONLEY & O'BARR, *supra* note 3 (examining small claims litigants); Relis, *supra* note 3, at 163; Hosticka, *supra* note 3 (research into poverty law cases).

12. See Cunningham, *supra* note 3, at 1300.

13. Which, of course, could include not only claims of compensation for pain and suffering and loss of amenity, but also for reimbursement of expenditures incurred as a result of the injuries.

reoccurrences, answers and apologies remain invisible to most lawyers throughout the litigation and mediation of these cases.¹⁴

As such, this article presents a picture of discontinuity in terms of basic understandings of what these cases were about. This discontinuity appears to be due, in part, to failed communication. Yet, instead of viewing this discontinuity in terms of conflicting perceptions at a single moment, I argue that it is part of a system that acts on those perceptions and channels behavior in ways that reinforce those perceptions. So the structures of roles and

14. The full dataset derives from 131 in-depth interviews, questionnaires and observation files of actors (plaintiffs, defendants, lawyers and mediators) involved in 64 medical malpractice cases that underwent voluntary and court-linked mandatory mediations in three sites in Toronto (Ontario Court Mandatory Mediation Program, ADR Chambers, College of Physicians and Surgeons). Specifically, there are case interviews and questionnaire files from 17 plaintiffs (co-plaintiffs in any cases were interviewed separately), 13 defendant physicians, 27 plaintiff lawyers (comprising views from seven general practitioners & 11 specialist medical lawyers, being those who worked on 10 or more medical cases per annum and amongst the top specialist lawyers in the region—nine discussed more than one case), 17 physician lawyers (with views from eight physician lawyers—four discussed more than one case), 23 hospital lawyers (comprising views of seven hospital lawyers—five discussed more than one case), 29 mediators (with views from 17 mediators, 10 being lawyers and seven being non-lawyers—seven discussed more than one case) and two hospital representative/insurer interviews. All physician lawyers and hospital lawyers were medical malpractice specialists. Of all the plaintiffs involved in the study, perhaps only one or two, if any, might be viewed as “wealthy” in terms of being non-representative of plaintiffs generally. This conclusion is based upon information obtained during the research process, e.g. from what plaintiffs said during interviews and observed mediations including private caucuses, respondents’ questionnaire responses about their homes, and their job descriptions as well as those of the principal financial providers in each household. *See generally* Relis, *supra* note 11.

Interviews were conducted with 10 plaintiffs subsequent to voluntary mediations and seven plaintiffs subsequent to mandatory mediations on the litigation-track. Mandatory court-linked mediations (similar to many U.S. court-connected programs, although generally occurring prior to discovery) generally had to take place within 90 days after the first defense had been filed, unless the court ordered otherwise. (ONT. R. CIV. P. 24.1.09). Voluntary mediations at ADR Chambers generally occurred far later (often years later) and close to trial (all cases were already on trial lists). *See* Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 244-45. Disputes that did not settle at mediation continued to follow normal litigation routes. *See* Ontario Ministry of the Attorney General, *Ontario Mandatory Mediation Program* at <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/rule24.asp> (last visited Nov. 6, 2006). Plaintiffs would have commenced litigation within one year of the disputed incidents as in Ontario the limitation period for medical malpractice cases is only one year. [Limitation of Actions Act, R.S.A., ch. L-15, §§ 55(a), 56 (1980); Health Disciplines Act, R.S.O., ch. H4, § 17 (1980); Hospitals Act, R.S.P.E.I., ch. H-10, § 13 (1988); The Medical Profession Act 1981, 1980-81 S.S., ch. M-10.1, § 72]. College mediations, which were pre-litigation, were not included in the analysis of plaintiffs’ litigation aims.

A number of the lawyers and mediators provided data on more than one case as these individuals were repeatedly listed on the court files as acting in the various medical cases. This appeared to be due to the relatively small size of the specialist medical-legal community in the region. Nonetheless, I obtained a wide range of exposure to different mediators and lawyers. Accordingly, I am not aware of any bias resulting from the cases included in the study.

expectations outlined here might be seen as creating some of the problems and the perceptions. More specifically, I explain this discontinuity as a product of a system that forces legal action for dollars partly because it is structured that way, and partly because lawyers and insurance representatives understand disputes in those narrow terms. These understandings are reinforced by the behavior of plaintiffs, who have had their disputes transformed by both their own lawyers and the non-responsiveness that a defense posture focused on money creates.

In proffering detailed empirical data from actual plaintiffs on their motivations and objectives, this article offers new insight into the critical area of litigants' non-economic goals for litigation.¹⁵ The findings also inform the lawyering theory literature, answering questions such as "how do attorneys understand what a particular client's 'problem' is?" and "what 'facts' do attorneys perceive versus those that escape them?"¹⁶ As such, this article highlights the role of plaintiffs' extra-legal agendas within the discontinuity between claimants' aims, lawyers' understandings and realities, and the pervasive economic assumptions of the civil justice system.¹⁷ In so doing, the article underscores the significance of fully comprehending litigants' extra-legal agendas as an integral facet of the civil justice system.¹⁸

15. See Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering* 6 HARV. NEGOT. L. REV. 145, 165-66 (2001); Genn, *Access to Just Settlements*, *supra* note 5, at 11; John Conley & William O'Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 LAW & CONTEMP. PROBS., 181, 182-84, 196-97 (1988) [hereinafter Conley & O'Barr, *Hearing the Hidden Agenda*]; Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 515 (1984); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 THE LANCET 1609, 1609-13 (1994). The data here shed light upon how lawyers and disputants think and speak about the meaning of cases. They also represent talk about motives, which I hope will be regarded as revealing and useful. I do not claim that this answers the ultimate psychological question of why people do things. This is one of several windows on motivations, adding to the scant depth of research on the needs of plaintiffs and why they sue.

16. Richard Sherwin, *Lawyering Theory: An Overview What We Talk About When We Talk About Law*, 37 N.Y.L. SCH. L. REV. 9, 42-43, 48, 51 (1992).

17. See Conley & O'Barr, *Hearing the Hidden Agenda*, *supra* note 15, at 181, 182-84, 196-97. Conley and O'Barr's ethnographic research into small claims litigants in three U.S. states provides extensive linguistic evidence of the significance of litigants' hidden extra-legal, non-economic agendas. Stressing the "importance, if not the pre-eminence of non-economic factors for litigants," they conclude, "the discontinuity between litigant agendas and the operating assumptions of the system may be a fundamental source of dissatisfaction with the law."

18. This research applies interpretive theory, drawing upon the agency-structure paradigm that emerges in the works of Anthony Giddens and Pierre Bourdieu. As such, the focus is upon recovering actors' understandings and meanings whose actions are informed by structure—here, being litigation and mediation processes. See PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 18, 53 (1990); PIERRE BOURDIEU,

In an attempt to remedy the specific issues discussed here, I present two proposals. First, direct dialogue early on in litigation between defense lawyers and plaintiffs concerning plaintiffs’ litigation aims is necessary. Early mediations present opportunities for litigants to articulate their extra-legal realities and needs. This awareness should affect the way attorneys understand and subsequently deal with these cases if they are not resolved through mediation. Second, core law school curriculums for law students and continuing legal education and ethical rules for attorneys must provide greater emphasis upon litigants’ extra-legal dispute realities, needs and objectives during case processing.

This article proceeds as follows. Part II examines similarities and differences in the manner in which plaintiffs’ aims are understood across three separate attorney groups: physicians’ attorneys; hospital attorneys; and plaintiffs’ attorneys. Part III presents data on the dramatically disparate motivations and litigation objectives articulated by plaintiffs within many of the same disputes, most of which were rarely mentioned by the lawyers in their cases. To illustrate the marked discontinuity of understandings of plaintiffs’ aims, Section B of Part III presents three case studies juxtaposing all actors’ discourse concerning their comprehensions of what plaintiffs wanted. Part IV provides evidence of plaintiffs’ lawyers conditioning their clients on the monetary realities of the legal system through the phenomenon of system conditioning. It then examines plaintiffs’ understandings of this phenomenon, as well as the fusion of principles and money within some plaintiffs’ explanations of their aims. Part V offers an institutional theory to explicate the discontinuity between lawyers’ and plaintiffs’ understandings.

OUTLINE OF A THEORY OF PRACTICE 3, 21, 72 (Richard Nice trans., Cambridge Univ. Press 1977); ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION 5, 25, 30 (1984); George Walsh, *Introduction* to ALFRED SCHUTZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD, at xxi, xxiii, xxviii (George Walsh & Frederick Lehnert trans., Northwestern Univ. Press 1967); MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT I (A.M. Henderson & Talcott Parsons trans., J.C.B. Mohr 1957) (1922). In contrast to positivism, for Giddens, social reality is the “ongoing construction of and by knowledgeable actors whose recurrent interactions create, reproduce and transform the social world.” See NICOS P. MOUZELIS, BACK TO SOCIOLOGICAL THEORY: THE CONSTRUCTION OF SOCIAL ORDERS 19 (1991). Yet, the constitution of agents and structures represents a duality because structure’s role in organizing human conduct is not external to individuals. See *id.* at 26. Structure consists of recursively organized sets of rules and resources comprising the “situated activities of human agents, reproduced across time and space.” See GIDDENS, *supra* note 18, at 25. Not far from Giddens, Bourdieu’s theory of practice stipulates that “each agent . . . is a producer and reproducer of objective meaning.” See BOURDIEU, OUTLINE OF A THEORY OF PRACTICE, *supra* note 18, at 21. Thus, social practices are fundamental in understanding how social structures are produced and reproduced, as practices constitute structures while also being determined by structures. See *id.*

Finally, Part VI summarizes the findings and proposes two ways to address the problems discussed.

II. OPPOSING PARTISANS' SIMILAR COMPREHENSIONS OF WHAT PLAINTIFFS WANT

This Part examines the understandings of lawyers on all sides of medical malpractice cases concerning the elementary issue of why plaintiffs commenced these litigations, their goals, and their views of what these cases were about.¹⁹ In terms of the legal and practical context of these cases, it is generally accepted that despite marked increases in medical malpractice litigation in the United States, Canada, Britain and elsewhere, very few victims of medical accidents sue.²⁰ Of those who do, only a minority receive compensation through settlements, with even fewer obtaining court awards in

19. The research methodology was based predominantly on a qualitative paradigm, using a multiple case study design. Although the nature of the sample excluded the possibility of meaningful regression or multivariate analysis, a small amount of quantitative analysis was also undertaken, utilizing descriptive statistics. This was done to assess percentages and proportions of particular responses and to evaluate, as far as the data permitted, the strength of any associations between certain variables. Variables studied include individuals' views and perceptions, and their gender and actor positions in the litigation process. Analysis of participants' discourse was facilitated by the ATLAS.ti qualitative analysis computer program, enabling grounded theory. The dataset was segmented into 5508 coded units and grouped into 263 code families representing the main areas of focus. The integrity of the data was carefully preserved, and triangulation of methods was utilized to enhance internal validity. As to external validity, natural groupings representing social segmentation were used, enabling generalizations to wider populations, as is common in qualitative research and similar projects. Additionally, by approaching all litigated medical malpractice cases that mediated during the Fieldwork Period (May 2000 to October 2001) in the three sites, I conducted a form of census. The number of individuals approached who consented to partake in the research was over 70%, a response rate considered reasonable in terms of generalizing to outside populations.

Of course, as in all such qualitative legal research a number of methodological weaknesses exist. The fact that a random probability sample was impossible to obtain limits the generalizations that can be made from the findings across populations. There are also inherent risks in extrapolating findings without qualification from one location to another. However, it is acceptable to generalize thematic conclusions. Additionally, the small number of directly observed mediations (seven), due to permission difficulties, may be considered a weakness. To cure the effect of this limitation, observation data was used solely to support or contradict interview and questionnaire data. Due to the small numbers within each actor group, the findings must be regarded as tentative. However, in view of the consistency of responses and in support of what the findings reveal regarding general legal practices, although I looked at particular respondents involved in one case-type in particular institutions, there is no a priori reason to think that these findings would be different from other cases in other culturally similar jurisdictions.

20. There has been substantial growth in the frequency and severity of medical litigation in Canada. See Donald N. Dewees et al., *The Medical Malpractice Crisis: A Comparative Empirical Perspective*, LAW & CONTEMP. PROBS., Winter 1991, at 220-21, 237, 250; Joan M. Gilmour, *Overview of Medical Malpractice Law in Canada*, 3 ANNALS HEALTH L. 179, 183 (1994).

their favor.²¹ This is a result of various factors. First, there are difficulties in successfully proving the elements of negligence by the appropriate evidentiary standard, irrespective of whether claims are in fact legally meritorious.²² Plaintiffs must prove on the balance of probabilities that a duty of care existed, breach of the standard of care by the medical professional, causation, and consequent injury or loss.²³ However, only a proportion of medical errors

21. See Gerald B. Robertson, *The Efficacy of the Medical Malpractice System: A Canadian Perspective*, 3 ANNALS HEALTH L. 157, 170 (1994). In 1991, only 23% of plaintiffs in Canada succeeded at trials, by 1992 that statistic had increased to a mere 34% success rate. *Id.* at 173. This is similar to success rates in the United States and Britain. See P. Fenn & C. Whelan, *Medical Litigation: Trends, Causes, Consequences*, in SOCIO-LEGAL ASPECTS OF MED. PRAC., 8 (Robert Dingwall ed., 1989); Walter Orlando Simmons, *An Economic Analysis of Mandatory Mediation and the Disposition of Medical Malpractice Claims*, J. LEGAL ECON., Fall 1996, at 42. Canadian plaintiffs who do succeed at trials generally receive far less than successful plaintiffs in the United States, as non-pecuniary damages awards, which include loss for pain and suffering, loss of expectation of life, and loss of amenities, were capped at \$100,000 CAD in 1978 (though adjusted for inflation) pursuant to a trilogy of decisions by the Supreme Court of Canada. See Gilmour, *supra* note 20, at 185-86, 188 n.39 (citing *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229, 263-65; *Thornton v. Bd. of Sch. Tr. of Sch. Dist. No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 284). Additionally, although compensatory aggravated damages may be awarded, Canadian courts very rarely award punitive or exemplary damages. See Gilmour, *supra* note 20, at 186-87.

22. See Gilmour, *supra* note 20, at 197-98; Vincent et al., *supra* note 15, at 1609, 1612; Robertson, *supra* note 21, at 173.

23. See Gilmour, *supra* note 20, at 189-90. The legal position as to medical liability in Ontario is virtually the same as that in most of common law Canada. See *id.* at 187; Robertson, *supra* note 21, at 168. Apart from Quebec, which is a civil law jurisdiction, Canada’s remaining provinces and territories are common law jurisdictions where there is a notable coherence in case law, partially because the Supreme Court of Canada has acted to create doctrinal uniformity among all provinces as to medical liability. See Gilmour, *supra* note 20, at 189-91; Robertson, *supra* note 21, at 173-74, 173 n.35. Medical accidents in Ontario are compensated according to general civil liability principles and negligence tort law in particular, which aims to compensate those injured negligently as well as to prevent substandard practice. See Gilmour, *supra* note 20, at 189. This is the case notwithstanding the fact that other civil wrongs, such as breach of contract, breach of fiduciary duty and battery, could also be relevant. All physicians are consequently under a duty to exercise reasonable care when treating patients. See *id.* at 190. For medical negligence to be substantiated, plaintiffs must, inter alia, prove that the doctor conducted herself in a manner which was below “that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing.” See *id.*; Robertson, *supra* note 21, at 173, 173 n.31 (citing *Crits v. Sylvester*, [1956] O.R. 132, 143 (C.A.), *aff’d*, [1956] S.C.R. 991). Additionally, apart from emergency situations, patients in Canada who are able to comprehend the nature and consequences of medical treatment must explicitly or impliedly provide informed consent to receive treatment, or physicians may be sued for assault or battery. See *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Reibl v. Hughes*, [1980] 2 S.C.R. 880, 888-89; Gilmour, *supra* note 20, at 191-93; Robertson, *supra* note 21, at 174, 174 nn.41-42. As for liability of hospitals in medical negligence cases, they may be in breach of their direct duty of care owed to patients. See Gilmour, *supra* note 20, at 190-91. This includes liability for failures in their system to assure proper and punctual patient care. See *id.* at 191. However, only interns, residents and nurses are considered hospital employees by the Canadian courts. See *id.* Consequently, hospitals are not vicariously liable for the negligence of doctors who are viewed as independent contractors, and are sued as separate entities. See *id.*

will be caused by legal negligence.²⁴ If an incident could be classified as an excusable error of clinical judgment, plaintiffs will fail in their claims.²⁵ Second, plaintiffs face many practical hurdles, as even cases with real merit demand enormous amounts of evidence to succeed. Yet, when commencing legal proceedings, plaintiffs are normally poorly informed about the level and quality of care they received, as compared with hospitals and physicians who have access to more detailed information.²⁶ Third, these cases are often viewed as being “battles of the experts” where the defendant has far more economic power than the plaintiff to obtain expert opinions and expert counsel. Therefore, even in legitimate cases, plaintiffs could be shut out. Fourth, notwithstanding the possibility of contingent fee agreements between plaintiffs and their lawyers, only a small proportion of medical negligence claims will be economically feasible to pursue due to high legal expenses in conducting these cases.²⁷ Thus, lawyers generally will not be interested in taking cases in which plaintiffs have relatively modest claims.

Looking at these cases from a different perspective, medical malpractice disputes often comprise issues of immeasurable, life-altering significance, such as death or serious injury, affecting individuals’ lives as well as the lives of their family members. These cases are multi-faceted, involving health care professionals, whose life purpose, aspirations, training and work, is focused upon care and healing; individuals in whom patients put their trust during difficult life periods. The emotional difficulties of litigating for injured

24. See HARVEY TEFF, *REASONABLE CARE: LEGAL PERSPECTIVES ON THE DOCTOR-PATIENT RELATIONSHIP* 58 (1994); Clifford Hawkins & Ian Paterson, *Medicolegal Audit in the West Midlands Region: Analysis of 100 Cases*, 295 *BRIT. MED. J.* 1533, 1535 (1987); Sheila M. Johnson, *A Medical Malpractice Litigator Proposes Mediation*, *DISP. RESOL. J.*, Spring 1997, at 44.

25. See, e.g., Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, *LAW & CONTEMP. PROBS.*, Winter 1997, at 199-200. See Gerald Robertson, *Reform of the Law of Medical Liability: The Position in the Common Law Jurisdictions of Canada*, in *CONTEMPORARY LAW: CANADIAN REPORTS TO THE 1990 INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 175 (H. Patrick Glenn ed., 1992).

26. Henry S. Farber & Michelle J. White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 *J. LEGAL STUD.* 777, 781 (1994).

27. Even with contingency fees, plaintiffs still risk having to pay a proportion of defendants’ legal costs if they lose at court, since Canada has implemented the British rule that costs follow the event in all civil litigation. Thus, plaintiffs whose cases are not sufficiently strong to result in early settlements must be ready to risk large legal costs. See Gilmour, *supra* note 20, at 184; Dewees et al., *supra* note 20, at 227; HERBERT KRITZER, *RISKS, REPUTATIONS AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* 258 (2004) (discussing contingency fee arrangements in Ontario). It must also be noted that, although technically available in Ontario, legal aid is virtually defunct. See Dewees et al., *supra* note 20, at 228, 249. This situation deters the commencement of actions and encourages litigants to reach settlement. See Gilmour, *supra* note 20, at 184-85.

plaintiffs or their surviving families are patent. For defendants, the non-economic costs of defending litigation arising from medical negligence claims are also high, entailing much anxiety and emotional pain, as medical professionals often view such disputes as attacks on their integrity and competence.²⁸ Yet, a different picture emerges through examining how lawyers involved on all sides of these disputes understand what these cases were about in terms of plaintiffs’ litigation motivations. Despite some differences among the groups, attorneys representing physicians, hospitals and plaintiffs either immediately or ultimately described the issue as one of money—solely or predominantly.

A. Physicians’ Lawyers: It’s Only About Money

Virtually all physicians’ lawyers in the study were of the strong belief that plaintiffs had sued for financial compensation alone. Even the two who mentioned that non-fiscal objectives might also have been involved put much emphasis on claimants’ primary monetary aims.

The following interview excerpts are typical of physicians’ attorneys’ responses in answering the global question: “*What, in your view, were the plaintiff’s aims in litigating?*”

“My view is [that] the issue was money, to compensate for the pain associated with the deterioration, and to compensate for lost income associated with the surgery that was necessary. *So it was money alone?* I believe so.” **Male attorney-50’s-prescription alleged to have destroyed plaintiff’s bone tissue, resulting in the 40 year old plaintiff undergoing hip replacement surgery-litigating several months.**

“To settle it. Their assumption was that this would never go to trial; that they would get money out of this beforehand. *So you feel it is solely an issue of obtaining financial compensation?* Yes, but I also think that they are of the view that if they obtain financial compensation it will make . . . them feel better. I think they’re misguided on that.” **Female attorney-30’s-plaintiff’s abdomen was not left intact after surgery-litigating several months.**

“I think in virtually all cases, it’s directly driven by financial compensation, by their desire for compensation The sole aim, you know, in most of the cases it is to be financially compensated for the wrong. And I would say that’s in 99% of the cases I do, that’s what plaintiffs want.” **Male attorney-30’s-child fatality case-litigating 4 years.**

28. See TEFF, *supra* note 24, at 13, 57; Chris Currie, *Mediation and Medical Practice Disputes*, 15 MEDIATION Q. 215, 217 (1998); Dauer & Marcus, *supra* note 25, at 190-91, 191 n.29; Johnson, *supra* note 24, at 45; Janice E. Linn, *Alternative Dispute Resolution for Health Care Providers: An Introduction*, 22 J. HEALTH & HOSP. L. 336, 336 (1989); Scott Forehand, Note, *Helping the Medicine Go Down: How a Spoonful of Mediation Can Alleviate the Problems of Medical Malpractice Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 907, 910 n.14 (1999); Thomas Hobbs & Gregory Gable, *Coping With Litigation Stress*, PHYSICIAN’S NEWS DIGEST, Jan. 1998, <http://physiciansnews.com/law/198.html>.

The following chart summarizes the responses of physicians' lawyers.

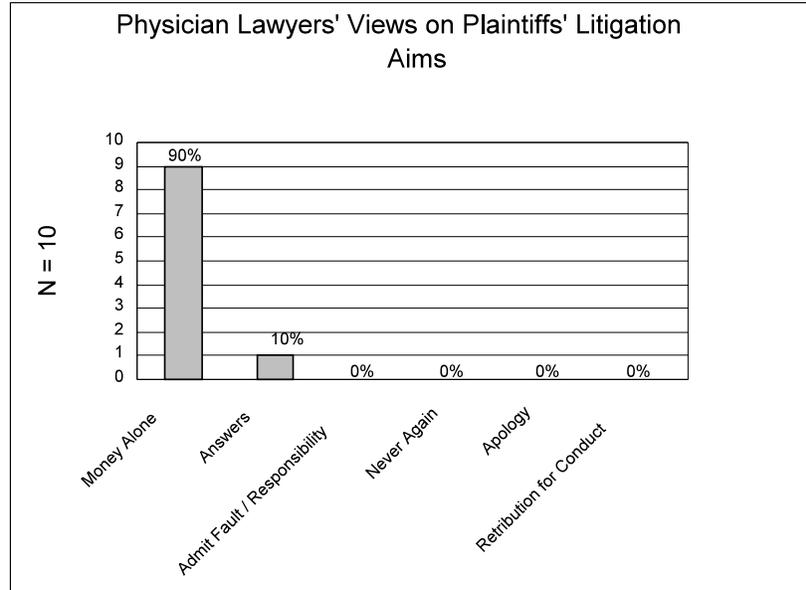


Figure 1—Physicians' lawyers' views on plaintiffs' litigation aims

The vast majority of defense physicians' attorneys felt that litigating plaintiffs sued for monetary compensation alone.

To understand the stance of the bulk of physicians' attorneys, it may be relevant to bear in mind that the individuals studied were part of a group of defense firms working on generally high paying cases that generate large legal fees. Like most attorneys, they were judged by their peers and superiors, at least to a material degree, by the amount of money they brought to their firms in terms of billable hours, and particularly the amount of money they were able to save their paying client, the Canadian Medical Protective Association ("CMPA"), which underwrites the vast majority of trial judgments and settlements in medical negligence cases in Canada.²⁹ Defense lawyers for

29. The CMPA, which employs virtually all medical defense lawyers in Canada, is a non-profit medical mutual defense organization incorporated by an Act of Parliament and owned and run by its physician members. See Dewees et al., *supra* note 20, at 221-22; Gilmour, *supra* note 20, at 182. Though it is within the organization's discretion to refuse claims altogether and it does not sell insurance per se, the CMPA acts partially as an insurer. Gilmour, *supra* note 20, at 181-82. It provides its members with legal advice and counsel in legal actions based on allegations of malpractice, payment of legal expenses, and provides no upper limit on the court awards, costs and settlements that it will pay out, with no deductibles. See *id.*; Canadian Medical Protective Association (CMPA), About Us, <http://www.cmpa->

doctors and hospitals in these cases each represented two clients: the individual physician or the hospital (and/or its employees), and the insurer or insurer-type body, which is the attorney’s paying client. Thus, the attorneys’ own personal achievement criteria and career trajectories most likely had much to do with finances, as well as getting rid of cases and settling them.

Yet, as one prominent female physicians’ lawyer put it,

What I can tell you is what I see and what I’ve heard. I’ve heard many people say, “I never wanted to go to a lawyer. I only went because the hospital or the doctor wouldn’t answer my questions.” They say, “I only commenced an action because I wanted to be very sure this never happens to anybody else,” or they say, “I wanted to hear the doctor say ‘I messed up’ or ‘I’m sorry.’” And they always say “It isn’t about the money.” I’m not so sure I always buy that. But I guess it’s possible that it’s also about something else.

This “something else” was somewhat more prevalent within the views of hospital lawyers, who very often represented co-defendants in the same actions.

B. Hospital Lawyers: It’s Mostly About Money

Similarly to physicians’ lawyers, the widespread view of hospital lawyers in the cases studied was that plaintiffs sued primarily, though not solely, to obtain financial compensation. However, contrasting somewhat with physicians’ attorneys, only two individuals, representing 17% of those interviewed, felt that the issue was money alone. Thus, hospital attorneys’ discourse about claimants’ primary fiscal aims was regularly coupled with talk of other non-pecuniary or non-legal motivations, albeit on a secondary level.

The disparity between the views of hospital attorneys and physicians’ attorneys may have been due to the identity of their clients. For physicians’ attorneys, claims may have been viewed more as personal attacks against their individual clients. Admissions of error can be personally devastating for doctors. Hospital attorneys represented large entities where claims may have been perceived as less personal, given that the client’s responsibility is collective. This, in turn, may have created a less defensive environment for

acpm.ca/cmpapd02/pub_index.cfm?FILE=HOME_MAIN&LANG=E (follow “About the CMPA” hyperlink; then follow “About Us” hyperlink). Hospitals are normally self-insured by various companies, and nurses have a protection organization not unlike the CMPA. See Gilmour, *supra* note 20, at 182; J. ROBERT S. PRICHARD, LIABILITY AND COMPENSATION IN HEALTH CARE: A REPORT TO THE CONFERENCE OF DEPUTY MINISTERS OF HEALTH OF THE FEDERAL/PROVINCIAL/TERRITORIAL REVIEW ON LIABILITY AND COMPENSATION ISSUES IN HEALTH CARE, App. A at 58-59, 61, 63-64 (1990).

hospital lawyers, allowing for greater openness to plaintiffs' extra-legal aims. Moreover, if it was clear that there was going to be financial liability, there would likely be little personal cost to admitting error.³⁰ The chart below highlights the views of hospital lawyers.

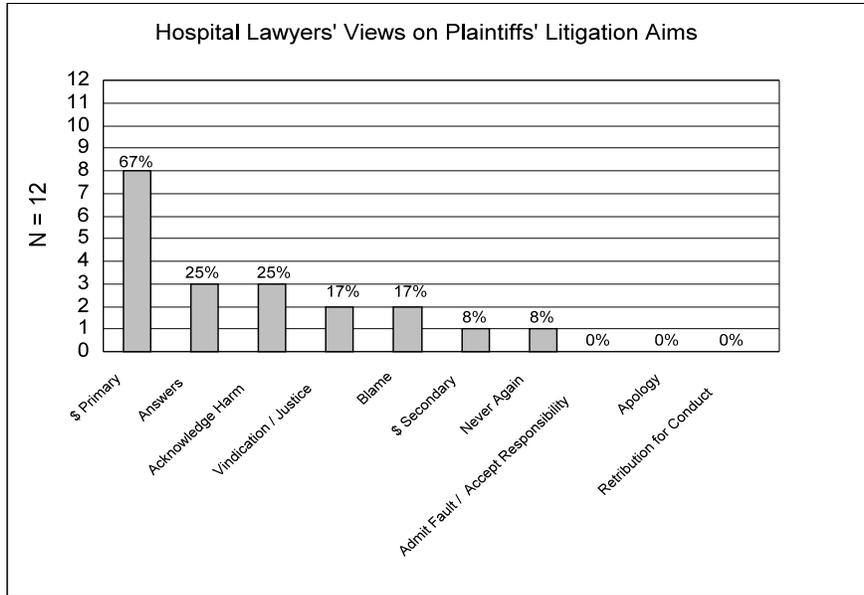


Figure 2—Hospital lawyers' views on plaintiffs' litigation aims

As with physicians' lawyers, most hospital lawyers viewed monetary recompense as the primary driver for plaintiffs. However, other secondary objectives were recognized by some.

The following interview excerpts are illustrative of the responses of hospital attorneys to the question: "*What do you think the plaintiffs' aims were in suing?*"

"To recover money. I think that was one of the big things. But, [also] to gain a sense of control over what had happened. I think there's just a lot of bitterness. And I think it's finding someone to blame for a lot of things that happened in [the plaintiff's] life."
Female attorney-30's-plaintiff's abdomen was not left intact after surgery-litigating approximately one year.

"Oh, well [the plaintiffs are] definitely very angry. And they also want a lot of money I think there's [sic] a lot of other issues going on. But I also have the sense that money was a primary driver."
Female attorney-20's-dispute over failed vasectomy and

30. Comments on manuscript, from Richard Abel, UCLA Law School, to author (Sept. 5, 2005) (unpublished, on file with author).

consequent abortion, where plaintiffs were practicing Catholics unable to support a further child-litigating just under one year.

“Partially financial compensation. I think clearly they’re a struggling family . . . Even though it could be said that these cases aren’t worth very much, they’re probably worth a great deal to them. And I think also there’s the . . . element of . . . getting at the truth and the matter of principle.” **Female attorney-40’s-death of an infant subsequent to labor and delivery-litigating five months.**

A possible cause for the disparity in responses of counsel for hospitals and those of counsel for physicians could be attributed to the gender composition of the groups studied. The hospital lawyers’ group was predominantly female (67%) (eight females, four males), whereas 80% of the physicians’ lawyers group were male.³¹ Although these gender findings must be regarded as tentative due to the small number of individuals studied, the data suggests that defense lawyers’ awareness or understanding of plaintiffs’ extra-legal litigation aims was affected by gender. Only one of four male respondents discussed plaintiffs’ extra-legal aims, whereas seven of the eight female respondents did. Moreover, when aggregating the views of all 22 defense hospital and physician lawyers (10 female, 12 male), 80% of females mentioned plaintiffs’ extra-legal objectives when discussing litigation aims as compared with only 25% of males. This finding was surprising amongst the professionals, as attorneys are trained to view disputes objectively, according to the law. Thus, one would think that the gender of a lawyer would not affect the way that s/he understands a case. However, this finding supports the view that women have different interpretations of events than men, lending support to writings in feminist legal theory claiming that even at its most neutral, there are gender relations that continuously affect the way law works.³² Thus, it may be that female professionals have the potential to offer greater assistance in addressing disputants’ extra-legal needs during litigation-linked processes.³³

31. Plaintiffs’ lawyers were omitted from the analysis, as there were only two females amongst that group.

32. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 25-29, 62-63, 173 (1982).

33. See Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 *NEV. L.J.* 305, 311-12 (2003); Stephen N. Subrin, *A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better Than I Thought*, 3 *NEV. L.J.* 196, 207-08 (2003).

C. Plaintiffs' Lawyers: It's Mostly About Money, But Also Other Issues

Plaintiffs' lawyers were clearly in a different position than defense lawyers in terms of knowing plaintiffs' aims. Yet, in exploring some of the questions from the lawyering theory literature—such as “how do attorneys understand what a particular client's ‘problem’ is?” and “what ‘facts’ do attorneys perceive and what ‘facts’ escape them?”³⁴—it was interesting to note that, as with defense lawyers, most plaintiffs' lawyers felt that money was plaintiffs' primary litigation aim. Still, the bulk of plaintiffs' lawyers viewed non-pecuniary litigation objectives as being more important to plaintiffs than their defense lawyer counterparts. These non-pecuniary factors, illustrated in the chart below, included obtaining answers about what happened; acknowledgements of harm; apologies; defendants' acceptance of responsibility, and retribution for insulting physician conduct.

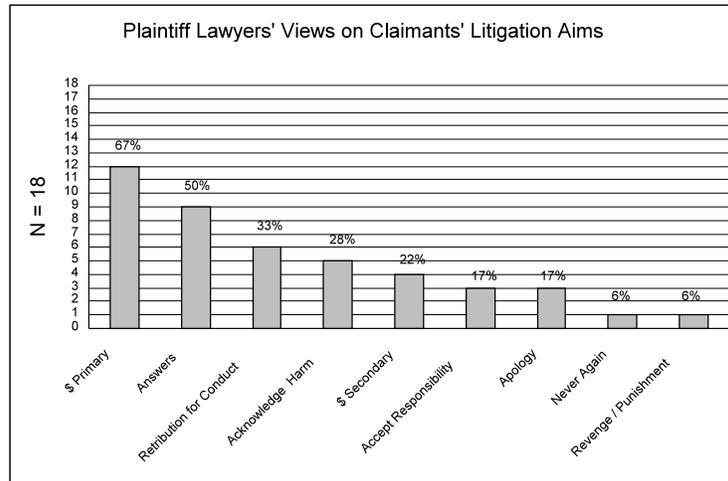


Figure 3—Plaintiff lawyers' views on plaintiffs' litigation aims

The majority of plaintiffs' lawyers viewed monetary recompense as their clients' primary aim. Yet, they were more aware of extra-legal litigation objectives as compared with defense lawyers.

Nonetheless, claimants' monetary aims were prominent in most plaintiffs' lawyers' parlance. As one female generalist lawyer noted in a case that had been litigating for several months:

34. Sherwin, *supra* note 16, at 42-43, 48, 51.

I think always, when a client proceeds with a lawsuit, including a medical lawsuit, money is one factor. But I think that’s because that’s the only thing our courts can compensate an individual with. But often the individual wants to understand what happened to them and why it happened. So I think that for the individual is very important . . . as compared with the money involved . . . So the plaintiff’s aim would be . . . information and understanding . . . And I guess there’s always the monetary consideration. I don’t think people ever launch a lawsuit unless at some level there’s a monetary consideration.

Similarly, an experienced male specialist lawyer in his fifties stressed, “My aims are to restore to my clients some kind of dignity, as their lives have been shattered. I feel a responsibility to financially restore to them some kind of security.”

In fact, a significant minority of both specialist and generalist plaintiffs’ lawyers viewed financial compensation as their clients’ only aim. Yet, in comparison to most defense lawyers, plaintiffs’ lawyers generally explained this on a less legal, more “human” level. As one male specialist lawyer explained:

My clients are devastated psychologically, emotionally and financially . . . They feel they have been betrayed by their doctors . . . My clients see the first tyranny as that of the “cover ups” . . . i.e., the tyranny of medicine. They perceive the second tyranny as being that of the litigation process, the length of the process, the exhaustion of the process, the feeling that they are nothing but a number, nothing but a debt . . . They rely on their lawyers implicitly. More often than not, their lawyers let them down.

Plaintiffs’ lawyers would generally be most likely to acknowledge other, non-pecuniary motives, as plaintiffs express their emotions directly to their legal counsel. Perhaps some plaintiffs’ lawyers may also want to see themselves as champions, not just hired guns. Perhaps they want to see their clients as representing the interests of all potential victims. At the same time, the only remedy plaintiffs’ lawyers can get for their clients through the formal civil justice system is money. Therefore, plaintiffs’ attorneys also seek to monetize other client motives.³⁵

As with defense counsel, plaintiffs’ lawyers, other than sole practitioners, are also judged by their peers and superiors based on fiscal considerations such as how much money they bring into the firm in legal fees and the amounts of settlements they are able to achieve. Judgments based on these considerations have a significant impact on lawyers’ own career trajectories, including election to partnership within their firms. A further practical reality in these cases relates to contingency fee arrangements between plaintiffs’

35. See Abel, *supra* note 30.

lawyers and their clients, which existed de facto for nearly all of the cases studied. Contingency fee lawyers only accept cases if they see the opportunity for an economic return; if the cases look like sound investments. As such, regardless of clients' motives, contingency fee systems drive lawyers to evaluate their cases initially as investments and to constantly re-evaluate them in the same way. Thus, economic realities of legal practice may have played a role in how the various legal actors in the study talked about and thought about plaintiffs' motivations and litigation aims.

Further interview excerpts from plaintiffs' attorneys are included in the case studies below. Notwithstanding the economic realities of legal practice, it was startling that not a single plaintiffs' lawyer suggested that money had little to do with what their clients wanted from litigation. Yet, this was something that most plaintiffs vehemently stressed.

III. PLAINTIFFS: IT'S ABOUT PRINCIPLES, NOT MONEY!

Of all respondents, plaintiffs' views are arguably the most important in answering the question of what motivated them to sue and what precisely they wanted. Although some empirical research has been done on litigants' motivations, much of it is dated or relies upon survey evidence. Thus, numerous lacunas still exist. Some sources argue that the vast majority of suits are about money.³⁶ However, studies in tort, divorce, injury and small claims cases have shown that plaintiffs frequently have material hidden aims or agendas that involve more than just money, and which may, in fact, be their cardinal goals.³⁷ Moreover, the fact that the formal justice system does not

36. See HERBERT KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 28-34 (1990) (identifying monetary stakes in the vast majority of cases, although Kritzer also identifies nonfinancial stakes). Kritzer also makes the point that a distinction should be made between plaintiffs' goals in litigation and their goals in the underlying dispute, as few litigants would choose to invest their own money in litigation if there were not a prospect of a significant recovery. E-mail from Herbert Kritzer, Professor of Law, William Mitchell College of Law (July 11, 2006) (on file with author). This is a valid point; however, in the present study, some of the claims were for relatively low damages (e.g. infant death case, child operation case, vasectomy case). Moreover, some litigants were paying their lawyers on an hourly-rate basis (i.e. they did not have contingency fee agreements with their attorneys) with no guarantees of financial recovery. Additionally, plaintiffs in the present study were asked specifically about their why they instituted legal proceedings and their goals for litigation itself, not simply about their underlying dispute objectives. Although, arguably these would be intertwined once litigation commenced. Finally, I do not make the claim that plaintiffs' aims for litigation never include monetary objectives, but simply that plaintiffs at the same time have a whole host of non-fiscal objectives for litigation that are not recognized by many legal actors.

37. See Conley & O'Barr, *Hearing the Hidden Agenda*, *supra* note 15, at 181; Marc Galanter, *Adjudication, Litigation, and Related Phenomena*, in *LAW AND THE SOCIAL SCIENCES* 151, 191 (Leon

deal with litigants' perceived requirements and real objectives, including their non-monetary agendas, has been found to be a major reason for litigants' dissatisfaction in small claims and injury cases.³⁸ Thus, in various contexts scholars have posited that plaintiffs may sue for psychological reasons, to ascertain the truth, to express anger, or to achieve moral vindication or "justice" by finding opponents in the wrong.³⁹

A. Plaintiffs' Articulations of Their Motives and Litigation Aims

Plaintiffs' articulations of their litigation objectives rarely correlated with what legal actors perceived as their prime litigation aims. In fact, a regular and conspicuous occurrence was the failure of plaintiffs to mention financial compensation as an objective at all (occurring in 65% of interviews), unless probed. Instead, what plaintiffs recurrently repeated was a lexicon of non-fiscal, extra-legal objectives for their litigation. "It's not about the money!" was a common theme throughout virtually all plaintiffs' discourse. The issue of "principle" was prominent for plaintiffs as revealed in the various objectives they passionately spoke about. Many of their comments concerned dignity and respect after the injury, inability to be heard, refusal to listen, dismissal and victim blaming. All of this added insult to injury.⁴⁰

Overall, the plaintiffs' group was uniform in terms of the litigation aims they discussed. There were no material differences in plaintiffs' articulated

Lipson & Stanton Wheeler eds., 1986) [hereinafter Galanter, *Adjudication, Litigation, and Related Phenomena*] (illustrating that litigants desire moral vindication albeit to varying degrees); Marc Galanter, *Reading The Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 30-31 (1983) [hereinafter Galanter, *Landscape of Disputes*]; Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Re-Examining the Concept of Dispute*, 9 JUST. SYS. J. 151, 157 (1984); SARAT & FELSTINER, *supra* note 4, at 93 (finding that litigants often seek acknowledgement that they have been treated unjustly as evidenced by the fact that they commonly seek apologies; and that some litigants seek solely emotional vindication). *See generally* SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990) (illustrating that litigants frequently have important hidden agendas and unrevealed aims which may be their cardinal goals and providing an example of a professional female making a \$30 claim against a repairman for allegedly causing damage in her house); Engel, *supra* note 1 (litigants want what they perceive as "justice" by the system ascertaining the truth and finding opponents in the wrong).

38. *See* CONLEY & O'BARR, *supra* note 3, at 126-27, 141-49; Conley & O'Barr, *Hearing the Hidden Agenda*, *supra* note 15, at 182-84, 196-97; MERRY, *supra* note 37, at 134-37, 142-46, 170-71; O'Barr & Conley, *supra* note 7, at 159-60. *See generally* T. MATRUGLIO, *PLAINTIFFS AND THE PROCESS OF LITIGATION* (1994).

39. *See* Engel, *supra* note 1, at 558-62; Merry & Silbey, *supra* note 37, at 153; Sarat, *supra* note 9, at 346.

40. *See* Abel, *supra* note 30.

objectives between claimants of different genders or education levels.⁴¹ Moreover, plaintiffs' extra-legal objectives did not appear to be affected by the passage of time, as plaintiffs' views derived from cases that had been litigating between three months and five years. Nor did opinions differ based on whether claimants had complained to the College of Physicians and Surgeons as well as having sued.⁴² The following chart illustrates the spectrum of objectives iterated by claimants.

41. Although no substantive differences were found within the plaintiffs' group in terms of gender, a further tentative finding relates to evidence of a degree of unease amongst female plaintiffs in discussing the financial objectives inherent in their claims. This was noted in 73% of female plaintiff interviews (11 individuals), yet in 0% of male plaintiff interviews (6 individuals). Even in cases where a mistake was admitted and/or an apology given and a settlement agreed upon, female plaintiffs often appeared less comfortable in speaking about pecuniary issues. This was evident even in cases comprising the most serious harm. Seeming more concerned than males about how others perceived their litigation aims, only female plaintiffs stressed that they were not the sorts of people who sued for money. The following are excerpts from interviews with female plaintiffs whose cases had been ongoing for three to five years.

"From day one I said, 'I'm all about truth here. I have to feel good within me.' And that's the reason why I said, 'I'm not the type who would get a slight hit on the bumper and, in all this neck brace and what have you.' I am not that." **female-50's**

"As . . . it got progressively worse, we weren't able to cope with it financially . . . Also starting a law suit, because you know, we don't sue people. We never have. . . . My parents never sued anybody. We don't do that kind of thing. And that car accident We don't do that" **female-40's**

"To me, suing, it was almost a sense of like, the right thing to do That's your only recourse She would have needed money for these things. So we 'had' no choice. But, you know, it was that sense too, thinking 'Well what do they think? That we're after money?' Do they think that money is really going to settle this type of thing, and is going to make it okay?" **female-40's**

"We're not like that. We don't want money" **female-40's**

42. Only nine plaintiffs (53% of those interviewed) sued as well as filed College complaints, whereas all but one plaintiff discussed extra-legal objectives in litigating.

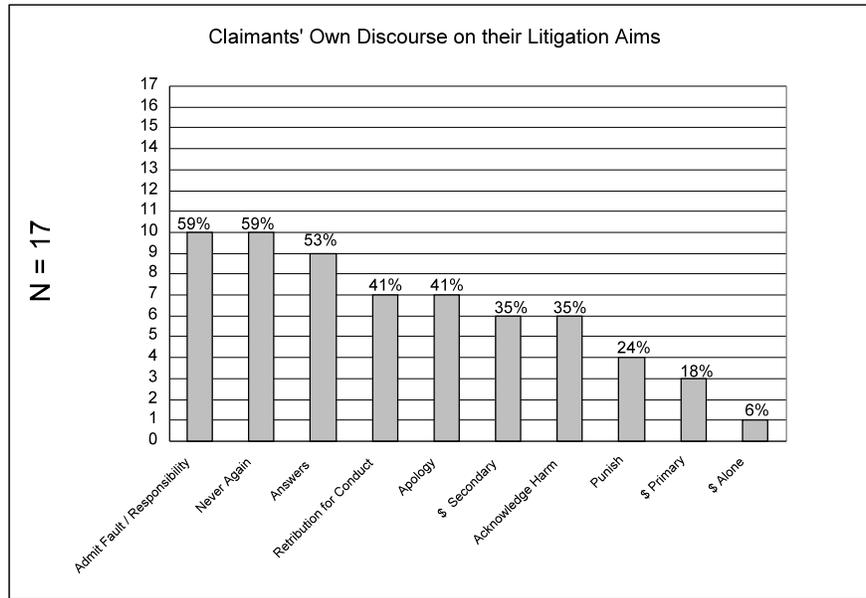


Figure 4—Claimants’ descriptions of their litigation aims

Plaintiffs’ articulated litigation aims were largely composed of extra-legal objectives of principle, with 41% not mentioning monetary compensation at all, 35% saying it was of secondary importance, 18% describing money as their primary objective in suing, and only one person (6%) saying it was money alone.

One might argue that plaintiffs may have felt that money is a culturally inappropriate goal, and thus offered other motives as rationalizations to the interviewer. However, findings in several studies on medical dispute plaintiffs in various jurisdictions (predominantly using survey data) lend credence to those in the present research. In these studies, claimants’ desires for monetary compensation were never found to be a predominant litigation motivation or of primary importance to most plaintiffs. Instead, they found extra-legal litigation aims similar to those noted by plaintiffs in the present research.⁴³

43. Survey findings on medical injury plaintiffs’ motivations and litigation aims, coupled with the uniformity of responses proffered by plaintiffs within the present research on their aims of principle leave little doubt as to their veracity. This is also supported by procedural justice findings that litigants can view negotiations, which concentrate on money alone, as trivializing issues they view as important. See Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 965-67 (1990).

For instance, a Florida survey study of 127 perinatal injury plaintiffs found that litigation motivations included not only requiring money (24% of cases studied), but also wanting to reveal cover-ups and to protect others in future.⁴⁴ In Britain, questionnaire data indicated that less than half of medical malpractice plaintiffs felt that obtaining financial compensation was a “very important” objective. Prevention of similar occurrences, physician acknowledgement, admissions that something had gone wrong, and answers were objectives most often rated as “very important.”⁴⁵ Likewise, other British findings deriving from 227 medical negligence plaintiffs’ self-administered questionnaires (via 5 attorneys’ firms) suggest that legal action was taken to prevent re-occurrences, for explanations and apologies, accountability, and admissions of negligence. Only 17% described compensation as a reason for suing.⁴⁶ Other research in the U.S. and Australia notes similar findings.⁴⁷ However, this knowledge appears not to have filtered through to legal practitioners in many cases.

It might also be argued that plaintiffs in medical malpractice cases may be more invested in acceptance of responsibility than other tort plaintiffs because doctors are so invested in seeing themselves as motivated only by patient well-being. In comparison, the stranger defendant in automobile accidents or products liability cases rarely pretends to be interested in victims’ well-being.⁴⁸ Yet, non-monetary litigation objectives have also been found for other case-types. For instance, research into community disputes, entailing court and mediation observations and disputant interviews, found that plaintiffs pursue cases not only for material interests, but also for integrity and

44. G. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1359, 1361 (1992).

45. Genn, *Access to Just Settlements*, *supra* note 5, at 393-412. In fact, the British National Consumer Council survey, discussing diverse dispute types, stated that only one third of respondents said monetary compensation was the most important thing they wanted to achieve, with apologies and prevention of similar occurrences also being frequently noted primary goals. See NAT’L CONSUMER COUNCIL, *SEEKING CIVIL JUSTICE: A SURVEY OF PEOPLE’S NEEDS AND EXPERIENCES* (1995).

46. Vincent et al., *supra* note 15, at 1609-13.

47. A.E. Daniel et al., *Patients’ Complaints about Medical Practice*, 170 MED. J. AUST. 598, 598-601 (1999); Dauer & Marcus, *supra* note 25, at 185-86, 218; Catherine Meschievitz, *Mediation and Medical Malpractice: Problems with Definition and Implementation*, 54 LAW & CONTEMP. PROBS. 195, 200-01 (1991); Paul Nisselle, *Editorial: Angered Patients and the Medical Profession*, 170 MED. J. AUST. 576, 576-77 (1999). In view of these multi-national findings, I would argue that the issue of money being of secondary importance to many plaintiffs should not be regarded as an instance of North American exceptionalism. However, such findings might differ for plaintiffs in non-western contexts, where money might more often represent core needs for survival.

48. See Abel, *supra* note 30.

self-respect.⁴⁹ More recently, survey data deriving from 30 claimants in sexual assault and violence cases who sought legal compensation similarly indicated that most plaintiffs who sued sought more than money from civil litigation.⁵⁰ In fact, most claimants discussed therapeutic as opposed to monetary goals. They frequently wanted validations of their experiences, public declarations of the wrong, closure, retribution, and apology, as well as to be heard and to deter similar events.⁵¹

In the present research, in comparing legal actors’ understandings with those of plaintiffs in the same or similar cases, it was particularly remarkable that very few lawyers noted either of plaintiffs’ most recurrently stated objectives. Out of 40 lawyers interviewed, not a single physician lawyer or hospital lawyer, and only three plaintiff lawyers (comprising 17% of those interviewed) mentioned that plaintiffs wanted defendants to admit fault or to accept responsibility. Likewise, not a single physician lawyer, only one hospital lawyer (8% of that group) and one plaintiff lawyer (6% of that group) noted that plaintiffs wanted to “ensure it never happened again.” Similarly, “obtaining answers or explanations” about what had happened was the second most repeated litigation objective of plaintiffs. All plaintiffs had stated that they either had not received any explanation or had received an unsatisfactory one after the incident, regardless of the severity of their injuries. Though discussed by 50% of plaintiff lawyers, a mere 25% of hospital lawyers and only a single physician lawyer mentioned that plaintiffs wanted answers or explanations. Likewise, the third-most repeated plaintiff objective was to obtain apologies and retribution for insulting physician conduct. Not a single physician or hospital lawyer ever mentioned the issue of apology, and only three plaintiff lawyers (17% of that group) did. Neither did any physician or hospital lawyer bring up issues of physician conduct. Thus, it was surprising that out of the numerous recurrent litigation aims vehemently stressed by plaintiffs, so few were mentioned by lawyers who generally worked on these same cases on a regular basis for several years.

This discontinuity of understandings may have related to the fact that these aims were not within the norms of traditional legal practice. Still, apart from suggesting that academic knowledge of plaintiffs’ litigation objectives is not filtering through into the field of legal practice, it appeared that critical needs of claimants who had generally suffered traumatic injuries or family

49. Merry & Silbey, *supra* note 37, at 153-54, 160.

50. Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL’Y & L. 433 (1998).

51. *Id.* at 422.

fatalities were not being recognized. Although outside the scope of the present article, it became clear within the larger research project that lawyers' misconceptions or incomplete understandings of plaintiffs' aims had a marked affect upon how they approached these cases and how they behaved towards plaintiffs during litigation-track processes, such as mediation, attempting to resolve these disputes. For instance, a recurrent theme for plaintiffs during litigation-track mediations was their astonishment, anger and incomprehension of why defendants or their lawyers generally did not provide any explanations, acknowledgements of their harm or apologies, even in a qualified manner (so as not to increase defendants' vulnerability during lawsuits).⁵²

A case involving a bladder operation, which had been in litigation for several months, provides one example of this discontinuity between legal and lay understandings of plaintiffs' aims. The case involved a man who had a severe bladder problem, resulting in urination 8-10 times daily, headaches, vomiting and strong stomach pain. The defendant-urologist performed an operation to attempt to alleviate the problem. Subsequent to the operation, the plaintiff felt that his problem had materially worsened, having to urinate approximately 20-25 times a day or more and still suffering persistent headaches, stomach pain and backaches. As a result, the plaintiff could not keep his job as a carpenter. The plaintiff's lawyer suggested that the initial diagnosis and operation may not have been correct, and may have actually worsened the problem. However, other issues were involved as well. The following excerpts from separate discussions with both the plaintiff and his attorney illustrate the discontinuity in their respective understandings of the case.

"Why did he sue? Money. Solely? Yeah. I think the guy is simply looking for compensation for what he feels has been done to him and worsened his quality of life. There isn't a lot of anger, there isn't a desire to make the doctor accountable, as far as I can tell . . . He did start a complaints process . . . So maybe he's got a desire to see the doctor brought to account." **Male general practice plaintiffs' attorney-40's**

"Why did you sue? After the surgery, I said to [the] doctor . . . 'Everything's getting worse,' and he replied, 'Oh, you complain too much. I have no idea what the problem is,' . . . took some other guy's file . . . He ignored me . . . He didn't have time for me. He just ignored me like that . . . He disappointed me . . . He must see what he did; and he must pay for what he did . . . I believe he's just not sorry . . . I want the truth . . ."

52. See generally RELIS, *supra* note 11 (containing chapters on various aspects of case processing for cases that ultimately underwent mediation, and examining the diverse understandings and goals of the lay, professional and gendered actors involved in these cases; chapters five and six include examinations and analyses of defendants' and defense lawyers' explanations relating to why they acted as they did during mediations).

I don’t know what he did. *Is that why you sued?* Yeah. I want to get to the bottom of this, what he did He didn’t care about his patients. He cares for his professional career. *Was your main aim not financial compensation?* Financial compensation is not so important Compensation is not really the problem or the solution After they didn’t cooperate with me after complaining at the hospital and the College, then I went to a lawyer My situation is very bad I am in a lot of pain If he tried to fix the problem, or the hospital tried to help me, I would not go to my lawyer. But they tried to brush me off.” **Male plaintiff-40’s**

In addition to the discontinuity of understandings between lawyers and plaintiffs, the data here suggest that the extra-legal litigation motivations and aims of plaintiffs do not change with the passage of time.⁵³ Nor do they appear to be dramatically affected by lawyers conditioning plaintiffs on legal system “realities” as has been suggested in other contexts such as divorce cases.⁵⁴ Indeed, there were no marked disparities in the way plaintiffs spoke of why they sued and what they wanted from the civil justice system as between plaintiffs who had commenced litigation three to four months earlier (interviewed subsequent to court-mandatory mediations) and claimants who had been litigating for several years (interviewed after voluntary mediations of cases already on trial lists). Moreover, in examining the discourse of all actors on the separate issue of what they wanted to do during mediation processes,⁵⁵ plaintiffs’ articulated mediation objectives were not only consistent with their accounts of their litigation aims (further emphasizing their extra-legal objectives), but they were uniform for plaintiffs at all stages of litigation. Yet, as with plaintiffs’ expressed litigation aims, there appeared to be little awareness by defense lawyers and even some plaintiff lawyers of what plaintiffs sought from mediations on the litigation-track.⁵⁶

53. *But see* Felstiner et al., *supra* note 2, at 638 (arguing that disputants’ feelings and objectives change over time and complicate the dispute).

54. *See* Austin Sarat & William Felstiner, *Legal Realism in Lawyer-Client Communication*, in LANGUAGE IN THE JUD. PROCESS 139-48 (Judith Levi & Anne Walker eds., 1990); William Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1451-59 (1992); John Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?*, 20 LAW & SOC’Y REV. 135, 135, 146-49 (1986); Stuart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC’Y REV. 115, 115, 136-40 (1979); Mather & Yngvesson, *supra* note 3, at 775, 778, 780, 789, 796; SARAT & FELSTINER, *DIVORCE LAWYERS*, *supra* note 4, at 106-07; Austin Sarat & William Felstiner, *Law Talk in the Divorce Lawyer’s Office*, 98 YALE L.J. 1663, 1664, 1671-76 (1989) [hereinafter Sarat & Felstiner, *Law Talk*]. *See generally* WHITE, *supra* note 3; Felstiner et al., *supra* note 2.

55. Litigation objectives was the first topic of discussion during interviews, whereas mediation aims was discussed later on during interviews.

56. *See generally* RELIS, *supra* note 11, at chapter 5 (discussing extensively defense attorneys’ lack of awareness regarding plaintiffs’ aims during litigation-track mediation).

These findings serve to negate arguments that lawyers' conditioning of plaintiffs on legal system "realities" results in claimants materially revising the aims of principle they seek from the justice system. Notwithstanding any delineation laid down by lawyers to clients regarding what the litigation system can provide or attorneys' legal translations of cases, plaintiffs' "original" meaning of disputes as well as their extra-legal resolution objectives were not dislodged, even at later stages of their cases' processing. This "reality" is highlighted in the case studies below.

B. Case Studies Revealing Parallel Worlds of Understanding Plaintiffs' Aims

The following three case studies examine perceptions of plaintiffs' litigation objectives within particular disputes. The existence of parallel worlds of understanding and perception of plaintiffs' aims quickly becomes apparent.

Incomplete Child Operation Case

This case, which had been litigating for less than one year, involved an operation on a four-year-old child in which only one of the two parts necessary was completed. The child had undergone other medical procedures and had developed a material fear of going to doctors. As a result of the incomplete operation he had to undergo three operations in total, having to be sedated three times. As far as the plaintiff parents were concerned, the dispute involved much more than simply undergoing another operation to complete what had not been done. As the father noted during mediation, "I said everything would be okay after the first operation and then it wasn't. I lost credibility with my four year old." Yet, as the following excerpts illustrate, understandings of the case were disparate as amongst all the actors involved.

"What do you think the plaintiffs' aims were when they sued? Money. Do you think that's the sole aim? Yes. Any underlying issues? No." **Male attorney for defendant surgeon-50's**

"Why do you think [plaintiff] decided to pursue legal proceedings? Well I, I have no idea. But I suspect because there was a very identifiable error. They may have spoken to a lawyer So let's see if we can collect some money out of this. Do you see any other reasons? I don't I don't think they purely were angry at me. I don't think it was a 'get even' type thing." **Male defendant surgeon-60's**

"They sued obviously to recover some money for their . . . pain and suffering I think that in any lawsuit there's an aim to get some money for pain and suffering. Any other kind of underlying objectives? I don't think so." **Female hospital attorney-20's**

"I think there was as much hurt on an emotional level, as there was, you know, a desire for compensation First of all he didn't apologize for what he did He offered no words of condolence . . . no words of encouragement So I think there was an

element of personal scorn there . . . and I think also recognition that there was a wrong that there was going to be compensation for. So their goals were twofold I think: to get him to acknowledge the error of his ways, and also to ensure some compensation for their son.” **Male plaintiffs’ attorney-30’s**

“*Why did you sue?* I wanted them to apologize for what happened to my son and to make sure that stuff like this . . . shouldn’t end up in such a huge ordeal like it was for us . . . I can’t believe, like he did not want to admit fault . . . he wasn’t apologetic about it. And the bottom line in this whole thing was he still is a doctor, . . . He told me that it was a mistake, . . . So that’s where I felt betrayed. Because, you know, if he would have come out and said he was sorry and he would try to fix it right away. But he wasn’t apologetic at the hospital. You know, ‘it was an error; it’s not my fault.’” **Co-plaintiff, mother of victim-30’s**

“*What was your reason . . . for starting a legal action?* I think mostly because of the lack of concern. The surgeon didn’t seem to be concerned about the mistake that he made. If we really got a sincere apology and they said, ‘Oh, we’ll do anything we can to make you and your family, your son, more comfortable’ But there was no apology. It was like they tried to smooth us over with some free parking passes. It was just the principle of it. They really affected somebody’s life. So, I wanted them to know that Because we really didn’t want, like I don’t need the money. My son doesn’t need the money. He’s well off. His mother’s well off. It was the fact that we wanted somebody to notice. We didn’t want it to happen to anybody else

It’s about somebody being accountable for their actions and what they’ve done Let’s make sure they don’t screw up and then we don’t have to go to court I mentioned in the mediation, that’s why we get fined when we speed down the highway because it deters us from speeding again. If you dip into somebody’s pocket . . . then obviously somebody is held responsible for that Then maybe next time they’ll be a second look at . . . and maybe the surgeon will double check and triple check, and make sure that the procedure he’s doing is right.” **Co-plaintiff, father of victim-30’s**

Fatality Case Relating To Disputed Do Not Resuscitate (“DNR”) Order

The next case had been litigating for approximately one year at the time of the study. It involved a dispute over a “do not resuscitate” order and the consequent death of the plaintiffs’ husband and father. Notwithstanding his age, the mediator noted, “it came out in mediation that this man was looking forward to living and that this man had a lot to live for . . .”

“I think it was motivated by emotional factors, and also money.” **Male physician attorney-50’s**

“I think their aim was that they just wanted to be heard. I think . . . they wanted to be compensated financially for what they viewed as a wrong.” **Female hospital attorney-30’s**

“They sought compensation for the loss of the family member who made a contribution to a . . . business, and to the spouse who . . . depended upon him much more than might be expected . . . and she felt that loss very acutely. *So would you say then that it’s a mix of financial compensation as well as other elements?* Um, by definition, a civil action is there for financial compensation. Whether that also represented a symbolic suing for hurt feelings is hard to say.” **Male specialist plaintiffs’ attorney-40’s**

“*Why did you sue?* My husband was neglected in hospital the last six days until he died; and I blame the doctor . . . You know the doctor told my son, ‘You dropped your father

in the hospital because you wanted to get rid of him' . . . Those were hard words. *So you felt angry about how the doctor spoke to you?* I know that it is such negligence . . . But our main point, we think that many old people, sick people are neglected, and we say we have to teach them. We suffered, but so many others are suffering from this. *So that was your goal when you decided to sue?* Yes . . . we wanted to stop this . . . We want to open the whole system, and what's going on in the hospitals, particularly for old people. *So the reason that you went to a lawyer was not only because you wanted to have financial compensation?* No, no! Absolutely not. Court, you know, it's lost of headaches, lots of worries and lots of financial. But we wanted, you know, we feel very hurt . . . I told the doctor, 'why did you tell my son that we dropped my husband in the hospital because we want to get rid of him?' This was 'very' hard for me and for him. Big insult. I think it pushed us to go to legal proceedings . . . All this situation pushed us to go ask for legal help." **Co-plaintiff, widow of deceased-70's**

"What was your goal in suing? Primarily I wanted to . . . bring to light . . . any other malpractices . . . until he admits he made an awful mistake . . . I'm not fighting for my father, but for whoever else he's erred as well . . . The physician was totally arrogant. He didn't say 'Listen, I'm really sorry about the loss of your father. I made a mistake' . . . He could have . . . and I think I would have felt good about that. We're all human. We make mistakes. He could have said that . . . We're not seeking anything. We wanted answers . . . It was his arrogance that pushed us to sue him . . . When we spoke initially . . . he made implications we're only here to hunt him for money. So I said, 'I don't want nothing. I don't need money. Just give me your diplomas. I lost a father. I think you should lose something too . . . What if it was your daughter or son? This is not about money. This is about the respect and dignity of my father . . . We didn't get an apology . . . This could have been done so civilly, before legal proceedings. You push us into a corner. *So the reason you went to a lawyer was not only because you wanted financial compensation?* Well you can tell by where we live and everything, the money is not part of it. *And financial loss?* Yeah, well, okay. They could have said . . . 'Let's pick up the tab for the funeral expenses . . . ' Or even, you know, do something. It's not a matter of the money now. It's just, 'here's a gesture,' you know. You made a mistake. And I think we would have probably gone away a lot quieter . . . We even waited right to the last month until we said we're going to commence a claim. This is what we want to do because, in our hearts, Dad unjustly died." **Co-plaintiff, son of deceased-40's**

In the two cases above where finances were not required in order to maintain life, it appeared that the sums sought represented the degree to which the plaintiffs perceived defendants to be valuing the wrong, their harm or their suffering. Just as salary levels represent not only what individuals can buy, but also how much people are valued (influencing feelings of self-worth), a higher degree of acknowledgement or importance ascribed to the harm would be represented by higher amounts of compensation, and vice versa.

Loss of Sight Case

This case, which had been litigating for three years, involved a woman who had glaucoma. She subsequently lost all vision in her right eye and sixty percent of her vision in her left eye, which was expected to diminish. The dispute related to the issue of failure to diagnose the disease in its early stages,

which was argued could have prevented or arrested the loss of sight. She had been going to the same optometrist (the defendant in the suit) for 16 years.

“Apart from financial compensation, any underlying reasons for why they sued? Purely financial.” **Male attorney for optometrist-50’s**

“Compensation. Financial compensation? Yeah. Any underlying issues? From when my involvement started later in the case, what I gathered was mostly a motivation for compensation.” **Male general practice plaintiffs’ attorney-40’s**

The plaintiff explained that she had asked the optometrist to do a glaucoma test because her father had been inflicted with the disease, and she felt film on her eye. She said, “He told me he’d already done the test and I was negative . . . I then went to another clinic and tested positive for glaucoma and was told that the right eye was at an advanced stage and could not be repaired—and that it should have been detected many years ago.”

“When you instituted legal proceedings, what did you want to achieve? I hate this cliché, but there is no amount of money that can compensate for an eye. My objective was more or less to see that this man is either punished for what he did, or he’s kicked out . . . stopped from practicing. I don’t know how many people he has overlooked. If he continues to practice, there’s going to be a lot of people like me who will lose their sight. So that was your main aim? Oh, yes. I take this very seriously. This punishment is a very serious thing . . . We also lodged a complaint at the College of Optometrists. Do you feel you should be compensated also? Oh, definitely. Presently I am taking drops every day . . . eighty bucks every three weeks. This is something that’s coming out of our pockets . . . and this will be for life. Now, I have to have the money at least for the drops. So it is a mixture of you needing financial compensation but there are a lot of other reasons; the main reason being that you feel that it shouldn’t happen to somebody else? That’s right. And that was the truth. That was very important to me; and my lawyer knew that.” **Female plaintiff-40’s**

“Wrong diagnosis . . . no explanation . . . She lost the right eye’s vision and sixty percent of the left eye . . . I think one of the reasons for the dispute is to ‘cover.’ It’s not accepting blame. It’s obvious that the doctor is wrong. So it’s like ‘let us not admit fault, sweep it under the carpet’ that sort of attitude. The reasons you sued, was it for financial compensation? The principle. Also the principle. I don’t want that my wife loses her eye, and nothing is done. Somebody has to take responsibility for it. And I believe that the doctor and the insurance company need to be responsible for it . . . although you can never compensate” **Co-plaintiff, victim’s husband-50’s**

In sum, it appeared that the vast majority of plaintiffs wanted other things, or at least more than simply financial compensation, for their harm. Yet, as seen above, what plaintiffs often explained to be of greatest importance to them in terms of their aims of principle was regularly not even mentioned by the legal actors in their cases, sometimes not even by their own lawyers. These few examples highlight the recurrent finding within the research of the discontinuity of understandings of plaintiffs’ aims within particular cases.

Although understanding plaintiffs' goals would seem to be a basic requirement for litigating attorneys,⁵⁷ some argue that lawyers frequently fail to even attempt to comprehend plaintiffs' desires or how they feel about their disputes.⁵⁸ Nevertheless, these findings correlate with procedural justice studies, which argue that lay disputants want disparate things from the justice system than what is routinely delivered to them.⁵⁹ What they desire reflects a psychological paradigm. Yet this is inherently different from the paradigm of legal discourse and decision-making that attorneys and judges are socialized into in law school, and which dominates discussions by legal actors.⁶⁰

In attempting to understand this phenomenon from the viewpoint of attorneys, one may argue that disputants' extra-legal objectives are not within the legitimate fields of lawyers' operations. Some posit that when we deal with institutions, we want a certain distance, an impersonal contact with people acting in an official, professional capacity.⁶¹ Yet, as lawyers have achieved over generations a near monopoly over dispute management,⁶² one might argue that if lawyers do not work to assist disputants with these issues, who else is in the position to? Who else has the power to? It has been argued that "lawyers create a particular epistemic understanding of what they can know and do out of the adversary and advocate's conception of their work that frequently shuts them off from other ways of knowing, being, and doing."⁶³ In this context, the present findings empirically "highlight the need for lawyers to be reoriented to a different set of assumptions about legal problems, and advocate a broader, social welfare approach for lawyers to determine what underlying conflicts may be at issue in disputes."⁶⁴

57. See generally ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

58. See generally Tamara Goriely, *Quality of Legal Services: The Need for Consumer Research*, 3 CONSUMER POL'Y REV. 112 (1993); MICHAEL ZANDER, *LEGAL SERVICES FOR THE COMMUNITY* (1978).

59. Tom Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 894 (1997). *Id.* at 872-84.

60. *Id.* at 872-84.

61. Interview with Joseph Raz, Professor of Law, Columbia Univ., in N.Y., N.Y. (Sept. 29, 2004).

62. MICHAEL PALMER & SIMON ROBERTS, *DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION MAKING* 25 (1998).

63. Carrie Menkel-Meadow, *The Lawyer As Problem Solver And Third-Party Neutral: Creativity And Non-Partisanship In Lawyering*, 72 TEMP. L. REV. 785, 787 (1999).

64. Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 20 (2004). The findings also support those who have previously urged lawyers to integrate clients' legal and non-legal interests. See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 22, 185-86 (1977); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING*

IV. “SYSTEM CONDITIONING” BY LAWYERS

This Part examines evidence of system conditioning and its effects upon plaintiffs’ understandings and aims for litigation—both as a phenomenon in itself as well as a means of comprehending how claimants’ stated aims of principle were overlooked by many attorneys in their cases.

It has been argued that extra-legal concerns are often the most important issues for plaintiffs,⁶⁵ far outweighing legal worries.⁶⁶ Thus, litigants frequently pursue social and emotional benefits from litigation in contrast to lawyers, who are predominantly interested in clients’ financial positions.⁶⁷ Indeed, research into divorce, injury, welfare, consumer and small claims cases has highlighted sharp distinctions between litigants’ expectations, goals and views of justice and lawyers’ far narrower objectives and explanations of law’s capabilities. Consequently, attorneys in various case types have been found not to respond to issues relating to litigants’ feelings or other matters of importance to clients that would be viewed as legally irrelevant. Instead, they focus on cases’ legalities.⁶⁸ Moreover, lawyers often treat what plaintiffs describe as their aims as something ephemeral, and regularly urge clients not

TO CREATE VALUE IN DEALS AND DISPUTES 169 (2000); LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 86-95 (2d ed. 1997); Warren Lehman, *The Pursuit of a Client’s Interests*, 77 MICH. L. REV. 1078, 1079-80 (1979); Peter Margulies, “Who Are You to Tell Me That?”: *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 213 (1990); Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1386 (1998); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1602-04 (1995).

65. See Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1743 (1993). See generally BINDER & PRICE, *supra* note 64.

66. See DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 33 (1991).

67. See Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce* 40 RUTGERS L. REV. 1133, 1157 (1988). See generally CONLEY & O’BARR, *supra* note 3; Sarat & Felstiner, *supra* note 3; Sarat & Felstiner, *Law Talk*, *supra* note 54; Felstiner & Sarat, *supra* note 54.

68. See Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619, 620-628 (1991); Relis, *supra* note 3, at 166, 168. See generally Hosticka, *supra* note 3 (discussing poverty lawyers); Griffiths, *supra* note 54 (discussing divorce); Macaulay, *supra* note 54 (discussing consumer cases); SARAT & FELSTINER, *DIVORCE LAWYERS*, *supra* note 4 (discussing divorce). Other observational data on divorce lawyers and clients has also found many lawyers reluctant to deal with “non-legal” issues or to engage these more personal concerns, which were often the most important ones to clients. LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 68-69, 91-92 (2001).

to pursue goals such as emotional or moral vindication.⁶⁹ By relying upon their knowledge, experience and views on trial results, lawyers then condition plaintiffs on civil justice system realities and direct clients on how to view their disputes.⁷⁰ In so doing, they attempt to persuade clients to aim for what they view as legally realistic as opposed to plaintiffs' initial desires.⁷¹ Consequently, injurious incidents, which are not experienced as legal events, are translated, reconstituted and coerced by lawyers to fit into legal compartments. This ignores aspects of disputes deemed irrelevant in law and generally excludes many matters of greatest importance to plaintiffs.⁷²

After some negotiation between lawyers and clients, system conditioning has been found to result in claimants generally not demanding from lawyers emotional or moral vindication, social justice or anything different from what

69. It has been argued that most litigants' expectations are consequently deflated or shaped, and they are persuaded not to expect too much from the legal process and not to demand things such as emotional or moral vindication. *See, e.g.*, DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 76-77 (1974) (discussing personal injury cases); Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 *LAW & SOC. INQUIRY* 795, 803-05 (1998) (discussing personal injury cases); Richard J. Maiman et al., *Gender and Specialization in the Practice of Divorce Law*, 44 *ME. L. REV.* 39, 50 (1992); SARAT & FELSTINER, *DIVORCE LAWYERS*, *supra* note 4, at 85, 106-07. Although some of these studies include litigant interviews, much research relies upon observational data and interviews with lawyers alone. The data from litigants in the present research suggests that simply because plaintiffs may cease to demand things overtly from their lawyers does not mean that they do not still have extra-legal aspirations for litigation. *See generally* W.A. Bogart & Neil Vidmar, *Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment*, in *ACCESS TO CIVIL JUSTICE: BRIDGES AND BARRIERS* (Allan C. Hutchinson ed., 1990) (discussing diverse case-types). *But see* Felstiner et al., *supra* note 2 (arguing that in reaction to various subsequent experiences and to what others say, do or expect, litigants redefine their complaints as well as the way they perceive injurious experiences).

70. *See* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107, 2118-25 (1991); Sarat & Felstiner, *supra* note 3, at 116; SARAT & FELSTINER, *DIVORCE LAWYERS*, *supra* note 4, at 85, 106-07; Sarat & Felstiner, *Law Talk*, *supra* note 54, at 1663, 1664, 1671-76. Sarat & Felstiner's research was based upon observations and interviews with matrimonial clients in 40 cases in two American towns. They found that clients were given "law talk" by their lawyers in response to their questions. Lawyers described legal processes and actors in critical, cynical and negative ways, stressing limitations whilst at the same time attempting to be sympathetic to clients' situations and emphasizing their insider knowledge, connections, positions and/or reputations.

71. *See, e.g.*, ROSENTHAL, *supra* note 69, at 63, 65 (discussing injury cases); Felstiner & Sarat, *supra* note 54, at 1672-76 (discussing matrimonial cases); Kritzer, *supra* note 69, at 803-05; Sarat & Felstiner, *supra* note 3, at 116; SARAT & FELSTINER, *DIVORCE LAWYERS*, *supra* note 4, at 85, 106-07. *See generally* CONLEY & O'BARR, *supra* note 3 (discussing small claims cases).

72. *See* C. Campbell, *Lawyers and their Public*, in *LAWYERS IN THEIR SOCIAL SETTING* 195, 208-10 (D. McCormick ed., 1976); Clark D. Cunningham, *Legal Storytelling: A Tale of Two Clients: Thinking About Law as Language*, 87 *MICH. L. REV.* 2459, 2474 (1989); Galanter, *Adjudication, Litigation, and Related Phenomena*, *supra* note 37, at 3. *See generally* CAIN, *supra* note 3.

they are told courts would provide.⁷³ Indeed, having experienced system conditioning and hearing about litigation's "monetary realities" during contacts with their attorneys, plaintiffs in the present study often appeared to have simply ceased to discuss their extra-legal objectives with their lawyers. Yet, as illustrated above, this did not divert plaintiffs' focus from their aims of principle throughout their litigation experiences.

The way in which a number of plaintiffs' lawyers described plaintiffs' aims highlights the phenomenon of "system conditioning" by lawyers in present study's cases. This was done in order to steer clients away from extra-legal objectives and to train them to view their cases as relating to money alone, as "that is all the system can provide." Of course, the ability to frame the terms of a dispute demonstrates the significant power that lawyers have in setting out the nature of a problem and what should be done about it, shaping its outcome.⁷⁴ The following excerpts from interviews with plaintiffs' lawyers provide evidence of system conditioning in medical injury cases.

"Why do you think the plaintiff sued? That's a little hard to say. I think ultimately . . . they do get the message that . . . the object of the exercise . . . is trying to resolve their case based on a reasonable compromise of the prospects of the case . . . I do believe, by and large, that they understand when it's explained to them that this is about compensation. So therefore it is about money. And therefore it's about trying to achieve an outcome where you have received, you know, a check that represents your fair compensation." **Male specialist attorney-40's.**

"I've worked on about 150 medical malpractice cases. Their aims once it gets to litigation are primarily financial, because they listen to the lawyer and lawyers can only quantify these things in dollar terms . . . Yes, they would have to say that it's finances; but the undercurrent for them is an explanation and an apology . . . which they never got . . . the doctor never showed up to even explain anything to them . . ." **Male specialist attorney in infant death case-40's.**

"Day in and day out people say to me 'We've got to go forward, even if it's only to make sure nobody else has to go through what I've gone through.' So there's an altruistic aspect to people's motives . . . or money doesn't matter, you know 'I just need enough to do this . . .' or getting back at the doctor. Although once they begin to understand the financial implications of getting into litigation I think they find that they can't afford litigation on principle. There has to be the prospect of an economic recovery to make it worthwhile. But I see that from the start in eighty percent of cases . . . Then the focus later on does become money. Perhaps because I continually remind people that's all a lawsuit is about. It doesn't make the world a better place. It doesn't heal their injury."

73. See, e.g., Cunningham, *supra* note 3, at 1339-57, 1367-85; Felstiner et al., *supra* note 2, at 634-37, 645; Sarat & Felstiner, *supra* note 3, at 116-17, 125-28; SARAT & FELSTINER, *DIVORCE LAWYERS*, *supra* note 4, at 406.

74. MERRY, *supra* note 37, at 2-3, 4-5, 34; Sally Engle Merry, *Culture, Power, and The Discourse of Law*, 37 N.Y.L. SCH. L. REV. 209, 215, 218 (1992); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 25-27 (1986).

It provides compensation, and as such it has to be looked at in a business-like way. As you get into litigation, suddenly money does become the focus. Much more so. And you find people that profess to have very modest expectations at the outset, suddenly when you tell them they have a pretty good case, start becoming somewhat more demanding in their expectations of monetary gain, more bullish Whether it's a change that would happen regardless of what I say to my clients and what I try and train them to do, or whether I have some input into that, I don't know. But I tell clients that investing in a malpractice case is no different from investing in the stock market. It's all about money, and you should look at it that way." **Male specialist attorney-50's.**

Thus, it seemed that lawyers' efforts to condition plaintiffs on the monetary realities of the civil justice system played a role in causing some plaintiffs to intertwine their aims of principle with talk of financial recompense, or to express these extra-legal aims through monetary compensation. A good example of claimants' perceptions of "system conditioning" and its effects was provided by a female plaintiff in her fifties who described the inherent financial part of her legal action that had been ongoing for three years. However, as the following interview excerpt illustrates, financial compensation was not driving her claim following the death of her son.

"Was any part of the reason to sue to get compensation? I wanted the truth about this. And they said they couldn't promise me the truth; they could just promise me dollars. Dollars weren't going to bring my son back The dollars feel really bad when you compare them to a life. No matter how big they are, they feel bad. They hurt So then you move that you'd like X number of dollars to do something. Like I'd like to give a million dollars to this hospital. That was my big dream So then it didn't make me angry that this is about dollars. And you were able to do that? Early up [sic]. I went into the whole civil case saying 'I want the truth. I don't want dollars, I want the truth' And then I was told 'well, the truth isn't going to be; that isn't part of what a civil case is about' My ultimate goal was 'never again' . . . to get that particular drug that killed my son off the market. . . . All along you're told 'civil equals dollars' even though dollars mean nothing. You want the truth; you want other people to know about this; and you want doctors not to lie and cover up But you don't get any of that from a civil case. It's just dollars, I learned that early up So, I'm not going in with a price tag. But unfortunately you come out with a price tag, even though you didn't go in with that mindset."

It was interesting to note that while this legal claim was not about money, after system conditioning this plaintiff in some way accepted that her case had been transformed on some level into being about dollars. Indeed, system conditioning did appear to have an effect on some plaintiffs' understandings of their litigation aims. The explanation of the following male plaintiff in his forties, who sued subsequent to the death of his father, further illustrates how

clients’ perceptions and aims are affected by system conditioning. The case had been litigating for nearly one year.

“Would you say your primary aim when deciding to start legal proceedings was to get financial compensation for your loss? Unfortunately, through lawsuits it’s only financial compensation you can achieve In the mediation . . . their lawyer made an offer saying ‘We’ll pay \$5,000 or \$7,000.’ But it’s not a matter of the price So in that case, I’m going to ask you again, when you sued, what was your aim? Well, when we went see the first lawyer, he said, ‘Look, litigation has nothing to do with what you want. This is only about money.’ . . . That’s . . . the way we were explained it The legal system, all it can give you is only financial . . . not answers or an apology. The legal proceedings can’t do that for you, unfortunately The doctor’s lawyer said at the mediation, ‘Well, if you’re struggling and hurting for money’ He doesn’t know where we live, doesn’t know about our financial situation. Meanwhile there’s no mortgage on our house. He’s thinking maybe we’re trying only to get money out of the doctor for financial benefit. But no . . . this is our family, and there’s not a dollar value to it I’m doing it for my father; it’s my passion, my heart And I want everyone to know People should have dignity in their lives I’m selling my factory, I’m devoting my life to whatever I can”

For those plaintiffs who said that obtaining financial compensation for their harm was one objective, a duality of principles and money was present throughout their articulations on what they sought. For example, a dispute over a failed vasectomy and a consequent pregnancy and abortion provided an example of plaintiffs intertwining their aims of principle with financial compensation, or simply expressing these objectives through monetary recompense. The plaintiffs were practicing Catholics who were unable to financially support an additional child. The case had been litigating for just under one year.

“What was the reason you sued? Really, when it comes down to it, it was just the hurt that I put my wife through due to the unsuccessful operation . . . because it wasn’t my fault; but we had a lot of trouble at that time So I more or less wanted to sue because of her; because of what she went through I just wanted the doctor to pay for what he has done to me and my family. And the question isn’t merely about money. I just wanted answers of why, you know? I just wanted him to tell me why did this happen to me I wasn’t given no answers, nothing.” **Male plaintiff-30’s.**

A hospital accident case that had been litigating for five years provides a further example of financial compensation entangled with the non-monetary objectives plaintiffs sought. The case involved the behavior of a nurse and her failure to assist a hospitalized patient who repeatedly asked for her help but did not receive it. The patient subsequently fell while in the hospital. The damage resulting from the fall forced the patient to wear large casts on her leg continuously for three years. These casts rendered her immobile for what

were to be the last three years of her life. Although subsequent care for the victim of the accident necessitated money, as with virtually all plaintiffs in the study, the expressed motivations and objectives of her surviving children in bringing the suit clearly showed they did not sue for money. Instead, they intensely spoke of how it was principles that were of greatest importance to them in terms of what they sought from litigation. As the following interview excerpts illustrate, they sought acknowledgement, an apology, the prevention of recurrences and acceptance of responsibility on the part of the defendant.

“That’s what this dispute has always been about They not acknowledging that this had transpired . . . the fact that she fell, nothing . . . I’m sure that nurse is still doing it to others . . . she was so rude to my mother . . . And then . . . trying to get them to say, ‘We’re sorry your mother fell.’ You know, nothing The whole reason for all of this is, as we said to our lawyer was ‘My mother needed an apology.’ ‘That’ is what this is about: the mistakes and no apology, nothing. That’s what this is about . . . apologizing What’s so difficult about acknowledging the fact that this was a mistake, and saying we’re sorry? That’s all we wanted. *So that was the reason you decided to sue?* Yeah. And my mother’s care. What was going to happen to her? And all these casts she had to wear on her leg for the years until she passed away It wasn’t as if they had all this money stored away for a time like this, because they didn’t have it. So, what are you supposed to do? You know, somebody had to be responsible for this. Because if this happened to my mother, how many other people was it going to happen to? . . . It wasn’t a money issue. It became a money issue in the end only because of care for my mother Something had to be done for this error.” **Co-plaintiff, daughter of victim-50’s**
“*Why did you decide to take legal proceedings?* We had become so frustrated. The hospital wasn’t accepting accountability. They weren’t even acknowledging it to start with. It was unbelievable . . . just to have somebody say that this happened. We’re sorry But nothing was done They just kept sweeping it under the rug, that this accident had even happened It’s important they should admit to such things, and take care of it properly; and promptly. Otherwise, you know what, there wouldn’t have been any kind of lawsuit . . . Part of it was that I felt the hospital should be accountable We were looking at my mother losing her leg. That’s what we had basically been told . . . as a result of the fall . . . How was she going to be able to cope with all of this because of the accident in the hospital? We told our lawyer, ‘we want an apology . . . and some acknowledgement of this’ It wasn’t about a dollar amount to be compensated, it was about so they could know what damage was done to the family.” **Co-plaintiff, daughter of victim-40’s**

Some plaintiffs may have sought compensation as a signal of being heard and acknowledged or as a deterrent to future conduct. This seemed to be the case in the incomplete child operation case noted above. Indeed, “money is often a symbol of other things, such as finding a fair and honorable result, validation of injury, vindication of justice, ‘winning’ . . . attribution of fault,

and perception of (not) being ‘taken.’ ”⁷⁵ One plaintiffs’ lawyer provided insight into the phenomenon of the concretization of principles expressed as monetary aims, as illustrated in the following interview excerpt.

“What in your view were the plaintiffs’ litigation aims? Money was not the issue. I think there was a desire for some revenge . . . along with a desire to see the wrongdoer punished . . . and a desire to find the truth . . . and ultimately making the defense pay an amount But for non-financial reasons? Yeah, that’s right.” **Male specialist plaintiffs’ attorney in a fatality case-50’s**

The issue was expounded from a slightly different perspective by an experienced female non-lawyer mediator, as evinced in the following excerpt.

“Do these cases relate to monetary compensation alone, or do you see other issues involved? No, not even usually relating to money. There are many other issues. I mean money is the way it often gets described as a problem . . . but financial remuneration, in my cases anyway, has not been a focus . . . I’m not saying there aren’t legitimate monetary issues, but there are many other factors at play If it ‘is’ just money, we’re talking about a different animal Sometimes I think lawyers in particular make it a substantive issue when it’s really more than that In the mediations I mediated at the College, in every single case they withdrew their complaint . . . even fatality cases People only know that the way to get some recognition is to do legal proceedings.”

Plaintiffs’ lengthy accounts of their motives and objectives for litigation showed that their extra-legal aims of principle remained important objects of plaintiffs’ desires throughout the processing of their cases. This was notwithstanding their lawyers’ delineations of what the litigation system could provide, the legal reformulation of plaintiffs’ cases, or the passage of time. Thus, although the intermeshing of principles and money added complexity to the issue, it was clear that, notwithstanding any needs or desires for pecuniary recompense, plaintiffs were intensely seeking extra-legal principles from the civil justice system. Plaintiffs sought “truth” as they had suffered harm and deserved answers. They wanted perceived wrongdoers to “do right” in recognizing their wrongs, admit fault, accept responsibility and apologize. This appeared to be the case regardless of the degree to which claimants required funds to continue life in their newfound situations. Yet, through civil litigation, these principles were ultimately manifested in money alone, in a system that was repeatedly described to them as one which could only provide financial compensation for their harm. Consequently, plaintiffs who also

75. John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 328 (2000).

mentioned pecuniary recompense when speaking of their aims for litigation, at the same time vehemently stressed, “It’s not about the money!”

Some plaintiffs may have initially pursued solely extra-legal aims of principle through litigation, with lawyers subsequently persuading them to substitute money. Others may have had multiple objectives from the outset, seeking from litigation both extra-legal issues of principle as well as financial compensation for their harm. In these cases, plaintiffs’ lawyers may have then simply translated all of plaintiffs’ aims into monetary ones. Regardless of which of these versions was most common, the fact remains that many of the things that plaintiffs uniformly indicated they sought from the civil justice system were not mentioned by most defense lawyers, or by many plaintiff lawyers.

V. AN INSTITUTIONAL THEORY ON LAWYERS’ UNDERSTANDINGS OF PLAINTIFFS’ LITIGATION AIMS

This Article has provided a picture of discontinuity in terms of the comprehensions of legal actors regarding what plaintiffs want from the civil justice system versus plaintiffs’ own articulations of their motivations and aims for litigation. This discontinuity was found to continue throughout litigation processes until settlement or trial. I present here an institutional explanation involving a fourfold process as to why this may have occurred. This should arguably describe both cases where plaintiffs approach lawyers seeking solely extra-legal aims of principle through litigation, as well as those where plaintiffs seek principles as well as financial compensation for their harm.

First, consistent with legal system norms, lawyers are trained to operate according to rights and rules, applying law to facts and placing people and occurrences into legal categories. Thus, it is more difficult for attorneys—who tend to be rational, logical and analytical—to be sensitive to parties’ interpersonal, emotional or extra-legal needs.⁷⁶ Consequently,

76. See, e.g., Susan J. Bell & Lawrence R. Richard, *Anatomy of a Lawyer: Personality and Long-Term Career Satisfaction*, in FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER? 152-53 (1992); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1405 (1997); Guthrie, *supra* note 15, at 155-56, 158-59; James L. Hafner & M. Ebrahim Fakouri, *Early Recollections of Individuals Preparing for Careers in Clinical Psychology, Dentistry, and Law*, 24 J. VOCATIONAL BEHAV. 236, 236-41 (1984); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 228-29, 234 (1991); Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 87 (1997); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-46

lawyers often focus exclusively on or emphasize money issues⁷⁷ in contrast to disputants’ tendencies to be more emotional about their cases.⁷⁸ Indeed, litigants in diverse case-types have been known to largely talk past their lawyers who interpret their descriptions without there ever being a shared comprehension of events.⁷⁹

Second, as a result of the civil justice system’s denial of certain human needs deemed legally irrelevant, lawyers condition plaintiffs on legal system realities, preparing them to expect only money as “that is all the system can provide.” Lawyers then inevitably re-define plaintiffs’ perceptions and transform the “reality” that litigants describe.⁸⁰ This involves narrowing the scope of the issues and reformulating all of plaintiffs’ stories and objectives (both extra-legal and monetary) to fit into legally cognizable categories—ultimately relating to monetary compensation alone. This commonly results in litigants being effectively silenced while lawyers purport to recount their stories.⁸¹ The effects of dispute translation should not be underestimated, as the linguistic definitions of conflicts are critical aspects of disputes.⁸² Indeed, psychological research has demonstrated how language and words influence the perceptions and views of listeners and readers.⁸³ Thus, I argue that system conditioning and dispute translation not only alter the nature of disputes for lawyers and observers,⁸⁴ but also contribute to some

(1982); Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL’Y & L. 1173, 1198-1200 (1999). Research focusing upon attorneys’ psyches also suggests that lawyers are predominantly left-brain dominant, indicating analytical orientation. See Guthrie, *supra* note 15, at 157; Graham B. Strong, *The Lawyer’s Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 761-62 (1998).

77. Jean R. Sternlight, *Lawyers’ Representation Of Clients In Mediation: Using Economics and Psychology To Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 323, 326, 342 (1999).

78. See Felstiner & Sarat, *supra* note 54, at 1456; Sternlight, *supra* note 77, at 324.

79. See Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, in THE LAW & SOCIETY READER 406 (R. Abel ed., 1995) (discussing divorce cases). See generally Alfieri, *supra* note 68 (discussing poverty lawyers); Hosticka, *supra* note 3 (discussing poverty lawyers); Macaulay, *supra* note 54 (discussing consumer cases).

80. See Cunningham, *supra* note 3, at 1298, 1339-57, 1367-85.

81. Alfieri, *supra* note 68, at 2119.

82. See Mather & Yngvesson, *supra* note 3, at 780-81. It has been argued that the manner in which lawyers define litigants’ problems leads to the unhappiness and frustration of litigants in the long term. See MATRUGLIO, *supra* note 38 (discussing injury cases); Jeffrey M. Fitzgerald, *The Contract Buyers League and the Courts: A Case Study of Poverty in Litigation*, 9 LAW & SOC’Y REV. 165, 177 (1975) (discussing poverty litigation).

83. Paul Kay & Willet Kempton, *What is the Sapir-Whorf Hypothesis?*, 86 AM. ANTHROPOLOGIST 65 (1984).

84. See, e.g., Alfieri, *supra* note 68, at 2111; Sara Cobb, *The Domestication of Violence in*

plaintiffs eventually articulating that very same interest in economic recompense despite having other strong extra-legal objectives for litigation.

Third, plaintiff lawyers' dispute translations must also serve to cement their own convictions that financial compensation is either entirely or primarily what their clients seek, as plaintiffs were found to cease or reduce the extent to which they discussed their aims of principle with their counsel over the years in which litigation ensued. This was similarly found with U.S. divorce lawyers and clients.⁸⁵

Fourth, the translated fiscal manifestations of plaintiffs' extra-legal objectives are then transmitted by plaintiffs' lawyers to defense lawyers in their subsequent, often regular, bilateral communications and monetary negotiations that continue throughout the months or years of case processing. The defense attorneys interviewed had little contact with plaintiffs themselves. Yet, they regularly mentioned their communications with plaintiff lawyers. This, coupled with the economic realities of legal practice for plaintiff lawyers, such as contingency fee arrangements, and for defense attorneys—who generally act for insurance-type entities that view cases monetarily—must further reinforce lawyers' misunderstandings or incomplete understandings of what plaintiffs want. In fact, it may be that these misunderstandings of what plaintiffs seek are subsequently passed down from defense lawyers to their defendant clients. So the cycle of at least partial misconception of claimants' aims continues throughout litigation processes, including litigation-track mediations.⁸⁶ All of this occurs whilst plaintiffs almost uniformly insist, "it's not about the money!"

VI. CONCLUSION

Through an examination of the understandings of both lay and professional actors within the civil justice system, this article has reconsidered a core element of the legal system, legal practice, and the resolution of disputes: why plaintiffs sue and what they seek from the civil justice system. In comparing plaintiffs' articulations and lawyers' comprehensions of plaintiffs' aims within the structure of litigation processes, I have argued that a picture of near pervasive misunderstanding or incomplete understanding exists between lawyers and plaintiffs on the elemental issue of what these

Mediation, 31 LAW & SOC'Y REV. 397, 436-37 (1997); Hosticka, *supra* note 3, at 600-04; Sarat & Felstiner, *supra* note 3, at 116-17.

85. Felstiner & Sarat, *supra* note 54, at 1460, 1463-64.

86. See RELIS, *supra* note 11, at chapter 9.

cases are about. By looking beyond the perceptions captured, I have embarked upon a theory as to why these disparities exist.

I have shown that the disparate lawyer groups, regardless of allegiances, tended overall to hold the same view: that plaintiffs sued mostly or solely for money. Physicians’ lawyers saw claimants as solely questing for funds, whereas hospital and plaintiff lawyers generally viewed financial compensation as litigants’ primary aim to compensate for harm. Yet, even for those plaintiffs’ lawyers who mentioned clients’ extra-legal objectives, these were swiftly translated into monetary compensation alone—as “that was all the legal system could offer.” At the same time, virtually all plaintiffs vehemently stressed that they sued not for money, but rather for principles. Although financial recompense was involved at some level within some claimants’ descriptions of their objectives,⁸⁷ plaintiffs’ articulations of what they sought from the civil justice system were thickly composed of extra-legal aims. Yet, remarkably, the things that plaintiffs repeatedly described as being of prime importance to them were generally omitted by virtually all physicians’ lawyers, most hospital lawyers, and sometimes even by plaintiffs’ own lawyers.⁸⁸ Thus, plaintiffs’ expressed motivations and litigation aims rarely correlated with legal actors’ understandings of this basic premise.

I have further shown that plaintiffs’ aims of principle do not appear to dissipate over time, as their descriptions of what they wanted were the same in cases that had been litigating for three months or for several years. Likewise, I have demonstrated that plaintiffs’ extra-legal objectives do not change subsequent to lawyers’ conditioning them on civil justice system “realities” and legal transformations of their disputes. System conditioning resulted in plaintiffs’ increased perceptions of the litigation game being about money. Claimants’ expressed aims of principle were also at times intertwined with pecuniary recompense or described as their concretization. These issues were interwoven because, as some claimants’ explicated, the system, via lawyers, forced them to be. Plaintiffs approached the legal system wholly, predominantly, or at least in part seeking principles, yet they were conditioned by their lawyers to understand that litigation can only be about money—even for cases that later underwent mediations. Nevertheless, the non-economic principles that plaintiffs sought from litigation remained driving ambitions for them throughout.

87. Clearly, the more critically funds were required to maintain lives subsequent to medical accidents, the greater importance would be ascribed to them in terms of litigation objectives.

88. As previously pointed out, gender may play a role in lawyers’ sensitivity to plaintiffs’ extra-legal needs. *See supra* Part II.B.

The findings here illustrate in the context of medical injury cases the ideological dissonance that exists between how plaintiffs and the justice system, through its actors, view disputes.⁸⁹ The data further highlight the indivisibility of plaintiffs' legal and extra-legal needs in case processing. Yet, "the operations of the legal system hinge on law's ability to sharply distinguish between the legal and the extra-legal."⁹⁰ The findings here, however, show this is ultimately misleading, as human disputes have not only legal implications, but also often a host of other concerns, such as emotional, interpersonal and moral issues.⁹¹ Some have argued that disputants expect that the legal system can deliver more than it is actually able to, and thus their desires may be unrealistic.⁹² However, based upon the premise that the law and its workings must exist for the benefit of laymen rather than for that of legal or institutional actors, this article implicitly argues that conceptions of the meaning of litigation processes within the civil justice system must be broadened to include litigants' extra-legal needs. If lawyers view litigation processes solely as legal and financial mechanisms, many fundamental issues within disputes will not be addressed or resolved.⁹³ Thus, on a policy level, a rethinking of civil justice assumptions and objectives is urgently necessary.⁹⁴

I offer two proposals to address the problems discussed in this article. First, as these findings derive in part from issues of failed communication, direct dialogue early on in litigation between defense lawyers and plaintiffs on plaintiffs' litigation aims is necessary. This could occur during early litigation-track mediations, which present opportunities for litigants to articulate their extra-legal objectives in a confidential environment. Assuming that plaintiffs partake in a meaningful way, this would serve to sensitize

89. This has similarly been found for other case-types. *See generally* BALDWIN, *supra* note 5; JOHN BALDWIN, *MONITORING THE RISE OF THE SMALL CLAIMS LIMIT: LITIGANTS' EXPERIENCES OF DIFFERENT FORMS OF ADJUDICATION* (1997) (discussing small claims); Felstiner & Sarat, *supra* note 54 (discussing divorce); MERRY, *supra* note 37 (discussing family and neighbourhood disputes); ROGER BRYANT HUNTING & GLORIA S. NEUWIRTH, *WHO SUES IN NEW YORK CITY?* (1962) (discussing automobile accident cases).

90. REZA BANAKAR, *MERGING LAW AND SOCIOLOGY* 7-8 (2003).

91. *See* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6-7, 14-15, 19, 26-27 (1996).

92. *See, e.g.*, Felstiner & Sarat, *supra* note 54, at 1459-60; MERRY, *supra* note 37, at 179 (commenting on expectations of the justice system).

93. Vincent et al., *supra* note 15, at 1612; RELIS, *supra* note 11 (providing evidence of various adverse consequences resulting from lawyers and litigants' disparate understandings and aims for litigation and mediation processes).

94. *See* Des Rosiers et al., *supra* note 50, at 433, 442. It has been similarly argued that the attributes of the adversary system as the "ideal type" of a legal system must be re-examined. *See* Menkel-Meadow, *supra* note 91, at 5, 7, 42.

defense attorneys and defendants to case realities from plaintiffs' perspectives and may affect the way lawyers subsequently approach these cases. Second, core law school curriculums for law students and continuing legal education and ethical rules for attorneys must provide greater emphasis upon litigants' extra-legal dispute realities, needs, and objectives during case processing.⁹⁵ This should result in a broadening of the meaning of litigated disputes from those dictated by narrow, adversarial approaches to conflict resolution. This, in turn, should assist in transforming attorneys' orientations to focus upon problem solving, as opposed to money alone, so that money need not be "regarded as a proxy for everything."⁹⁶ Various changes have occurred in American law schools to include new approaches to lawyering, such as therapeutic jurisprudence,⁹⁷ holistic lawyering and collaborative lawyering. Yet, although these approaches have been taught for a number of years,⁹⁸ they still remain on the periphery of legal education and practice.⁹⁹ Thus, much remains to be done to bring these perspectives into the mainstream.

It is my hope that this article was successful in its primary objective of generating further recognition of the need to look beyond the monetary elements of claims to understanding plaintiffs' motivations and their aims

95. See, e.g., Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 429 (2003); Kimberlee K. Kovach, *Good Faith in Mediation: Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 619 (1997); Menkel-Meadow, *supra* note 63, at 9; Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 409-10, 428 (1997); Nolan-Haley, *supra* note 64, at 1372-73. Others too have discussed behavioral transformation of attorneys, focusing upon relationship and communication skills as well as listening, empathizing and problem-solving skills. See Guthrie, *supra* note 15, at 180-82; Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1228, 1234 (2004).

96. Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 36 (2000).

97. Therapeutic jurisprudence deals with emotional and psychological implications of the legal system and attempts to apply law in a more therapeutic way. See Loraine E. Ferris, *Using Therapeutic Jurisprudence and Preventive Law to Examine Disputants' Best Interests in Mediating Cases About Physicians' Practices: A Guide for Medical Regulators*, 23 MED. & LAW 183, 185-86 (2004).

98. Kimberlee Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 972-76 (2001); Menkel-Meadow, *supra* note 96, at 427.

99. See, e.g., Paul Brest, *Skeptical Thoughts: Integrating Problem Solving into Legal Curriculum Faces Uphill Climb*, A.B.A. DISP. RESOL. MAG. Summer 2000, at 20; Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1, 8, 10, 14, 16-21, 23 (2002); Frank E.A. Sander & Robert H. Mnookin, *A Worthy Challenge: The Teaching of Problem Solving in Law Schools*, A.B.A. DISP. RESOL. MAG. Summer 2000, at 21.

during litigation processes. More attention needs to be paid by attorneys to the possibility that plaintiffs want things other than money from litigation. For this to happen, the law and legal actors must first recognize a broader definition of legal disputes. It is my hope that this article will assist in bringing about such recognition.