SETTLEMENT AND REFORM OF THE CIVIL JUSTICE SYSTEM: HOW SETTLEMENT IS CHANGING THE PRACTICE OF LAW

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I. SUMMARY

The central feature of reforms to civil justice in common law jurisdictions is the shift away from adjudication towards settlement.[1] Settlement is now commonly regarded as the primary objective of the civil justice system to the extent that the term 'vanishing trials'[2] has been used to describe the dramatic decline in litigation following the introduction of the Woolf Reforms to civil justice in England and Wales.[3]

This article argues that settlement must now be regarded as a form of civil justice in its own right and is also indispensable to improving access to adjudication, which is correctly regarded as a public good. Adjudication which develops precedent can also enhance settlement to the extent that parties frequently bargain 'in the shadow of the law'.[4] Although settlement and adjudication are distinct processes it is arguable that the relationship between settlement and adjudication is complementary rather than competitive.

The importance of settlement in the new legal landscape raises questions about the anatomy of settlement. Such questions include whether settlement is appropriate, and if so the timing of settlement and which settlement process is most likely to satisfy the parties interests and needs. Finally, it will be argued that conventional adversarial advocacy is not well matched to the explicit institutional emphasis on settlement; the developing role of lawyers as conflict resolution advocates will be explored within the context of recent New Zealand legislation which emphasises the primary role of settlement in resolving civil disputes.[5]

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1 See, Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (1996) which led to what are known as the Woolf reforms to civil justice, introduced in England and Wales on 26 April 1999 and referred to as the Civil Procedure Rules (CPR). Ministry of Justice (UK) *Civil Procedure Rules: Practice Direction Protocols* available at http://www.justice.gov.uk at 15 August 2009. The reforms implemented in the Australian State of Victoria, Victorian Law Reform Commission *Civil Justice Review: Report* (2008) available at <http://www.lawreform.vic.gov.au> at 15 August 2009, and the new District Court process in New Zealand, which comes into force on the 1st of November 2009.

2 Professor Julie Macfarlane, 'The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law' (2008) 1 *Journal of Dispute Resolution* 61, citing Mark Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 *Journal of Empirical Legal Studies* 459.

3 Woolf, above n 1.

4 A phrase originally used by R H Mnookin and L Kornhauser 'Bargaining in the Shadow of the Law: The Case of Divorce', (1979) 88 *Yale Law Review* 950.

5 District Court Rules 2008.

II. The Expanded Meaning of Civil justice; Settlement as Civil Justice

The phrase civil justice is traditionally used to describe all stages of court based adjudication to resolve civil disputes between citizens, including the issue of proceedings, pre trial proceedings, settlement, trial and post trial appeals. Modern reforms to the civil justice system have expanded the meaning of civil justice by explicit institutional recognition that settlement is now the primary objective of the civil justice system both before the commencement of proceedings by the extensive use of pre-proceedings protocols[6] and after proceedings have been issued by court encouragement of Alternative Dispute Resolution (ADR) processes, including court annexed private mediation and Judicial Settlement Conferences (JSCs).

While reforms of the civil justice system, designed to promote access to justice, have also focused on the conventional meaning of civil justice by seeking to reduce the cost, delay and uncertainty of court based adjudication, with judicial rather than party control of proceedings,[7] there is no doubt that settlement is the primary objective.

Clearly in the context of settlement the phrase 'just resolution of disputes' must be construed differently from the test applied to evaluate the outcome of adjudication. If the dispute is resolved by adjudication the quality of the outcome is ultimately judged by the impartial application of the correct law to the judicially determined facts. This outcome might be referred to as judicial justice and is synonymous with the conventional concept of justice invoked by the term the rule of law.

Improved access to judicial justice has prompted reforms to civil procedure described above and simultaneously promoted settlement as a parallel expanded form of justice. Justice in the context of settlement may be based on a neutral evaluation of the parties' legal entitlements which will often include considerations of cost, delay and uncertainty which are inescapable features of even a refurbished system of civil justice. Conversely, the impetus for settlement may be based on a broader analysis of the dispute, taking into account the non legal needs and interests of the parties which cannot be satisfied by the 'limited remedial imagination of the law'.[8]

Settlement, unlike adjudication is based on the parties reaching their own agreement to resolve the disputed issues. The sometimes acrimonious dialogue between adherents of judicial justice and consensual notions of justice is captured by the view expressed by Dame Hazel Genn that consensual processes represent an approach to civil justice which is anti adjudication and are just concerned with settlement rather than just settlement.[9] An expanded notion of civil justice which

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6 Ministry of Justice (UK), above n 1. Rule 4.1 'the court will expect the parties, in accordance with the overriding objective ... to act reasonably in exchanging information ... and generally in trying to avoid the necessity for the start of proceedings;' and Rule 4.2 'the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.' See also Victorian Law Reform Commission above n 1, Chapter 6 'Getting to the Truth Earlier and Easier.'

7 Lord Woolf, Access to Justice: *Interim report to the Lord Chancellor on the civil justice system in England and Wales* (1995), Chapter 5 'The Need for Case Management by the Courts'. See also, Adrian Zuckerman, 'Court Adjudication of Civil Disputes: A Public Service to be Delivered with Proportionate Resources, Within a Reasonable Time and at Reasonable Cost' (2006) *Australasian Institute of Judicial Administration* available at <http://www.aija.org.au/ac06/Zuckerman.pdf> at 15 August 2009.

8 Phrase used by Carrie Menkel-Meadow 'The Trouble with the Adversary System in a Multicultural World' (1967) 38 *William & Mary Law Review* 5, 25.

9 Dame Hazel Genn *Judging Civil Justice* (2009) (forthcoming) on the case against settlement. See also Owen Fiss 'Against Settlement' (1984) 93 *Yale Law Journal* 1073. For an opposing view which generally condemns adjudication as a dispute resolution process see Ken Cloke 'What's Better than the Rule of Law' in *Mediating Dangerously: The Frontiers of Conflict Resolution* (2001).

accepts the conceptual legitimacy of settlement acknowledges the reality that the vast majority of cases settle[10] and for this reason the explicit shift to settlement promoted by modern reforms to civil procedure appears to be a pragmatic and at least partial solution to the problems of cost, delay and uncertainty which typically motivate reform of the civil justice system.

Early settlement mitigates unnecessary waste of judicial and party resources but, importantly, unless settlement meets the needs and interests of the parties, which may include reference to the party's perceived legal entitlement, settlement is correctly characterised as an inferior form of justice. In other words, settlement should not be entirely determined by reference to party or judicial resources and it is important that the civil justice system be adequately resourced. However, even if the objective of reforms to judicial justice are achieved adjudication will generally be a more expensive and uncertain process than settlement and in any event narrow legal remedies may not satisfy party interests.

For these reasons the shift to settlement which characterises modern reforms to civil justice is sensible and pragmatic. In this context, it would appear more useful to analyse the interdependent relationship between settlement and adjudication rather than simply extol the virtues of one process and vilify the other. A more nuanced approach to the relationship between settlement and adjudication also invites the development of a more refined analysis of the appropriateness of settlement or adjudication for the resolution of a particular dispute. If settlement is appropriate which settlement process would best fit the party's needs and interests and what factors contribute to the early (and late) settlement of disputes?

III. The Co-existence of Settlement and Adjudication

As has been noted above, settlement, together with judicial oversight of pre-trial procedures, are the main features of reforms to civil justice which strive to enhance access to justice. Although adjudication is obviously distinct from consensual dispute resolution processes, in many respects the relationship between settlement and adjudication is complementary rather than antagonistic or competitive. Indeed it is arguable that the extra judicial resources required to implement judicial control of the litigation process seem to depend at least to some degree on the early settlement of disputes.[11]

It is also true that settlement negotiations often take place in the shadow of the law and that the threat of adjudication often provides the impetus for settlement. Further court based adjudication can, to a limited extent interrogate the fairness of the settlement reached by the parties.[12] For these reasons, which are discussed in more detail below, it is important that court based adjudication is well resourced and reasonably accessible. More broadly, the mitigation of adversarial litigation culture and the encouragement of a co-operative ethic particularly in relation to the comprehen-

10 In England the total number of cases issued in 1997 was 2,208,878 in 2003 four years after the introduction of the CPR rules the number of cases issued had dropped to 1,571,976. Around 60% to 80% of cases issued settled prior to trial. John Peysner and Mary Seneviratne, *The Management of Civil Cases: the courts and the post-Woolf landscape* DCA Research Series (2005) 8 and 35.

11 Ibid.

12 *Hildred v Strong* [2008] 2 NZLR 629. Issues of mediator liability are beyond the scope of this paper, however for discussion on this issue see generally mediator liability and immunity in Laurence Boulle, Virginia Goldblatt and Phillip Green, *Mediation: principles, process, practice* (2nd ed, 2008).

sive early disclosure of information underpin pre and post issue settlement negotiations and is also a feature of the reformed litigation process.[13]

IV. Judicial Justice as a Public Good; Settling in the Shadow of the Law

The phrase 'bargaining in the shadow of the law' refers to the influence of a party's perceived legal entitlements in reaching an agreement. An important function of the civil law is to map out the boundaries of acceptable social and economic behaviour. Modern consumer legislation, for example, seeks to adjust the rights and responsibilities of consumers and traders in accordance with contemporary notions of fairness and the party's legitimate expectations.[14] Fair trading arrangements between traders and traders and consumers and traders are encouraged by a statutory framework which outlines rights and responsibilities which are enforceable by the court.

In most circumstances the mere existence of statutory provisions is sufficient protection of legal rights and recourse to the civil justice system is unnecessary. If a dispute does arise, the guidance of statutory provisions and case law, together with the open and early exchange of information between the parties, enhances the possibility of settlement in accordance with perceived legal entitlements. In some circumstances the rights and duties established by legislation need to be interpreted and given practical shape by the courts and in this respect adjudication not only helps to define the rights which citizens possess but also develops the case law which is then available to parties seeking to achieve settlement based on their legal entitlement.

More broadly, the development of precedent through adjudication constantly refines social and economic norms which are then available to provide guidance for parties seeking to settle their dispute according to contemporary legal standards. It is not merely the credible threat of enforcement which promotes settlement. Rather the public service function of adjudication is also to expand the legal framework in which settlement in the shadow of the law can be achieved. In some circumstances the party's interests may not be satisfied by the application of contemporary legal norms but this fact does not undermine the importance of the complementary relationship between settlement and adjudication.

In some cases the parties will require the impartial application of legal rules to determine disputed liability and damages and in these limited cases the parties should not be forced into a settlement which does not reflect their legal entitlement. Such a situation is intolerable as it does not satisfy either judicial or consensual concepts of justice. Indeed settlement which does not satisfy judicial or consensual forms of justice is aptly described as agreement which is just about settlement rather than just settlement. For these reasons it seems correct to describe settlement without

13 CPR, above n 4 Rule 1.4(2)(a) 'encouraging the parties to cooperate with each other in the conduct of the proceedings' and VLCR, above n 4, Chapter 3 'Improving the Standards of Conduct of Participants in Civil Litigation' 149. Rule 1.1 'overriding obligation imposed on participants', with the purpose of creating a model litigant, to mitigate the adversarial culture and 'emphasising co-operation, candidness and respect for the truth.' Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (4th ed, 2005) [13.16] cited in VLCR, above n 4, 151.

14 Fair Trading Act 1986 s 9.

reasonably accessible court based adjudication as the 'sound of one hand clapping'[15] and accordingly it is imperative that access to judicial justice be cost effective, timely and proportionate.

V. The Limited Application of Judicial Justice to Post Settlement Agreement

It has been argued that the concept of judicial justice sometimes informs settlement negotiations to the extent that parties seek settlement based on reasonably anticipated legal entitlements. The application of legal rules to challenge settlement, however, brings into sharp focus the fundamental distinction between judicial justice and the consensual notion of justice achieved by various ADR processes. Clearly if agreements could be set aside simply on the basis that the settlement did not reflect the party's legal entitlement a fundamental feature of ADR would be defeated. A fundamental feature of ADR is the ability of the parties to craft an agreement which satisfies their non legal interests. Such interests might include, preserving an ongoing commercial relationship, to put the dispute behind them, avoid the cost and uncertainty of litigation or to adopt a solution which is beyond the limited remedial imagination of the law.

The essence of the distinction between judicial and consensual justice is pithily summarised by the New Zealand Court of Appeal in *Hildred v Strong*[16] '[m]ediation is not a Court proceeding in mufti'[17] and subject to rare exceptions the parties ought to be bound to the agreement reached and a dissatisfied party should not be able 'to get a second bite at the cherry'.[18] An obvious exception to the general proposition that a party ought not to be able to resile from an agreement reached by an ADR process is the situation where the agreement contravenes the statutory rights of a third party eg the interests of the child.

As was made clear by the court in *Hildred* it is not, in most circumstances, for the court to interrogate what motivated the parties to reach agreement when the parties have decided to invoke a consensual process to settle their dispute.[19] This view illustrates the basic point that settlement is a legitimate form of civil justice but perhaps more importantly provokes fundamental questions about whether or not parties should settle their dispute and if so the factors and processes which encourage early and just settlement.

VI. The Anatomy Of Settlement: the Factors and Processes which Contribute to Early Settlement; Impediments to Settlement.

Lord Woolf's prescription to remedy the ills of the civil justice system was to divert the mass of cases away from court by encouraging early settlement, subjecting those that remain to robust judicial oversight. The dramatic decline in cases issued since the introduction of the CPR in 1999[20]

15 A phrase used by Dame Hazel Genn in her forthcoming (November 2009) Hamblyn Lecture based on a sculpture by Lloyd Whannel, The Sound of One Hand Clapping 'From a Zen koan, a paradoxical statement or question, which is intended to let each viewer discover their own answer.' Available at http://www.fubiz.net/galleries/set/lake-oswego/photo/2759180938/ at 27 October 2009.

16 [2008] 2 NZLR 629.

17 Ibid [16].

18 Ibid [46] [65].

19 Ibid [46].

20 Peysner and Seneviratne, above n 10, 8.

indicates the success of pre-action protocols. Clearly quantitative statistics which measure the decline in cases issued say nothing about the quality of the settlement reached.

In this context empirical research indicting parties satisfaction with the agreement reached, which might be based on a match with perceived legal entitlement or broader needs and interests would be useful. What can be said with a degree of certainty is that bargaining and reaching agreement in the shadow of the law is greatly enhanced by pre-action protocols which mandate and control the early exchange of documents and information about the nature of the dispute.[21] As observed by one District Judge:

> the legal profession generally are looking much earlier at the files …before issuing proceedings, [and] direct[ing] their minds to all those aspects that formerly they tended to leave way on into the case, and very often close to the end of it.[22]

As has been noted by Justice Heath, adjudication is usually a fairly straightforward application of the law after the facts have been determined.[23] Aside from the relatively few disputes which raise novel points of law or one of the parties requires the binding force of precedent, the early exchange of information together with competent legal advice seems to enable the early and just settlement of most disputes. Critics of pre-action protocols point out that the early and extensive preparation required for compliance of the protocols results in the front-loading of costs. Professor Zander complains that:

> the effect [of the protocols] is to front-load costs unnecessarily if the case would have settled without it. It is possible that in some of those cases the settlement will come earlier or be more soundly based by virtue of more information. But that is mere speculation.[24]

It seems realistic to assume that the significant drop in number of cases issued, and therefore saving judicial and party resources, since the introduction of the CPR is linked to the introduction of pre-trial protocols, the anecdotal evidence of solicitors appears to support this view.[25] One might ask on what basis cases settled without the benefit of exchanging information?

Best practice requires the accumulation of information to reach an informed decision about settlement. The forced co-operative environment produced by the protocols mitigates the adversarial approach to the exchange of information which added unnecessarily to the cost and delay of reaching settlement. The reforms to civil justice recommended by the Victoria Law Commission also emphasise the importance of the disclosure of information and cooperation before proceedings are commenced. What is novel about the Victorian Reforms is the extension of legal duties and obligations which impose standards of 'cooperation candidness and respect for the truth'[26] on all participants involved in the civil justice system. In this way recalcitrant clients are also subject to legal duties and obligations which seek to promote sensible conduct and encourage early settlement.

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21 Ibid 9.

22 Ibid 11-12.

23 Justice Paul Heath, 'Hard Cases and Bad Law' (2008) 16 *Waikato Law Review,* 12.

24 Michael Zander, *The State of Justice* (2000) 41.

25 Peysner and Seneviratne, above n 10, 13.

26 Ross, above n 13.

VII. The Problem of Post Issue Late Settlement

'This [late settlement] is always a problem. And there will always be a problem. But the truth of the matter is that there are some clients who won't face up to reality until they are actually at the door of the court.'[27] As settlement is often the fundamental objective of reforms to civil justice unnecessary impediments to settlement, it ought not to be accepted simply as a matter of human nature. An understanding of the probable causes of late settlement, which is problematic in terms of judicial and party resources, offers possible solutions to help mitigate the problem.

The severity of the late settlement issue obviously needs to be considered in the context of its diminishing importance given the dramatic decline in proceedings issued since the introduction of the CPR rules.[28] One estimate is that the post issue settlement rate is between 60 and 80 per cent[29] and although it is not clear how many cases settle at the court room door, the authors acknowledge that 'late settlement is considered an enormous problem'.[30]

A significant contribution to the problem of late settlement is that, in some cases, only the imminence of a hearing is enough to offset the psychological factors associated with the investment in costs incurred in preparing the case for hearing,[31] particularly in a cost shifting regime which transfers a significant proportion of costs to the loser. As noted earlier, few cases which proceed to adjudication are particularly difficult to resolve once the facts have been determined. It is possible that more extensive use of judicial pre-trial reviews attended by the parties could highlight the risks and costs inherent in adjudication and may also point out the broader advantages of settlement as a dispute resolution process.

Peysner and Seneviratne state that '[s]ome courts did bring in the parties before the trial date to encourage settlement, and this had resulted in a high number settling at this pre-trial review.'[32] Pre-trial reviews (settlement conferences) clearly have party and judicial resource implications[33] and also raise issues relating to the role of the judiciary in conducting such conferences. Parties are likely to be less than candid in disclosing sensitive information or making concessions if it is possible that the judge will eventually hear the case if it does not settle. Also judges who might hear a case will feel constrained from giving firm indications about the strength of the case at a pre-trial conference for fear of not appearing impartial.

While these difficulties might be overcome by straight forward administrative measures the more difficult question relates to the role of judges at 'judicial settlement conferences' (JSCs) and more broadly how judicial attempts to settle cases fits with the range of ADR processes which are typically encouraged by civil justice reforms pre and post action of proceedings.

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27 Peysner and Seneviratne, above n 10, 43.

28 Ibid 8.

29 Ibid 35.

30 Ibid 43.

31 Robert Mnookin, Scott Peppet and Andrew Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000).

32 Peysner and Seneviratne, above n 10, 42.

33 Ibid 41 'in many cases the case management is done by telephone.'

VIII. ADR AND SETTLEMENT

The term ADR, although strongly associated with mediation, refers to a wide variety of processes, including mandatory judicial settlement conferences, court annexed and private mediation, industry based Ombudsman schemes and collaborative law[34] which encourage parties to resolve their dispute without the formality of court based adjudication. Given the emphasis of justice reforms on diverting cases away from litigation the central role of ADR is unsurprising. What is perhaps a little surprising is the extent to which pre-action settlement in England and Wales is being achieved by lawyers without the intervention of third parties.

It is particularly noteworthy that mediation, which is normally the process most heavily associated with ADR, appears to have played a minor role in the dramatic decline in the issue of proceedings following the introduction of the CPR rules in England and Wales.

> The large increase in the numbers of cases settled has not been matched by a corresponding increase in the use of ADR. … Most Judges thought that there was little out of court mediation, little use of ADR and that there was either 'real resistance' or 'no enthusiasm' for it. Most Judges had little experience of its use.[35]

In many cases settlement is the result of solicitor negotiations and is assisted by rules which require the early disclosure of information and encouragement to negotiate co-operatively. Anecdotal evidence indicates that settlement is primarily based on the parties' perceived legal entitlement and interest based bargaining does not appear to be a feature of pre-action settlements achieved by solicitor negotiations. This tentative conclusion does not fully support Professor Macfarlane's contention that exclusively rights based strategies will rarely bring about optimal settlement.[36] Although it is of course possible that interest-based bargaining might increase the number of settlements and produce settlements that are more closely aligned with client interests.

The broader question in this context is the extent to which solicitor negotiations should stray into an area more traditionally the domain of facilitative mediation. The conceptual and practical problems associated with solicitors adding interest based bargaining to their repertoire of skills is considered below, but on the strength of the empirical research conducted by Peysner and Seneviratne it is possible to conclude that pre-action protocols are, in any event, very successful in diverting cases away from litigation.

The role of mediation appears to play a minor role in promoting settlement when proceedings have been issued.[37] Various reasons for this failure are given by judges and solicitors including lack of court annexed mediation[38] and the reluctance of English courts to endorse mandatory mediation. The conceptual debate concerning the effectiveness of compulsory court annexed or private mediation turns on the apparent incongruity of forcing parties to engage in a process which

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34 Victoria Law Commission Report, above n 1, 212. Chapter 4 'Improving Alternative Dispute Resolution', which explicitly refers to the need to expand the range of ADR options to assist the court to efficiently manage diverse types of disputes; collaborative law refers to the process where lawyers and clients sign a contract to negotiate in good faith to resolve a dispute without going to court. If the dispute is unable to be resolved by negotiation the lawyers acting for the parties withdraw and new lawyers must be instructed in litigation proceedings.

35 Peysner and Seneviratne, above n 10, 43.

36 Macfarlane, above n 2, 61.

37 Ministry of Justice (UK), above n 4. Rule 1.4(2)(e). Active case management includes 'encouraging the parties to use alternative dispute resolution procedure if the court considers that appropriate and facilitating their use of such a procedure.'

38 Ibid.

relies on good faith bargaining, a feature which would appear to be firmly grounded in voluntary entry into the process.

In the English court of Appeal Decision in *Halsey v Milton Keynes General NHS Trust*[39] the court stated the standard objections to compulsory mediation:

> If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process.[40]

The Court also opined that 'it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court, and, therefore, a violation of Article 6.'[41] While these arguments have clear merit, they are not compelling. Mediation does restrain access to court based adjudication in the sense that parties are entitled to proceed to adjudication if agreement cannot be reached. The possibility of mediation increasing party costs is clearly an important factor given that the objective of civil reform is to promote access to justice by delivering a process which is cost effective.

Rather than abandon compulsory ADR because of the real possibility of bad faith bargaining and/or the futile expenditure of costs on a case which is unlikely to settle at mediation, party resources might more usefully be applied to an ADR process which better suits the parties objectives. If properly informed parties require an impartial assessment of the risks associated with litigation, a process presided over by an authoritative expert such as a JSC, or a less formal process such as evaluative mediation might be appropriate. The effectiveness of JSCs will obviously turn largely on the settlement skills of judges. It also appears to be crucial that the parties attend settlement conferences.[42]

Settlement before a trial minimises the problem of overlisting, reduces the costs associated with the trial and reduces the inherent uncertainty of adjudication. If parties require a process which is interest rather than rights based then referral to facilitative mediation would be appropriate, although this step would only seem necessary to the extent that the parties' lawyers were unable or unwilling to engage in interest based negotiations.

IX. Settlement and the Changing Practice of Law

In her book,[43] Professor Macfarlane claims that justice reforms that favour mandatory and voluntary settlement processes, have promoted the emergence of a more collaborative and holistic approach to legal practice. Conflict Resolution Advocacy (CRA) is the phrase used to describe the new bundle of skills required by lawyers to work successfully in the new settlement environment.

While conceding that an understanding of rights based strategies is a unique, crucial and continuing aspect of legal practice, her contention is that effective negotiation and settlement skills which move beyond partisan posturing and exclusive reliance on legal issues are becoming in-

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39 *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920. See also the Australian decision in *Australian Competition & Consumer Commission v Lux Pty Ltd* [2001] FCA 600.

40 Ibid [10].

41 Ibid [9] referring to the European Convention on Human Rights.

42 Peysner and Seneviratne, above n 10, 42, report that 'some courts did bring in the parties two or three weeks before the date of the trial to encourage settlement, and that this had resulted in a high number settling at this pre-trial review.'

43 Professor Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (2008).

creasingly central to the practice of law. Professor Macfarlane's central assumption is that rarely will legal analysis of the facts accumulated to provide a legal remedy be an adequate basis for optimal resolution of the conflict. For example, the importance of business or personal relationship issues cannot be repaired or enhanced by the application of legal remedies, quite apart from the financial cost and uncertainty of adjudication.

Client interests cannot always be reduced to legal entitlements. As has been emphasised in this paper, adjudication is a public good and rights based strategies within the context of a reformed civil justice system are essential to develop precedent and to address imbalances in power which might result in consensual injustice. Indeed the purpose of the Woolf Reforms is to promote access to judicial justice by mitigating zealous adversarial pre trial strategies. Analysis of the effectiveness of such reforms to reduce the complexity and cost of adjudication is outside the scope of this paper, but it is clear that the explicit policy of settlement is responsible for the recent trend in vanishing trials. These observations are not antithetical to Professor Macfarlane's thesis: supported by supposedly empirical evidence gathered in Canada that the prospects of achieving an optimal settlement are sometimes unproved when non legal issues and solutions are blended with rights arguments. Ultimately the composition of the blend must be determined by properly informed clients and will depend on the client's objectives (and resources).

On a practical level the communication skills required by lawyers to engage in conflict advocacy are formidable. The new lawyer's repertoire of skills must embrace the central premise of principled bargaining that often the clients best interests can only be achieved if the interests of the other part are taken into account.[44]

The discussion above refers to reforms which have been implemented in recent times in England and Wales and recommended in Australia. New Zealand has also been looking at these issues and as a result changes to the District Court rules relating to settlement will be implemented as of 1 November 2009. The following section provides an insight from the perspective of a legal practitioner as to what the implications of these rule changes may be.

X. Settlement and the New New Zealand District Court Rules: A Practitioners Perspective

The philosophy and objectives of the rules were clearly set out and described in the recent New Zealand Law Society seminar[45] and are timetabled to come into force on 1 November 2009. As noted in the Law Society seminar at their heart lies a philosophical sea change to the litigation process which has no New Zealand precedent and no clear parallel in the common law world. Some of the changes are fundamental, because fundamental change is needed. The core philosophy of the new rules puts access to justice ahead of competing considerations. As a result, the defended witness trial is no longer the focal point of the process and has been relegated from its position of primacy to become simply one of several possible outcomes. The reason for that is straightforward. The assumption underlying existing common law civil procedure is that all cases will go to hearing as a witness action. That assumption is such an obvious myth that the pretence can no longer be maintained.

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44 See Mnookin above n 31.

45 Judge Colin Doherty et al 'The New District Court Process – A Radical Change' paper presented at the New Zealand Law Society Seminar August 2009, Hamilton.

In all common law jurisdictions around the world, only a very small percentage of cases actually reach trial. In the District Court of New Zealand the figures across the registries rarely reach three per cent and in some registries the figure is one per cent or less. Most cases settle, either because they should or because both parties have to. The new rules take settlement as the basic objective, the process being designed to enhance the prospects of settlement at an early stage.

The full scale witness action trial, with its attendant expense and delay, has been procedurally relegated to its economically justifiable place, namely the very last resort. It is anticipated that full scale trials will all but disappear. Summary judgment will only be available by judicial direction following a settlement conference, reducing the relative expense in cases involving smaller monetary claims. In between early settlement and full scale witness action trial, shorter and cheaper forms of trial will be available.

The parties will be free to appoint a private mediator at any time and will be encouraged to do so. They will have plenty of time to appoint a private mediator before the judicial settlement conference is allocated and will be encouraged to do so at the JSC if it seems that course of action is desirable.[46] The object of the new rules is to secure the just, speedy and inexpensive determination of proceedings.[47]

Explicit objectives include equal treatment of parties, saving expense, recognition of the need for proportionality in connection with the importance of the case, the complexity of the case, the amount of money involved and the financial positions of the parties, all the while recognising that there are limits to the court's resources. A significant objective of the rules is to make the process user friendly and accessible to laymen e.g. by the process of online forms.

XI. The Contrast Between the Rules and the Woolf Reforms in England and Wales

The purpose of the Woolf Reforms in England and Wales was to improve access to justice by reducing complexity cost and delay in litigation, which was to be achieved by a three tier approach:

(a) Diverting cases away from court by the use of protocols requiring the exchange of comprehensive information and details about the case in a co-operative manner before proceedings are issued.
(b) Pro-active case management if cases are not settled pre-issue. The case management strategies include a fast track for minor claims, limited discovery, multi tracks for more complicated cases and judicial settlement conferences. Proportionality is encouraged.
(c) The promotion of ADR both at the pre-issue and post issue stages.

Clearly the rules regime in New Zealand addresses two of the three tiers of the Woolf Reforms, namely the promotion of ADR and the case management regime after the issue of proceedings with a focus on encouraging settlement, limiting/reducing the traditional adversarial witness action trial process; and recognising the concept of proportionality.

A key difference between the Woolf Reforms and the District Court Rules is that the New Zealand regime does not include pre-issue protocols.[48] It is and has been the case in New Zealand for many years that some lawyers have pro-actively adopted the conflict resolution advocacy ap-

46 Draft rule 1.7.

47 Draft rule 1.3.

48 That is the rules requiring the exchange/disclosure of documents and information and a co-operative approach before proceedings are issued.

proach described by Professor Macfarlane as distinct from the traditional adversarial advocacy approach. In New Zealand, however, the conflict resolution advocacy approach has never been proscribed in the sense of mandatory procedural rules requiring disclosure of information and co-operation before court proceedings are issued. The client care rules, which came into force on 1 August 2008 as part of the Lawyer's & Conveyancer's Act 2006, contain a provision[49] requiring lawyers to assist clients with the resolution of a dispute by keeping clients advised of alternatives to litigation that are reasonably available to enable the client to make informed decisions about the resolution of a dispute. Although rule 13.4 of the client care rules does contain a positive obligation on lawyers to advise their own client about ADR options, it does not and was not, intended to be a procedural code requiring co-operation and disclosure of information between parties before or after the issue of court proceedings.

Based on the research carried out in England and Wales into the Woolf Reforms which have now been in force for about 10 years, it appears that the pre-issue disclosure of information and co-operation protocols, together with competent legal advice, have significantly contributed to the mitigation of the adversarial approach to litigation and dramatically reduced the number of court proceedings issued.[50] Mediation appears to have played a minor role in the dramatic decline in the number of court proceedings issued following the introduction of the Woolf Reforms. In many cases settlement comes about as a result of lawyer negotiations assisted by the pre-issue disclosure and cooperation rules. Anecdotal evidence indicates that settlement is primarily based on the parties' perceived legal entitlement and interest based bargaining does not appear to be a significant feature of the pre-issue settlements achieved.

Although it needs to be appreciated that the above research is tentative and further research needs to be carried out into the role played by interest based bargaining in achieving settlement. I suggest that many New Zealand lawyers practising in ADR and court litigation would be surprised by the results of the UK research to date. New Zealand lawyers will not necessarily be surprised that lawyer competence is a contributing factor to the levels of settlement achieved before the issue of court proceedings as many ADR/litigation lawyers have an unshakeable confidence in their own ability. What will be more surprising however is the number of cases that are being resolved by settlement before the issue of court proceedings and the apparently minor role played by mediation in the dramatic decline in the number of court proceedings issued.

The experience of many New Zealand ADR/litigation lawyers[51] is that it is difficult to persuade the client to move into 'settlement mode' before proceedings are issued or defended. At that point in the chronology of the dispute the clients are more likely to have a bullish and often overly optimistic view of the litigation process and their prospects of success. The experience of many New Zealand lawyers is that meaningful settlement negotiations are more likely to occur after proceedings have been issued or defended, often after discovery has been completed and commonly at or following a private mediation or JSC.

The issue/defence of court proceedings and the mediation/JSC process tends to have a sobering effect on many clients and provides a classic 'reality check on a number of fronts'. Firstly, the cost of litigation is very significant. A client involved in court litigation will be receiving invoices of significant value from their lawyers for litigation related advice and services with the prospect

49 Paragraph 13.4.

50 See Peysner and Seneviratne, above n 10.

51 Brendan Cullen, author, included.

that the quantum of the invoices will significantly increase during the trial preparation and trial attendance phases of the process. The direct cost of legal fees and disbursements will often cause clients to consider an out of court settlement.

Secondly, there are very significant indirect cost to clients who are involved in the litigation process including the distraction factor of court litigation, lost business opportunities and an inability to enjoy life while the litigation juggernaut rolls on. Clients will often come to realise during the litigation process that there is a real value to settling disputes so that they can put the matter behind them and get on with more positive aspects of their life and work.

Thirdly, the inherent uncertainty of outcome if the dispute goes to trial is another significant factor which acts as a reality check for clients. Competent lawyers will advise their clients about the uncertainties of outcome at trial (both as to liability and quantum) and also the possibility of appeals which will result in a further round or rounds of cost delay and uncertainty. The recent relationship property case of *Rose v Rose*[52] is a classic example. It started in the Family Court and ended up in the Supreme Court with different outcomes at all four levels of the court system.

The reality checks set out above are usually highlighted and reinforced at a mediation or JSC which in turn contribute to the likelihood that the client will explore the options for an out of court settlement rather than taking their chances at trial. Based on the apparent success in the UK of the pre-issue protocols in reducing the number of court proceedings issued, the following questions arise in New Zealand:

- Were pre-issue protocols considered for inclusion in the new District Court Rules?
- If not, why not?
- If they were, what were the factors the rules committee took into account in deciding not to include pre-issue protocols?

If pre-issue protocols are incorporated as procedural rules would the same trends occur in New Zealand as have occurred in England and Wales namely a dramatic reduction in the number of court proceedings issued?

These questions require further research, however irrespective of the outcome of any debate about pre-issue protocols, it is clear the new rules will have significant consequences for lawyers in New Zealand practising in the ADR/court litigation field. The authors of the recent New Zealand Law Society seminar booklet commented as follows:

> The skill set required to make the most of the new rules has some significant differences from the skill set required under the existing rules. Identification and articulation of the factual and legal issues are presently, and will always be, core competencies. But interlocutory warfare will cease. Only those interlocutories which are genuinely necessary will be permitted and the skills necessary to successfully conclude settlement negotiations, whether privately, by means of ADR, or in the JSC, will come to achieve a prominence hitherto unseen. *Chamberlain v Lai* 2005 NZSC 32 will see to that.[53]

As described by Professor Macfarlane, an essential skill to successfully conclude settlement negotiations is acknowledgement of the interests of the other party and to persuade the other party to settle on the best possible terms for your client. It remains to be seen how New Zealand lawyers will respond to the challenges presented by the new settlement environment.

52 *Rose v Rose* [2009] 3 NZLR 1.

53 Doherty, above n 45, 11.

XII. Conclusion

In his book[54] John Van Winkle refers to the process of court based adjudication as a 'litigation train'.[55] The dispute arises, lawyers are consulted, entrenched positions are taken, and after ritual posturing, proceedings are filed. The track to adjudication then follows a predetermined path which consumes party and judicial resources in preparation for a hearing which statistically is unlikely to take place. Even if the dispute is determined by a judge the win/lose nature of adjudication may not match even the winners interests.

Civil justice reforms have attempted to derail the litigation train by explicitly encouraging early settlement, based on the indisputable fact that settlement is the usual end point of legal proceedings. Just settlements promote access to justice because in most cases early settlement is cost effective and may produce better outcomes for the parties than the zero sum result assured by adjudication. Judicial resources should be preserved for the cases which require impartial assessment of the litigation risk and for the fewer cases which require the adjudication skills of experienced judges. Adjudication is a public good which extends the shadow of the law by developing precedent and allows for the public articulation of values. For the reasons outlined settlements based on legal rights are enhanced to the extent that precedent is developed. Pre-issue settlement also allows judicial resources to focus on the cases which require access to adjudication.

The increased institutional emphasis on settlement raises complex issues about the relationship between ADR processes and settlement and the scope of the role of lawyers in promoting settlement. In England and Wales, ADR and mediation in particular, appears to have played quite a minor role in the settlement culture encouraged by the civil justice reforms. Clearly mediation is not the only way forward for disputing parties and no doubt the attitude of lawyers and judges to mediation, together with the resources available for mediation, contribute to the minor role of mediation in settling civil disputes. It is also possible that ADR has been unnecessarily limited to mediation. This point has been emphasised by the reforms recommended by the Victorian Law Commission. There is more chance that the process will match the parties' needs if a wide range of ADR procedures are available.

Professor Macfarlane's thesis that settlement is changing the practice of law is correct to the extent that the Woolf Reforms and the reforms proposed by the Victorian Law Commission seek to promote settlement by mitigating a adversarial litigation culture. While forced cooperation in terms of pre-issue protocols is promoting settlement in England and Wales, it is not clear if lawyers are engaging in creative problem solving skills to craft settlements which, in appropriate circumstances, take into account clients' non legal interests. Reforms which promote cooperation and settlement do not necessarily result in the development of skills which enhance conflict resolution advocacy. Professor Macfarlane's arguments that conflict resolution advocacy can improve access to justice and optimal settlements are persuasive. Her recognition that knowledge, legal rights and rights based strategies remain an essential aspect of the new lawyer's repertoire of skills supports the contention that settlement and adjudication are complementary processes for achieving accessible consensual and judicial justice.

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54 John van Winkle, *Mediation: A Path Back for the Lost Lawyer* (2001).

55 Ibid 1.