# Reform of the Civil Justice System: The New Meaning of Justice and the Mitigation of Adversarial Litigation Culture

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## Abstract

Reforms to the civil justice system, which are intended to promote access to justice, have remodelled the meaning of civil justice in two fundamental ways. First, the justice delivered by court based adjudication must balance the accuracy of the decision with affordability and timeliness. In this respect it is necessary for case management principles to eschew the procedural indulgence associated with the merits of the case approach to civil procedure. Case management is underpinned by the importance of the public value of adjudication. Second, notwithstanding the social importance of adjudication, settlement is now institutionally entrenched as the primary form of dispute resolution. Negotiated justice is not antagonistic to adjudication or the civil justice system. Indeed negotiated justice resulting in settlement that reflects the legal rights of the parties is dependent on quality adjudication to "refresh" the common law. It will be argued with particular reference to the Civil Procedure Act 2010 (Vic) and the reforms to civil procedure in England and Wales, that mitigation of an adversarial disputing culture, which emphasises the partisan interests of the parties, is necessary to achieve the overarching objective of enhancing access to consensual and court imposed justice.

## I. Introduction

Improving access to justice is often expressed as the overarching objective of modern reforms to the civil justice system. The fundamental problem faced by policy makers in promoting access to justice is that because public funds are limited the notion of justice must also be limited if access to justice is to be enhanced. This inherent compromise is illustrated by the overarching purpose of the Civil Procedure Act 2010 (Vic) which "is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute".[1] A typical approach of reforms intended to promote access to court based adjudication[2] is to require the judiciary to manage the tensions inherent in

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1 Civil Procedure Act 2010 (Vic), s 7(1).

2 Civil Procedure Rules 1998 (UK), r 1.4 Court's Duty to Manage Cases.

the objective of delivering quality judgments within a reasonable time at a reasonable cost.[3] An important broad principle of case management is that in some circumstances, the public interest in timeliness and affordability of adjudication outweighs the private interest of the particular parties in presenting an arguable case to the court.

The procedural indulgence associated with the "merits of the case"[4] approach to litigation is incompatible with the efficient use of judicial resources and fails to take into account other parties waiting in the litigation. The development of case management principles based on the public interest in efficient litigation recognises that adjudication is a critical public service and the importance of accessibility will sometimes transcend the private interests of the parties. The evolution of case management principles guided by the public interest in efficient use of limited judicial resources and the rejection of the merits of the case judicial philosophy is discussed by reference to two leading cases. The decision of the High Court of Australia in *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR, illustrates the principle that when considering a late application by a party to amend its pleadings the Court must take into account the public interest in the efficient administration of justice and not simply the achievement of justice between the parties.[5]

Perhaps a more difficult question for case management is how the objective of delivering affordable, timely justice is reconciled with a summary judgment application to strike out a "hope-

3 Although the focus of the article is on the United Kingdom and Australian case management reforms, recent changes to the New Zealand District and High Court Rules in 2009 also reflect this trend. In particular, District Court Rule 1.3 and High Court Rule 1.2 which both state "The objective of the rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application". See also Rod Joyce et al *The New District Court Process – A Radical Change* (NZLS, Wellington, 2009) at 1. "The core philosophy of the new rules puts access to justice ahead of competing considerations. ... The new Rules take settlement as the basic objective, the process being designed to enhance the prospects of settlement at an early stage. ... 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. ... [They] are intended to enhance access to justice, both by reducing the cost of getting a dispute to the point at which meaningful settlement negotiations can occur, and by making that process accessible to lay litigants." The impact of these reforms on New Zealand jurisprudence is beyond the scope of this article and will be addressed in more detail in the future.

4 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) <www.aija.org.au> at 7.

5 See also, *John Bevan-Smith v Reed Publishing (NZ) Limited and Alan Smith* [2006] 18 PRNZ 310. This was an appeal from a High Court decision to decline adjourning a trial, where Priestly J stated that "As a matter of principle I am not prepared to grant an adjournment. The common denominator to the various problems the plaintiff faces is quite simply inadequate or last minute preparation. ... The interests of justice cannot permit a last minute adjournment of this nature to succeed merely because of preparation difficulties." at [15]. The Court of Appeal dismissed the appeal and noted that "Case management is fundamental to the efficient administration of justice, a concept which in this case embraces the interests of not only the appellant but also the respondents and, as well, the interests of other litigants waiting to have their cases heard. But case management is, for all this, merely a means to an end ..." at [34]. The Court went on to say that they thought the High Court had "struck an inappropriate balance between case management principles and ... a fair trial .." at [36]. Nonetheless, they dismissed the appeal, as they considered that "the appellant's rights [had] not been irretrievably compromised" and Priestly J had been flexible in regard to trial arrangements, at [37].

less case". The *Three Rivers* litigation,[6] which one writer has described as a "colossal wreck",[7] illustrates diverging judicial opinion on the relationship between case management principles and the right of a party to invoke interlocutory procedures to seek evidence in support of a "hopeless case". The principled tapering of civil procedure to take into account resource constraints and the public interest in the timely delivery of judgments, is essentially to achieve the overarching objective of enhancing access to the determination of proceedings by the Court. There is also little doubt that that the objectives of case management require the co-operation of lawyers to assist the Court with the prompt resolution of disputes.

Indeed the mitigation of adversarial legal culture is a fundamental objective of both the Victoria and Woolf reforms.[8] A second, and perhaps more fundamental, reshaping of civil justice is that civil justice reforms explicitly encourage the private, early settlement of disputes. Again the Civil Procedure Act 2010 (Vic) provides a clear example of the importance of settlement in achieving the overarching objective of promoting access to justice. Section 7(2) states that the overarching purpose that is outlined in s 7(1) may be achieved by "the determination of the proceeding by the court",[9] "agreement between the parties",[10] or by "any appropriate dispute resolution process agreed to by the parties; or ordered by the court".[11]

This institutional recognition that settlement is now formally incorporated into the architecture of civil justice raises controversial questions about the relationship between adjudication and negotiated justice.[12] Further, if the diversion of disputes from the Court to private settlement is "just about settlement rather than just settlement".[13] The integrity of settlement as the primary process for resolving disputes in the civil justice system is undermined. The argument presented in this paper is that the relationship between adjudication and settlement is complementary. Settlement is not anti adjudication and indeed the quality of settlement will often depend on the development of the common law. This is because parties will often bargain in the "shadow of the law"[14] and accordingly settlement will be based on predicted legal rights.

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6 *Three Rivers DC v Bank of England (No 3)* [1996] 3 All ER 558 (QB); *Three Rivers DC v Bank of England (No 3)* [2000] 2 WLR 15 (CA); *Three Rivers DC v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16 [2001] 2 All ER 513.

7 Zuckerman above n 4, at 12.

8 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 1998 No 3132 (L 17) (UK); Ministry of Justice (UK) *Civil Procedure Rules: Practice Direction Protocols* <www.justice.gov.uk>; The reforms recommended in the Australian State of Victoria, Victorian Law Reform Commission *Civil Justice Review: Report* (2008) <www.lawreform.vic.gov.au> which led to the Civil Procedures Bill 2010 (Vic).

9 Civil Procedure Act 2010 (Vic), s 7(2)(a).

10 Ibid, s 7(2)(b).

11 Ibid, s 7(2)(c)(i) and (ii).

12 See Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, 2009); Owen M Fiss "Against Settlement" (1983) 93(6) *Yale Law Journal* 1085.

13 Ibid, at 117.

14 A phrase originally used by Robert H Mnookin and Lewis Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88(5) *Yale J Int'l Law J* at 950.

A key element in promoting early settlement without undue formality in exchanging information critical to settlement negotiations is pre action protocols.[15] While it seems reasonably clear that pre action protocols have contributed to a dramatic reduction in cases filed in England and Wales,[16] the effect of the protocols on the objective of reducing the cost of resolving disputes is more problematic.[17] As with the efficient delivery of adjudication it will be suggested that a co-operative, rather than adversarial approach by lawyers and their clients to the exchange of information is necessary to achieve the overarching objective.

## II. The Role of Case Management in Reshaping the Meaning of Civil Justice

The purpose of case management, which refers to judicial rather than party control of civil proceedings, is to ensure that "a civil proceeding is managed and conducted in accordance with the overarching purpose".[18] This means that the determination of the proceeding by the Court must balance the "just" resolution of the dispute with timeliness and cost effectiveness.[19] In light of this objective it seems clear that in some circumstances justice between the parties will be compromised to satisfy the broader social interest in the delivery of affordable justice within a reasonable time. Practical examples of the possible compromise to justice for individual parties explicitly arise when the court is required to exercise its discretion whether or not to grant procedural amendments. While the permissive approach to procedural amendments associated with the "merits of the case"[20] approach focuses on the right of a party to advance an arguable case, this approach is largely oblivious to the overarching objective of modern law reforms. Perhaps a more controversial test for the judicial philosophy expressed by the objective of case management is the appropriate allocation of judicial resources to a "hopeless case". Before considering these practical questions in more detail it is useful to discuss the public value of adjudication and why party-driven proceedings are inimical to public interest in the efficient delivery of quality court-based adjudication.

A fundamental objective of civil justice reforms is to improve access to court-based adjudication.[21] While it is important that citizens have effective access to the courts for the vindication of legal rights, quality adjudication also fulfils a valuable public function that transcends the partisan interests of the parties. The social purpose of adjudication is partly that it provides "a framework in which business can be done and investment can be protected, thus supporting economic activity and development."[22] The importance of adjudication to the resolution of commercial disputes is also discussed by Heydon J in *Aon*:[23]

15 Civil Procedure Rules 1998 (UK), r 1.1(1); Civil Procedures Act 2010 (Vic), s 7; Civil Dispute Resolution Act 2011 (Cth). In New Zealand the process is managed through the exchange of information capsules in the Court as required by the District Court Rules 2.14–2.17.

16 John Peysner and Mary Seneviratne *The Management of Civil Cases: the Courts and the Post Woolf Landscape* (Department for Constitutional Affairs, London, 2005) at 8 and 35.

17 Michael Zander *The State of Justice* (Sweet & Maxwell, London, 2000) at 41.

18 See Civil Procedure Act 2010 (Vic), s 47(1) and Civil Procedure Rules 1998 (UK), r 1.2(1) Overriding Objective.

19 Civil Procedure Act 2010 (Vic), s 7(1).

20 Zuckerman above n 4, at 7.

21 Civil Procedure Act 2010 (Vic), s 7(1); Civil Procedure Rules 1998 (UK), r 1.1.

22 Genn, above n 12, at 17.

23 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR at [137].

> Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. … The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

More broadly as observed by Jolowicitz "the broad social goals of civil justice are to demonstrate the effectiveness of the law and to allow judges to perform their function of clarifying, developing and applying the law".[24] The public value of adjudication in this respect is obviously not limited to commerce, as this reasoning applies to all jurisdictions including family and criminal law. Recognition of the public value of adjudication assists with development of case management principles, which consider the social purpose of adjudication in balancing the partisan interests of the parties with the interests of the broader community in the efficient use of judicial resources. These wider interests in the public value of adjudication are not a prominent feature of the "merits of the case" approach to adjudication.

The importance attributed to achieving justice between the parties, which is at the heart of the merits of the case approach and consequent procedural indulgence, is illustrated by the statement of Bowen LJ in his dissenting judgment in *Cropper v Smith* (1884) 26 Ch D 700, who stated: [25]

> I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party.

This focus on interparty justice is reinforced by his Lordship's view that "I have found in my experience that there is one panacea which heals every sore in litigation and that is costs."[26]

A more recent case that explicitly rejects the proposition that case management should oust justice between the parties is *State of Queensland v JL Holdings* (1997) 189 CLR 146 where the Court stated that:[27]

> Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

Importantly the Court later said:[28]

> ... Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out of raising an arguable defence, thus precluding the determination of an issue between the parties.

These statements bluntly pose the fundamental question: in what circumstances ought the partisan interests of the parties be outflanked by the public interest in the efficient administration of justice? A useful starting point for this discussion is the assumption made by policy makers that party driven litigation, motivated by the partisan interests of the parties is often an impediment to

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24 JA Jolowicz *On Civil Procedure* (Cambridge University Press, Cambridge, 2000) at 71, cited in Genn, above n 12, at 18.

25 *Cropper v Smith* (1884) 26 Ch D 700 at 710.

26 Ibid, at 711.

27 *State of Queensland v JL Holdings* (1997) 189 CLR 146 at 154.

28 Ibid, at 155.

the purpose of civil procedure; discovery of the true facts. The impact of unrestrained adversarial conduct on the efficient administration of justice is described by Davies.[29]

> The adversarial imperative is the compulsion which litigants and especially their lawyers have to see the other side as the enemy who must be defeated; the 'no stone unturned mentality' is a compulsion to take every step which could conceivably advance the prospects of victory or reduce the risk of defeat. Both, in turn increase the labour intensiveness and consequently the cost and delay of dispute resolution and, especially as between parties of unequal means, render it unfair.

In Lord Woolf's view effective control of civil proceedings by the Court was necessary to prevent the tactical use of pre-trial procedures "…to intimidate the weaker party and produce a resolution of the case which is either unfair or is achieved at a grossly disproportionate cost or after unreasonable delay".[30]

A fundamental purpose of case management is to improve the efficiency of adjudication by mitigating the adversarial litigation culture described by Geoffrey Davies and Lord Woolf. The role of the judiciary in mitigating adversarial culture, which focuses on the partisan interests of the parties, is starkly illustrated by provisions that direct judges to encourage the parties "to co-operate with each other in the conduct of the civil proceedings"[31] "to settle the whole or part of the civil proceedings"[32] and "to use appropriate dispute resolution".[33]

An innovative feature of the Civil Procedure 2010 (Vic) Act is that the bundle of specific overarching obligations that help shape the meaning of "co-operation" apply to lawyers and the parties.[34] The bundle of duties imposed on the parties and their lawyers include the "obligation to act honestly",[35] "cooperate in the conduct of civil proceedings",[36] "disclose existence of documents",[37] "narrow the issues in dispute",[38] "to ensure costs are reasonable and proportionate",[39] "minimise delay",[40] and "use reasonable endeavours to resolve the dispute."[41] These duties mesh with and are intended to reinforce the purpose of active case management, which is to ensure that proceedings, if necessary, are conducted in accordance with the overarching purpose.[42]

The overall intention of the overarching obligations is to bolster the lawyer's paramount duty to the Court.[43] The duty of the Court to facilitate the efficient administration of justice relies in

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29 Geoffrey L Davies "Fairness in a Predominantly Adversarial System" in Helen Stacey and Michael Lavarch (eds) *Beyond the Adversarial System* (Federation Press, Sydney, 1999) 102 at 111.

30 Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor's Dept, London, 1995) at Ch 5.

31 Civil Procedure Act 2010 (Vic), s 47(3)(d)(i).

32 Ibid, s 47(3)(d)(ii).

33 Ibid, s 47(3)(d)(iii) r 1.4 (2) (a) active case management includes "encouraging the parties to cooperate with each other in the conduct of proceedings".

34 Ibid, s 10 defines the participants. Section 12 provides that subject to the paramount duty of the court the overarching obligations prevail over any legal or contractual obligation to the extent that the obligations are inconsistent).

35 Ibid, s 17.

36 Ibid, s 20.

37 Civil Procedure Act 2010 (Vic), s 26.

38 Ibid, s 23.

39 Ibid, s 24.

40 Ibid, s 25.

41 Ibid, s 22.

42 Ibid, s 7. See also Peysner and Seneviratne above n 16, at 12–13 where they discuss the culture of co-operation.

43 *Rondel v Worsley* [1969] 1 AC 191 sets out the common law position.

large measure on the mitigation of the adversarial litigation culture that flourished under the merits of the case approach to the conduct of litigation. For the reasons outlined above, court based adjudication is an essential public good that transcends the partisan interests of the parties to a particular dispute. The objective of case management is to deliver prompt, affordable justice. This objective is incompatible with trial tactics that result in the waste of public resources and the loss of public confidence in courts to deliver timely decisions. If a party engages in conduct that is contrary to the public interest in the efficient administration of justice, in order to promote partisan interests, case management principles require the Court to adopt a firm approach in determining applications to vacate trials.

The impact of case management principles on the adversarial conduct of litigation is illustrated by the reasoning of the High Court of Australia in *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR. In *Aon* the High Court of Australia was required to decide the scope of case management rules[44] to the plaintiff's application for an adjournment of a trial to make substantial amendments to its statement of claim. The application was made at the start of a four week trial and resulted from the plaintiff, the Australian National University (ANU), settling with its insurers and then seeking to make substantial amendments to its statement of claim against its insurance brokers *Aon*. The trial Court and the Supreme Court of the Australian Capital Territory reasoned, following the decision of the High Court of Australia in *State of Queensland v JL Holdings* (1997) 189 CLR 146, that the adjournment should be allowed.

*JL Holdings* stood as authority for the proposition that case management did not oust justice as between the parties, as the paramount consideration in whether or not to grant a procedural amendment. This reasoning was emphatically rejected by Gummow, Hayne, Crennan, Kiefel and Bell, who stated that:[45]

> Rule 21(2)(b) indicates that the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and other litigants.

An award of indemnity costs to compensate the defendants, which was unanimously agreed by the Supreme Court,[46] obviously has no bearing on the wasted time of the court and public confidence in the efficient administration of justice. A critical element in the decision was that there was no satisfactory explanation as to why ANU sought the amendment. While there was no suggestion that ANU's amendment "... involved any nefarious, illegitimate, tricky or improper element,"[47] nevertheless the Court observed that the amendment "… raised new claims not previously agitated apparently because of a deliberate tactical decision not to do so".[48]

As discussed above, the idea of overriding obligations, introduced particularly by the Civil Procedure Act 2010 (Vic), reinforces the idea that lawyers have a positive duty to assist the Court with efficient and fair resolution of disputes. Strategic manoeuvres that are compatible with an unrestrained adversarial ethos focusing on the partisan interests of parties do not always fit com-

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44 Court Procedure Rules 2006 (ACT) 21(2) "Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving (a) the just resolution of the real issues in the proceedings; and (b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties."

45 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR at [93].

46 Ibid, at [3].

47 Ibid, at 179.

48 Ibid, at [4] per French CJ.

fortably with the overarching objective of the fair and timely resolution of disputes by the Court.[49] The social importance of timely adjudication is discussed by Heydon J who observed that:[50]

> …While in general it is now seen as desirable that most types of litigation be dealt with expeditiously, it is seen as especially desirable for commercial litigation. … Those claims rest on the idea that a failure to resolve commercial disputes speedily is injurious to commerce, and hence injurious to the public interest.

## III. Procedural Indulgence in the Context of a Hopeless Case: *Three Rivers* Litigation

A more vexed question for the remodelled notion of justice is the allocation of judicial and party resources in circumstances where a party is determined to pursue a "hopeless case". A spectacular example of such a case is the *Three Rivers* litigation.[51] The trial Court allowed a summary judgment application to strike out the proceedings because it:[52]

> ... reached the conclusion that the BCCI depositors had no realistic prospect of establishing that the Bank of England officials knowingly acted unlawfully with the intention of or foresight of damaging them and therefore gave summary judgment in favour of the bank.

The decision was affirmed by the Court of Appeal, and subsequently overturned by the House of Lords. A majority of their Lordships emphasised the importance of justice between the parties. Lord Hutton stated:[53]

> … I think that justice requires that the plaintiffs, after discovery and interrogation should have the opportunity to cross examine the Bank's witnesses. ... The fact that a plaintiff does not have direct evidence as to the belief or foresight or motives of the defendant is not in itself a reason to strike out the action.

Arguably, a firmer grasp of the procedural philosophy that underpins case management objectives is apparent in the minority decision of Lord Hobbhouse who said:[54]

> … cases should be dealt with justly and that this includes dealing with cases in a proportionate manner, expeditiously and fairly, without undue expense and by allotting only an appropriate share of the court's resources while taking into account the need to allot resources to other cases. This represents an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party's conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pre-trial procedures.

As Zuckerman commented, ultimately the plaintiff's day in court:[55]

> … proved a futile exercise. It collapsed on day 256. The cost to the defendants alone are thought to be in the region of 80 million pounds. The costs in terms of judicial time are incalculable.

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49 Mediation commenced on the first day appointed for trial. Partial settlement of ANU's claims was reached two days later.

50 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR at [137].

51 *Three Rivers DC v Bank of England (No 3)* [1996] 3 All ER 558 (QB), cited in Zuckerman, above n 4, at 12.

*Three Rivers DC v Bank of England (No 3)* [2000] 2 WLR 15 (CA), Auld LJ dissenting.

*Three Rivers DC v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16; [2001] 2 All ER 513.

52 Zuckerman, above n 4, at 12.

53 *Three Rivers DC v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16; [2001] 2 All ER 513, at [147]-[148].

54 Ibid, at [153].

55 Zuckerman, above n 4, at 12.

Importantly this case was about the amount of procedural indulgence permissible to establish a credible factual foundation on which to base a cause of action. The case did not involve a novel or contentious point of law. In the view of the majority of judges who heard the summary judgment application, the plaintiffs had no realistic prospect of establishing the facts necessary to succeed within the existing law. If a realistic prospect of establishing the necessary facts had been denied the plaintiffs on efficiency grounds alone, the plaintiffs could claim that access to justice had been denied. As with procedural amendments, the question of justice between the parties in the context of a hopeless case must now be balanced with a broader view of the administration of justice that takes into account the reality that public resources are limited.

Unlike the *Aon* litigation there is no suggestion that judicial or party resources were wasted by the tactical manoeuvrings of either party. That said, it is possible that the specific positive obligations outlined in the Civil Procedure Act 2010 (Vic), particularly in relation to the disclosure of the existence of critical documents,[56] the duty to ensure costs are reasonable and proportionate,[57] and the duty to narrow the issues in dispute,[58] may have helped to prevent the incalculable waste of judicial time.

## IV. Settlement as an Integral Part of Civil Justice System

The first part of this paper has contended that the overarching objectives of civil justice reforms require the development of case management principles that are required to balance justice between the parties with the broader purpose of promoting a wider view of access to justice. In the context of courtbased adjudication, access to justice includes the public interest in timely delivery of judgments at reasonable cost. This approach recognises that the public value of adjudication is undermined to the extent that parties are unwilling or unable to consider adjudication because of cost and or delay. Perhaps a more fundamental challenge to the notion of civil justice comes from the institutional emphasis on the desirability of private settlement as the primary mode of dispute resolution.

Given the public value of adjudication described above, deep questions arise concerning the nature of the relationship between adjudication and settlement in modern civil justice systems. Can settlement be legitimately regarded as a form of civil justice? Does settlement undermine the public value of adjudication? Should settlement processes be encouraged or compelled? How should we decide which cases should not settle? These are important questions. The view taken in this paper is that adjudication and settlement are complementary rather than antagonistic processes in so far as quality settlement often depends on the development of common law by judges. Historically, settlement has been the traditional process of resolving disputes.[59]

The purpose of the reforms discussed in this paper is to promote just settlement without the delay and cost associated with settlement reached after expensive and time-consuming interlocutory procedures. It will be suggested that the effectiveness of pre-action protocols that are a criti-

56 Civil Procedure Act 2010 (Vic), s 26.

57 Ibid, s 24.

58 Ibid, s 23.

59 See LM Friedman "The day Before the Trials Vanished" (2004) 1(3) Journal of Empirical Legal Studies 689 at 689, where he stated that "[the] trial was never the norm, never the model way of resolving issues and solving problems in the legal system".

cal element in the just settlement of disputes is undermined by adversarial practices that focus on partisan interests of clients, rather than the just resolution of the dispute.

## V. Settlement as the Primary Mode of Dispute Resolution: Pre-Litigation Requirements

The importance of settlement in achieving the overarching objective of modern law reforms is made clear by the requirement that parties comply with extensive pre-litigation protocols. The basic features of pre-action protocols are outlined in s 34 of the Civil Procedure Act 2010 (Vic). In line with the Woolf reforms in England and Wales[60] and Australian federal legislation,[61] parties are expected to take reasonable steps to resolve the dispute without the need for civil proceedings in a court. Reasonable steps include the exchange of information and documents critical to the resolution of the dispute. Parties are also required to consider options for resolving the dispute "including but not limited to resolution through genuine and reasonable negotiations or appropriate dispute resolution."[62] Cost sanctions can be imposed by the Court if the parties commence proceedings without complying with the pre-litigation procedures.[63]

If the question of the success of pre-action protocols is measured simply in terms of diverting cases away from the Court, the protocols in England and Wales have been an unqualified success. The conclusion of the UK Civil Procedure White Book that the protocols have been a success "without a doubt"[64] is largely based on statistics that indicate that new litigation, post civil procedure reform, has reduced by 80 per cent in the High Court and 25 per cent in the County Court.[65] A more nuanced approach to the effectiveness of pre-action protocols points to the front loading of costs and in some cases increasing the costs of litigation.[66] What is clear is that pre-action protocols seek to encourage a sea change in the content and form of pre-issue negotiations. Requiring the parties to act reasonably in exchanging information[67] and to engage in genuine and reasonable negotiations is far removed from traditional adversarial bargaining strategies. Unregulated pre-

60 Pre-action protocols were implemented under the new Civil Procedure Rules 1998 which govern practice and procedure in the civil division of the Court of Appeal, the High Court and the County Courts.

61 Civil Dispute Resolution Act 2011 (Cth).

62 Civil Procedure Act 2010 (Vic), s 34(2)(b).

63 Ibid, Part 3.2.

64 Lord Justice Waller and IR Scott (eds) *Civil Procedure: The White Book Service 2009* (Sweet & Maxwell, London, 2009) at 2306–2307. Cited in Michael Legg and Dorne Boniface "Pre-action Protocols" (paper presented to Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne, Australia, (May 2010) <www.aija.org.au> at 5.

65 Ibid.

66 Genn, above n 12, at 56; Michael Zander "The Woolf Reforms: What's the Verdict?" in Deirdre Dwyer (ed) *The Civil Procedure Rules Ten Years On* (Oxford University Press, Oxford, 2010) at 418; See also Lord Justice Jackson *Review of Civil Litigation Costs: Final Report* (TSO, London, 2009) at 345, in which he found that generally there was a high degree of unanimity that specific protocols (which apply to personal injury claims, judicial review cases, defamation claims, professional negligence cases, clinical disputes, disease and illness claims and housing disrepair cases) served a useful purpose, but that the Practice Direction that operated as the default position for disputes not subject to a specific protocol should be abandoned.

67 Civil Procedure Rules 1998 (UK), r 4.1.

action dialogue was often characterised by tactical gamesmanship[68] involving exaggerated claims with scant regard to the available evidence.[69]

Aside from the contentious and important question of whether pre-action protocols reduce the cost of dispute resolution, the diversion of cases away from court-based adjudication raises fundamental jurisprudential questions about whether or not settlement should be regarded as a legitimate objective of the civil justice system[70] and further, the nature of the relationship between adjudication and settlement. In relation to the first question, it is clear from the overarching objectives referred to above[71] that settlement must be "just". If the matter is resolved by the Court "just" means the application of the correct law to the judicially determined facts. The application of the substantive law is also important when parties negotiate a settlement based on predicted legal rights. Pre-action protocols are intended to assist parties to bargain in "the shadow of the law"[72] by requiring the disclosure and exchange of information critical to the resolution of the dispute.

While it is not clear how many cases diverted from the courts have settled in the "shadow of the law," research indicates that parties who engage in collaborative law[73] mainly settle on the basis of anticipated legal entitlements.[74] Obviously, if the facts remain contested or a party wishes to argue a novel point of law, settlement is not normally appropriate. It is also possible that a legally correct settlement will not satisfy the interests of the parties if they are involved in a personal or business relationship or require a settlement that is beyond the reach of the "limited remedial imagination of the law".[75] A voluntary negotiated settlement of a dispute within a framework of a party's predicted legal rights seems to be a "just" resolution. The private nature of settlement does not of itself detract from the fairness of the settlement. More problematic is the mandatory referral by the Court of cases to alternative dispute resolution.[76]

In England and Wales active case management includes "encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the

68 Dick Greenslade "A Fresh Approach: Uniform Rules of Court" in Adrian Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure: Essays on Access to Justice* (Oxford, Clarendon Press, 1995) at 19–120.

69 For a detailed account of negotiating strategies that support the philosophy of pre-action protocols see Robert Mnookin, Scott Peppet and Andrew Tulumello *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Belknap Press, Massachusetts, 2004).

70 Fiss, above n 12.

71 Kornhauser, above n 14.

72 Ibid.

73 Where parties agree in advance that lawyers participate primarily for settlement purposes and cannot represent either party in litigation. See Pauline H Tesler *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (ABA, Chicago, 2001).

74 See *Custody, Access and Child/Spousal Support: A Pilot Project* (Ellis Research Associates, Department of Justice, Ottawa, 1995) <www.justice.gc.ca> cited in Julie Macfarlane *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, Vancouver, 2008).

75 Carrie Menkel Meadow "The Trouble with the Adversary System in a Multicultural World" (1967) 38 Wm & Mary L Rev 5, at 25.

76 Civil Procedure Act 2010 (Vic), s 66. In England, active case management includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating their use of such procedure". Civil Procedure Rules 1998 (UK), r 1.4(2)(a). See also the Court's comment in *Halsey v Milton Keynes General NHS Trust FCA* [2004] 4 All ER 920 at [10]. "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." See also the Australian decision in *Australian Competition & Consumer Commission v Lusk Pty Ltd* [2001] FCA 600.

use of such procedure.[77] In *Halsey v Milton Keynes*[78] the English Court of Appeal held that the Court had no power to order mediation. Further, the Court would decide whether a party's refusal to attend mediation was unreasonable on the facts.[79]

In most cases ADR is synonymous with mediation. The problem is particularly acute if the focus of the mediation "… is just about settlement rather than just settlement".[80] Quite aside from questions relating to the voluntary nature of mediation or a citizen's constitutional right to a trial, which is delayed rather than pre empted by compulsory mediation, it seems wrong in principle to undermine the public value of adjudication by compulsory reference to ADR. Although Lord Woolf acknowledged the benefits of mediation he did not propose that mediation should be compulsory, stating that:[81]

> I do not think it would be right in principle to erode the citizen's existing entitlement to seek a remedy from the Civil Courts, in relation either to private rights or to the breach by a public body of its duties to the public as a whole.

This point serves to reinforce the importance of adjudication and hence promote meaningful access to adjudication in the ways described in the first part of this paper.

That said, adjudication, even if efficiently managed by case management principles, is likely to be more expensive and more time consuming than settlement. The purpose of pre-action protocols is to promote early settlement in accordance with predicted legal rights. If settlement is not achieved, pre-action protocols contribute to promoting efficient adjudication by narrowing down the issues in dispute.

## VI. Complementary Relationship Between Adjudication and Settlement

Modern reforms to the civil justice system clearly contemplate that the just resolution of disputes can be achieved by either court-based adjudication or settlement. This paper has suggested that settlement is not in itself antagonistic to adjudication providing the public value of adjudication is not eroded by compulsory court-directed mediation.[82] Compulsory attendance at mediation, particularly if the focus of the mediation is resolution of a civil dispute without regard for legal rights, does indeed rightly provoke Dame Hazel Genn's memorable question "ADR and civil justice:

77 Civil Procedure Rules 1998, r 2(a).

78 *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920.

79 Civil Procedure Rules 1998, r 1.4(2); Part 4.4 provides that, in relation to costs, the Court can take into account whether the parties have tried ADR. Cf *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1479 (Ch) where the successful defendant was denied costs because they had not agreed to mediation. Also Lord Justice Clarke's speech – at the mediation conference 2001 – Court has jurisdiction to order mediation. Cited in Genn, above n 12, at 102.

80 Genn, above n 12, at 117.

81 Lord Woolf, *Interim Report* above n 28, at ch 4 [4].

82 In New Zealand the District and High Court Rules provide for mediation as a means of dispute resolution providing the parties agree to it. See District Court Rules 2009 Court, r 1.7 and the Judicature Act 2008 Schedule 2 Part 7, Sub 8 7.79(5).

what's justice got to do with it?".[83] This position is in stark contrast with pre-litigation requirements that compel parties to disclose critical information necessary to allow legal representatives to evaluate legal merits in light of factual background to the dispute. Even if the case does not settle, the exchange of documents is intended "to clarify and narrow the issues in dispute in the event that civil proceedings are commenced".[84] One English District Judge noted that pre-action protocols have had a positive impact on the efficient conduct of proceedings in so far as:[85]

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

Justice Dyson observed in the *Burrells Wharf* case[86] that the benefit of disclosure before proceedings are issued saves costs by closely defining the issues at an early stage and assists to dispose fairly of anticipated litigation.[87] Pre-action protocols have attracted a number of critics who claim that they result in the front loading of costs[88] and the potential for satellite litigation.[89]

## VII. Conclusion

In an eloquent criticism of the role of the court and counsel in the conduct of the *Aon* litigation Justice Heydon remarked that:[90]

> The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another.

Reforms to civil justice have proceeded on the assumption that unrestrained adversarial litigation culture is a structural impediment to the efficient functioning of the civil justice system. Case management principles that clearly define the objectives of court-based adjudication signal the determination of policy makers "to change the whole culture, the ethos applying in the field of civil litigation."[91] The purpose of changing litigation culture, which is illustrated by the injunction that judges encourage the parties to co-operate in the conduct of litigation, is intimately connected with reshaping the traditional idea of what constitutes civil justice. The focus of judicial justice is

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83 Genn, above n at 12, at 78. As with negotiated settlements the position is quite different if properly represented parties chose to ignore legal rights to foster personal or business relationships. In New Zealand it is noteworthy that family mediations concerning child care issues must recognise that the best interests of the child are paramount statutory provision. The pilot mediation scheme in Auckland is voluntary and mediators are drawn from a panel of senior barristers.

84 Civil Procedure Act 2010 (Vic), s 34(1)(b).

85 Peysner and Seneviratne, above n 16, at 11–12.

86 *Burrells Wharf Freehold Ltd v Galliard Homes Ltd* [1999] 2 EGLR 81.

87 Ibid, at 83.

88 Zander, above n 17.

89 Legg and Boniface, above n 64, at 22.

90 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR, at [156].

91 The Lord Chief Justice, announcing the general Practice Direction of 24 January 1995 (1995) 1 WLR 262. Cited in Simon Roberts and Michael Palmer *Dispute Processes: ADR and the Primary Forms of Decision-making* (Cambridge University Press, Cambridge, 2005).

no longer exclusively on the partisan interests of the parties. The efficient administration of justice now explicitly requires the judiciary to balance the interests of the parties with the overriding public interest in meaningful access to the Courts. Given the public interest in prompt adjudication the view that "costs are a panacea"[92] is no longer appropriate. This consideration applies particularly in circumstances where the delay arises from parties seeking a tactical advantage.

The effectiveness of case management in achieving overarching objectives is largely dependent on acceptance by the judiciary and lawyers that the public value adjudication and the corresponding public interest in the efficient use of judicial resources is incompatible with an unrestrained adversarial culture. Culture change is also at the core of the effectiveness of early settlement initiatives. Settlement is now institutionally entrenched as the primary mode of dispute resolution. It has been argued in this paper that "negotiated justice" is not necessarily anti-adjudication. Providing settlement is based on the predicted legal rights of the parties, unless the parties choose to incorporate non-legal interests into the agreement. There is no principled reason why settlement should not be considered a legitimate aim of the civil justice system. Even if the dispute is not resolved by the informal exchange of information required by pre-action protocols, the disclosure of information should assist the court with the early identification of the issues and thereby assist with the efficient management and disposal of the case. Perhaps more testing than the question of the legitimacy of the primary role of settlement in resolving civil disputes, are questions relating to the cost effectiveness of pre-action protocols. The front loading of costs and the possibility of satellite litigation have been identified as concerns that completely undermine the purpose of pre-action protocols. It is possible that technical amendments, including tailoring the requirements of protocols to particular causes of action, may increase their effectiveness. Ultimately, however, the effectiveness of pre-action protocols is largely dependent on lawyers and parties abandoning traditional adversarial negotiations and embracing the broader philosophy of rules that encourage the early, just and proportionate resolution of disputes with minimal legal formality.

92 *Cropper v Smith* (1884) 26 Ch D 700 at 711.