

# SETTLING FOR LESS: HOW THE RULES OF CIVIL PROCEDURE OVERLOOK THE PUBLIC PERSPECTIVE OF JUSTICE

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## 1. Introduction

Learned Hand once wrote, “As a litigant I should dread a lawsuit beyond almost anything short of sickness and death”.<sup>1</sup> There is little doubt that many share this sentiment. Going to trial is an expensive, frustrating and time-consuming way to resolve a dispute.<sup>2</sup> Perhaps unsurprisingly, then, a trial is also a rather uncommon manner of dispute resolution; as few as 3% of civil actions commenced are resolved through a trial.<sup>3</sup> Far more cases end in settlement.<sup>4</sup>

The statistics regarding the number of cases that make it to trial and, more importantly, Ontario’s Rules of Civil Procedure support the assertion that “a trial is a failure”.<sup>5</sup> A number of the rules

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1. Learned Hand, “The Deficiencies of Trials to Reach the Heart of the Matter”, in Association of the Bar of the City of New York, *Lectures On Legal Topics, 1921 — 1922* (New York: The Cornwell Press, 1926), p. 89 at p. 106.
2. Although this article will refer to trial, the arguments can, for the most part, also apply to cases that fall within the jurisdiction of public administrative tribunals, such as the Human Rights Tribunal of Ontario.
3. Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (the Rules). Sources vary as to the precise proportion of cases that settle prior to trial, but there is no doubt that the vast majority of cases end in settlement: see *e.g.*, Blanca Fromm, “Bringing Settlement Out of the Shadows: Information about Settlement in an Age of Confidentiality” (2001), 48 U.C.L.A. L. Rev. 663 at p. 664 (noting that less than 3% of cases go to trial); Judith Resnik, “Managerial Judges: The Potential Costs” (1982), 96 Harv. L. Rev. 374 at p. 406, note 125 (stating that 85-90% of federal civil suits end in settlement); Marc Galanter and Mia Cahill, “Most Cases Settle’: Judicial Regulation of Settlements” (1994), 46 Stan. L. Rev. 1339 at p. 1340 (stating that two-thirds of cases settle without a definitive judicial ruling).
4. Alternative dispute resolution, also known as “ADR”, consists of a variety of different processes, including mediation and arbitration. For the purposes of this article, all components of the category will be included in the term “settlement”, indicating any situation in which parties resolve their dispute without a judicial ruling.
5. Samuel R. Gross and Kent D. Syverud, “Getting to No: A Study of

governing our civil justice system are in place specifically to encourage parties to resolve their disputes without going to court: rule 24.1 requires mandatory mediation, Rule 49 creates cost incentives to settle, and Rule 50 encourages settlement through pre-trial conferences.

These rules ensure that the justice system is able to meet parties' needs for dispute resolution, even if not through the traditional means of going to trial. The institutionalization of settlement is largely celebrated as a victory for those seeking greater access to justice. It is not, however, a victory without sacrifice.

The Rules push litigants to settle; they create a number of mandatory steps in the civil litigation process requiring parties to actively decline the opportunity to settle their dispute out of court. These rules strive to achieve the private goals of the justice system by promoting efficient dispute resolution. By making this our priority, however, we overlook the big picture and fail to consider a number of important public goals such as the predictive value of precedent and findings of fact to potential future litigants, the long-term efficiency of the justice system, equality in power dynamics, deterring undesirable behaviour, and achieving justice in each case.

The Rules promoting settlement introduce significant uncertainty and inequality into our civil justice system and do not satisfactorily achieve the objectives of promoting efficiency and access to justice. The Rules undermine extremely valuable objectives by encouraging settlement in every case, even where it is not necessarily desirable.

On the surface, it may appear that prioritizing parties' needs over the public interest is justifiable because it is necessary to respect party autonomy in our adversarial litigation process. Within the adversarial system a case is, above all, about the litigants' dispute and our civil justice system must honour the parties' right to run their case as they deem appropriate. The public interest cannot force parties to go to trial, no matter what benefits the public could reap if certain issues were required to proceed to trial.

However, by pushing litigants towards settlement, the Rules can serve to detract from the principle of party autonomy. Litigants would be in a better position to run their own case if they were free from outside influence regarding the choice to settle or proceed to trial. The Rules, however, clearly strive to push litigants to settle rather than resolve their disputes in court. If the Rules were revised to remove or reduce their bias towards settlement, our civil justice system would better permit litigants to make autonomous choices

Settlement Negotiations and the Selection of Cases for Trial" (1992), 90 Mich. L. Rev. 319 at p. 320.

having considered the advantages and disadvantages of their dispute resolution options as they apply to their particular case.

This article is not, as Professor Owen Fiss would say, “against settlement”.<sup>6</sup> It does not intend to suggest that we push more cases to trial to achieve public goals or change the Rules to make achieving a settlement more difficult. Rather, it considers the value of dispute resolution in a judicial setting and proposes that a more appropriate blending of the public and private goals of justice should be adopted within the Rules. In doing so, our civil justice system could achieve more of its goals and would better serve both party autonomy and the public interest.

Part II of this article begins by outlining the basic tenets of the private and public perspectives of our justice system. Part III discusses the specific rules that promote settlement, what they permit, and what they try to achieve. Part IV addresses the consequences of promoting settlement through the Rules. Settlement exacerbates issues of uncertainty, inequality and efficiency in the justice system. Through settlement, the Rules strive to improve access to justice, but it is questionable if it is, in fact, justice that results. The conclusion considers potential amendments that would enhance the Rules’ neutrality between the public and private perspectives and between settlement and trials as dispute resolution options.

## **2. Private and Public Views of the Civil Justice System**

The civil justice system must balance and prioritize different perspectives of its goals. As there are many different views about the purpose of the courts, however, one’s view about the Rules of Civil Procedure’s treatment of settlement will depend on one’s vision of the civil justice system as a whole — whether it is designed to serve the private interests of litigants or the broader public interest.

### **(1) The Private View**

The private view is perhaps the more traditional view of the justice system and could also be called the “dispute resolution” view. Those adhering to the private view argue that the civil justice system exists solely to resolve disputes brought to it by litigants.<sup>7</sup> In this model, a trial is a “self-contained contested transaction between two private parties—a plaintiff seeking redress for an injury inflicted by a directly

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6. Owen M. Fiss, “Against Settlement” (1984), 93 *Yale L.J.* 1073 at p. 1085.

7. Richard L. Marcus, “The Discovery Confidentiality Controversy”, [1991] *U. Ill. L. Rev.* 457 at p. 468.

adverse defendant”.<sup>8</sup> Any information made available to the public as a result of this transaction, in the eyes of private-view advocates, is merely “a side effect”.<sup>9</sup> Professor Arthur Miller summarizes the private perspective quite clearly when he states that “the function of the judicial system is to resolve private disputes, not to generate information for the public”.<sup>10</sup>

Settlement aligns nicely with this view: to resolve their disputes, litigants may negotiate and compromise with each other, eventually entering into private contracts setting out their resolution.<sup>11</sup> Settlement thus accomplishes the private-view goals of the civil justice system while honouring the values of our legal system: consent, participation, empowerment, privacy, efficiency and access.<sup>12</sup>

The private view of civil justice does not share the notion that the justice system has objectives beyond that of dispute resolution. The primary justification for this exclusion of public goals is party autonomy; we have a “party-controlled and party-initiated legal system” in which the dispute belongs to the litigants.<sup>13</sup> It is the parties to the lawsuit who bear the expense and risk of litigation and who will be affected most deeply by the resolution arrived upon.<sup>14</sup> A private-view advocate would ask, “How can the desires of the uninvolved public be prioritized over those of the parties, who are so thoroughly invested in the litigation?”

## (2) The Public View

Proponents of the public view advocate for a broader view of the goals of the civil justice system. Professor Owen Fiss articulates the opposite view of Professor Miller, stating: “Courts exist to give

8. Robert J. Pushaw, Jr., “Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts” (1994), 69 *Notre Dame L. Rev.* 447 at p. 458, note 62.

9. Arthur R. Miller, “Confidentiality, Protective Orders, and Public Access to the Courts” (1992), 105 *Harv. L. Rev.* 427 at p. 431.

10. *Ibid.*, at p. 441.

11. Leandra Lederman, “Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements” (2000), 75 *Notre Dame L. Rev.* 221 at p. 224.

12. Carrie Menkel-Meadow, “Whose Dispute is it Anyway?: A Philosophical and Democratic Defence of Settlement (In Some Cases)” (1995), 83 *Geo. L.J.* 2663 at pp. 2669-670.

13. *Ibid.*, at p. 2696 and 2680.

14. Laurie Kratky Doré, “Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement” (1999), 74 *Notre Dame L. Rev.* 283 at p. 298.

meaning to our public values, not to resolve disputes".<sup>15</sup> Fiss's view is more extreme than others', arguing that courts' primary duty is to give force to the values in statutes and the Constitution.<sup>16</sup> He has been criticized for placing too much value on "structural transformation" lawsuits, which have as their subject-matter a question of public importance relating to governmental institutions (such as *Brown v. Board of Education*, for example).<sup>17</sup> In this model, litigants' private disputes are a mere vehicle for consideration and reform of the common law.

Scholars more moderate than Fiss, however, also subscribe to the public view. First among their concerns with the private view is that it underplays the importance of precedent. In resolving disputes, courts create and adjust legal rules that have fundamental value, both for future litigants and for non-litigants who look to the common law to guide their behaviour.<sup>18</sup> Professor David Luban argues that the civil justice system is responsible for creating "public goods", which include precedent, legal rules, lawyers' advocacy skills, and fact discovery.<sup>19</sup>

Public-view contenders find considerable support in the fact that the civil justice system can operate only with public funds. Public resources are used to build and maintain courthouses, pay judges, and fund the administrative structure supporting them.<sup>20</sup> Surely, a public-view proponent would argue, the system must provide the public with some benefit; solely providing dispute resolution services to private actors would be insufficient in light of the institution's public status.

### (3) The Public-Private Spectrum

In reality, our justice system can function effectively only if it balances the private and public perspectives. The two need not be seen as mutually exclusive options; to the contrary, neither private nor public values in our civil justice system can be realized in isolation.

The chief argument supporting each view demonstrates this; the

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15. Owen M. Fiss, "Foreword: The Forms of Justice" (1980), 93 Harv. L. Rev. 1 at p. 29.

16. Fiss, *supra*, footnote 6, at p. 1085.

17. *Brown v. Board of Education* [author pls provide cite for this case] See David Luban, "Settlements and the Erosion of the Public Realm" (1995), 83 Geo. L.J. 2619 at pp. 2629-631.

18. *Ibid.*, at pp. 2622-623.

19. *Ibid.*, at pp. 2623-625.

20. Fiss, *supra*, footnote 6, at p. 1085.

question of who bears the cost of civil justice gets us nowhere closer to determining how to prioritize the two perspectives. Although privately funded disputes between private actors drive the system, there would be no venue for litigants to resolve these disputes without public funds supporting the civil justice system. Moreover, the public's funds cannot create any public goods unless private parties take on the risk and expense of litigating. Professor Erik Knutsen suggests that "it is a rosy picture of the litigation world indeed if one believes that litigants expend resources, time, and emotional energy in a lawsuit with the sole lofty goal of somehow contributing to the public commons".<sup>21</sup> It is a similarly rosy picture of the litigation world if one believes the public funds a mechanism designed for the purpose of allowing disgruntled neighbours to dispute the positioning of their fence.

When considering standard, non-aggregate disputes,<sup>22</sup> we need not pick a side; there is no reason why both perspectives cannot receive fair and relatively equal consideration. Not only can these perspectives be reconciled but they ought to be — the public holds an interest in efficient dispute resolution (as it pays the institutional costs of litigation),<sup>23</sup> and even seemingly inconsequential fender-bender claims have significant potential for clarification of our public values and the development of the common law.<sup>24</sup> Why, then, do the Rules prioritize the private perspective at the expense of public values?

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21. Erik S. Knutsen, "Keeping Settlements Secret" (2010), 37 Fla. St. U.L. Rev. 945 at p. 963.

22. This article does not address those concerns unique to complex litigation (mass torts, class actions, etc.). Such situations may call for public and private values to be balanced in a different manner; we will leave this question for another day.

23. Lederman, *supra*, footnote 11, at p. 256.

24. Although she is a proponent of the private perspective, Professor Carrie Menkel-Meadow concedes the public value within private litigation in her article "Whose Dispute Is It Anyway" (*supra*, footnote 12, at p. 2667, note 27). She calls on her personal experience mediating auto accident cases in Los Angeles, where factual disputes about small amounts of money raised the issue of how the racial composition of juries affects damage awards, addressed widespread claims of fraud by plaintiffs and their doctors and lawyers, and posed larger questions of the difference between law "on the books" and in reality on the street. Furthermore, even those civil cases that do not address novel or interesting issues of law can create useful precedent relating to the appropriate quantum of damages, or by applying the law to a particular set of facts that may be useful for future litigants.

### 3. Rules of Civil Procedure

#### (1) Rules in Question

A number of the Ontario Rules either explicitly or implicitly encourage parties to settle. This article will focus on three: rule 24.1, Rule 49 and Rule 50.

#### (A) Rule 24.1 and Mandatory Mediation

Rule 24.1 establishes a mandatory mediation program in Ottawa, Toronto and the County of Essex. Mediation must take place within 180 days after the defence is filed and must be arranged before the action is set down for trial. Matters discussed in mediation sessions are deemed to be without prejudice.<sup>25</sup>

Rule 24.1 has a few exceptions. Parties need not submit to mediation under the rule if: (i) they are required to do so under another rule or statute;<sup>26</sup> (ii) the action relates to Rule 64 (for mortgages), the *Construction Lien Act*,<sup>27</sup> or the *Bankruptcy and Insolvency Act*;<sup>28</sup> (iii) the action is certified as a class proceeding under the *Class Proceedings Act, 1992*;<sup>29</sup> or (iv) the court approves a party's motion seeking exemption from the rule.<sup>30</sup> These exceptions, however, are rather narrow. Even the broadest exception, which under rule 24.1.05 allows parties to bypass mediation upon court approval of a party's motion, is quite restrictive; in *Owen v. Hiebert*,<sup>31</sup> a civil sexual assault case, a party's motion to avoid mediation on the basis that she feared being in the same room as the other party was denied (in spite of his consent). The court held that the opposing party's consent does not mandate the granting of an exemption order and that conducting mediation with the parties in different rooms and providing a mediator trained to address issues of violence could accommodate any concerns.<sup>32</sup>

Rule 24.1.01 states the purpose of the mandatory mediation rule: "to reduce cost and delay in litigation and facilitate the early and fair

25. Garry D. Watson and Michael McGowan, *Ontario Civil Practice* (Toronto: Carswell, 2011), p. 645.

26. Rules of Civil Procedure, rule 24.1.04(2)(a) and (b).

27. R.S.O. 1990, c. C.30.

28. R.S.C. 1985, c. B-3; *ibid.*, rule 24.1.04(2)(d), (e), and (f).

29. S.O. 1992, c. 6. *Ibid.*, rule 24.1.04(2.1)(b).

30. *Ibid.*, rule 24.1.05.

31. (2000), 50 O.R. (3d) 82, 11 C.P.C. (5th) 302, 2000 CarswellOnt 1900 (Ont. S.C.J.).

32. *Ibid.*, at paras. 19-20.

resolution of disputes”.<sup>33</sup> The focus of the rule is quite clear: the private goals of civil justice are paramount. The rule explicitly promotes the goals of efficient dispute resolution, in spite of the potential for dispute resolution to occur in the shadow of the law.

### **(b) Rule 49 and Cost Consequences for Failing to Settle**

Rule 49.10 provides for unfavourable costs orders against a party who declines to settle where the rejected settlement offer would have provided a better result for that party than the result of the trial.<sup>34</sup> These consequences provide incentives for parties to make reasonable offers and for recipients of offers to take them seriously.

Rule 49.10(1) stipulates that where the plaintiff’s recovery is equal to or greater than the amount of the plaintiff’s earlier offer to settle, the plaintiff will receive partial indemnity costs up to the date of the offer and substantial indemnity costs thereafter.<sup>35</sup> Rule 49.10(2) provides that where a defendant’s offer to settle was equal to or greater than the plaintiff’s recovery, the plaintiff is entitled to partial indemnity costs only up to the date of the offer, and the defendant is entitled to partial indemnity costs thereafter.<sup>36</sup>

By providing concrete financial consequences for failing to settle, Rule 49 considers only the private view and neglects to consider that one might refrain from settlement for reasons above and beyond the dispute’s immediate result. The rule contemplates the benefits of settlement but overlooks the negative effects.

### **(c) Rule 50 and Pre-trial Conferences**

Rule 50 requires parties to participate in a pre-trial conference before a judge or case management master to discuss the possibility of settlement.<sup>37</sup> The purpose of the rule is stated in Rule 50.01: “to provide an opportunity for any or all the issues to be settled without a hearing . . . ”.<sup>38</sup>

Like rule 24.1, Rule 50 institutionalizes opportunities to settle. This rule is problematic for a few reasons. First, while pre-trial conferences may help parties reach a resolution to their dispute more efficiently than through a trial, they do not provide a means for accomplishing the public goals of the civil justice system. Second, the

33. Rules, *supra*, footnote 3, rule 24.1.01.

34. Watson and McGowan, *supra*, footnote 25, at p. 1044.

35. Rules, *supra*, footnote 3, rule 49.10(1).

36. *Ibid.*, rule 49.10(2).

37. *Ibid.*, rule 50.02 and 50.06.

38. *Ibid.*, rule 50.01.



rule makes such conferences mandatory, creating yet another hoop for those litigants desiring a trial to jump through in the civil justice process.

Finally, it is no secret that many judges lean on parties to settle in the course of a pre-trial conference. In such a case, the imbalance between private and public goals in the Rules is compounded. Not only do the Rules compel litigants to endure additional steps in the civil justice process in the hope that they will settle, but Rule 50 also creates an opportunity for judges to apply pressure for settlement in an attempt to remove cases from an overcrowded docket. Pre-trial conferences have the potential to place significant pressure on litigants to settle, which can cloud litigants' judgment as to the best option for resolution in their individual case.

## 2. What Do the Rules Strive to Accomplish?

All three of the Rules considered above aim to encourage settlement. This is, in many ways, a justifiable goal for our civil justice system; settlement can reduce the financial and emotional expenditures a trial requires as well as save time in coming to a resolution. Motives for private litigants to settle abound. In his paper, "Justice Rushed is Justice Ruined", Justice H. Lee Sarokin even goes so far as to suggest that the following arguments in favour of settlement should be served along with the pleadings:<sup>39</sup>

By settling this dispute:

1. You save the cost of litigation.
2. You avoid the time, irritation, and emotion of trial.
3. If you are the recipient of money, you will have its immediate use.
4. If you are the payor, you avoid the possibility of a larger verdict.
5. All uncertainties are eliminated — no one in a trial knows what the final outcome will be.
6. The best result is a settlement with which no one is completely satisfied.

The reasons in favour of settlement can essentially be broken down into two arguments. Firstly, settlement can reduce litigants' costs and thus remove financial barriers to justice. Secondly, settlement can provide litigants with a resolution to their disputes more efficiently than a trial.

The high costs of litigation pose a significant barrier to justice for much of the population. With Legal Aid funding extremely limited

39. H. Lee Sarokin, "Justice Rushed is Justice Ruined" (1986), 38 Rutgers L. Rev. 431 at p. 433.

and *pro bono* services difficult to obtain for general civil disputes, taking a case to trial is simply not a viable option for many. Providing opportunities and incentives to settle within the Rules makes reaching a resolution more accessible for litigants with financial constraints.

Efficiency is an explicit goal of the rules promoting settlement. Docket congestion is a serious problem in the civil justice system and causes lengthy waits for trial dates. For parties seeking to recover damage awards quickly, settlement is likely the most attractive option. Furthermore, some scholars argue that settlement, by concluding one dispute, permits scarce judicial resources to be used for other pending litigation — including those disputes that relate more obviously to the public interest.<sup>40</sup>

The Rules accord well with the private “dispute-resolution” model. They provide for a peaceful, efficient end to parties’ disputes and aim to lower litigants’ costs. These Rules, however, are focused solely on the private viewpoint and fail to contemplate the costs of settlement to the general public.

#### **4. Negative Consequences of Settlement**

For all its advantages, settlement carries with it many disadvantages as well. One need only consider the public perspective of civil justice to come to this conclusion. If parties elect to settle, the public purposes of litigation are simply not realized. Settlements inject significant uncertainty into our civil justice system and perpetuate issues of inequality between opposing parties. Furthermore, while the Rules promoting settlement may help parties reach resolutions to their disputes, they do not necessarily provide access to justice.

##### **(1) Settlement Fails to Create Precedent**

When disputes are considered at trial, the judge articulates her determination of the result in writing with reasons. The resolution of the dispute creates precedent. When parties settle their dispute, no judicial precedent is created.

Precedent is extremely valuable for litigants and non-litigants alike. It allows our civil justice system to accomplish goals that serve the public interest such as interpreting and developing the common law, finding facts to be used by future litigants, and deterring negligent and other wrongful behaviour.

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40. Lederman, *supra*, footnote 11, at p. 261.

**(a) Failure to Interpret and Develop the Common Law**

The development of the common law through judicial interpretation is a key aspect of our legal system in Canada. Trial decisions provide predictive value — without precedent, lawyers cannot reliably evaluate what the expected outcome of a case may be. Settlements, on the other hand, are frequently confidential;<sup>41</sup> even when parties do not include confidentiality clauses in their settlements, the documentation rarely provides any reasons for the result.<sup>42</sup>

Any information resulting from a settlement, without reasons, cannot have much influence on other cases. After all, a settlement does not constitute a finding of fault — it usually means the parties simply compromised. Plaintiffs may settle because they face issues of contributory negligence, credibility, or a lack of evidence.<sup>43</sup> Defendants may settle even if they are not at fault because they simply do not wish to spend the time and money taking a case to trial, or because they seek to keep certain information, such as intimate personal details or industry secrets, away from the public eye.<sup>44</sup> Without certainty as to why the parties settled and what details were agreed upon along the way, settlements provide little, if any, predictive value.

The problem perpetuates itself. Parties frequently settle precisely because there is little or no valuable precedent available to them. Litigants and lawyers are unlikely to elect to go to trial if they are not sufficiently confident in the likely application of the law to the facts before them to roll the dice and trust the outcome of their case to the whim of a jury or judge.<sup>45</sup>

This is particularly a problem in discrimination litigation in employment contexts. Professor Minna J. Kotkin has observed that confidential settlement is the norm in employment discrimination lawsuits, insisted upon by corporate defendants who fear a public record will result in a barrage of further lawsuits by disgruntled employees.<sup>46</sup> Kotkin argues that not only do these “invisible settlements” skew the discourse about employment discrimination, but they make assessments of liability and damages nearly impossible in future claims.<sup>47</sup> She offers the example of a woman claiming that

41. Knutsen, *supra*, footnote 21, at p. 950.

42. Luban, *supra*, footnote 17, at p. 2639.

43. Knutsen, *supra*, footnote 21, at p. 966.

44. Knutsen, *ibid.*, at p. 952.

45. Fromm, *supra*, footnote 3, at p. 670, note 24.

46. Minna J. Kotkin, “Invisible Settlements, Invisible Discrimination” (2006), 84 N.C. L. Rev. 927 at p. 929.

she had been denied a promotion on the basis of her gender and was the target of sexual harassment. Without precedent illustrating what is required for findings of liability in these circumstances and the appropriate quantum of compensatory and punitive damages, lawyers are unable to evaluate the chances of success of the claim, and potential resulting damages awards.<sup>48</sup> Professor Menkel-Meadow agrees that it is precisely those cases in which the public has a strong interest that are driven out of the formal court system, as settlements preclude any judicial discussion of the factual or legal issues at play.<sup>49</sup>

Professor Luban makes the added point that, along with assisting lawyers and litigants to predict the outcomes of future cases, interpretation of the law in judicial reasoning provokes further argument. Adjudication serves the public interest by laying the groundwork for public conversation about the status of the law and the desirability of the obligations the law imposes.<sup>50</sup>

Fiss highlights how problematic a lack of legal precedent can be for the public interest when he observes that settlement is used to avoid both of the key elements of a common law legal system based on *stare decisis*: governance by existing legal rules and the enunciation of new rules from the application of existing rules to new facts.<sup>51</sup>

### **(b) Lack of Judicial Fact Finding**

It is not solely judicial interpretation of law that provides value to the public. Findings of fact are essential precedent as well. Proven facts provide future litigants, as well as trial and appellate courts, with context for the application of the law in a particular case.<sup>52</sup>

Facts can also hold significant value for non-litigants. The judicial fact-finding process is detailed and thorough. The power of judges to compel the production of documents and witness' testimony, in addition to their role as impartial decision-makers, makes for a detailed collection of tested information.<sup>53</sup> This can be useful for policy planning purposes, but perhaps more importantly the public can gain access to information that can affect their health and safety. A number of academics have argued that without asbestos product

47. *Ibid.*, at p. 931.

48. Kotkin, *supra*, footnote 46, at p. 969.

49. Menkel-Meadow, *supra*, footnote 12, at p. 2679.

50. Luban, *supra*, footnote 17, at pp. 2639-640.

51. Menkel-Meadow, *supra*, footnote 12, at p. 2679.

52. Laura Macklin, "Promoting Settlement, Foregoing the Facts" (1986), 14 N.Y.U. Rev. L.

53. *Ibid.*, at p. 597.

liability litigation, the public would have remained unaware of its dangers.<sup>54</sup> It has been also alleged that various settlements relating to pickup trucks, silicone breast implants, sleeping pills, heart valves, and painkillers have hidden information about product defects that are potentially dangerous to public safety.<sup>55</sup> While cases relating to public safety are surely a minority of civil litigation, a system that hides even a small amount of such information from public view to protect the interests of a wrongdoer should bear responsibility for any negative consequences that result. Also, one must remember that, as discussed in Part II, public concerns can be found in even a common and simple fender-bender or property dispute. Fact-finding has the potential to create value in all litigation.

### **(c) Inability to Influence Behaviour**

One of the goals of the civil justice system is behaviour modification; litigation has the potential to deter undesirable or negligent behaviour of non-litigants.<sup>56</sup> Without precedent, however, individuals do not become aware of judicial treatment of such conduct and thus have no opportunity to arrange their affairs to accord with accepted behaviour before potentially becoming a party in litigation themselves. In contrast, judicial decisions, which provide reasoning and a clear result, make the public aware of the current state of the common law; non-litigants in similar situations to that of the parties to that dispute may then respond accordingly.

Consider, for instance, the earlier example of workplace discrimination on the basis of gender. When such cases are settled out of court, businesses do not have the opportunity to reflect upon their practices on the basis of judicial discussion of the issue. If more cases of this sort were resolved in a trial setting with published reasons, businesses could better understand the practical application of the law. They could adjust their hiring, promotion, and retention practices to ensure they are in accordance with accepted human rights and employment law standards — and potentially head off future disputes in the process.

## **2. Settlement Perpetuates Existing Inequalities in the Justice System**

Inequality is always a concern in our civil justice system.

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54. *Ibid.*, at p. 592.

55. Luban, *supra*, footnote 17, at p. 2650.

56. Kotkin, *supra*, footnote 45, at p. 948.

Significant imbalance in the opposing parties' resources can bring into question whether any result is, in fact, just. Promoting settlement through the Rules exacerbates issues of inequality in the justice system. Disparity between parties' resources is worsened when settlement occurs more frequently and an institutional push towards settlement provides wealthier parties with the opportunity to exploit their opponents' financial disadvantage.

### (a) Effect of Disparate Resources

The process and results of settlement can be deeply affected by the resources available to each party to finance the dispute, and those resources are frequently distributed unequally. This is a significant concern at trial as well, as poorer parties are less able to collect and analyze the research needed to predict outcomes in any litigation situation. Settlement, however, has the potential to amplify distributional inequalities.

Of course, despite the fact that precedent is not created when a settlement is made, some knowledge of the result is out there — it is available to those who are in the know. The universally accessible sources of settlement information, however, are grossly insufficient. Specialized reporters publish some information about certain settlements, but settlement information is extremely limited in the grand scheme.<sup>57</sup> Media coverage of settlements has been found to be highly selective, with a strong bias towards cases addressing controversial issues with high, spectacular awards.<sup>58</sup> Professor Ben Depoorter explains in his article, “Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements”, that settlement information also circulates widely within the legal community in spite of confidentiality agreements.<sup>59</sup> The best source of settlement information, however, is personal experience. “Repeat players” not only have firsthand knowledge but also control who gets this information.<sup>60</sup> Although most lawyers take confidentiality of settlements seriously, those with more and better information will have the upper hand over their opponents<sup>61</sup> and parties who can afford well-seasoned lawyers can exploit the disadvantage of their adversary.

The guiding presence of an impartial judge at trial can mitigate

57. Ben Depoorter “Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements” (2010), 95 *Cornell L. Rev.* 957 at pp. 967-68.

58. *Ibid.*, at p. 969.

59. *Ibid.*, at p. 965.

60. Fromm, *supra*, footnote 3, at p. 665.

61. *Ibid.*, at p. 700.

disparity in knowledge and resources between parties. Judges may invite other persons to participate as *amici*, ask questions where appropriate, and give the benefit of the doubt to poorer litigants in their rulings in an attempt to make the process fairer.<sup>62</sup> While these measures may have only a small impact on moderating inequality, settlement, on the other hand, accepts bargaining on the basis of unequal resources as a legitimate part of the process.<sup>63</sup>

### **(b) Opportunities to Exploit Opponents' Financial Need**

The Rules provide incentives to settle, require litigants to attend mediation and pre-trial conferences to attempt to settle, and impose penalties for not accepting a settlement. These institutional forces push litigants to settle rather than participate in the open, public, and impartial trial process. With such rules, trial is no longer considered the culminating stage of the litigation process. Rather, it is a step the system seeks to avoid at all costs.<sup>64</sup> This imbalance between the private and public perspectives becomes clear when one considers the unintended consequences of pushing settlement in so many ways.

The overall impact of the three aforementioned Rules is not to gently nudge litigants towards settlement but rather to shove them in that direction. This is particularly problematic when one party is in financial need. Supported by the incentives and processes set out in the Rules, wealthier parties may be able to induce the poorer party to enter into an inadequate or unfair settlement if the poorer party needs money immediately or appears not to have sufficient resources to make it to trial.<sup>65</sup> Consent to settlement cannot be considered legitimate where it is hardly a choice for a disadvantaged party to enter into it. In such cases, an important justification for settlement, party autonomy, is essentially lost.<sup>66</sup> In an attempt to motivate parties to efficiently achieve their private goals of dispute resolution and compensation, the Rules provide opportunities to exploit and exacerbate problems of inequality.

### **(3) Does Settlement Promote Access to Justice?**

A primary goal of the Rules promoting settlement, as mentioned in Part 3 of this article, is to remove barriers to justice. In addition to the

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62. Fiss, *supra*, footnote 6, at pp. 1076-1077.

63. *Ibid.*, at p. 1078.

64. Steven C. Yeazell, "The Misunderstood Consequences of Modern Civil Process", [1994] Wis. L. Rev. 631 at p. 659.

65. Fiss, "Against Settlement", *supra*, footnote 6, at p. 1076.

66. Menkel-Meadow, *supra*, footnote 12, at p. 2693.

problems of uncertainty and inequality created and perpetuated by settlement, the effects of the Rules invite the question: is it truly access to justice that results?

### **(a) Inefficiency**

As already discussed, settlements deny future litigants information relevant to their dispute by failing to create precedent. This lack of predictive value may serve to negate the goals of efficient dispute resolution the Rules strive to achieve. Although, in the short term, each individual dispute may be resolved quickly, it is questionable if settlement achieves long-term efficiency. Just the opposite may be true: where information from settlements is not passed down or saved, the administrative and information costs expended in a case are incurred repeatedly. As Knutsen notes, without precedent, “litigants are forced to go to the expense and trouble of essentially relitigating disputes that have already been resolved”.<sup>67</sup> Where a case at issue would provide precedent to help resolve future cases, the argument that settlement helps relieve docket congestion no longer holds water.<sup>68</sup> In the short term, access to the civil justice system may be increased, but it is unclear if the rules in question will, in fact, increase access in the long run.

Furthermore, both Rules 24.1 and 50 add additional steps to the civil litigation process, mandatory mediation and pre-trial conferences. Each of these steps increases the length of the process, meaning those cases that reach trial actually take longer to proceed through the system. In addition, parties’ lawyers must prepare for and attend mediation and pre-trial conferences, which increase the overall cost of an action. Although the Rules attempt to promote efficient and cost-effective resolution through settlement, those cases that do not settle are forced to pay the price.

### **(b) Injustice**

As mentioned in Part 4(2), unjust results arise when parties exploit inequalities to coerce settlement. This is not the only injustice settlement has the potential to create.

Injustice also results when the settling parties agree they can pass problems, losses, or risks to a third party. Professor Luban provides an interesting example of how settlement can create a “public bad”: if a halfway house for formerly dangerous criminal offenders were

67. Knutsen, *supra*, footnote 21, at p. 962.

68. Lederman, *supra*, footnote 11, at p. 261.



proposed in a wealthy neighbourhood and its residents sued the proponents, the parties may settle their dispute by agreeing that the halfway house will be built in a poor neighbourhood instead.<sup>69</sup> In this situation, the litigants achieve an outcome that is satisfactory to both parties rather efficiently, accomplishing their private goals with ease. However, this comes at the expense of uninvolved and unrepresented parties who are forced to absorb potential negative consequences. Settlement may apportion a loss to someone who is not even sitting at the bargaining table.

Furthermore, numerous academics espousing the benefits of settlement note that confidentiality may be used as a bargaining chip in settlement negotiations. Injured plaintiffs may use the defendant's desire to avoid negative publicity and future lawsuits to their advantage to receive greater damages.<sup>70</sup> Defendants with high stakes in the dispute may be able to "purchase" a confidential settlement, all the while avoiding unfavourable judicial precedent.<sup>71</sup> As the argument goes, it creates a win-win situation — the plaintiff has a powerful tool at her disposal and can receive adequate compensation and the defendant can evade the negative consequences she fears.

But what does the defendant's ability to avoid future lawsuits and negative publicity say about the goal of achieving a just result? It appears that settlement provides an avenue for defendants to sidestep legitimate claims and escape public knowledge or future legal consequences. If nobody knows that a defendant has acted negligently, potential plaintiffs who have been harmed by this wrong are not likely to seek redress. This is certainly not the traditional conception of justice for which, one hopes, our legal system strives.

## 5. Conclusion

Ultimately, the Rules promoting settlement prioritize quantity over quality; they aim for the resolution of as many disputes as possible without any concern as to whether the measures used to promote efficient results ensure that these results are just. As Justice Sarokin observes, the number of cases resolved and the speed of resolution is but one measure of the success of a justice system; it cannot be the only one.<sup>72</sup> Those who administer the civil justice system must consider the quality of justice that results.

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69. David Luban, "The Quality of Justice" (1989), 66 *Denv. U.L. Rev.* 381 at p. 404.

70. Knutsen, *supra*, footnote 21, at p. 951.

71. Depoorter, *supra*, footnote 56, at pp. 958-59.

72. Sarokin, *supra*, footnote 38, at p. 431.

This article has explored a problem — but what are the solutions? Some academics advocate proposals for making settlements more public: judicial approval of settlement agreements with a presumption of openness, or a private market for settlement information.<sup>73</sup> These suggestions, while offering potential for remedying the issue of uncertainty, are likely unworkable. The use of secrecy as a bargaining chip provides advantages for both the plaintiff and defendant in a particular case: both the party desiring to keep her private affairs private and the party who stands to benefit from a better deal as a result are able to arrive at a resolution to the dispute with which they are content. In a system that holds party autonomy sacred, the threat of making settlements public would hurt more than help.<sup>74</sup>

Is there, then, a way to gain useful precedent from settlements? In light of the potential benefits of secret settlements to private parties, our justice system's dearly held value of respecting party autonomy would suggest not. But this conflict of values does not mean our Rules must go so far in institutionalizing and incentivizing settlement.

It would appear that Rules 24.1, 49, and 50 are a “Band-Aid” solution to docket congestion. In an ideal world, we would be able to achieve the private goals of efficient and cost-effective dispute resolution through the existing trial system, which also effectively addresses the public perspective concerns of creating precedent, developing the common law, and deterring wrongful behaviour.

The best solution, perhaps, would be Rules that allow, but do not push, for settlement. At present, the Rules essentially require litigants who desire a trial to opt *out* of settlement at several different points in the pre-trial process. Many of the negative consequences of settlement could be alleviated (albeit not cured) if the Rules provided opportunities for the parties to a lawsuit to opt *in* to settlement discussions. For instance, rather than requiring all litigants to attend mandatory mediation and pre-trial conferences, these events could be optional with their occurrence triggered by the election of one or more parties to the dispute. Such a shift in the Rules would enable those who desire the confidentiality that potentially comes along with settlement or prefer an alternative procedure such

73. See, e.g., Kotkin, *supra*, footnote 47.; Luban, “Settlement”, *supra*, footnote 17; Macklin, *supra*, footnote 51.

74. Professor Knutsen notes that the potential that secrets may be revealed in discovery or at trial may, in fact, discourage parties from entering the civil justice system and having their disputes effectively resolved at all. Or, conversely, forced settlement disclosure may have the effect of encouraging subsequent frivolous lawsuits. See Knutsen, *supra*, footnote 21, at pp. 963-65.

as mediation to have the autonomy to make decisions in their own best interests without placing additional steps in the civil justice process.

Rules allowing parties to opt into settlement would speed up the pre-trial process (as the mediation and pre-trial conference stages could be skipped entirely if neither party wishes to avail herself of them) and would consequently have the potential to lower litigants' costs. More study of the likely practical consequences of such amendments would, of course, be necessary; however, if more cases were to go to trial as a result of the more neutral Rules, increased docket congestion could be offset by greater availability of judges to sit at trial (as they would spend less time overseeing pre-trial conferences<sup>75</sup>) as well as potentially fewer cases entering the civil justice system in the long term due to the increased predictability of outcomes resulting from more precedent on the books.

Those parties who wish to settle because of a preference as to procedure or confidentiality concerns should absolutely be provided with the opportunity to do so. But if parties are making the choice to settle on the basis of speed and costs, those administering our civil justice system should address these concerns in a manner that more effectively balances public priorities with private ones.

It is simply not possible to respect parties' autonomy and simultaneously ensure that those cases that should go to trial for the public interest do in fact go to trial and those cases that are better suited to settlement are settled. These suggested amendments to the Rules, however, could bring our civil justice system one step closer in that regard. Modifications to the Rules permitting parties to opt into settlement discussions — rather than forcing them to opt out — would make the Rules neutral with regard to the preferable forum for dispute resolution as between settlement and trial, thus enhancing party autonomy. Such amendments would also soften the push towards settlement in light of its negative consequences from the public perspective and would be a step towards ensuring parties are settling by choice and not because of a lack of resources, power, or time. Amended Rules would honour the perspectives of all stakeholders in our civil justice system — promoting effective dispute resolution while accomplishing goals in the public interest — and would bring our legal system one step closer to providing justice for all.

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75. Many have noted that hearing cases and adjudicating are essence of a judge's role, and that judges are in fact ill suited to the role of encouraging settlement in pre-trial conferences.