Alternative Dispute Resolution and Civil Justice: A Relationship Resolved?

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Rationale


• Special Issue contributed to by some ‘well respected scholars, judges and jurists’: Cyril Glasser, Simon Roberts, Sir Leonard Hoffmann (later Lord Hoffmann), A.A.S. Zuckerman, William Twining, Hazel Genn, Carrie Menkel-Meadow (North America) and Richard Ingleby Australia).

• Perceived crisis in the civil justice system, in which Roberts claimed had led judges to see ADR as a way to ease the weight of judicial business.
ADR & CIVIL JUSTICE in the 1990s
Roberts’ Observations

“ADR had more than one life”

• The provision of support for party negotiations – at a distance from civil justice;

• Innovative forms of legal practice – adjacent to it;

• Novel procedures on the threshold of the court – part of civil justice itself.
The Changing Civil Justice Landscape

• 1990s volume of civil litigation undoubtedly growing but there were signs indicating a shift towards settlement directed processes;

• Dispute resolution and access to justice are linked.

“The law must be accessible and, so far as possible, intelligible, clear and predictable”. (Bingham).

• Growing concerns by the early 1990s that the state of the CJS in England and Wales was compromising principles of unqualified human rights (art 6 ECHR).
Civil Justice Concerns and Woolf

- Excessive costs, delay and complexity, expensive, (impossible to predict the cost of litigation);

- Failing to provide fair, economical, timely access to justice;

- Woolf’s findings (*Access to Justice Interim and Final Reports*) bore this out.


- Disputants should try to settle their disputes without recourse to litigation.
Three Models to be Incorporated into the Civil Justice System

• A reference away for further bilateral negotiation;

• A reference to some form of out of court ‘mediation’;

• Direct attempts by judiciary to promote settlement.
Have These Ideas Been Adopted?
A reference away for bilateral negotiation

- Few civil disputes were actually being litigated;
- Small percentage required adjudication;

- Pre-action protocols – encouraging openness and more negotiation/ADR (costs penalties);

- Cases settled earlier (Zander 2007) - but increased settlement levels?

- No real suggestion that more negotiation is taking place today than 25 years ago.
County Court Activity 2000-2017

The Proportion of Civil Claims Going to Trial

- 2000: 71,233
- 2014: 44,778
- 2017: 58,502

- Blue: Civil Claims Disposed at Trial
- Orange: Total Claims Commenced
Have These Ideas Been Adopted?
A reference to out of court ‘mediation’

- CPR encourages Judicial case management and costs sanctions for failing to consider or attempt ADR;

- Mediation Provision: growth and establishment of private (unregulated) mediation services;
  - small claims conciliation in some County Courts.

- Lawyers as Mediators: (recall the Beldham Committee’s recommendation);

- Lawyers and ADR: SRA Code of Conduct;
  - regional research findings (Kent).
Have These Ideas Been Adopted?
Judicial attempts to promote settlement

• Justice, Coercion and Compulsion:
  - Critics of state/judicial-sponsored settlement: Bentham and Fiss;
  - Supporters: Fuller and Rawls (fairness);

  USA perceived the courts as failing to operate in a manner that assured all citizens the opportunity to exercise their basic liberties. (Compare Woolf’s findings)

• Judicial Activism (Driven perhaps by expediency);

  The use of costs sanctions:
  
  *Hurst v. Leeming* [2001] EWHC (Ch) 1051
An Emergent Relationship
The Post-Woolf Developments

- Mediation Pilot Schemes (Beldham Committee): ARM and VOL - limited success;

The evidence from such schemes suggest that facilitation and encouragement [plus] selective and appropriate pressure is likely to be more effective/efficient than blanket coercion (Genn)

- Small Claims (SCMS – est. 2007): c10,000 mediated annually. 65-70% settle;

- Legislation:

- The Online Court and ODR (currently piloted): Claims < £25k.
  Tier 2: A facility for reviewing case papers to support either negotiation or mediation; including automated negotiation tools.
Civil Justice Reviews

- **The Jackson Report (2010)** – Clear support for ADR;
  
  “Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases”. (Jackson)
  
  - No compulsion;
  - Favoured education;
  - Authoritative ADR handbook.

- **The Briggs Report (2012)** – Chapter reserved for ADR;
  
  “There is a substantial proportion of claims of modest value where mediation is under-used and …..personal injury and clinical negligence (disputes), seemed to make insufficient use of mediation”. (Briggs)
  
  - Not supportive of compulsion;
  - ODR: support for encouragement of ADR pre-action via the online court;
  - Reintroduction of the county court after-hours mediation scheme.
Civil Justice Reviews


• ADR has not become integral to the CJS, it has had its successes undoubtedly, but they have been extremely patchy;

• If ODR techniques become woven into the design of the court system then the debate about whether or not to compel ADR may simply become obsolete;

• Specific challenges which ADR faces in serving cases of middle or lower value;

• A failure so far to make ADR familiar to the public and culturally normal.
Crisis? What Crisis?

- Tangible improvements;
  - less delay
  - fewer trials
  - judicial case management and,
  - SCMS;

- Crisis of a different kind - *LASPO (2012)* and its effects;

- Paradoxically, the burden of judicial business seems not to have been reduced.
Conclusions

• Mediation has not been ‘professionalised’ (or indeed fully institutionalised or regulated) - No ‘multi-door courthouse’;

“Although the ADR bandwagon has really started to roll in this country, it is well behind developments elsewhere (Genn).

• We (arguably) have no ADR compulsion - The relationship that civil justice in England and Wales has to ADR can therefore be best described as essentially one of inducement or, one which applies a ‘carrot and stick’ approach.

• Post-Woolf era of satellite litigation;

• More mediation providers;
Conclusions

• A culture of encouragement to use PAP period as an opportunity to negotiate settlement terms has developed;

• The reference to some form of out of court 'mediation' has gained traction;

• Judicial settlement sponsorship - direct attempts by the judiciary to promote settlement at various stages during the litigation life cycle;

If the status of the ADR/civil justice relationship is to be measured against these criteria, then I argue that the relationship has been largely resolved.