Compulsory mediation?

Paul Randolph asks why litigation is so often preferred to mediation

IN BRIEF

- Protracted litigation can be one of the most destructive elements in society: it destroys businesses, breaks up marriages, and damages health. There is therefore an urgent social need to dissuade people from unnecessarily entering into prolonged disputes.

Imagine for a moment that mediation is a product—a stain remover—that can be purchased from any supermarket.

Almost all who have used it praise it highly. The product "does what it says on the tin": it is cheap, quick, is easy to use, and saves time, cost and energy. On the adjacent shelf is another stain remover called litigation. Almost all who have used it are highly critical of it: it frequently fails to deliver its promise of success: it is extremely costly, very slow, and takes up huge amounts of time, money and energy. Yet people queue up to purchase litigation, and leave mediation on the shelf. Why?

This bizarre situation, which defies all market trends, was confirmed by Professor Dame Hazel Genn in her research into the Automatic Referral to Mediation Pilot Scheme at Central London County Court, where in approximately 80% of cases, one or both parties objected to mediation. Other research also shows that people are not as enthusiastic about mediation as the government, the judges, and the mediation community think they ought to be.

So what is it that drives the public to purchase in droves a product they know is costly, lengthy and risky to use, in preference to one that is cheaper, faster and has little or no risk?

History of the problem

Many will argue that it is a matter of education: that there are still too many who remain ignorant about mediation, and who merely need to be informed. Indeed, in his Final Report on Civil Costs, Sir Rupert Jackson recommends that there should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring.

However, the sad fact is that UK mediators have spent the last 20 years in just such a campaign—educating firstly solicitors and barristers, then judges, the public, financial institutions, insurers and large and small corporations. Can any of these people remain truly uninformed about mediation, in this age of IT, where Google can fully define any concept, and explain every variant of its use, in nano seconds? Or is it a case of the public, for some reason, not wishing to know?

Throughout history, Christian clergy, Rabbinical teachers, Muslim clerics, Buddhist monks, and Confucian philosophers have sought to teach the essence of mediation. Abraham Lincoln's 1850 notes for a lecture to his law students contained the following: "Discourage litigation. Persuade your neighbors to compromise whenever they can…As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

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Why have all these teachings fallen upon deaf ears?

It is true that many law firms, corporations and insurance companies have been converted to mediation. Some judges have found that by referring, for example boundary disputes to mediation, they relieve themselves of having to hear the most tiresome and futile cases in their lists.

But still mediation has not been accepted by the legal system in the way most would have hoped.

The problem explained—psychologically

As a species, we are not programmed to compromise, we are programmed to win—and in winning we want to see blood on the walls! We have an innate aggression, which, when we are in dispute, transforms itself from a mere instinct to "survive" into an acute need to crush the opposition. We no longer act rationally or think commercially; instead we are driven by an emotional craving to triumph over our opponent.

Such emotions are not confined to squabbles over property boundaries or family assets. A survey in October 2007 by the Field Fisher Waterhouse, found that 47% of the respondents (chief executives and in-house lawyers) involved in commercial litigation, admitted that a personal dislike of the other side had driven them into costly and lengthy litigation.

The Amygdala—a biological rationalisation

There is a biological explanation for such behaviour: it is the Amygdala, a part of our brain that controls our "automatic" emotional responses. From an evolutionary perspective, it governed the "fight or flight" reflex, associated with fear of attack. The

amygdala reacts to the threat of attack by initiating a reaction within the brain which overrides the neo-cortex (the "rational" thinking part) and physically precludes any reliance upon intelligence or application of reasoning.

In present day terms of course, the attack which can trigger such a reaction is not necessarily a physical attack, but rather a personal attack upon our values and integrity. In a legal context, few attacks can be more deeply penetrating than an allegation of individual or corporate negligence or breach of contract.

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It is for this reason that parties in dispute find themselves unable to approach the matter rationally—particularly in the initial stages of the dispute, when the emotions are raw, self esteem has suffered a battering, and the parties are driven by feelings of anger, frustration, humiliation, and betrayal. It is at this stage that the lure of litigation is at its most powerful, offering everything a litigant yearns for: complete vindication, outright success, public defeat and humiliation of the other side, and vast sums of money!

Mediation cannot compete with such promises, and so little wonder that litigation is the disputant's preferred choice of a resolution process. It is not until the stress of protracted litigation begins to bite, that litigants start to consider alternative forms of resolution. Is it time for some form of compulsion to be introduced, to protect litigants from their own folly?

The arguments

Purist mediators have an intelligible aversion to compulsion: a cornerstone of mediation is that it is a voluntary consensual process. Mediators further argue that mandatory mediation would:

- create another strata of costly procedure;
- unfairly impede the public's right of free access to the courts;
- achieve statistically lower success rates.

Lord Phillips, the former lord chief justice, refuted these contentions at a Delhi Conference in 2008, stating "court-ordered mediation merely delays briefly the progress to trial and does not deprive a party of any right to trial"…"Mediation is ordered in many jurisdictions without materially affecting the prospects of success". He described it as "madness" to incur "the considerable expense of litigation….without making a determined attempt to reach an amicable settlement".

Mediation may not be appropriate in all cases, for instance where a definitive ruling on the law is required, or an injunction is sought; or the visibility of litigation may be desirable (as in some copyright cases). Yet it remains commercially indefensible to continue in dispute with another, where there is an alternative possibility of early resolution. Lord Clarke, then master of the rolls, in his speech at Grays Inn in June 2009, stated: "only a fool does not want to settle".

The answer

Surely it must be time to oblige parties to mediate without necessarily compelling them to settle? Mandatory ADR is accepted globally, from the US, through Scandinavia and China, to Australia and New Zealand. Furthermore, there is no constitutional bar in the UK to mandatory mediation. Article 5(2) of the EU Directive in effect permits our national legislation to make mediation compulsory, providing it does not deny the parties a right of access to the courts.

Positive sentiments upon mandatory mediation have been echoed by other senior members of the judiciary, pointing to the fact that the courts have existing powers under the case management provisions in the CPR to direct mediation. Even where the judiciary are not entirely convinced of compulsory mediation, they are virtually unanimous in agreeing that there must be "robust encouragement" to mediate.

Sir Rupert Jackson's Final Report concludes that despite the considerable benefits of mediation, parties should never be compelled to mediate. He recommends that courts can and should in appropriate cases:

- encourage mediation and point out its benefits;
- direct the parties to meet and/or discuss mediation;
- require an explanation from the party which declines to mediate; and
- penalise in costs parties which have unreasonably refused to mediate.

A "direction to meet and/or to discuss mediation" may amount to "robust encouragement", but is it sufficient? If not, then there will be an inevitable temptation to ever raise levels of robustness—and the line between encouragement and compulsion will gradually erode.

Protracted litigation can be one of the most destructive elements in society: it destroys businesses, breaks up marriages, and damages health. There is therefore an urgent social need to dissuade our neighbours from unnecessarily entering into prolonged disputes.

Baroness Scotland, when Attorney General, announced the government's aspiration of making ADR the mainstream dispute resolution process, and litigation the alternative. If persuasion through commercial logic cannot achieve this, then some form of compulsion is likely to be the obvious and most effective answer. NLJ

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