

From judge to mediator towards a solution

Gamekeeper turned poacher?
Just a different gamekeeper!

Retired from bench 4 years ago (Designated Civil Judge Leeds and North and West Yorkshire).

Given job of standardising directions for MT by Jackson LJ
Which resulted in CPR 29.1(2)

The standard directions team:

Adapted *Halsey* direction (*Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576)

To be found now in all the standard/model directions

(see website www.justice.gov.uk/courts/procedure-rules/civil)

As Leeds grew in stature as a centre for civil litigation I became more and more interested in all forms of ADR and promoted it.

Seemed natural to train as a mediator.

Trained by two superb mediators, David Richbell and Jane Gunn.

In my Role play, was quickly told:

Trying to reach the solution too quickly!

Forget judicial skills!

Now make no apology for being an enthusiast.

Mediation is but one of the tools in your ADR armoury.

The Jackson ADR Handbook commended

Will Find quote from *Halsey*

'All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR'

The simplest and potentially most cost effective ADR method - Negotiation

From phone calls/letters to round table meetings.

Negotiation of course common to all methods of achieving settlement.

Going to examine where negotiation fits into mediation and is enhanced by mediation.

Mediation rightly described

'facilitated negotiation process'

'neutrally assisted negotiation'

What's so different from picking up the phone to the solicitor on the other side?

Back to mentors, David Richbell and Jane Gunn

A skilful mediator will seek to prepare the ground for a successful negotiation and enable the parties to reach their own resolution: exploration of the parties' wants and needs.

The advantage of an independent facilitator.

The example of the General Synod debate on Women bishops: facilitated discussions with small groups succeeded where traditional debate failed.

The Mediator

Impartial or 'multi partial'

The mediator wants to help each party to find the mutually acceptable solution.

Experience has shown that exploration of the real needs and interests of the parties forms ...

The **Key** to preparing way to effective negotiation

Does it work?

Yes

Why?

Mediation adds a new dynamic and a balanced approach

Often at a time when many parties to a dispute need independent help through a deadlock.

Sometimes strong feelings need to be managed.

Relationships need to be managed.

In Personal Injury cases:

Eg

Employer/employee relationship

Doctor/patient relationship

What is necessary to facilitate the process?

Confidentiality (twofold)

- The whole process remains confidential externally (until a binding agreement is reached)
- Within the process what each party says to the mediator remains confidential party/mediator unless given authority to convey something to the other party.

Impartiality.

- Need for complete trust in the mediator.
- A good mediator is a good listener.

The open question.

An important tool for extracting essential information.

(The opposite to the closed questions so often used by lawyers in court - for fear of getting the wrong answer!)

Patience.

Often most mnecessary for guiding parties to a solution.

Creative thought - often comes from some throw away remark by one of the parties

- An apology may assume great importance (eg in clinical neg)
- The same could apply to many work accidents where the inter relationship of fellow employees assumes importance
- Resuming a good working relationship may be important.

Where necessary robustness is called for:

Eg

- challenging the positions of parties
- reality testing

Trying to replicate the 'day in court'

Trying to balance the pressure to achieve resolution with a comfortable place

SO

The mediation starts with an open session.

- The Parties can add the personal touch to their cases
- The Opportunity for each side to gauge the strengths and weaknesses not only of the opponent's case but also of their own.
- In personal injury, where credibility is in issue, great opportunity for the insurance man to assess how a claimant will come across.

The open session then paves the way to closed sessions where the real work begins:

eg

- What each party wants to achieve that day
- What are the risks of proceeding.

By the time the needs and interests of the parties have been explored, each should be ready to enter the negotiation stage.

Feeding together, if possible, helps build trust entwined parties.

Hopefully by this stage each has respect for the other's position.

The mediator becomes the diplomat passing between the parties.

Warns against the 'insult zone'

As negotiation proceeds so sometimes the mediator has to challenge the position of a party.

Particularly where it is clear that some movement is necessary.

eg

- "What if?" Etc
- "Imagine your waiting to go into court"

Not every mediation results in binding settlement

But rare that is nothing achieved.

Always it will result in a better understanding of each other's case.

Is it cost effective?

Of course there is some added cost

But in the scheme things in modern day litigation a resounding YES
costs of mediation:

- Fixed fee
- Parties control related expenses
- Documentation is controlled and limited
- Easy to estimate how much time needed to prepare for mediation

Buying into the process.
Strong incentive for the process to be successful.

The solution lies in the hands of the parties themselves.
As a mediator I don't have to impose a solution as I did as a judge.
Dare I say the chances of reaching a just solution are probably better by helping the parties to find their own solution, rather than having one imposed by a judge who can never know the whole story.

How does it all fit with Personal Injury litigation?
Spent many years at Bar and on Bench involved with PI -
All shades and kinds.

Convinced that the enhanced negotiation in the mediation process provides the best shot at achieving the best deal for both sides.

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