

“Do you think that the courts offer the best means of solving disputes?”

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When faced with a dispute, many people consider the courts to be an effective and reliable way of finding a solution. The civil justice system is designed to provide fair and legally binding decisions on all kinds of disputes, and the civil courts are prepared to deal with a dispute of any size. This is reflected in the large number of cases every year which are settled using court proceedings. However, while many cases are dealt with by using the courts, there are other methods available. In recent years many people have been moving away from litigation and instead have been trying to resolve their disputes by other means. There are a wide range of resolution methods available outside the courts, which are often referred to as ADR. Alternative methods such as negotiation, mediation, conciliation and arbitration are now generally considered as respectable ways of finding a solution to civil disputes, but are they more effective than the traditional court system? In this essay I will explore how the courts and ADR are used to decide civil cases, and I will compare their various strengths and weaknesses to decide whether or not the courts really offer the best means of solving disputes.

Litigation:

Using the court procedure to deal with a dispute is known as litigation. Civil cases tend to arise when one party feels that their rights have been infringed, and wish to sue the party responsible or request a civil order such as an injunction. Despite being the most well known form of dispute resolution, court procedure is usually only used as a last resort; the majority of cases never reach court and instead are dealt with by other means¹. Where a person does decide to take their issue to court, there are two main courts which can hear the case – the County Court and the High Court. Cases will be assigned to a particular court based on their value and complexity, and each court deals with cases in a slightly different way. County courts have a very wide jurisdiction and deal with the majority of cases, including debt problems, consumer disputes over faulty goods or services and personal injury cases². The High Court, on the other hand, tends to only deal with the more complicated cases which are worth a substantial amount. A claimant can start a case in any court by filling out Form N1, which they must give in at one of the 230 County Courts across the country or one of the 20 District Registries for the High Court depending on where they want the case to be heard. They must also pay a court fee which varies depending on the size of the case. When the defendant receives the claim they have two options open to them. The first option is to admit liability and pay the full amount of damages requested, and if this action is taken the case ends at this point. Otherwise they can send Form N9, also known as an acknowledgement of service, to dispute the claim. If the defendant takes no action, the court can order them to pay the money requested as well as the costs of the proceedings³.

¹ “Civil Justice in England and Wales”, see: <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jurisdictions/civil-jurisdiction>

² Citizens Advice Bureau – “Courts of Law”, see: http://www.adviceguide.org.uk/index/your_rights/legal_system/courts_of_law.htm

³ “The English Legal System” – Jacqueline Martin, p.108

Reformation of the Civil Justice System:

Prior to 1999 the civil justice system was seen as slow, costly and ineffective. This prompted Lord Woolf to conduct an investigation into the workings of the civil justice system and his findings were published in his report, "Access to Justice (1996)"⁴. In this report, Lord Woolf found that there were many problems with the court process, including disproportionate costs, lack of equality between parties and incomprehensible language making the system unnecessarily complex. He concluded that the "civil justice system in this country urgently needed reform"⁵, and set out 303 recommendations for improvement. These recommendations were later implemented by the Civil Procedure Rules which came into effect in 1999⁶. One of the ways in which these rules reformed the civil justice system was by placing a greater emphasis on case management in an attempt to resolve cases more quickly which would save both parties time and money. This led to the introduction of the track system. Each case is sorted into one of three "tracks" by a judge, and the track a case is allocated to will decide which court it is heard in and what kind of procedure will be used. In order to help the judge decide which track is most appropriate for the case each party is sent an allocation questionnaire. The three tracks available are the small claims track, the fast track and the multi-track, and these are explained in detail below.

The Small Claims Track:

The small claims track is for simple disputes with a value of less than £5000, or less than £1000 for personal injury or housing cases⁷. This procedure has to be much quicker and cheaper than other civil court procedures as otherwise the costs of the case would be likely to exceed the value awarded in damages. The use of lawyers is discouraged in order to cut costs, and the winning side of a small claims case cannot claim for the cost of legal representation. District Judges are given special training in the handling of small claims cases and are encouraged to take more active role in establishing the facts of the case. This will help both parties to explain their points without the help of a lawyer. There are approximately 800,000 small claims every year⁸. The most obvious advantage of this track is that costs of proceedings are relatively low and the procedure is a lot quicker than other court processes, taking 29 weeks on average from the issue of the claim to the hearing compared to 48 weeks for a fast track case⁹. However, there is often inequality between parties as big businesses are highly likely to be able to afford a lawyer, putting the claimant at a disadvantage if they cannot also afford one. In addition there is no guarantee that claimants will receive the full amount they deserve even if they win the case. Only about 60%¹⁰ of successful claimants receive the full amount of damages they are awarded.

The Fast Track:

Straightforward cases with a value of between £5000 and £25,000 are allocated to the fast track. The case will be heard by a Circuit Judge in the County Court and the whole procedure will be a lot more formal than that of the small claims track.

⁴ "The English Legal System" – Jacqueline Martin, p.113

⁵ "Access to Justice (1996)", see:

<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/overview.htm>

⁶ Civil Courts, see:

http://sixthformlaw.info/01_modules/mod1/1_1_civil_courts_adr/1_1_1_civil_courts/31_small_claims.htm

⁷ "The English Legal System" – Jacqueline Martin, p.108

⁸ "AS Law" – Elliott and Quinn, p.345

⁹ "The English Legal System" – Jacqueline Martin, p.109

¹⁰ "The English Legal System" – Jacqueline Martin, p.110

Before the Woolf Reforms, cases of this type were lengthy and expensive, and so the idea of a fast track was brought in to improve the efficiency of dealing with cases such as these. Strict timetables for preliminary matters were introduced to reduce the overall time taken for a case to reach court and, as a result, prevent any unnecessary expenses. The trial itself usually has a one day time limit and only one expert witness is allowed, which both parties must agree on. These new time-saving measures have been very effective in reducing delays; the average waiting time between the issue of the claim and the hearing is now 48 weeks, compared to an 85 week wait before the Woolf reforms¹¹. However, statistics from a study into the effect of the Woolf reforms¹² show that there has been no real improvement on the speed that a fast track case is dealt with. Although fast track cases are now dealt with more quickly after the claim has been issued, the process before the issue of a claim has got slower, meaning that the average time taken for a fast track case was 13 months both before and after the reforms.

The Multi-Track:

This track is for more complex cases with a value of over £25,000. These cases can be heard in either court, but cases with a value of over £50,000 are likely to be sent to the High Court. The case will be heard by a Circuit Judge who must manage the case and set timetables for both parties to follow.

Cases in this track tend to incur large costs, as there is a substantial amount of money involved and as a result professional legal representation is likely to be necessary. Therefore, cases such as these will be particularly costly for the losing side, which will have to pay for the winning side's legal fees on top of all other costs. Because of the large amount of money at stake, the judge has the right to postpone proceedings to allow the parties to try an alternative method of dispute resolution.

A major disadvantage common to all civil court cases is that they tend to be costly and time consuming, and sometimes the amount of time and money required to see a court case through to the end can be disproportionate to the amount of damages a claimant will receive in return. The adversarial nature of court cases is also a hindrance as it can cause the relationship between parties to break down, which is not productive if the two parties wish to do business in the future. This can also be traumatic for any third party involved, for example a competitive court environment is not a very pleasant place to be for any children involved in a divorce case. The fact that court cases tend to attract a lot of publicity can also be a problem for people involved, particularly where one of the parties is a big business and their reputation may be at stake.

However, there are many advantages to using a court case to deal with a dispute. Unlike many alternative methods of dispute resolution, there are many opportunities for appeal if either party is not satisfied with the outcome of the case. Higher courts such as the Divisional Courts of the High Court, the Court of Appeal and in some cases the Supreme Court can hear appeals of civil cases if it is felt that the damages awarded were unfair, or if there is a point of law involved. This ensures fairness in the civil justice system and promotes consistency in the amount of damages awarded for certain cases. Another advantage to using the courts is that the decision is legally binding and can be easily enforced – there will be consequences if either party does not comply.

¹¹ "The English Legal System" – Jacqueline Martin, p.111

¹² "More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour" – a study by Tamara Goriely, Richard Moorehead and Pamela Abrams for the Civil Justice Council and the Law Society. See: <http://www.newlawjournal.co.uk/nlj/content/zander-woolf>

Alternative Methods of Dispute Resolution (ADR):

Since the Woolf Report, there has been more of an emphasis on using ADR to resolve disputes rather than resorting to a court case. As a result, alternative methods of dispute resolution have become more popular and are now widely used to deal with the majority of civil cases. There are many different forms of ADR available, including negotiation, mediation, conciliation and arbitration.

Negotiation:

Negotiation is the simplest form of dispute resolution, as it involves the two parties trying to sort the matter out between themselves through discussion. Sometimes parties may hire solicitors to negotiate on their behalf to try and reach a compromise. Negotiation is usually a comparatively cheap way of resolving disputes and is also often a lot less time consuming than other methods. Most cases are resolved using negotiation as it does not strain relationships between parties. This which makes negotiation an ideal method for solving family cases where it is essential that good relationships are preserved.

Negotiation is a very valuable method of dispute resolution as there is a possibility of reaching a compromise which everyone is happy with, meaning that the process is much less adversarial than a court case would be. Also, the fact that any decisions made do not have to follow judicial precedent allows parties to make decisions which are appropriate to their case without any restrictions. Negotiation is entirely private and so removes the publicity element that would be present in a court case, which is beneficial to businesses who did not want their reputations to suffer as a result of taking legal action. Good relations between parties are encouraged, which provides a strong base for further business in the future.

However, there are disadvantages to using negotiation. There is no guarantee of a solution and parties may be unwilling to negotiate in the first place, and even if negotiation does take place there are still several problems that may occur. Although the cost of negotiation is generally lower than other methods, these costs can quickly rise once a solicitor is involved. For example, solicitors can charge from £200-£500 an hour for divorce cases¹³. Negotiation can continue for a very long time if the parties are unable to reach a compromise, and in some cases parties only agree on a settlement "at the door of court"¹⁴ just before the trial starts. Furthermore, there is great potential for imbalance of power, especially where one party is a large business who may use a lawyer while the other party cannot afford to. While the fact that decisions do not follow judicial precedent may allow freedom in reaching a compromise, it also means that there can be a great deal of uncertainty about whether the decision is the right one for both parties.

Negotiation is a good starting point for all civil disputes. Ideally, every civil case should begin with some form of negotiation to help the parties sort out their differences, but if parties refuse to negotiate then other means may be necessary.

Mediation:

¹³ "What does it cost?", see: <http://www.takelegaladvice.com/news-and-information/legal-guidance/-/What-does-it-cost/>

¹⁴ "The English Legal System" – Jacqueline Martin, p.123

Mediation involves enlisting the help of an impartial 3rd party who will listen to both sides of the case and attempt to find common ground. Divorce cases are often solved in this manner as it prevents any children involved from going through the traumatic experience of a court procedure. This is outlined in the Family Law Act 1996¹⁵, which places great emphasis on mediation for divorce cases. There are many different forms of mediation, and the parties are in control over which one to use for their case. One such method is a formalised settlement conference, in which both parties present their cases to a panel composed of a decision-making executive from each party and a neutral advisor, who will evaluate the situation and try to come to an agreement.

As with negotiation, mediation has many advantages over litigation when it comes to speed and cost-effectiveness. While using a mediator can cost between £1000 and £1500 a day, this is still favourable to the cost of a court case, which is often in excess of £100,000¹⁶. The use of an impartial 3rd party also helps to address the issue of imbalance of power that was a potential problem of using negotiation, as the 3rd party does not have a vested interest in the case and so no side has any particular advantage. However, there is no guarantee of a solution and so the parties may have to pay for a court case anyway on top of the fees for mediation.

The most important point to consider is that mediation is ineffective if the parties are not willing to compromise. In this case, it would be better to use another method of dispute resolution entirely.

Conciliation:

Conciliation is very similar to mediation in that an impartial 3rd party is used to find common ground for a settlement. However, unlike a mediator a conciliator can voice their opinions on the case and can suggest possible compromises. There are many schemes which offer formal conciliation services, including the Advisory, Conciliation and Arbitration Service (ACAS)¹⁷. This scheme is often used in unfair dismissal cases to try and solve the dispute before it goes to an Employment Tribunal.

As the processes of mediation and conciliation are very similar, they will have similar advantages and disadvantages. Allowing the conciliator to suggest grounds for a compromise allows the consideration of new ideas which may be more productive in bringing parties together. However, the parties are not required to follow the conciliator's suggestions if they disagree, which could render the whole process pointless.

Arbitration:

This is the oldest form of ADR and involves allowing an impartial 3rd party to decide the case. The Arbitration Act 1996 regulates private arbitration and section 5 of this Act states that arbitration can only be used where there is a written agreement between the two parties to arbitrate. For this reason, many contracts now contain a "Scott v Avery" clause¹⁸ which is an agreement to use arbitration in if a dispute should arise. If a contract contains this clause, the courts are likely to refuse to deal with any dispute and the parties must use arbitration to sort out their differences, as they had previously agreed. The arbitrator is chosen by the parties and may be a lawyer, an expert in the particular field or a trained arbitrator. The number of arbitrators to be used is also at the parties'

¹⁵ "AS Law" – Elliott and Quinn, p.408

¹⁶ "The English Legal System" – Jacqueline Martin, p.

¹⁷ "AS Law" – Elliott and Quinn, p.407

¹⁸ "Arbitration", see:

http://sixthformlaw.info/01_modules/mod1/1_1_civil_courts_adr/1_1_2_alternatives/03_arbitration.htm

discretion, but if they are unable to agree on a number then the Access to Justice Act states that a sole arbitrator should be used.

This method of ADR is different from the others in that it does not rely on the cooperation of the parties and a decision will definitely be made. Unlike other methods, the decision reached in arbitration is legally binding and can be enforced through the courts. The fact that the arbitrator can be an expert in the field reduces the hassle of using expert witnesses, and also saves time that would be used in explaining technicalities to a judge. The arbitration process also has the advantage of being a lot more flexible than court procedure, and does not jeopardise future relationships in the way that an adversarial court case would.

However, arbitration is a lot more costly and time-consuming than other methods of ADR. The decision made by the arbitrator is final, which means that there are limited rights of appeal if one party is unhappy with the outcome of a case.

Tribunals:

Tribunals are not technically a form of ADR, but they do work alongside the courts to resolve disputes. There are many different tribunals, and each one specialises in a particular area. Unlike ADR, a tribunal hearing must be used instead of a court case – a case that is heard by a tribunal cannot then go to court. Procedure in tribunals is often a lot less formal than procedure in courts, but tribunals still have to follow the principles of natural justice used by courts, namely that the hearing is fair to both sides and that the decisions are open and impartial. A tribunal is heard by a Tribunal Judge, but in some cases two lay assessors with expertise and experience in the particular field will form a panel with the Judge to decide the case.

As with arbitration, a tribunal case can be heard by an expert in the field, which saves time explaining technical points and ensures that the final judgement is a well informed one. Tribunals are also much cheaper than court cases, as clients may represent themselves and so it is not necessary to pay for a lawyer. The informal approach taken by tribunals makes the whole process less stressful and the majority of cases are heard in private.

However, the fact that lawyers are rarely used in tribunals means that there is limited availability of legal funding, the exceptions being cases involving fundamental human rights such as mental health cases or cases involving the right to seek asylum. Although the procedure used in tribunals is a lot less formal than the court procedure, it is still a lot more formal than ADR methods which can be disconcerting for some people, especially those who are presenting their own cases. The fact that part time lay members are involved in the decision making process means that there can be long delays, especially in the resolution of particularly complex cases which may be dragged out over several weeks or months.

Conclusion:

Court cases are by no means the only way of solving disputes. As I have explored throughout this essay, alternative methods such as negotiation, arbitration, mediation and conciliation are available to anyone faced with a civil problem, and the tribunal system which operates alongside the courts can also provide resolutions. Civil courts have been providing fair and impartial decisions on disputes for centuries, but are they the most preferable way of dealing with a disagreement?

In my opinion, court cases are not always the wisest choice for solving disputes. While court cases

do provide a legally binding, informed and impartial decision on civil matters, the end result of a case is not always worth the amount of time and money that was required to start it. Furthermore, court proceedings can sometimes put even more strain on tenuous relationships, which in cases such as divorce tends to only aggravate the situation. In cases such as these, it is clear that ADR stands a much better chance of reaching a satisfactory solution for both parties. In general, alternative methods of dispute resolution are much cheaper, quicker and less intimidating than court cases and are much more productive in encouraging future relationships. For this reason, ADR should always be tried before starting court proceedings, because there is a large chance that the case will be resolved before it any legal action is necessary.

However, alternative methods are not so effective if the parties will refuse to negotiate, and in the majority of instances it is impossible to make sure that the decision is enforced. In arbitration the rights of appeal are limited, which makes it difficult to change decisions that were wrongly made. For these reasons, I think that the court is sometimes necessary for resolving disputes, but it should only ever be used as a last resort after all other methods have failed to reach an appropriate decision.

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