

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

Written by Michael Craig (November 2009)

Since the Woolf Report in 1999 solving disputes in court has become discouraged. Judges are now encouraged to promote Alternative Dispute Resolution. In this essay I will be looking at alternatives to resolving a case in court such as mediation, arbitration, negotiation and conciliation. I will also discuss the circumstances where these alternatives are commonly used. I will be looking at the advantages of court hearings and how the process has improved after the Woolf Reform, such as the fast track system. I will look at problems with court hearings such as inflexibility, imposed solutions, cost and publicity. Finally I will evaluate the circumstances where a court hearing is the best method and circumstances where alternative methods are preferred

The Court Procedure

The Woolf Reform

The civil justice system has been largely reformed in the last 10 years; this is largely due the report *Access to Justice* made by Lord Woolf in 1996. Lord Woolf said that the civil justice system should deliver fair and just verdicts, be fair in the way it litigates, offer appropriate and reasonable cost, deliver cases at a reasonable speed and be effective, adequately resourced and organised¹. The report found that virtually none of these targets we're achieved, the report described the system as being unequal, slow, expensive and complicated². The report contained 303 recommendations on how the system should be improved. These recommendations included; extending small claims cases to £3,000, a fast track system for cases up to £10,000, a multi track system for cases over £10,000, encouraging the use of alternative dispute resolution, simplifying procedures and shortening timetables. The Woolf report was seconded by the labour governments Middleton Report in 1997. The report supported Lord Woolf recommendations and added that small claims cases should go up to £5,000 and fast track up to £15,000. As a result of these reports the civil justice systems was radically reformed in April 1999.

Small Claims Cases

It is vital that small claims cases are kept as cheap as possible; otherwise the cost of going to court may outweigh the sum of the dispute. Small claims cases go up to £5,000 or £1,000 in personal injury cases. People are encouraged to represent themselves to kept costs low, however cases are started in the same way as any other, and this means people may find it

¹ OCR Law for AS by Jacqueline Martin

² OCR Law for AS by Jacqueline Martin

difficult to understand what is going on. The use of lawyers is discouraged and legal costs cannot be recovered from the losing party. People sometimes use lay representatives to defend themselves.

The advantages of small claims are that cost of proceeding is low, if you lose your case you will not have to worry about paying legal costs for the other side. The procedure is quicker than in other types of cases. District judges also receive training to help them be more inquisitorial; they will take an active role in proceeding and help parties explain their case.

The disadvantages of small claims are that for cases over £1,000 an allocation fee of £100 must be paid. Legal aid is not available so people with low incomes with are at an instant disadvantage if they are against a business who is using a lawyer. Research by Jack Baldwin has found that District Judges are not always helpful to unrepresented claimants. There is also a big problem with enforcing damages payments, statistics show that even if you win your case you are not guaranteed to be paid. In fact only 60% of successful claimants receive all the money awarded to them.

Fast-Track Cases

Fast track cases are given strict timetables for the exchange of witness statement, disclosure of documents, the exchange of expert reports and trial and date period within which the trial will take place. The hearing should happen no more than 30 weeks after the case is begun (this is compared to 80 weeks before 1999). Fast-track cases are for claim between £5,000- £15,000. The case will normally be heard by a circuit judge and take place in open court with more formal proceeding than in open court.

Multi-Track Cases

Claims for more that £15,000 is allocated to the multi-track system. The case will be heard by a circuit judge who is expected to manage the case from the moment it is allocated to the multi-track system. The judge can set timetables. It is even possible to ask parties to try alternative dispute resolutions to prevent the waste of costs. A proactive approach is taken by the courts, the court is required to identify all issues at an early stage, deal with cases out of court as much as possible whether by ADR or the judge taking control of proceedings, make appropriate use of modern technology, deal with the case efficiently and quickly.

Problems with Court Hearings

The Adversarial Process

In a court case you will always get an outcome of a winner and a loser. The adversarial process can often lead to parties falling out and cases become aggressive and extremely stressful. This is a major disadvantage in cases where there is a reason why it is important for the parties to be able to communicate afterwards. An obvious example of this is family cases such as custody of children. However in business issues this is also important. In cases such as unfair dismissal or cases where two businesses who work with each other are going to court, it is important to make sure the parties are not enemies after the case has finished. It is thought that the court system is often suited to parties that do not know each other and are happy to stay that way. In close knit societies going to court would not be appropriate as it would disturb the harmony of the group, hence court type procedures are rarely used, and disputes after often settled through negotiation.

Technical Cases

In cases which are very complex, not in terms of law but other specialist subject such as engineering or medicine, an ordinary judge may not be qualified to be able to interpret the case. Expert witnesses or specialist can be brought into the case to assist the judge however this takes time and increases the cost of the case. In cases where specialist knowledge is required parties could possibly use arbitration, then the parties could choose an expert to replace the judge, this would make the case quicker and cheaper. Also the decision would still be legally binding.

Inflexibility

Because of the large number of cases a court has to deal with, court hearing are constructed around a strict fixed timetable to make them more time efficient. This may be a disadvantage to cases that are largely of private concern. Alternative methods can allow parties to take control of the case and construct its own timetable and is more convenient to each party.

Imposed Solutions

If a case is taken to court the verdict of the court hearing is legally binding. The verdict does not need to consent of either party and therefore parties may be reluctant to go along with the decision. This can lead to problems of enforcing solutions, this takes up more time and cost. If parties are able to settle a problem without being forced to do so it is more likely the resolution will be more smoothly and more effectively carried out.

Publicity

The majority of court hearings are available to the public. This may be undesirable to cases where large businesses are involved. The business will not want to lose its reputation or get bad

publicity. They make not want to make public the details of the cases or the detail of things like their financial situation or business practices because of competition and business associates.

Alternative Dispute Resolutions

Negotiation

Negotiation is the quickest and cheapest method of dispute resolution; it is commonly used in small claims cases. It involves parties communication directly with each other in a private and relaxed manner. Negotiation is far less stressful than court and far less adversarial, this means parties are less likely to come out of the dispute feeling aggrieved or being enemies. If negotiation is unsuccessful between the party and the cases goes further parties will bring in solicitors. Solicitors will also try to come to an out of court settlement and even once court hearings have commenced negotiation can still continue. A large percentage of disputes are settled outside court. A disadvantage is that once solicitors are brought into the case it does become more expensive but it is still not as costly as court. Negotiation is encouraged by the Woolf Reform.

Mediation

In mediation a neutral mediator is brought into the case to help the parties come to a resolution. The mediator's job is to assist the parties and give them an evaluation of the legal strength of their case. The mediator however is not allowed to give his personal opinion on the case. Mediation can be legally binding if both parties agree. Mediation can involve a formalised settlement conference, this is a 'mini-trial' where parties will enter a court like situation to put their points forward to the other party. Even if the case is not settled by mediation it reduces the number of issues needing to be addressed in court and it also makes it more likely for a case to be settled quickly in court.

Mediation is becoming more common in commercial cases. One of the main services is the Centre for Effective Dispute Resolution which was set up in London in 1991. Businesses say that using the centre has saved thousands of pounds in court cost. The typical cost of mediation is about £1,200 to £3,000 a day³. This compares to litigation costs which are frequently over £100,000 and sometimes over £1,000,000!⁴ The main disadvantage of using mediation is there is no guarantee the case will be solved, therefore the case will still have to go to court. However statistics for the Centre for Effective Dispute Resolution are that 80% of cases are settled when mediation is used. Also even if the case is not settled it makes court cases much shorter.

³ OCR Law for AS by Jacqueline Martin

⁴ OCR Law for AS by Jacqueline Martin

Mediation is not just used in major commercial cases; there are free mediation services to help resolve small disputes, such as with neighbours. The West Kent Independent Mediation Service helps resolve local issues such as noise, parking issues or boundary fence disputes⁵. A widely known problem with mediation is that success largely depends on the mediator themselves. Mediators require a 'natural talent'. If these skills are not present the process can become a bullying session. One person said *'leaning on people is the only way you will get a settlement. In you lean on two halves of a see-saw it is usually the weaker half that will break and that is where you should apply your effort'*⁶.

Conciliation

This method is very similar to mediation; the main difference is that the conciliator is expected to have a much more active role. As well as advising parties, the conciliator will provide suggestions and grounds where the resolution can be made. Conciliation is often used in industry; ACAS (advisory, conciliation and arbitration service) is an example of a service that provides legal opinion and impartial judgement. Like mediation, in conciliation there is no guarantee of a resolution so cases may still need to go to court.

Arbitration

Arbitration covers two rather different processes. One process is in the commercial court of the Queen's Bench Division. It is seen as a more informal procedure to hear cases. The other process is where two parties enter into a legally binding contract to resolve its dispute. Private arbitration is now governed by the Arbitration Act 1996 which states *'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense'*. *'The parties should be free to agree however how their dispute should be resolved, subject only to the safeguards of public interest'*. This means that arbitration is the voluntary submission by parties, of their dispute, to the judgement of some person other than a judge⁷. Arbitration can be chosen even before a dispute arises. Many commercial contracts include a Scott v Avery clause; this is a clause that means parties involved will always settle disputes by arbitration. Courts will normally refuse to deal with any cases where a Scott v Avery clause is present. One of the only exceptions is in consumer claims cases.

There are many advantages to arbitration, the parties are allowed to choose their own arbitrator, and they can therefore decide whether the case is dealt with by a technical expert or by a lawyer or by a professional arbitrator. If the case is specialist or involves technical points that a normal judge would not understand, having an expert as an arbitrator saves the time and expense of calling an expert witness in court. The hearings are far more flexible, parties can

⁵ OCR Law for AS by Jacqueline Martin

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⁷ OCR Law for AS by Jacqueline Martin

choose the time and place the hearing can take place instead of having to stick to strict court timetables. The procedure itself is more flexible as it doesn't have to follow set rules; this means cases can be more relaxed and less stressful. The hearing will also be private; this can be important for parties who want to protect their reputation and do not want to reveal their circumstances to the public. Arbitration is quicker and cheaper than litigation. The award to the winner of the cases is final and legally binding; it can also be enforced by the court.

Arbitration is not all good and there are some disadvantages. The major issues can arise when parties are not on an equal footing in terms of being able to present the case. Legal aid is not available in arbitration so people many find themselves taking on a major business by themselves, in court a person with low income is able to get free legal aid. Other disadvantages include that complex points of law may arise; these cases cannot be resolved by a non-lawyer arbitrator. Arbitration can be very expensive especially if parties opt for a formal hearing which can include witnesses and lawyers. There are limited rights of appeal and delays in major cases are often as bad and in courts. These problems have lead to arbitration losing popularity as a method of dispute resolution. Many businesses are choosing alternatives offered by services like the Centre of Dispute Resolution.

Examples of Cases Where ADR is Used

Mediation in Divorce Cases

The court procedure is commonly seen as unsuitable for divorce. The adversarial process can aggravate disputes between children and property and make the case extremely stressful often worsening situation between parties. Court can make the procedure more traumatic. Because of this mediation has been made available for divorce cases to ensure arrangements can be made as amicably as possible, this reduces the stress of the case and the tension between parties. The Family Law Act 1996 requires couples seeking public funding to attend mediation sessions to consider whether mediation would be more appropriate than court.

In divorce cases, success mainly depends on party's ability to co-operate, meeting in a neutral, less stressful environment with the help of experienced mediators can help parties to communicate with each other and increase the chance of success. A three year study on the reform found that 8 out of 10 settled at least some issues through mediation and 4 out of 10 settled cases completely. However the SFLA points out because men are normally higher earners women will need lawyers to get a fair deal financially in terms of child care etc.

Conciliation in unfair dismissal cases

A statutory conciliation scheme administered by ACAS operates in cases of unfair dismissal before cases can go to an employment tribunal. Their main aim is to settle cases by

reinstatement however in practice most cases are settled by paying damages. Conciliation offers parties the opportunity to discuss issues of the case and a conciliator can advise each party on the strength of their case. The success of the scheme is sometimes measured by the fact that 66% of cases are either withdrawn or settled by the conciliation process. However it ignores the imbalance of powers between employee and employer, especially when the employee has no legal representation, just because the case has been settled does not mean it had be settled fairly. Dickens 1985 study found the awards of a case in court were normally higher than those in conciliation. It also suggested employees are put under pressure to reach an agreement. It suggested the conciliator should take more focus on ensuring the workers' rights are protected.

Conclusion

Overall I would say there is not set answer to whether court is the best resolution, like many aspects of law it depends on the case involved. In some cases, such as in family cases I believe that other methods are less stressful and are more ready to deal with the personal issues involved. Also I would say the adversarial process means that party's relationships suffer as a result of going to court so in cases where the relationship of the parties is important, whether in terms of business or in personal terms then ADR is better than going to court. I say however that the use of ADR means that a balanced fair procedure is not guaranteed, many people going against large businesses will be put at a large disadvantage due to their financial situation.

ADR is a quicker and cheaper method which, when possible should be used. However it is not possible for parties to co-operate without being forced to. Also rights of appeal are limited when using ADR. In a conclusive sentence I would say that in an ideal world ADR is a theoretically better alternative to court hearings however some cases could never be resolved without legal intervention.

Bibliography

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