

Keynote Address: A View From On High

Civil Mediation Conference 2015

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1. It is a great pleasure and a great honour to be asked to deliver the keynote address at the 2015 Civil Mediation Conference. When I was in practice as a barrister, mediation was virtually unheard of in the world of United Kingdom civil litigation. When it came to legal disputes, there was litigation, there was arbitration and there was settlement. Of course there was mediation outside ordinary legal disputes – ACAS being a prime example. And some of us were aware that it was going on in other countries, but the general view was that it was fine for the Americans and Australians, but it was not for us: we didn't need it. No doubt there was the odd informal mediation, but the idea of a professional mediator, let alone the possibility of compulsory mediation, was unknown. In fact mediation really seems to have started in this country in any meaningful way around a year after I became a judge, which was in 1996.
2. So, if you want to be unkind, you could say that I am an outsider with no more than second-hand experience of mediation speaking to experts on the topic. Such a view of this talk may be rather reinforced by the rather self-important sounding title, which, as far as I can recall, was not of my choosing. I think I detect the familiar and mischievous touch of your chairman today. However, when it comes to mediation, I see myself neither as truly outside nor as being on high. Rather, I prefer to see myself as an informed, objective and supportive observer and commentator of mediation. Informed because for three years I was Master of the Rolls and Head of Civil Justice – a wonderful combination of titles. “Master of the Rolls” sounds mysterious, romantic and ancient,

whereas “Head of Civil Justice” sounds modern, managerial and slightly Stalinist. As Master of the Rolls, I was closely involved with incorporating mediation into the civil justice system and had quite a bit to do with mediation and mediators. Objective, because I have no personal interest in mediation in any way. And sympathetic, because I believe that mediation is a good thing and should be encouraged for reasons which are based both on practicality and on principle. And, I should add, any encouragement must be based on practicality and principle, and not on some sort of messianic commitment to mediation.

3. I referred to mediation being a new phenomenon, which has just come of age. In fact, if you go back to the 11th century or even earlier, mediation was very common in England. Indeed, it appears that the Church instructed all Christians to avoid litigation and threatened those who did not agree to mediate with excommunication¹. And legislation at the time of Henry I (1100-1135) encouraged mediation, or settlement by love as it was referred to, at least in relation to partnership disputes². Indeed, the days on which mediation could occur were known as lovedays, according to the researches of Professor Derek Roebuck³, who also records how medieval English judges often adjourned cases so that the parties could mediate a settlement. Indeed the famous dispute between Henry II and Thomas a Becket was apparently the subject of a failed mediation: apparently the loveday proved unsuccessful because the King refused to kiss Becket⁴. So, like so many supposedly new ideas and novel practices, it turns out that mediation is not a brilliant new late 20th century idea, but that it had in fact been around for a long time in this country. For some reason, having been very wide awake in early and late medieval times,

¹ Derek Roebuck *The Charitable Arbitrator: How to Arbitrate and Mediate in Louis XIV's France* (2002), p 109

² *Leges Henrici Primi* p 173, 54.2 and 3

³ Derek Roebuck, *Mediation and Arbitration in the Middle Ages England 1154 to 1558* (2013), pp 29ff

⁴ JW Bennett, *The Medieval Loveday* (1958) pp352-353, citing Theodore Erbe, *John Mirk: Festila* (1905), p 41

mediation at some point went into a Rip van Winkle-like hibernation or Sleeping Beauty-like sleep for many years at any rate in this country, until it woke up around 1997.

4. Since it woke up, mediation has grown up very quickly, and, as one might expect, it has and has had its fans and its detractors. As is almost always the case, both the positive views and the negative views have something to be said for them, and, as always, striking the right balance is fundamental. There is still a tendency, albeit that it has receded quite a lot, to see mediation as a trendy idea, with no real substance, and which will soon have had its day, so that dispute resolution in England and Wales will revert to being a mediation-free zone. There is also a tendency, which has found increasing favour in some circles particularly those in which saving money is the main aim, that mediation is a sort of universal panacea, which, properly developed, should obviate the need for an effective civil courts system in England and Wales. Both tendencies are not merely wrong: they are misconceived, and actually risk undermining the very argument that their supporters wish to maintain. That is because, if policy is implemented on the basis of either of those arguments, the argument concerned will very quickly be brought into disrepute – and quite rightly.

5. Mediation undoubtedly has advantages over litigation – but there are also some disadvantages. The advantages and disadvantages, many of which overlap or interrelate, are well known, but it is I hope worth briefly summarising the advantages and the disadvantages.

6. So what are the advantages of mediation over litigation? First, mediation is quicker, cheaper and less stressful and time-consuming than litigation. Secondly, mediation is more flexible than litigation in terms of potential outcomes. Thirdly, mediation is less likely to be harmful to the long term relationship between the parties. Fourthly,

mediation is conducted privately, under less pressure and in somewhat less artificial circumstances than a court hearing. Fifthly, it is far more likely that both parties will emerge as “winners” or at least neither party will emerge as a disgruntled “loser”. In a way, all these advantages can be said to be encapsulated in Winston Churchill’s dictum that “to jaw jaw is better than to war war”⁵. However, each of these advantages must be qualified by the words “but only provided that the mediation is successful”.

7. And that leads to the first disadvantage of mediation. If a mediation does not work, it has corresponding disadvantages: the overall proceedings, because they involve a failed mediation as well as a trial, cost more, take more time and are more likely to cause serious damage to the relationship between the parties. The second disadvantage is connected with this. A litigant who is rich or wants to delay can use mediation cynically to put pressure on an opponent who is poor or in a hurry. The third disadvantage is that the parties to what seemed at the time to be a successful mediation can retrospectively feel that they were “bounced” into what now appears to be an unsatisfactory settlement, when they should have had their day in court. A fourth disadvantage of mediation is a bit of a lawyer’s point, but it does have some validity: if almost all cases settle and hardly any disputes go to court, the development of the law will be prejudiced – a particularly significant point in the common law world, where judges do not simply interpret the law, but formulate and develop it.

8. Mediation is particularly attractive at the present time when litigation is becoming ever more expensive and time-consuming, when the law is getting increasingly complex, when legal aid is ever more attenuated, and when court fees are being increased markedly. As a result of this almost perfect storm of financial difficulties, we are at risk of depriving most ordinary people of access to justice. But as well as justifying a general move

⁵ Winston Churchill, an alleged remark during a lunch at the White House on 26 June 1954

towards more mediation, this point also highlights a fifth disadvantage of mediation as against litigation. A citizen's right – and therefore her ability – to go to court to vindicate or to defend a civil or family law claim is an absolutely fundamental ingredient of the rule of law. Three months ago in the *Financial Times*, John Thornhill wrote this:

“The late, great historian of the Communist Party of the Soviet Union, Leonard Schapiro, used to argue that of all the factors distinguishing democracies from autocracies, the most important was the rule of law. The right to vote a self-serving government out of office was a wonderful privilege. Free speech, free markets and a free press were all to be cherished. But the ability of an individual to defend his or her rights in a court of law – even against the predations of a government or a ruling party – was the most precious freedom of all. ‘The law has always been and, I believe, always must be the acid test of a free society’, he wrote”.⁶

9. The right of access to courts is fundamental and, like all rights, it has to be genuinely available to all. And so mediation must not be invoked and promoted as if it was always an improved substitute for litigation. Mediation is not litigation; I said in a speech a few years ago that mediation and litigation are twins, but I might have usefully added that they are not identical twins. (And I might add that arbitration means that there are non-identical triplets rather than twins). The fact that mediation and litigation are not identical twins (or triplets) is clear enough from the different advantages and disadvantages which I have already discussed. But in addition, in constitutional terms, there is no right of access to a mediation, so mediation, unlike litigation, has no inherent implications for the rule of law. People plainly should have the constitutional right to refuse to agree terms because they want their day in court: by the same token, they have the same constitutional right to refuse to mediate if they want their day in court. The delivery of justice is a fundamental constitutional function of any civilised government: it is not just

⁶John Thornhill, *Vladimir Putin and his tsar quality*, *Financial Times* 6 February 2015

a service, while the provision of mediation is just a service – and, I must emphasise, that in no way denigrates mediation. Indeed, in practical terms, although I have characterised it as a disadvantage, it can be said to be an advantage, because the constitutional role of the courts leads to significant constraints on litigation which do not apply to mediation (or indeed to arbitration): the requirement for public hearings, the relatively inflexible rules and the constraint on remedies are but three examples.

10. And that brings me to the sixth and final disadvantage of mediation, namely that some people simply don't want to mediate. Mediation still has something of a credibility gap with some people. There are no doubt several reasons that fewer cases go to mediation than one might hope. It has been said that it is human nature to fight to win rather than to compromise⁷. Whatever Winston Churchill may have said, people, or at least many people, are in some respects hard-wired for war rather than for jaw jaw.

11. People no doubt have many reasons for litigating without even trying to mediate first. Some people simply want their day in court; some people are so convinced that they will win, that they see no point in mediation; sometimes a party thinks that the other party won't mediate in good faith; sometimes a party just can't believe that the case is settleable; sometimes a party thinks that it is a fatal sign of weakness to propose or even agree mediation; and some people still just find the notion of mediation a bit weird. Perhaps the most telling evidence of human nature trumping good sense in this field comes from a 2007 survey, which reported that 47% of respondents involved in commercial litigation admitted that a personal dislike of the other side had been responsible for driving them into costly and lengthy litigation⁸.

⁷ <http://www.newlawjournal.co.uk/nlj/content/litigation-v-mediation>

⁸ *ibid*

12. So mediation, like almost every aspect of human endeavour, has its advantages and its disadvantages. But its advantages are so great and so important, particularly in the present time, that this is not a topic on which one simply shrugs one's shoulders, says that there is much to be said on both sides, and then walks away. We have to examine the disadvantages and either answer them or neutralise them.

13. In other words, provided we acknowledge and take into account the disadvantages of mediation and do our best to cater for them or to neutralise them, I think we can and should be pretty uninhibited about supporting the idea of mediation in civil and family disputes. Since 1999, with the Woolf reforms, and even more since 2012 with the Jackson reforms, there is a very strong presumption that the court time and the legal costs involved in any civil case should be proportionate to the value of what is at issue in the case. And precisely the same principle lies behind the Norgrove reforms to the family justice system. Of course, the "value" of a case in this context is not limited to pure financial value, but normally and inevitably financial value is a major factor, and, frankly, sometimes the only factor, when one is assessing proportionality.

14. There are plenty of civil and family cases where it is very hard to work out a way of litigating properly without the costs and time involved being wholly disproportionate to the value of the case. I would have thought that such cases could usefully go to mediation, and indeed they ought to go to mediation, given that the costs would be less, and indeed there would be the other benefits which I have mentioned, including the fact that it would take less time, be subject to less delay, and the hearing would be less frightening and alien to most non-lawyers than the full panoply of a court hearing.

15. In the context of increasingly expensive litigation, augmented court fees and substantial legal aid cuts, the relative cheapness of mediation (coupled with its speed) is, or at least should be, particularly attractive to ordinary people. And it is attractive, at least at first sight to the Government, because the more cases that mediate the smaller the demand for the courts. But there is, I suppose, an arguable possibility of a conflict of interest, as the Government has a vested interest in parties mediating only after the claimant has issued proceedings in the courts (or, even better in some cases after further court costs have been incurred). Of course, at least on the face of things, it is very much in the interest of parties (and therefore in the interest of dispute resolution, and thus in the public interest) that the parties are encouraged to mediate before any court fees are incurred. However, I believe that experience also suggests that one of the reasons for mediation failing is that it takes place prematurely, and that it often helps for the parties to know more about each other's case before mediating. There is a fine balance to be struck between not mediating too early (for this reason) and not mediating too late (when the amount of costs already incurred may make it much more difficult to settle).
16. More broadly, what steps can be considered in order to answer, neutralise or mitigate the disadvantages of mediation which I have mentioned? The risks and disadvantages of mediation failure can be met with an answer which is both pragmatic and impressive, namely that the great majority of mediations are successful. The UK National Family Mediation suggests that over 80% of their mediation cases "reach full settlement"⁹. Other evidence in the UK is similarly impressive. And United States research which is admittedly based on evidence a couple of decades ago, suggests that the overall success rate of mediation in the US is, or at least was some twenty years ago, around 80-85%¹⁰. And I am not sure whether these figures take into account the mediations which appear

⁹ <http://www.nfm.org.uk/?gclid=CMjHta-2usUCFZTLtAodflgAjw>

¹⁰ <http://adrr.com/adr3/other.htm>

to fail on the day, but subsequently settle as a result of the mediation. When it is contended that mediation is expensive when it fails, such impressive success figures offer a powerful answer.

17. However, the evidence is not all one way. Evidence submitted to Sir Rupert Jackson in connection with his inquiry into legal costs, for instance, showed that 95% of personal injury cases settle without the need for formal mediation¹¹. And a US study by the Rand Corporation¹² involving 10,000 mediations suggests that, while over 70% of cases resulted in settlement, they may not have resulted in much savings by way of costs or time¹³. On the other hand, the study also suggested that a failed mediation added no more than £2,000 to the overall costs¹⁴. However, the evidence is not particularly reliable and it would be very good if we had a comprehensive and rigorously collected and analysed data bank of information regarding mediation, so we could make properly informed choices.

18. Such a data bank might produce an answer to the question: which types of case are most likely to mediate successfully? If there was an answer to that question (which I must admit to doubting), it would be invaluable not merely to practising lawyers but also to Judges. One of the problems for a Judge is how far to encourage mediation when a case comes before him at an early stage. In some cases, the lawyers may be hoping that the judge strongly recommends the parties to mediate, as they may take such a recommendation seriously when it comes from the Judge but not when it comes from

¹¹ Evidence submitted from Trust Mediation Ltd, cited at Jackson Final Report (2009) at 358.

¹² Zander, *The State of Justice*, (Sweet & Maxwell) (2000) at pp 37-38

¹³ Genn et al, *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series 1/07) (May 2007) at p 67 (<http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>).

¹⁴ Genn et al, *ibid* at 98

their lawyers. But sometimes the Judge may be wasting his time or wrongly encouraging mediation because of factors which the lawyers know but he does not.

19. In general, I strongly suspect that the balance of risk favours judicial recommendation and encouragement of mediation rather than holding back. In the first place, mediation appears to enjoy a pretty high rate of success, as I have mentioned. Therefore, statistically at any rate, in most cases in which any encouragement towards mediation is successful, the eventual outcome is likely to be happy. Quite apart from this, there is unlikely to be much downside in a Judge advising mediation inappropriately (save a waste of the judicial breath), as it is unlikely to result in a mediation. On the other hand, a Judge encouraging mediation in an appropriate case could obviously be very valuable. But maybe I am over-estimating the effect of judicial words of encouragement.

20. A more extreme solution is simply to require the parties to mediate, not just to consider mediation, before they are permitted to have a trial. There is principled objection to such a proposal which has real, if perhaps limited, force. It is that such a requirement would make it more difficult to get access to the courts, both because the mediation costs could prevent some people from thereafter litigating and because it could delay the hearing – sometimes quite substantially. Of course, if mediation is low-cost (or even better, free) and speedy, then this objection largely goes by the board anyway.

21. In the Spring of 2014, the Ministry of Justice set up a system of compulsory, but often free, so-called MIAMs (mediation information and assessment meetings) “for separating couples”, which the parties have to undertake before they are allowed to bring family proceedings. At least according to the Ministry’s own information service, just under seventy percent of MIAM mediations have successfully resulted in settlement.¹⁵ Although

¹⁵ <https://www.gov.uk/government/news/more-free-mediation-sessions-for-separating-couples>

my predecessor, Lord Phillips, spoke unequivocally in favour of compulsory mediation when he was Lord Chief Justice, I am a little more cautious, although I definitely incline in favour of it in some types of case. After all, mandatory mediation is in place in the US, Australia, New Zealand, and Scandinavia, at least for some types of civil case. While, as I say, it would be wrong for me to go so far as to say that it ought to happen, I think there plainly must be a lot to be said for extending the MIAM scheme to smaller civil cases. Indeed, I understand that at last year's conference, Lord Faulks, then Minister of State for Justice, said he would explore whether a similar system could be introduced for civil mediation¹⁶.

22. The middle way between merely encouraging mediation and positively requiring mediation is to penalise the party who refuses to mediate. Like all middle ways that course has obvious attractions. However, it has not had a particularly happy history in England. Given that the mediation is treated as without prejudice negotiations, the information available to the court when deciding whether to penalise may be insufficient or one-sided. There is no way of penalising a party who loses and has to pay all the costs anyway. And, if a claimant is wholly successful, it seems a bit weird for a judge to penalise him for not agreeing to mediate his claim when he was not obliged to do so and the judge has just held that he was entitled to succeed 100%.

23. Another way of encouraging mediation is to get parties to include a compulsory mediation clause in their contracts, just like many commercial contracts have compulsory arbitration clauses. The government have tried to enforce mediation for boundary disputes which seems to me to be a good thing, but such disputes do not arise out of contracts and therefore cannot be catered for by the parties in advance. But there are contract-based claims of a similar nature which are pre-eminently suitable for mediation.

¹⁶ <https://www.gov.uk/government/speeches/mediation-and-government>

Thus, there would be much to be said for extending mediation to similar sorts of dispute, such as possession claims based on nuisance and annoyance. So might it not be a good idea to include a clause requiring mediation at least in some types of case in every Council or Housing Association tenancy agreement – or indeed in standard form private sector tenancy agreements? Service charges may be another good area for contractual mediation agreements— provided of course, a reasonably experienced mediator could be instructed.

24. I think that there must also be a lot to be said in favour of the Department of Health encouraging mediation pretty promptly after any medical procedure goes wrong in a relatively minor way. Very often in such a case, an apology, simply saying sorry, may be all the patient or the patient's family, want. Without a formal mediation, the doctors will be reluctant even to say sorry because of a fear that it will be construed as an admission of negligence. And, indeed, as you will all know better than I do, in many cases, the very existence of a mediation, getting the parties together, especially when facilitated by an expert mediator, can help get a consensual result when no such result would otherwise have been possible.

25. Another, rather different answer to many of my concerns that some mediations are worse than useless because they do not result in settlement, and so mediation increases costs and delay or because one of the parties may be playing the mediation card cynically, also involves the parties agreeing a procedure. That procedure is that, if the mediation has not produced a settlement by a certain time, the mediator can impose a settlement – which is referred to as med-arb because it is seen to involve converting the mediator into an arbitrator. In truth, I think that it sometimes should be called med-exp, as the mediator will, I suspect, convert herself into more of an expert determiner, who can proceed with her determination relatively freely as she wants, rather than through the

relatively formal arbitration procedure. No doubt, the knowledge that the mediator will suddenly convert to an arbitrator at a certain moment, like Cinderella turning into a pumpkin at midnight, helps concentrate the parties' minds on a settlement before that moment arrives.

26. I said at the beginning of this talk that mediation has to be supported but any such support must be on a practical and principled basis. It is absolutely fundamental that all citizens are able to establish their rights and defend themselves, whether against the state or against other citizens, ie whether public rights, private civil rights, or family rights. The traditional and principled way of achieving this is through the courts. It should not be impossible for citizens to have proper access to the courts – ie with decent legal advice and legal representation. However, and I do not say this in a spirit of recrimination, but simply as a matter of melancholy fact: the legal profession's charges, the court system's procedures and government cuts and charges render it difficult if not impossible for many citizens to get access to the courts. In those circumstances, provided that its costs are proportionate to the issues involved, mediation appears in practice to be the only alternative. Whatever may be said about mediation as an alternative to litigation as a matter of principle, it appears to be quite a satisfactory alternative in practice at any rate to many people - at least judging by the reported outcomes.

27. It is only right to add that mediation is by no means only for small claims: there have been some very big disputes which have been resolved successfully and relatively cheaply, painlessly and fast by mediators. This in itself is a valuable exercise for the country and for business. However, as a Judge, my primary concern is about access to justice, and, as to that large organisations and wealthy individuals can look after themselves. My concern is for ordinary people, average citizens, and ordinary businesses, SMEs, and the problems they have of getting access to justice, and, given that we are in

an age of austerity and proportionality, mediation is particularly suitable for their legal disputes.

28. Accordingly, I end with these two messages. First, as mediators, you are performing a valuable role, and you should continue to do so through sending out a clear message through your mediations, namely mediation works is a vital adjunct to litigation. Secondly, conferences such as these and other continuing education events are vital to ensure that mediators are, and are seen to be, learning from each other's experiences.

29. Thank you very much.

David Neuberger

London, 12 May 2015