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Achieving Justice Through the Courts

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Over the last 20 years, there has been a marked increase in the use of alternative dispute resolution (ADR) methods in this country to deal with conflicts traditionally litigated in courts. People in conflict can negotiate with each other. They can seek the assistance of others (often lawyers) to negotiate on their behalf. They might obtain the services of mediators – persons who facilitate negotiation of a solution. Parties in conflict can also hire an expert to appraise their cases, or submit the dispute to arbitration (similar to litigation but outside the formal court system). There are many alternatives to suing in court.

The acronym ADR explicitly acknowledges the primacy of courts in dispute resolution. Many people who favour ADR argue that the various means of attempting to resolve disputes should all be called DR – dispute resolution. They say that litigation is just one of many methods of dispute resolution. Whilst this is true, it may not negate the courts claim to primacy in dispute resolution – at least for legal problems.

ADR proponents point to many disadvantages of litigation. Suing someone generally causes irretrievable breakdown in friendships or previously successful commercial relationships. The courts can only provide a limited range of remedies (the primary one being an award of damages calculated in a money sum); judges cannot creatively generate solutions for problems. Judges must allocate ‘blame’, and generally award the winner all and the loser nothing. Court proceedings can be costly and time-consuming. One may begin to wonder whether the courts are a forum for justice at all!

The role of courts in achieving just dispute resolution

So, what role do the courts play in a just resolution of conflict? They are the means provided by the State to enable citizens to resolve their disputes in a civilised manner – rather than resorting to self help, such as shooting your enemy, or ‘stealing’ back the goods you claim are yours. They compel your opponent to respond to your concerns, or suffer the award of a judgment in default of an appropriate response.

The courts do have many advantages. Courts provide an open, public, accountable procedure. Judges are trained in law, rules of evidence and fair procedure. They are paid by the State, and have no personal interest in the cases they must decide objectively. The neutral judge also has power to compel the parties to behave properly and present their cases in accordance with developed rules of natural justice. They work to ensure both sides are fairly heard, and the case is resolved on its merits. Judges, because of their exercise of State endowed power to manage the conduct of cases can redress a power imbalance between the parties. Another

important aspect of litigation is that when cases are determined in the courts, records are kept and are available to the public. They provide precedents for people with similar disputes to evaluate their legal position. Best of all, if you take your case to court, you are guaranteed a result. Negotiation and mediation may fail, but a judge must give you a decision. Further, the court system helps the successful party to enforce court decisions.

Selection of cases for court or alternative dispute resolution

Despite the advantages of courts and because of the disadvantages of the trial system, parties may often consider attempting negotiation or mediation first, even if, ultimately, they may have to resort to court adjudication. There are cases, however, where the courts are the dispute resolution method of first resort. Some parties will not negotiate, and their opponents have no choice but to use the State sanctioned system – to sue in a court. Further, some disputes, due to the issues involved or circumstances of the parties, simply do not fit a negotiation / mediation model. There are many circumstances where one would recommend litigation, or where litigation is the only means by which a resolution can be achieved. Consider the following conflict scenarios. If someone approached you to help them decide whether to sit down and negotiate with the opponent in these cases (even with a professional mediator to assist) would you recommend negotiation / mediation, or litigation through a court? What might mediation achieve in these cases?

Conflict scenario 1 – The case of the unhappy vet

Sandra the vet fired her assistant Marge when she discovered that Marge likes to tease the animals. Marge also beats the dogs with a heavy wooden rod if they do not obey commands. Marge is seeking re-instatement, because she enjoys her job – she likes mis-treating animals. Sandra cannot bear to see an animal teased, let alone harmed.

Should they mediate, or go to court?

Conflict scenario 2 – The fight for the last kidney

Martha has been waiting for a kidney transplant for 2½ years. She is on dialysis 3 days per week. She is at risk of dying if she develops complications, but with careful management is expected to survive 2-3 more years on dialysis. She has been at the top of the waiting list for 1 year, but the last 3 kidneys were not compatible with her and were allocated to people lower down the waiting list. Martha is desperate.

Bert was added to the kidney transplant list 3 months ago, and is at the bottom. He is a heavy smoker, and very overweight. His situation is less stable than Martha, and he is also on dialysis 3 days per week. He may not survive more than 12 months due to his generally poor health. He is desperate.

A kidney has just become available, and is compatible with both of them.

Should they sit down to negotiate who gets the kidney?

Conflict scenario 3 – Poor Bill and the Big Bad Bank

Bill owns the home he lives in at Mudgeeraba. His son Jim pressured him into mortgaging his home to secure a loan

to Jim from the bank. Jim failed to make the monthly repayments, spent the money on drugs and gambling, and has vanished. The bank is planning to sell the house and land under the mortgage. The sale will probably realise less than what is owed to the bank.

Should Bill approach the bank to try to arrange a deal?

Conflict scenario 4 – The Carelessly Crafted Confusing Contract Clause.

Kathryn leased a shop for 3 years from Rubbery Figures Pty Ltd. In the contract it says that she can renew the lease for a further 3 years so long as she notifies the lessor “before the beginning of the last month of the third year from commencement of the lease”.

Just over 3 years ago she moved in to the premises in August and started paying rent. The details of the lease were not finalised until October due to lengthy negotiations between Kathryn and the company about payment of electricity and management costs during the lease. Kathryn and the company finally signed the document in late October and the lease is dated 23 October 2001. Since it had been drafted much earlier, in the first clause it expressly says the lease runs “for 3 years from 1 August 2001. This was not amended in the final version signed by the parties.

On 10 September 2004 she notified Matthew, the on-site agent for Rubbery Figures Pty Ltd and manager of the shopping centre, that she intended to re-new the lease. He agreed on behalf of the company. The company now claims that the lease required her to notify her intention to re-new by the end of June 2004, and that she needed to send a written notification to the company’s registered office, and that Matthew could not bind them to a renewal.

Both parties want to renew the lease, but the company wants to re-negotiate the lease for a higher rental, and Kathryn wants to take advantage of the fixed rental amount under the renewal clause in the contract.

Have you decided what you would recommend?

Without any detailed analysis of the law, consider some of the factors which are relevant in each case. Conflict scenario 1 – The case of the unhappy vet – involves a matter of principle. Sandra will not work with a person who is cruel to animals, and Marge will not stop mis-treating the animals. The question of reinstatement is “not negotiable” for Sandra. If Marge insists on seeking reinstatement, these parties should go straight to court (or in this case the Industrial Commission). In disputes where conflicting principles are directly in issue, sometimes the court is the best venue for the dispute to be resolved.

Conflict scenario 2 – The fight for the last kidney – involves a scarce resource. There is no way to create an alternative solution – someone must “win” and someone must “lose”. It is probably kinder to the parties in this case to allow an objective person to make a decision. Imagine asking them to confront each other from their hospital beds and fight for their lives! This is why hospitals work to develop clear and fair guidelines to deal with such scenarios. In disputes over scarce resources, sometimes there must be a winner and loser – and the courts are best placed to determine who has the better legal claim. This should not discourage you from looking for alternative solutions first.

Cases which involve matters of principle or scarce resources must generally be resolved in court. There is simply no room for the parties to negotiate – to “give and take”. In the first case, about the vet, the parties may be non-negotiable on the issue of reinstatement of Marge in her job, but given that Marge will not be reinstated, perhaps the parties could negotiate a termination payout, provision of a reference and other issues. You might be right in thinking, however, that these two people could not even deal with each other given the nature of their conflict.

Conflict scenario 3, involving “Poor Bill” and the “Big Bad Bank” seems like a case where doing a deal could be better for both parties. If the bank puts Bill out of his house, and still does not get all the money owed, it may not get any more money from Bill if he has no other valuable assets. Bill will be very upset to lose his home. If the parties talk, however, Bill might be able to pay off the mortgage over time, and might agree to do that. Whether Bill agrees to pay a lot, a little or nothing will depend on how strong he thinks his legal position is. Whether the bank agrees to accept part payment, or instalments will depend on how strong its legal position appears to its advisers. The bank might also wish to avoid adverse publicity. It might even want to help Bill, if it can do so without losing company assets. It may be better for these parties to negotiate.

Conflict scenario 4 – The Carelessly Crafted Confusing Contract Clause – involves a matter of law (contract interpretation). There appears to be no factual dispute. This matter could be resolved quickly in court, with one side winning and the other losing. On the other hand, if Kathryn is going to stay in the shopping centre, and maintain a good working relationship with the centre manager Matthew, it would be good if the parties could achieve their own settlement. It might be possible to arrange a deal where both sides benefit – something a court cannot do. For example, Kathryn might be happy to pay more and move into a shop in a better loca-

tion in the complex – a court could not order that. The owner of the complex might be willing to allow Kathryn to continue with her existing cheaper rental amount for 3 years if she commits to extend her lease for a further 3 years after that (paying more rent at that later stage). All contracts can be renegotiated if the parties wish.

Final thoughts

There are many factors to consider when choosing how to attempt to resolve a conflict. Often, parties will use a combination of methods to deal with a conflict, or try different approaches in turn. One should avoid thinking of the alternatives as exclusive. When parties negotiate, even if they do not settle their whole dispute, they may settle some of the issues. If they reduce or clarify the issues in dispute then, even if the matter goes to court, it will be resolved more quickly, at less expense. Mediation and negotiation can restore personal and commercial relationship broken by conflict. Although careless negotiation might make matters worse, careful negotiation can help the parties maintain friendships or working relationships even if some issues still have to be resolved in court. Good lawyers explore all of the options for their clients.

Litigation specialists know that all negotiation is conducted in the knowledge that the court system is available to provide a guaranteed result and is the source of precedents which the parties refer to in evaluating the strength of their positions. Some conflicts must be resolved in the courts. Justice (or even any result) often cannot be achieved across a negotiating table where the parties are arguing over a point of principle, or a scarce resource, or where one party is overborne by the other – especially in cases of abuse.

Ultimately, if you are “in the right”, justice is done by a judge recognising your legal right or defence and awarding you judgment.

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