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Diagnostic factors in mandatory ADR referrals

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Diagnostic factors in mandatory ADR referrals

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This is the third in a series of articles dealing with the ways in which the courts are defining and redefining aspects of ADR processes.

Barrett v Queensland Newspapers Pty Ltd & Ors [1999] QDC 150 (19 July 1999) was decided two years ago but it is being dealt with here because of its similarity with a NSW decision to be dealt with in the next issue of the ADR Bulletin. It raises an important and topical issue in the practice of ADR: on what basis will courts exercise their discretion to make mandatory referrals to one or other ADR process?

The plaintiff, a Queensland magistrate, had sued a publisher for defamation, alleging that a published article ('He's too soft' *Sunday Mail* 4 January 1998) implied that the magistrate treated criminal offenders too lightly, was responsible for a high crime rate in the Hervey Bay area and generally failed to administer justice properly.

The defence of the newspaper and other two defendants revolved around fair comment and qualified protection. Pleadings had closed, discovery and inspection had been completed and the defendants applied for a referral order to mediation in terms of the relevant *District Court Rules.*

The defendants argued that, given the complexity of the dispute, the fact of a jury trial and various other features of the case, a hearing time of 10 days would be required. It was submitted that preparation for a complicated trial of this length would be 'quite expensive' and that the defendants desired to reach a reasonable compromise before incurring the extensive costs involved in preparation. It was submitted on behalf of the defendants that a mediation, by contrast, would only take a single day and result in extensive cost savings.

The plaintiff opposed the application for referral, submitting that as a defamation matter it was not suitable for mediation. In particular, it was argued that: the defendant was not likely to accept liability; more than one day's mediation would be required to deal with the case's complexities; issues of credit would not be resolved at mediation; the pursuit of exemplary damages made it problematic; and that 'defamation trials rarely settle at mediation'.

The judge was thus faced with an increasingly common phenomenon where ADR is connected to the courts and referrals can be made according to the discretion of the court and over the objections of one or more parties. This is the *diagnostic* question — namely, what factors will judges take into account in exercising their discretions?

In *Barrett* Samios DCJ was faced with the reality that there is no established case law on the matter, though that is not likely to be a factor in the future — we now have one decision, with more on the way.

There was, however, the empowering legislation, the purpose of which was to make ADR available to litigants so that they could achieve 'negotiated settlements and satisfactory resolutions of disputes'. Yet in the case of mediation, unlike case appraisal, the relevant legislation and rules provided no guidance at all as to the matters a court could take into account when deciding whether to make a referral order. Nevertheless, the Court held that the statutory scheme allowed it to have a 'pre-disposition' to refer to mediation if one party sought an order, suggesting that the onus would lie on the objecting party to overcome the predisposition.

Before indicating what factors it considered relevant to the exercise of the discretion, the Court referred to two related matters of significance.

The first of these was the extent to ➢

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➢ which the interests of litigants other than the parties to the present dispute could be considered, particularly in relation to a circuit court which was available for a limited duration on an irregular basis. The defamation trial would dominate the two week circuit sitting, requiring other matters to wait considerable time periods before being heard. Not only did Samios DCJ regard this as a relevant consideration but he went on to endorse the merits of routine mediation of all matters so that those capable of mediated resolution would not stand in the way of those requiring adjudication. This upholds the view that judicial services can be rationed and there is no automatic entitlement to court time for all litigants, an approach which is referred to again later in this discussion.

Second, the Court queried the extent to which the decision-maker could take account of the prospects of success (or more accurately lack of success) at mediation, as argued by the plaintiff in opposing the application. Here Samios DCJ held that this might be inappropriate on the basis that even where one party was strongly opposed to it and there were grounds for being dubious about success, mediation still provided the best opportunity for dispute resolution, better than settlement on the steps of the court. This evidenced a strong judicial endorsement of the mediation process and the contributions which a skilled mediator could make. In effect, the Court is suggesting that arguments that mediation will not be successful will not carry much weight on their own.

Returning to the factors relevant to the exercise of the discretion, Samios DCJ held that, in the circumstances of the present case, it was relevant that:

- he could not conclude that mediation would not be successful;
- the trial might take longer than 10 days and detract from court time available to other litigants;
- three of the four parties were supportive of mediation;
- the second defendant, without admitting liability, had agreed to pay the plaintiff's share of the mediator's fee and venue costs;
- the application was made early in the action when substantial costs would be saved by all parties;
- there were risks in litigation, even for the party opposing the referral order; and
- a skilled mediator might be able to assist the parties, despite the difficulties inherent in the case.

What is important about this list is that it involves the judge articulating the criteria where there might otherwise be inarticulate premises, intuition and unreasoned conclusions. This is an important contribution to the development of criteria for dealing with the diagnostic question.

However, there are three factors of *Barrett* which will undoubtedly receive comment in the literature and be argued again in various courts, as follows.

Relevance of the interests of litigants other than those in the litigation under consideration

It is undoubtedly a reality of the times that court resources are finite and no individual has an infinite claim on them — case management practices give effect to this reality of court economics on a daily basis. However, there is also little doubt that it will be argued in due course that this approach involves showing a preference for one party's 'constitutional right' to access the formal justice system over that of another. There is indeed some irony in court connected mediation — a product of the Australian 'access to justice' movement in the early 1990s — becoming responsible for a denial of access to formal court justice for some litigants.

Basis for the strong endorsement of the mediation process and the skills of the mediator

This is not the first time that Queensland courts have expressed strong faith in mediation and in the contribution which can be made by skilled mediators (see the comments on the *Treloar* case in 2001 3(10) *ADR Bulletin*). This may be a function of the relatively early receptivity of the Queensland Bar to mediation training and the current judiciary's experience in and understanding of the process. However there may also be concerns about judges asserting, as Samios DCJ stated, that 'one knows from experience that often a ➢

➢ party will say a matter will not settle unless their "position" is met and yet the matter does settle because a different "position" is met ... at the court door', or 'one could point to disputes that have not been resolved because of the "people" involved in those disputes ... there could be as many disputes that have, despite the so-called stature of the people involved or the personalities of those people ... been resolved at a mediation ...'. While these comments show a refreshing insight into the realities of the litigation process (and even into some ADR jargon), they have little basis in survey studies or other 'scientific' resources. It is true that the diagnostic question will never be answered with complete objectivity, but it may be necessary in the future for judges to refer more to the literature, survey studies and other sources of information on the issue and less to anecdote and experience.

Suggestion that the court might be a better judge of the interests of a litigant than the actual litigant

In this case the plaintiff objecting to the referral application was both a lawyer and legally advised and was someone whom one might expect to be only too conversant with the vicissitudes of litigation. There is some irony in this approach, given the current prevalence of a 'deregulation' philosophy in many areas of social decision-making. Mediation began its life, in part, as a private, voluntary alternative to the formalism of adversarial litigation which allowed individuals to make their own risk assessment — both about whether to enter the ADR world and about how to behave once in it. Now it could become part of a 'regulated' environment in which part of the risk assessment is undertaken by the court, potentially in disregard of a litigant's own wishes, as it becomes the sponsor of private settlement.

This case provides a useful starting point in developing diagnostic checklists for the difficult decision of making mandatory ADR referrals. Yet it goes without saying that in the exercise of any discretion it is not only the list of relevant factors but the weight which is attributed to each of them which is important and there will, no doubt, be many future cases in which the weighting game can be played out. My own view is that where a plaintiff is seeking aggravated and exemplary damages in a matter which would proceed to jury trial, then this is a factor which might render mediation inappropriate. However, this view is based only on experience and has no claim to scientific objectivity or precedent status.

In the following issue of the Bulletin reference will be made to a NSW decision in which the objections of one party were considered to be a weightier factor in exercising the discretion over a referral order. ●

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