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ADR and the courts

Has mediation made the courts irrelevant?

Ian Hanger QC

To answer this question I propose to discuss why mediation has been so successful and will then briefly examine its disadvantages — perceived or real — before examining where we are headed.

Why has mediation been successful?

Depending on which State you were in, during the 1990s the delay involved in getting a matter to trial after the interlocutory steps were completed was in the order of one to three years.

The advent of the photocopier, the fax machine and the increase in international business transactions had the unavoidable effect of increasing the cost of commercial litigation. One may also surmise that during the same period costs were increased by the fear of possible actions for professional negligence. Litigation became and remains an enormously expensive (and, one may even say, luxurious) way of obtaining a final determination of a dispute. It was too slow and too expensive.

Mediation offered a quick solution. It was essentially non-confrontational and offered a relatively stress free environment in which to resolve a dispute. It had the advantage of confidentiality and encouraged creative solutions not available to the courts.

It was attractive in that it eliminated litigation risk; that is, the risk of something going wrong with one's case during the course of a trial, the risk of a judge erring, the risk of a long appeal process or the risk of recovering a hollow judgment at the end of the day.

Frequently it even offered what it was so often touted as offering — a win-win solution.

Finally, it offered flexibility. Each mediation is different. The mediator does not apply strict rules but adapts the process to the circumstances of the dispute and the personalities of the people and organisations involved. To

me, this flexibility is the key to its success.

Criticisms of the mediation process

Let me outline a few criticisms or concerns about the mediation process. There is a wide range of behaviour that may aptly be described as mediation. Definitions in this area are apt to be simplistic and misleading. However, a description of some of the practice of mediation is useful in evaluating criticism of the process.

I confine my comments to mediation by lawyers of what might broadly be described as 'legal commercial disputes'. These are disputes that if not resolved by the mediation process are likely to end up in a superior court. It has been the practice throughout Australia to ask senior legal practitioners to mediate such disputes. Why is this so? It cannot possibly be because such practitioners have the ability to sit quietly, sympathetically murmur 'What are your concerns?' and 'Tell me more' every so often, and generally act as therapists. The profession seeks out its senior members so that, apart from applying the necessary mediation skills, they can also use their substantial legal knowledge. The parties expect the mediator to assist in evaluating their positions and options. We are, I believe, paid to be evaluative and the most common criticism levelled at practitioner mediators is that they do not take an active enough role in urging the parties towards resolution.

It is therefore not surprising that one sometimes hears complaints of coercion by mediators. The mediator may have just crossed that line between actively urging settlement and forcing a settlement that is not wanted.

Such criticisms would be, in my opinion, rarely justified. Solicitors and barristers advising clients to settle are always faced with the prospect of a

client who has recriminations about a settlement alleging coercion. Thankfully, it is an allegation we do not see frequently. Insofar as mediators are concerned, the answer to an allegation of coercion, if one exists, is to point out that the client was at all times fully legally advised and made a decision after taking legal advice from his or her own advisers.

There is, however, a more insidious complaint that can be made about the mediation process. It involves the mediator unwittingly being manipulated and becoming a party to misleading conduct. It is best illustrated by a simple example.

Assume that the mediation relates to a personal injury matter and one of the issues is the extent of the injuries to the plaintiff. In a private conference the defendant's team informs the mediator that it has been videotaping the movements of the plaintiff over a period of weeks and 'has the goods on them'. With the authority of the defendant, the mediator convenes a private conference with the plaintiff's team, passes on that remark and quizzes the plaintiff about the extent to which the plaintiff has been using the injured limb. Have they been playing tennis? Have they been doing the gardening? And so on. The plaintiff, terrified but unknowing what surprises are in store for them in the courtroom, settles the case. In fact, the video, although indeed made, is relatively harmless. Had it been shown to the plaintiff it might have modified the approach to the case slightly, but probably not very much at all. You may ask why the plaintiff would settle — the plaintiff should have known that there could be nothing harmful in the video. I do not think that indicates an understanding of human nature. The ordinary, average person would be intimidated by such a bold assertion made by a person in authority.



In fact, this example merely demonstrates the value of the rule against hearsay. What the mediator should do is request that the so called damaging video be shown to the plaintiff. The example demonstrates how a mediator, who is a person in authority, can actually be used in a sinister fashion by one party to influence the other party.

If a mediator is involved in misleading conduct, generally no one will know either at that time or later. A further significant, and I believe proper, criticism of mediation is what I shall call the 'every child gets a prize' syndrome. With the advent of 'no win, no fee' type litigation there is a tendency for some of our colleagues to commence cases that have no real prospects of success, with a view to having them mediated. At the mediation they believe that to make the matter go away, an insurer will:

- (a) pay enough for them to recover their costs; and
- (b) leave something for the client.

They can say to the client that the litigation has been well worthwhile. From the point of view of the defendant insurer, it pays money that it believes it ought not to pay, but, if it does not do so, it is going to expend significant sums on non-recoverable costs. In other cases, a plaintiff's solicitors may join a number of defendants in the hope that the mediator will achieve a settlement, and will extract a small amount from each hapless defendant. The real wrongdoer, if joined, will enthusiastically endorse this approach.

There is one solution. The insurers should decline the mediator's invitation to settle by payment of a small sum. The only way in which cases which could properly be described as 'try-ons' are going to be minimised in the long term is to contest them. That requires defendants to manifest significant confidence in the judicial system.

Developing societal norms

Some argue that there could be a more significant effect of mediation than meets the eye. Where would we be if a certain ginger beer manufacturer in 1932 had chosen to mediate with a dissatisfied consumer?

The decision of a court does more than just determine the rights of the

parties to the litigation. It lays down what might be described as societal norms. That is to say, it delineates what is acceptable and unacceptable behaviour. While most decisions of courts don't result in the development of new codes of societal behaviour, there is a need to have enough decisions filtering through from the trial courts to the highest appeal courts to enable the societal norms both to be established and periodically modified.

Mediation encourages compromise. Compromised solutions too often ignore or give little weight to the policy that the law promotes in terms of public values. While the termination of a dispute is itself an admirable goal, it may ignore other admirable goals that might be more important. We have, for example, provided for the mediation of planning disputes. A mediated result of a dispute that involves the environment may well satisfy the parties to that dispute — it may save the relevant authority the cost of protracted litigation. However, it may not take into account the public interest in protecting the environment for the good of all society.

Mediation of all disputes would not be in the best interests of society. If, for example, society learns over a few decades that the way to avoid the harsh consequences that flow from a breach of contract is to mediate, then the deterrent effect of damages for breach of contract would be weakened considerably (consider Brunet E 'Questioning the quality of ADR' (1987) 62 *Tulane Law Review* 1 at 18). Once members of society appreciate that the harsh rigour of the law can be avoided by the mediation of a dispute, then the law loses its effectiveness; and in losing its effectiveness, it fails to signal to society what is acceptable and unacceptable behaviour. That in itself will, in the long term, give rise to more disputation.

The judicial process seeks to reach a true decision based on legal principle. Insofar as factual matters are involved in the legal process, the first determination is facilitated by the process of pleadings, particulars and the discovery or disclosure of documents. That is generally an expensive process. The spirit of ADR is against pleading and discovery because they slow down and add expense to the mediation process.



Critics of mediation therefore argue that the parties lack the benefits gained from what is seen as an essential process, necessary to achieve an informed and accurate resolution. Results that are reached without a mechanism that require the disputants, in legal terminology, to define the issues precisely and produce all relevant information are likely to be erroneous results, and therefore the resolution is not a good quality resolution.

In some ways it can be said that the strength of the court system — the definition of issues, precise finding of facts, application of legal reasoning and transparency of the process — is also its weakness because, of necessity, it adds to costs and delay. I have no hesitation in inviting

parties and lawyers in a mediation to speculate. Indeed I believe we are paid to speculate. What happens if the matter proceeds? Will you be able to obtain evidence to this effect? Do you think it possible they may obtain evidence to that effect? What kinds of documents probably exist? What do you expect to show? The litigation process is designed to answer these questions.

Mediation involves some guessing. We call on our extensive experience to guess intelligently at the answers and to make decisions based on limited factual information. We use our legal expertise to consider possible outcomes of litigation as one factor — an important one, but not the only one — in facilitating an outcome in what the parties see as their best interests.

Attitude of the courts to mediation

Drowning in civil litigation in the 1980s and early 1990s, courts found the advent of mediation to be a breath of fresh air. Mediation offered a way of unlogging the civil lists. The courts encouraged the use of mediation. Some courts took the further step of ordering parties, against their wishes, to mediate before a trial date was allocated and the scarce resources of the court were tied up for lengthy periods.

Far from seeing mediation as a threat, courts everywhere have welcomed the

process precisely for what it is — another way of dealing with a dispute. During the same period, the courts have streamlined the litigation process by supervising and managing cases, and introducing new rules relating to discovery, pleadings and the allocation of cases to various forms of expert evaluation. The courts now lean towards an 'all cards on the table' approach and have said on more than one occasion that the cards should be face up. In personal injury cases in Queensland

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there now has to be full disclosure before the action is commenced. Much more liberal rules dealing with separate determinations of questions of law also now apply in Queensland. I do not see this trend as being a response to a threat of being taken over by mediation. It is a welcome development that has been driven by the courts in a desire to implement a more efficient system.

In the fullness of time, the number of cases that go to court will significantly diminish. Indeed, I believe that this is the case in Queensland at present. One would like to think that the cases that will not be resolved in an alternate process will be the difficult cases and, in particular, those that will result in the laying down of societal norms.

I also suspect that in the last decade we have seen clients who are far more conscious of cost effectiveness and risk management. One sees matters in which clients ascertain how much money will be spent on pleadings, particulars and the discovery process, and decide whether such a process is cost effective or whether it is better to mediate before any court proceedings are commenced. These are the people who decide whether the imprecise speculation to which I referred is more cost effective than the more rigorous analysis involved in a legal proceeding.

Members of the legal profession have embraced mediation and in the highest

ethical traditions have urged clients, where appropriate, to consider the alternative of mediation rather than litigation, even though this may result in the earning of lower fees.

Future dispute resolution

The role of a judge is far more difficult now than it was 30 years ago. Issues are more complex and the public is more critical. Judges on fewer cases need more time to write well reasoned decisions. Indeed, it may be the case that

society reaches a degree of maturity in 50 years time when almost all of the problems that now take up the time of the courts are resolved by some alternative process. The day will not come when the courts cease to be the ultimate body to decide disputes or cease to lay down societal norms. I do not see their stature decreasing. The Bar also will survive. It will doubtless be smaller and specialised. It has already proved that it cannot only adapt to change but can lead change. It has successfully established a pre-eminent position in ADR challenges from other professions.

Based on the extent to which conflict resolution is now taught in schools and universities, and the extent to which dispute resolution clauses are written into Acts of Parliament and contracts, one can easily foresee our society entering into an age in which most disputes are resolved either by the disputants themselves or by some form of mediation. The world would be a better place. Presently, we are too litigious. ●

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