Thoughts on judges and mediation: the picture in South Africa and England & Wales

by Tony Allen
Solicitor (E&W), Mediator, Senior Consultant to CEDR (UK) and Conflict Dynamics (RSA)

Introduction

Over the last ten years I have had the privilege of coming to South Africa to train mediators and mediation, and from time to time to engage in debate and conference discussions about the place of mediation in the civil justice system in South Africa. My most recent visit in October 2017 has been more focused on training and raising awareness specifically about medical malpractice mediation, clearly and rightly a developing field in a sector of society where, like the UK, the costs of claims has spiralled almost out of control. I now mediate only clinical claims as the opportunity arises (maybe 15-20 a year, so still not a major activity), and I am also involved in a working party set up by the Civil Justice Council in England & Wales (E&W) to review the status of mediation and other forms of ADR and what steps if any should be taken within the civil justice system there to advance its use. Its interim report has now been published, with responses sought by early in 2018, and it can be downloaded for those interested using the following link:

https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf.

Any civil justice system starts from the premise that every citizen must have access to the courts for the determination and vindication of rights under the constitution. In E&W, with no written constitution, a major source for such rights is the European Convention on Human Rights, Art. 6 of which enshrines this right. The Constitution of South Africa is the source of such rights in RSA. It is some comfort that while E&W and RSA have confronted problems of crowded court lists and delays, these problems are far worse elsewhere in the world. In Europe, for instance, the Italian government introduced mandatory mediation for many types of civil claim for the very reason that it was constantly having to submit to judgments for serious delays in access to its courts in breach of ECHR Art. 6, with compensation consequently payable. Delays in jurisdictions like Pakistan and Nigeria, in both of which I have worked, are far worse, sometimes exceeding a decade. While having no statistics available to me about how much such delays exists in either the Courts of E&W or RSA as I write, I suspect that in both jurisdictions it is still not possible to get a trial date as quickly as litigants would wish.

For resource reasons of all kind – court budget stringencies, limited litigation funding, pay and staffing shortages in court offices and on the Bench, cumbersome and technical court procedures – courts are still not easily accessed to deliver rights to the citizenry. Hence business stagnates, inward investment is hampered by unreliable and tardy dispute resolution, individuals go unrecompensed without unacceptable delay, and frustration builds across society. Such frustration generates the search for alternative means of resolving disputes, which risks undermining the confidence of the judiciary, and generating instinctive opposition to such changes. These can then be framed as an attack on the constitution, even though any

honest appraisal of the practical working of the courts would reveal serious problems about service delivery.

This paper looks at some of those problems and how mediation should be viewed not as a threat to the courts or to a legal profession but an ally available to enhance the rights of those who seek ready access to any civil justice system.

The role and status of judges

It is unsurprising that judges should regard themselves as guardians of the right of access to the courts, whether protected by the RSA constitution or by UK statute such as the Human Rights Act. Judges occupy a privileged position in every civil justice system, and it falls to them to regulate the business of the courts by rules and practice directions in various ways. Very often they have been at the forefront of civil justice reform. In E&W, for instance, civil procedure was revolutionised in 1999 for the first time since 1875 by the reforms recommended by the Lord Chief Justice, Lord Woolf, embodied in the Civil Procedure Rules 1998 and effective from 26 April 1999. This was, and has largely continued to be a process of judge-led reform, under rules drafted by the Civil Procedure Rules Committee, which has reviewed them very regularly since then. Who better to devise and implement procedural change than the judges?

Does ADR represent a challenge to judges?

Judges too will be properly jealous of their status and powers, and resistant to challenges to their important role in society. Certainly, there has been some apparent judicial concern about alternative dispute resolution (ADR) generally and perhaps about mediation in particular as being a competitor process which might perhaps undermine their judicial role in some way. After all, the (in my view) unfortunate acronym ADR starts with the word "alternative".

Such a misunderstanding of the nature of mediation needs quick correction. Mediation as conducted both in E&W and RSA is a formal way to negotiate the possibility of settlement which never excludes initiating or returning to the litigation path if settlement cannot be agreed. In E&W and RSA, the mediator gives no directions and makes no rulings, but manages the process in a way which gives the parties a free choice as to whether to propose, and, if proposed, whether to accept terms to resolve their dispute. And in cases which could indeed end up before a court or tribunal, the discussion is conducted "in the shadow of the law". Each party will measure any possible settlement terms which emerge against what they think a judge might award, and adjust their expectations accordingly. If they believe that they will do better at court, they are free to go to trial without any adverse consequence in not settling. Furthermore, because the mediation is conducted both "without prejudice and subject to contractual confidentiality formally created by a signed mediation agreement, nothing said or offered at the mediation can be admitted in evidence. It is only in that respect that what happens at a mediation is kept from judges, in which respect mediation is no different from any other kind of settlement discussions.

Dispelling misunderstandings about mediation and arbitration

Mediation and mediators are not subject to any statutory definition or circumscription in E&W, something which can be unsettling to judges. There is no mediation legislation or any Mediation Act in E&W, where the legal status of mediation is derived from the law of private contract, equitable law of confidence and rules of evidence. This is in marked contrast to arbitration, which in E&W is a creature of statute. As demonstrated in the previous paragraph, mediation is an entirely different process in concept from arbitration. Arbitration is a private binding adjudicative process, in which the arbitrator makes a ruling which normally entirely excludes the jurisdiction of the courts, and often does not permit of appeal. As I understand it, the courts do still retain some oversight of arbitral awards in RSA. However, arbitration can be seen much more readily as a competitor to the courts, chosen as a means of obtaining a binding decision from a chosen adjudicator, rather than putting a case before an allocated judge in open court. In the UK, unlike in the USA, a very firm distinction is drawn between adjudicative and non-adjudicative ADR because of this fundamental difference. Arbitration is arguably truly "alternative", whereas mediation is supplemental to the civil courts and operates as a supportive adjunct to their jurisdiction.

There are a good number of judges still in RSA and E&W who were not in practice when mediation was available, so misunderstandings about what mediation really is are readily understandable. They should be capable of correction given appropriate training and information exchange. It is very important that this is done, because there is a strong case to suggest that mediation can be enormously helpful to judges in any jurisdiction.

Pressures on judicial work

For judges' face problems of a very practical nature in degrees that vary from jurisdiction to jurisdiction. The development of ADR started in the USA and was followed in Australia because litigants were finding litigation expensive and slow. Court lists were stacked and justice delayed is perceived by most people to be justice denied. So, courts themselves welcomed the relief that mediation offered to pressure on dockets and lists, by removing cases capable of settlement. The judges themselves did not cause the problem. The very willingness of litigants to bring cases before them serves as proper vindication for their role. But doubtless the constant pressure of conducting trials and writing judgments in cases which perhaps might have settled with some judicial encouragement to take time to discuss takes its toll. A formal settlement opportunity might well ease that pressure, compounded as it often is by many administrative tasks associated with their courts.

Also relevant to this is the quality of cases that judges are asked to try. It would be surprising if judges did not prefer to hear well prepared, well-argued cases of understandable controversy, rather than cases in which one party's case is unarguably weak, and really deserved to be brought into settlement discussions earlier which the parties never chose to convene. English judges frequently bemoan the fact that parties appear in front of them to run a case that cried out for compromise of some kind, sometimes because the judge is unable to deliver what the parties really want or need. For instance, in medical claims, parties who really want an apology, explanation and reassurance of lessons learned and changed practice, simply cannot acquire these at a trial, when the judge can only award damages (or not infrequently

dismiss such a case) based on an assessment of what did or did not go wrong probably between four and ten years previously. Judges in E&W often bemoan the disproportionate legal costs expended on a case that cried out for settlement.

The adverse effects of court door settlements

The problems for judges go wider than this. They may prepare a case for trial to start, and on the morning of the trial a settlement negotiated at the court door is announced. The day is thus wasted, and the expense and time of witnesses who attended is thrown away. While a surprise extra day for the judge to catch up on other work may be superficially welcome, the effect of court-door settlement needs to be measured more widely. The time spent preparing and reading into the case is lost when it could have been spent more productively on other cases or tasks. The judge's court-room may lie empty when another case deserving of trial might have been accommodated in it. A civil justice system which permits court door settlement without questioning can quickly forfeit the respect of parties and witnesses whose attendance was fruitless. The truth is that any case which is settled at the court door could easily have been settled two or three months earlier, especially with a mediator's help to minimise positional posturing, if timely preparation had been required or perhaps generated by the need to attend a mediation for settlement discussions. Court-door settlement is much rarer in E&W since the CPR, especially now that judges have the power to penalise even a successful party for unreasonable litigation conduct.

The adverse effects of adjourning trials

A similar wastage of judicial time by increasing pressure on court lists and thus on judges arises from permitting and granting applications for adjournment of trials too readily. Again, courts and judges may be forced to lie idle for no good reason, for today's adjourned trial vacates today's list but will have to be accommodated in another probably crowded list later. Meanwhile another case which might have been heard loses the space created by the adjournment because they have not been notified or are not ready. Floating cases to enter lists at the last minute when a court is vacated for whatever reason is one way of dealing with this, but the floating case which is sent away because no vacant court transpires is another likely source of disaffection. One of the practical effects of the CPR reforms in E&W has been to outlaw adjournments of a trial date except in the most extreme or unpredictable circumstances.

Changing litigation culture for the better

One of the most striking difference to an outside observer between the civil justice systems of RSA and E&W is in the degree of case management and the requirements for early disclosure of each party's cases. There are choices to be thoughtfully made here, with arguments to be debated both ways. In RSA, pre-trial review is now a clear step that has to be taken before trial, allowing the judge to direct the preparations necessary for an efficient hearing. However, there is an argument that court intervention much earlier in the life of a case would produce even more efficiency, and thus greater value for the judges. This will need the involvement of

procedural judges, perhaps of lower rank than trial judges in case management, although in some E&W courts, such as Technology and Construction, Commercial and Chancery, trial judges are docketed to each case throughout.

The tenor of the Woolf reforms was that litigation had become too adversarial, and as a result costly and slow, in ways that seriously affected parties to litigation. As a result, a co-operative litigation culture was fostered in a number of ways, the principal ones being:

- Pre-action disclosure of each side's broad case in accordance with Pre-action Protocols covering most case types, with positions set out in formal letters of claim and letter of response, to be exchanged before an action can be filed on pain of later costs sanction
- A "cards-on-the table" regime, requiring disclosure of lay and expert evidence and relevant documentation, with no ambushing of an opponent on any significant topic, on pain of a costs sanction, probably against the lawyer responsible
- Giving the courts the responsibility to encourage settlement (without being able to insist on settlement: note that parties in a mediation are under no obligation to settle)
- Taking away from the legal profession the right to manage the progression of cases (which was felt by Lord Woolf to have been a major cause of delay) and giving the courts case management powers to set timetables towards evidential disclosure, and thus to settlement or trial
- Conferring a residual power on judges to penalise parties in costs who conduct litigation unreasonably, whether before or after an action is issued at court: in due course the Court of Appeal decided that to decline to mediate or to ignore an invitation to mediate unreasonably could of itself constitute unreasonable litigation conduct and justify a costs sanction
- Minimising wasteful employment of procedural judges on hearing tactical and pointless minor applications on pleadings or evidential disclosure by allowing judges to assess costs summarily and to order their immediate payment by a losing party in any hearing (whether application or trial) which lasts no more than a day – such a rule made a dramatic and immediate reduction in trivial and time-wasting applications which had clogged the lists of procedural judges, replacing them with case management hearings.
- Taking steps to outlaw adjournments of fixed trail dates and court-door settlements

It will be seen that the natural consequence of such changes can be to bring the expenditure of costs in preparing a case earlier in the life of the case, especially if each party's case has to be adequately prepared for exchange before proceedings can be formally commenced. But this price is worth paying if it means that cases are thought through at an earlier stage, based on a fuller understanding of the evidence. Last minute disclosure of evidence, even during a trial, can seriously disrupt a trial by suddenly demonstrating hitherto unconsidered weaknesses to a party's case, which earlier compulsory disclosure might have avoided. This can be another cause of wasted judicial time, where a weak case collapses but only after hours or days of trial.

The effect of formally encouraging (but not compelling) settlement

This is why it makes sense for judges to use court rules to build a requirement for settlement discussions into the expectations of lawyers in a civil justice system. The overall aim can then be to winnow out cases that are capable of settlement, based on proper exchange of

information so that each party can assess their strengths and weaknesses as early as possible and decide whether to settle or fight on a properly informed basis. Parties of course will benefit from this, and so will the judiciary, who will only need to try cases where there is a real and worthwhile dispute incapable of settlement. A worst, judges will occasionally encounter cases where ne party has seriously misjudged the strength of their case despite full disclosure of their opponent's strengths. Costs sanctions in those cases will be easily imposed.

The impact of change on the legal profession

It will also be readily realised that changes of this kind are going to unsettle and even perhaps annoy or provoke opposition from the legal profession, requiring as they would a real shift in thinking, culture and practice. Some might even fear a threat to their livelihoods. More might fear a loss of status and role. It may be comforting to report that on the whole, the change of culture in E&W was achieved relatively bloodlessly! There has been a change for the better in the way litigation is conducted. There is a high settlement rate. In certain sectors this is attributable to the legal profession positively embracing the mediation process, particularly in commercial, construction and technology cases and in professional indemnity claims. It is also used significantly employment and inheritance disputes. In E&W it has been slower to be used in personal injury and clinical negligence claims, but even there its use is growing, and the NHS is sponsoring a mediation scheme in the latter. The overall settlement rate of litigation in E&W is very high, probably in excess of 90% of issued claims, with a marked increase over the settlement rates for litigation as conducted before the Woolf reforms. But litigation costs in E&W are extremely high, and claims still take far too long to settle or be tried. Justice delayed is justice denied and access to justice requires an affordable process.

Lawyers are of course keen to make a good living out of the work they do, but what they charge and how they work dictates the cost of access to justice for litigants. And in the final analysis, litigation belongs to the litigants themselves and not their lawyers. Responsibility for looking after the rights of litigants lies ultimately with the judges who can choose how to run each civil justice system. In doing this they may find they have to take unpopular steps which may impact on the way lawyers who choose to work in this field work and even earn. The public interest is paramount, however. Civil litigation is offered as both a constitutional right and a service to society in general and litigants in particular. Lawyers themselves (and I write as one who has been qualified as such for nearly fifty years) have no inherent right to dictate how the courts should be run when society perceives that the courts need change in the public interest.

Lawyers always been extremely adaptable to changed circumstances. They remain vital as advisers to their clients on how to prepare or defend a claim and as to prospects of success or risks of failure. This is emphatically true within the mediation process, where lawyers still are absolutely necessary to protect their client's partisan interests, and remembering that mediators are not there to advise parties on their rights or prospects of success. So, lawyers have no need to fear mediation as being exclusionary for them. It may require them to adapt their skill set to deal with negotiation in a new type of environment, with their clients uncomfortably close to them as they engage with their opposing party. For a change, those parties have been restored to the centre of their case, and given a "day in court" of a type which trial does not offer, rather than been excluded to the fringes by the technicality of litigation procedure. Lawyers are good at learning new ways if they are shown (in this case by changed

rules of court) that there is no alternative, and learn to appreciate that mediation does not represent a threat, but rather an opportunity, to their professional work.

Conclusion

This paper is offered in all humility to any who are interested to read it, not out of a sense of one system being right and another wrong, but in an attempt to generate thinking and options for what remain intractable problems for any civil justice system. RSA and E&W can both be justly proud of progress made hitherto, and such progress bodes well for further developments on both jurisdictions, given open and imaginative approaches to policy and objectives.