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Alternative Dispute Resolution and Civil Justice: A Relationship Resolved?

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Rationale

- S. Roberts, Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship, Mod. L. Rev., 1993.

- Special Issue contributed to by some ‘well respected scholars, judges and jurists’: Cyril Glasser, Simon Roberts, Sir Leonard Hoffmann (later Lord Hoffmann), A.A.S. Zuckerman, William Twining, Hazel Genn, Carrie Menkel-Meadow (North America) and Richard Ingleby Australia).

- Perceived crisis in the civil justice system, in which Roberts claimed had led judges to see ADR as a way to ease the weight of judicial business.

ADR & CIVIL JUSTICE in the 1990s
Roberts' Observations

"ADR had more than one life"

- The provision of support for party negotiations – at a distance from civil justice;
- Innovative forms of legal practice – adjacent to it;
- Novel procedures on the threshold of the court – part of civil justice itself.

The Changing Civil Justice Landscape

- 1990s volume of civil litigation undoubtedly growing but there were signs indicating a shift towards settlement directed processes;

- Dispute resolution and access to justice are linked.

> "The law must be accessible and, so far as possible, intelligible, clear and predictable". (Bingham).

- Growing concerns by the early 1990s that the state of the CJS in England and Wales was compromising principles of unqualified human rights (art 6 ECHR)`

Civil Justice Concerns and Woolf

- Excessive costs, delay and complexity, expensive, (impossible to predict the cost of litigation);
- Failing to provide fair, economical, timely access to justice;
- Woolf's findings (*Access to Justice Interim* and *Final Reports*) bore this out.
- *Civil Procedure Act* 1997. Civil Procedure Rules (CPR).
- Disputants should try to settle their disputes without recourse to litigation.

Three Models to be Incorporated into the Civil Justice System

- A reference away for further bilateral negotiation;
- A reference to some form of out of court ‘mediation’;
- Direct attempts by judiciary to promote settlement.

Have These Ideas Been Adopted?
A reference away for bilateral negotiation

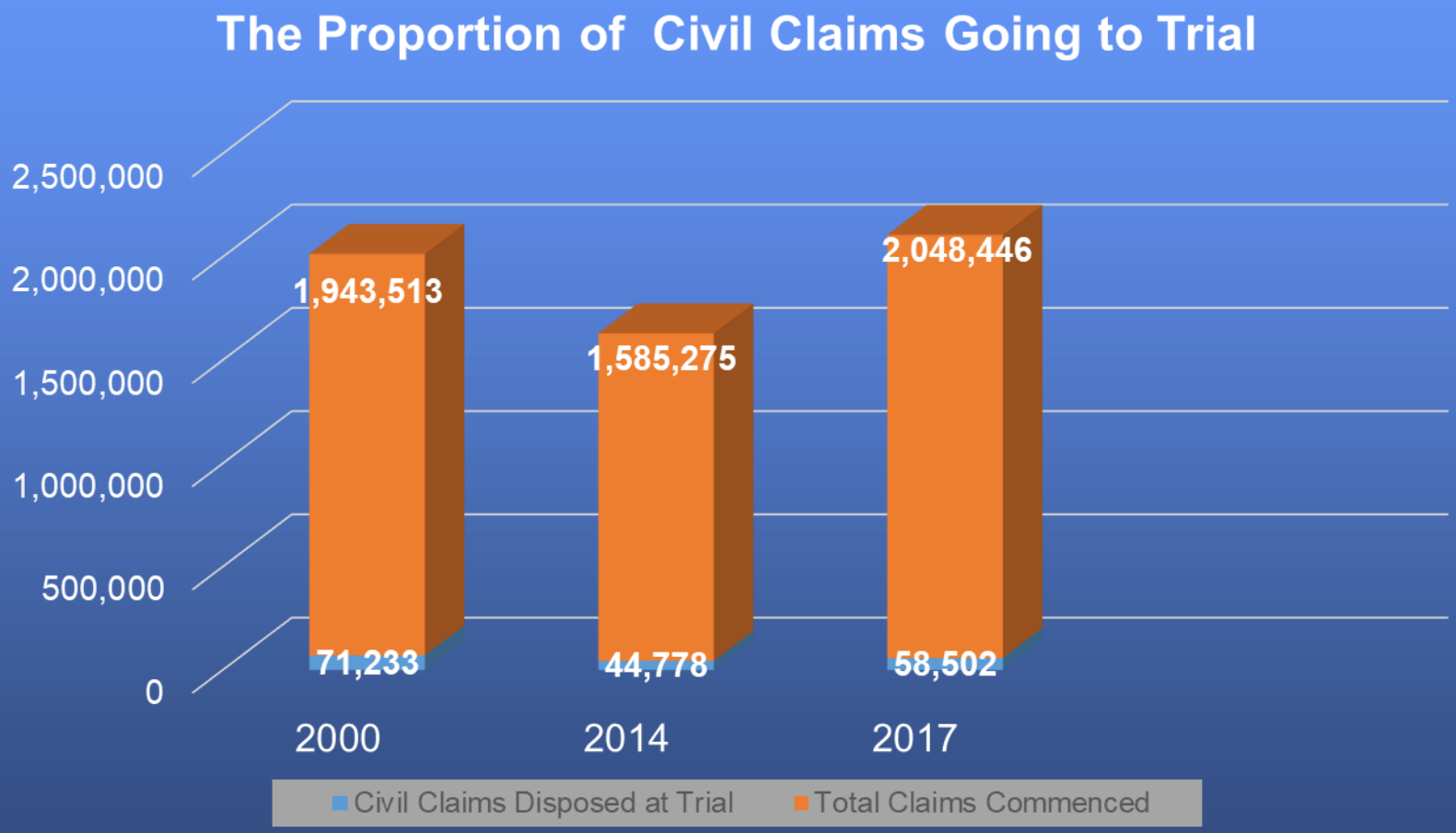
- Few civil disputes were actually being litigated;
- Small percentage required adjudication;

- Pre-action protocols – encouraging openness and more negotiation/ADR (costs penalties);

- Cases settled earlier (Zander 2007) - but increased settlement levels?

- No real suggestion that more negotiation is taking place today than 25 years ago.

County Court Activity 2000-2017



Have These Ideas Been Adopted?
A reference to out of court 'mediation'

- CPR encourages Judicial case management and costs sanctions for failing to consider or attempt ADR;

- Mediation Provision: growth and establishment of private (unregulated) mediation services;

  - small claims conciliation in some County Courts.

- Lawyers as Mediators: (recall the Beldham Committee's recommendation);

- Lawyers and ADR: SRA Code of Conduct;

  - regional research findings (Kent).

Have These Ideas Been Adopted?
Judicial attempts to promote settlement

- Justice, Coercion and Compulsion:

  - Critics of state/judicial-sponsored settlement: Bentham and Fiss;
  - Supporters: Fuller and Rawls (fairness);

  USA perceived the courts as failing to operate in a manner that assured all citizens the opportunity to exercise their basic liberties. (Compare Woolf's findings)

- Judicial Activism (Driven perhaps by expediency);

  The use of costs sanctions:

  Dunnett v. Railtrack [2002] EWCA Civ 303.

  Hurst v. Leeming [2001] EWHC (Ch) 1051

  Halsey v Milton Keynes General NHS Trust [2004] EWCA (Civ) 576: Important Guidelines (costs sanctions).

An Emergent Relationship
The Post-Woolf Developments

- Mediation Pilot Schemes (Beldham Committee): ARM and VOL - limited success;

The evidence from such schemes suggest that facilitation and encouragement [plus] selective and appropriate pressure is likely to be more effective/efficient than blanket coercion (Genn)

- Small Claims (SCMS – est. 2007): c10,000 mediated annually. 65-70% settle;

- Legislation:

  Children and Families Act 2014 (MIAMs). *Employment Tribunals Regs* 2013

- The Online Court and ODR (currently piloted): Claims < £25k.

  Tier 2: A facility for reviewing case papers to support either negotiation or mediation; including automated negotiation tools.

Civil Justice Reviews

- The Jackson Report (2010) – Clear support for ADR;

"Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases". (Jackson)

  - No compulsion;
  - Favoured education;
  - Authoritative ADR handbook.

- The Briggs Report (2012) – Chapter reserved for ADR;

"There is a substantial proportion of claims of modest value where mediation is under-used and …..personal injury and clinical negligence (disputes), seemed to make insufficient use of mediation". (Briggs)

  - Not supportive of compulsion;
  - ODR: support for encouragement of ADR pre-action via the online court;
  - Reintroduction of the county court after-hours mediation scheme.

Civil Justice Reviews

The CJC's ADR Working Group Interim Report (2017)

- ADR has not become integral to the CJS, it has had its successes undoubtedly, but they have been extremely patchy;
- If ODR techniques become woven into the design of the court system then the debate about whether or not to compel ADR may simply become obsolete;
- Specific challenges which ADR faces in serving cases of middle or lower value;
- A failure so far to make ADR familiar to the public and culturally normal.

Crisis? What Crisis?

- Tangible improvements;
  - less delay
  - fewer trials
  - judicial case management and,
  - SCMS;
- Crisis of a different kind - *LASPO* (2012) and its effects;
- Paradoxically, the burden of judicial business seems not to have been reduced.

Conclusions

- Mediation has not been ‘professionalised’ (or indeed fully institutionalised or regulated) - No ‘multi-door courthouse’;

“Although the ADR bandwagon has really started to roll in this country, it is well behind developments elsewhere(Genn).

- We (arguably) have no ADR compulsion - The relationship that civil justice in England and Wales has to ADR can therefore be best described as essentially one of inducement or, one which applies a ‘carrot and stick’ approach.

- Post-Woolf era of satellite litigation;

- More mediation providers;

Conclusions

- A culture of encouragement to use PAP period as an opportunity to negotiate settlement terms has developed;

- The reference to some form of out of court 'mediation' has gained traction;

- Judicial settlement sponsorship - direct attempts by the judiciary to promote settlement at various stages during the litigation life cycle;

If the status of the ADR/civil justice relationship is to be measured against these criteria, then I argue that the relationship has been largely resolved.