

## **Proportionate dispute resolution and public legal education today**

**By Sir Henry Brooke**

I will start by telling you a little about my experiences as a mediator since I retired from the Court of Appeal just over two years ago.

In the summer and autumn of 2006 I attended three different training mediation courses over a period of 13 days. I was accredited three times over. I did not grudge a minute of the time. I had so much to learn and so much to unlearn. The task of a mediator is entirely different from the task of an arbitrator or a judge. Arbitrators and judges - and, indeed, administrative tribunals - have to decide things: to impose solutions on parties who are unable to agree. Mediators, on the other hand, have to listen, to obtain people's trust, to see what they can do to help the disputants to find their own solution. A judge belongs to the tidy world of reason and logical relevance. The mediator's skills are largely psychological. He or she has to learn the arts of "active listening", of playback (repeating, in summary form, what a party has just told you), of ways of showing empathy, of reality testing while not losing the neutrality which is so vital, and of gently reminding parties what lies before them, in terms of cost, or stress, or loss of management time or the quality of their lives, whatever, if they cannot compose their differences before the mediation ends. The mediator cannot impose anything. He or she has to "go with the flow". The flow nearly always, in my experience, ends up with a settlement.

I have now conducted over 60 mediations on my own. Five out of every six have resulted in a settlement, and no mediator on earth could have resolved some of those that failed. It has been a very exciting experience. Exciting because it is so new to me, and because it is obviously such a worthwhile way of settling disputes. Exciting because one is able to treat the parties to the dispute like intelligent adults, to hear directly from them where their particular needs and concerns and interests really lie, and to ensure that they are in fact the decision-makers so that they feel a sense of ownership of the eventual agreement (if it comes). And exciting to watch the relief, and sometimes the sheer delight, on their faces when they achieve a settlement at the end of the day. On two occasions I have even received a kiss from the claimant at the end of a mediation. This never happened to me while I was a judge. And I have sat down for a drink with all the parties at the end of a long day after they had reached a settlement in a very emotional dispute over the size of the award to a seriously incapacitated man.

When I was a barrister and a judge, I never sought to specialise. It is the same now that I am a mediator. My mediations encompass commercial disputes, personal injury claims, family property or inheritance disputes, disputes between neighbours over rights of way or boundary lines, landlord and tenant disputes, disputes over nuisance by noise, employment disputes, defamation claims, professional negligence claims and expulsions from a members' club. Every kind of private dispute lends itself to mediation, and with a mediator of the appropriate experience and skill, most of them settle on the day, however bitterly the parties are entrenched. In at least 10% of my mediations the parties have refused to be in the same room together.

As an alternative way of resolving civil disputes between private parties, mediation has surely come to stay. There are still a lot of things we must do before it can really settle down as part of the mainstream processes for dispute resolution. We have got to spread awareness much more widely

about what mediation can and does achieve. We have got to develop practical advice to help identify that small minority of cases in which mediation is unlikely to work. As parts of the litigation market are now in the habit of arranging joint settlement conferences prior to trial, we need to do more to identify the tell-tale signs which suggest that the case is more appropriate for the involvement of a third party neutral than for a settlement meeting attended by the parties and their lawyers without outside help. Very recently we have altered some of the standard court forms, so that when the parties or their lawyers complete an allocation questionnaire the value of settling the dispute by mediation is now placed very firmly in the minds of the lawyers who fill it in. We are also contemplating further changes, so that this possibility is placed before them when they complete the claim form or the defence. And we have got to strengthen the arrangements in the courts for advising people about the merits of mediation and what they need to do in order to set one in motion.

The new small claims mediation scheme has been a great success and it has the attraction of being free of charge. Any small claim that is identified as suitable for mediation is now assigned to a court-based mediator who, if the parties want it, will devote up to an hour, often over the telephone, to mediating the dispute. I have seen statistics which show a 70% settlement rate and a 98.5% satisfaction rating from those who have used the service, which recently won an European award. For fast track and multi-track mediations in claims worth up to £50,000 we now have a network of accredited mediation providers, local, regional and national, who will arrange a mediation at a fixed fee for those litigants who are referred to them by the National Mediation Helpline. Sadly, although it is Government policy to encourage alternative dispute resolution, the Government is now withdrawing the subsidy it has provided for this service, so that it will have to be rather more expensive in future. For disputes over £50,000 in value, or for mediations arranged by the parties without the help of the Helpline, market rates dictate the cost of the mediator. I wish that solicitors would learn to shop around in the market more than they do at present, because competition has already introduced a healthy range of prices for mediators of the same basic quality and experience.

During these first two years my own mediation practice has only involved me in one mediation in which employment tribunal proceedings were in progress. On that occasion the bitterness of the parties' exchanges on paper dissolved into scenes of great mutual happiness when they finally reached an agreement in the late afternoon after a long, tense day. Mediation lends itself naturally as a way of resolving many of the disputes in the workplace that have involved dismissal or discrimination, although here again more needs to be done to identify the type of case that will settle with the help of a third party neutral and the type that will not. One of the great merits of a mediated, as opposed to an imposed, solution is that parties are much more likely to deliver on what they have agreed without the additional expense and strain and uncertainty of enforcement proceedings.

Mediation has now proved itself as a sensible way of trying to resolve workplace disputes. This is why the Government has now scrapped the statutory grievance procedures that were introduced only a few years ago, and is placing much more emphasis on mediation as a means of resolving trouble in the workplace before it starts to fester. Since last July I have been involved with discussions between the Civil Mediation Council, BERR and ACAS, and representatives of the workplace mediation community as well, in exploring how the CMC can introduce new arrangements for registering workplace mediators. In this way ACAS will have an appropriate point

of reference when it suggests to employers that it would be useful to invite a mediator to help the parties to resolve their differences, or when employers or trades unions are seeking a suitable mediator for this purpose. At the same time the CMC has been overhauling its own registration system for both individual mediators and mediation providers. I hope that new arrangements will be up and running at the beginning of next year.

So far I have been talking only about mediation in the context of private party and party disputes. There are of course other means of resolving private party and party disputes. All these methods lie somewhere along a spectrum that leads from inter-party negotiation on the left-hand side to all the expensive and time-consuming paraphernalia of contested arbitration and litigation on the right hand side. A non-binding early neutral evaluation is one. An evaluative mediation (where the parties encourage the mediator to express his or her views on the likely outcome) is another. *Med-arb*, which starts with a mediation and may turn into an arbitration if the mediation fails, is a third. *Arb-med*, which starts with an arbitration which may then be stayed in order to let a mediator explore the possibility of settlement, is a fourth. A binding determination by an expert is a fifth. And there are others. I think that everyone in the dispute resolution business should be aware of them all, and be ready to call up whatever seems most suited to the particular dispute and the stage it has reached.

I have been a bit surprised, for instance, that in the last two years nobody has yet invited me to conduct an early non-binding evaluation of the merits of a dispute and the likely outcome if the matter goes on to a contested trial. I suspect that this is mostly due to the fact that the usefulness, and cheapness, of ENE is still virtually unknown in this country. I can think of one case where if I had been invited to conduct an ENE for a fee of about a thousand pounds, I could have saved the parties, and the taxpayer, many, many times that amount when I think of the money which was in fact expended in a very long first instance trial and the three-day appeal proceedings that followed it.

It follows that in the field of party and party disputes in the tribunal world, there is plenty of scope for a mediator's skills. I have been delighted to read about the steps which the Council is taking to publicise and encourage what is now going on in different corners of that world. Valuation disputes are obvious candidates. So are different types of landlord and tenant disputes in the residential property field, as I know from my personal experience. I think that two inhibiting factors nowadays are ignorance and a perfectly natural human resistance to change. When I think of the savings that can be achieved through mediation and all the advantages of an agreed as opposed to an imposed solution, I hope that steady pressure from the Council may lead to more and more disputes in this field being resolved by mediation as opposed to a tribunal hearing.

It is easy to slide sideways from party and party disputes to technical disputes that arise in one way or another in the course of differences between the citizen and the state. In the planning field I delivered a lecture last May in which I drew attention to the scope for ADR in different parts of the planning field. Technical issues that arise in the negotiation of a Section 106 agreement or in the examination of major development proposals are obvious candidates. The CMC organised a very interesting planning law forum last month, at which we watched a mock mediation involving the developers, officers of the local planning authority, English Heritage, a local community group and Transport for London who were in dispute over different aspects of the proposals for a 30-storey tower block in an inner city area. The Royal Institute of Chartered Surveyors now has a mediation

section accredited by the CMC. There is now plenty of scope for involving a mediator who has other relevant professional skills in resolving disputes in the planning field. Disputes over valuations for compulsory purchase purposes are another obvious candidate for ADR.

With Lord Woolf's blessing I occupied a shadowy role between 2002 and 2004 as an extremely shadowy Senior President of a Tribunals Service which did not at that time exist. In that role I was largely responsible for upgrading the post of Senior President from the status of a High Court judge, as Sir Andrew Leggatt envisaged, to that of a Court of Appeal judge. I don't suppose Sir Robert Carnwath thanks me much for that. More importantly I was heavily involved in the discussions that were led by the minister, Lord Filkin, to whom I would pay a special tribute, and by Paul Stockton as his senior civil servant, which led to the 2004 White Paper taking the form it did. I, together with the real Presidents of Tribunals who were in office at that time, had the extraordinary experience of feeling that the Government was really listening to what we were saying, and was reproducing it in its White Paper. I was very supportive of Lord Filkin's desire to broaden the base of this new initiative, and to extend the scope of the new Council's remit into the places where administrative decisions are originally taken.

When I was Chairman of the Law Commission 14 years ago, we were much exercised by the fact that once a non-appealable administrative decision was taken, there was very often no remedy apart from the expensive block-buster of judicial review proceedings. Perhaps it was this experience which led me, sitting as a judge, to insist for the first time in 1994 that a letter before action should be written prior to the issue of judicial review proceedings if an applicant did not want to run into difficulties over costs. It also led the Law Commission to encourage the further extension of practices of internal review by a senior official where no appeal was available. I see that we said in our report that although statements by the Chief Adjudication Officer and the Council on Tribunals suggested that internal review was not a substitute for an appeal to an independent adjudicative body, it was likely to lead to a better standard of decision-making.

Since that time the perceived importance of proportionate dispute resolution has grown and grown. There is not only the obvious point that the more complicated the dispute resolution processes become, there is more by way of public and private resources tied up in resolving the dispute, quite apart from the time and the stress and the cost of irrecoverable management time that are such familiar features of disproportionate dispute resolution. There is obviously no single "one size fits all" solution. Many disputes between the citizen and the state are by their very nature not suited to a mediated settlement. But there are plenty of other PDR techniques that can be used, and the challenge to the Council over the next ten years is to proselytise about the PDR techniques that are available, to watch what is going on and ensure that appropriate evaluative techniques are being used, and to advise on "What works" and "what doesn't work" in different factual contexts and different specialist fields.

The mere fact that a public authority is one of the parties to a dispute is not in itself a show-stopper so far as mediation is concerned: it may simply add an additional procedural hurdle which is usually likely to be quite a low one. A few months ago I successfully mediated what was potentially very expensive litigation brought by a claimant who said that he had lost his liberty for 18 months due to the negligence of officers of a statutory authority. Although the Home Office had to have the last

word, I have no reason to suppose that they did not approve the figure the parties arrived at in their mediated settlement at the end of another long day.

The other day three of us went and conducted a training evening for senior officers and over 20 councillors of a borough council on the outskirts of Greater London. We told them how mediation worked, and what it could achieve, and we performed a mock mediation of an imaginary dispute between the owners of an Indian restaurant and the pub next door whose licensee complained of the cooking smells. The local environmental health officer had encouraged the parties to mediate a dispute which looked likely to move on to costly litigation, and miraculously we settled it within the hour allotted to us. We heard later that the council and its officers were actively considering the different areas of the authority's work in which the involvement of a third party neutral might lead to significant savings in the long run.

This leads me on naturally to the other subject I have been asked to talk about. When I retired as a judge two years ago I joined the Public Legal Education Taskforce, chaired by Dame Hazel Genn, which had administrative underpinning provided by what was then the DCA. The moving spirits behind this initiative were Martin Jones of the Advice Services Alliance, Nony Ardill, stemming from her time with the Legal Action Group, and Dan Mace, a partner in a City firm of solicitors who was a moving spirit within the Citizenship Foundation.

From their different perspectives they had become more and more worried about the extent of the avoidable suffering that is experienced by people who have a problem which they can't solve on their own, and which they don't recognise as a legal problem. And even if they do recognise it as a legal problem, they don't know how to set about getting the help they need. We started our report by saying how research had shown how often unresolved legal problems associated with employment and housing clustered with money problems, leading to a cascade effect in which a difficulty in one aspect of life led to problems in other areas. One-sixth of people with legal problems were said to experience ill-health or lose their jobs as well. In a small number of cases unresolved legal problems led to violence or to loss of the home. When invited to calculate the overall cost of unnecessary helplessness in national resource terms over a three and a half year research period, Government economists recently estimated that unresolved law-related problems cost individuals and the public purse thirteen billion pounds.

During the course of our work we were shown the extraordinary success that was enjoyed by two different initiatives in public education which were properly organised and resourced. I refer to the drive by the NHS to prevent illness before it happens, and the drive by the Financial Services Authority to teach people how to manage their finances and avoid unnecessary debt. The FSA is equipped with statutory powers to levy the money it needs for this purpose from the financial institutions it regulates.

The contrast between these two excellent, well-resourced schemes and what is going on – or not going on – in the field of public legal education could not have been more striking. Our report describes a lot of excellent one-off schemes, many of which sputtered out after the initial seed-corn funding had been spent. There was no process of learning by mistakes; there was a lot of re-inventing of wheels; there was no systematic process of evaluation; and there was nothing that could be described as an over-arching strategy. We were very keen that suitable schemes should continue to be run by local enthusiasts, but we strongly recommended the creation of a Centre

which would be a repository of relevant information, would carry out appropriate research, would provide structured advice about evaluation and how it should be carried out, would initiate experimental schemes on its own, would conduct conferences, seminars and workshops, and would generally be a powerhouse of know-how and learning on how to empower people to resolve their problems on their own and know how to look for help when they could not. We described the goal as one of creating “legally-enabled citizens.”

Since our report was published in July last year, a steering group has remained in being, and we have now received Government funding to employ a full-time member of staff. This has enabled us to launch what we have described as the PLEnet website, to explore what can usefully be done to market PLE, to run conferences and seminars, and to initiate experimental schemes which will be a guide to best practice. I am particularly interested in a “Preventing Possessions” scheme which is rising from the ashes of an excellent three-year scheme run by the Southwark Law Centre with LSC funding. The old scheme perished when it proved impossible to secure the funding needed to continue it after the first three years.

The Ministry of Justice has created an imaginary new pyramid which is called “Access to Justice.” At the very top of it are the highest courts, in which I spent the last 18 years of my working life. Further down the pyramid are the lower courts and the tribunals and the Ombudsman schemes and all the other arrangements for resolving disputes by introducing an imposed solution. If one alters the metaphor in the public law sphere, the Law Commissions has recently said that the current legal landscape for administrative redress has four pillars: remedies available by way of a court action; public sector ombudsmen; external non-court avenues of redress, such as public inquiries and tribunals; and internal mechanisms for redress, such as formal complaint procedures.

If I return to the MoJ’s imaginary pyramid, further down still are the mediators and their like, helping people to find solutions to their differences by agreement, with the knowledge that an agreed solution is far more satisfactory than an imposed solution. Within this group there are the mediators who do their work for a commercial fee and the many mediators who do their work pro bono, often combining night-time mediations in the community with a full-time day at the office. And at the bottom of the pyramid are all the schemes that exist or that ought to exist for helping people to resolve their disputes themselves, or to learn how to access the appropriate level of the pyramid in their search for the best and most proportionate method of resolving it.

We still have masses to learn. For example, the Advice Services Alliance recently ran an excellent project which explained how “living together” without the formality of marriage or a civil partnership exposed people to avoidable dangers if anything went wrong with the relationship. The project attracted plenty of plaudits. Research, however, showed that there was very little sign that many people were organising their affairs differently as a result. The same misery then occurred when things went wrong and one side or the other discovered that their legal position was a bit dodgy. Things could only then be put right at very great expense.

I regard the PLE initiative as a very important one. I am delighted that the Senior President and the Council have always given it its full support. Those who sit in tribunals or who administer tribunals gain a huge amount of knowledge about the mistakes and misunderstandings that contribute to the sum of human misery which they often have to disentangle, and I look forward to a two-way stream of information developing between the PLE centre, whatever it is, and the tribunal world, as this

new initiative gets stronger and stronger. If people knew how to call in the help of a mediator, or where to seek the advice they really need, before things start to go seriously wrong, then there would be less activity further up the pyramid, and room for a great shift of resources lower down the pyramid, to the places where they are really needed.

It has been a great pleasure to speak to you today. When Lord Archer invited me to address your predecessors in 1994, I see that I was told to do three things. "Tell them that they have got to do all they can to make sure their tribunals sit in public. Tell them that they should ensure that their tribunals stop being silly, if they are being silly, about the admission of hearsay evidence. And, above all, tell them they are doing a grand job." I hope that the first two statements are no longer necessary. I willingly repeat the third. And I look forward to steadily increasing co-operation between the Council and the CMC on the one hand, and the Council and the emerging PLE centre on the other, in the very exciting years that lie ahead.