

Alternative Dispute Resolution and Civil Justice Reform: Is ADR Being Used to Paper Over Cracks?

Reactions to Judge Jack Weinstein's Article

SALLY LLOYD-BOSTOCK*

I am honored to have the opportunity to give some of my reactions to Judge Jack Weinstein's article. As a citizen of the United Kingdom (U.K.), one of my main reactions is naturally to consider the extent to which the questions and cautions he has enumerated apply in the U.K. or English context. As compared with the United States (U.S.), developments in the use of alternative dispute resolution (ADR) in England are quite limited. Much of what he has described therefore does not—or does not yet—apply. Use of nonbinding ADR techniques is concentrated within a small range of cases, notably mediation in divorce and employment cases. However, there is a great deal of talk about ADR, and there are strong signs that it will develop and spread. Differences between the U.S. and the U.K. in legal culture and procedures may lessen the potential for ADR in the U.K. The U.K. does not, for example, have the uncertainties of the civil jury trial, mass tort cases, or the possibility of huge punitive damages in commercial cases, all of which can make ADR an attractive alternative in the U.S. Nonetheless, developments in the U.S. often indicate what will happen in the U.K. a few years later. The first question that Judge Weinstein's article raises for me is whether this is an import that we want.

I wish to focus on one particular point that Judge Weinstein raises: the question of how ADR does and should relate to reform of the civil justice system, and the provocative question of whether ADR techniques are being adopted as a means of avoiding necessary reform. He writes: "More justice, better administrated, is what both proponents of new and old forms should seek."¹ I also share his concern that ADR may worsen rather than alleviate problems of access to justice. He writes that ADR is often promoted as a way to increase the public's access to the courts. It is viewed by many as the most promising bridge over the gap between legal needs and affordable

* Sally Lloyd-Bostock, B.A. (Philosophy); B.A. (Law); D.Phil. (Psychology). Senior Research Fellow in Psychology and Law, Center for Socio-Legal Studies, Oxford University. The author is grateful to Miryana Nestic for her assistance in assembling material on developments in the United Kingdom.

¹ Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 243 (1996).

services. However, there is a risk of shutting the courthouse door to the have-nots with the excuse of procedural and substantive reform.²

A very significant development that has occurred in England in the past five years has been the extent to which ADR has overtly become part of the project to reform civil litigation. England is also increasingly looking towards the civil systems of continental Europe and examining closely the possible advantages of inquisitorial procedures, some of which have much in common with certain ADR techniques. Proposals for reform in England increasingly embrace ADR as potentially offering solutions to some of the central problems of cost and delay. As Roberts describes, ADR is attracting a wide range of sponsors, making it appear that it has the support of almost everyone.³ Judges in England are increasingly seeing ADR as a way to ease their caseloads. Government is attracted to ADR as a fruitful area for its own professional practice. This diversity of interests and motivations needs to be kept centrally in mind in any assessment or evaluation of ADR procedures and their place in civil justice.

Roberts distinguishes what he calls three "lives" of ADR, in the sense that the label has become attached to areas of practice in three significantly different locations:

1. The provision of support for party negotiations at a distance from civil justice;
2. Innovative forms of legal practice adjacent to civil justice; and
3. Procedures on the threshold of the courts, which is part of civil justice itself.⁴

In this third "life," ADR is incorporated as part of the judicial repertoire of dispute management techniques, and it is this third "life" that is of primary concern here. This Note will first sketch briefly the background of developments in the U.K. and then raise some concerns that echo those of Judge Weinstein.

I. U.K. DEVELOPMENTS

In approximately the last twenty years, the U.K., like the U.S., has seen a growing number of moves to institutionalize "alternatives" to litigation, albeit on a much smaller scale.⁵ Important examples include the

² Weinstein, *supra* note 1, at 261-62.

³ Simon Roberts, *Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship*, 56 MOD. L. REV. 452 (1993).

⁴ *Id.*

⁵ For a good overview of current developments and a theoretical discussion, see Cyril Glasser & Simon Roberts, *Dispute Resolution: Civil Justice and its Alternatives*, 56 MOD. L. REV. 270 (1993).

growth of mediation in family, commercial, and employment disputes.⁶ A range of organizations and bodies have become established that offer mediation and other forms of ADR. Examples are the Centre for Dispute Resolution (CEDR) and International Dispute Resolution (IDR) in Europe, which offer a range of ADR methods in commercial disputes, divorce cases, medical negligence claims, and other forms of dispute. Thus far, however, the volume of work remains small.

The past twenty years have also seen major changes to the framework for the conduct of civil litigation in English courts. Important examples are the new interlocutory orders established in the High Court in support of plaintiffs in cases of commercial fraud, such as the *Mareva* injunction and *Anton Piller* order;⁷ the introduction of exchange of witness statements;⁸ and small claims procedures introduced in the County Courts in the 1970s.⁹ These measures are of course not ADR techniques, but they have shifted the focus of attention to pre-trial activity and disclosure of information; and

⁶ *Id.*

⁷ A *Mareva* injunction (*Mareva Compania SA v. International Bulk Carriers SA*, [1980] 1 ALL E.R. 213) is an order freezing the defendant's assets so that they cannot be reduced below a certain level—usually the value of the plaintiff's claim. It is aimed at restraining the defendant (and anyone with control over the defendant's assets) from disposing of the defendant's assets or moving them out of the jurisdiction. It can have very harsh consequences for the defendant. An *Anton Piller* order (*Anton Piller KG v. Manufacturing Process Ltd.*, [1976] Ch. 55) (appeal taken from Civ. Div.) allows a solicitor (as an officer of the court) to enter the defendant's premises for the purpose of searching for and seizing items, including documents. It is again a Draconian type of order with potentially drastic consequences for the defendant. For *Anton Piller* orders generally, see 16 Halsbury Laws of England para. 372 (Lord Harlsham of St. Mary Lebone ed., 4th ed. 1992). Both procedures give the courts considerable discretion to influence pre-trial processes. For discussion, see Zuckerman, 56 MOD. L. REV. 325 (1993); STEVEN GEE, *MAREVA INJUNCTIONS AND ANTON PILLER RELIEF* (2d ed. 1990).

⁸ The relevant rule is Rules of the Supreme Court, Order 38, r2A (The Supreme Court Practice 1988). The Rules providing for exchange of witness statements before trial have been progressively amended in the direction of preventing "trial by ambush" by precluding litigants from using evidence at trial that has not been disclosed to the other side at the exchange stage. The aim is partly to encourage fair settlement before trial. Notably, in 1988 a provision that the court could make an order requiring the exchange of witness statements, which had previously applied to the Commercial Court and the Referee's Court, was extended to the Queen's Bench Division and the County Court. With effect from November 1992, the rule was amended to make an order for the exchange of witness statements virtually mandatory.

⁹ Small claims procedures aim to avoid formality and to enable litigants whose claims fall below a specified value to act alone. CHRISTOPHER J. WHELAN, *Small Claims in England and Wales: Redefining Justice*, in *SMALL CLAIMS COURTS* 100 (1990).

settlement has become more attractive. The court itself has become more involved in pre-trial preparations and sometimes in orchestrating settlement. Lawyers have become increasingly active in ADR initiatives in England. A number of major reports has been sponsored by the legal profession's disciplinary bodies—the Law Society and the General Council of the Bar.¹⁰ The Lord Chancellor's Department has set up a major review of civil court procedure by Lord Woolf, one of our House of Lords judges, with a view primarily to cutting the cost of the civil justice system. ADR and civil procedure are increasingly seen as interwoven amongst academics. They were discussed together at the 1992 annual Hart Workshop at the Institute of Advanced Legal Studies, which was organized around the theme "Dispute Resolution: Civil Justice and its Alternatives."¹¹

A strong common theme in the various reports and reviews mentioned above has been an enthusiasm for embracing ADR into civil procedure. For example, in 1991, the General Council of the Bar's Committee on ADR, chaired by Sir Roy Beldam, reported the following: "By the end of our work we were convinced that the case was made out for the courts themselves to embrace the systems of alternative dispute resolution We believe that ADR has much to offer in support of the judicial process."¹²

More recently, in 1993, an Independent Working Party set up jointly by the General Council of the Bar and the Law Society, and chaired by Hilary Heilbron Q.C., issued a report that strongly recommends the setting up of pilot schemes to experiment with court-based mediation, together with other measures to encourage the use of ADR.¹³ In keeping with Heilbron's recommendations, the judge in charge of the commercial list, Judge Cresswell, issued a significant practice statement, stating that the judges of the court wish to encourage parties to consider use of ADR, and will, in appropriate cases, invite parties to consider whether the case could be resolved by means of ADR.¹⁴

¹⁰ Henry Brown, *Alternative Dispute Resolution*, LAW SOC'Y COMM. CTS. & LEGAL SERVS. REP. (Law Soc'y, London, England), July 1991; *Report of the Committee on Alternative Dispute Resolution*, GENERAL COUNCIL OF THE BAR (Gen. Council of the Bar, London, England), Oct. 1991. [hereinafter *Report*].

¹¹ See generally, 56 MOD. L. REV. (1993) (special issue containing the proceedings of the 1992 Hart Workshop at the Institute of Advanced Legal Studies).

¹² See *Report*, *supra* note 10.

¹³ *Civil Justice on Trial—The Case for Change*, REPORT OF THE INDEPENDENT WORKING PARTY (Chairman: Hilary Heilbron Q.C., 1993).

¹⁴ Practice Statement (Commercial Cases: Alternative Dispute Resolution), [1994] 1 W.L.R. 14.

ADR AND CIVIL JUSTICE REFORM

The Lord Chancellor's Working Party under Lord Woolf has not yet reported, though a report is imminent. However, various press statements indicate quite clearly the same enthusiasm for embracing ADR techniques and procedures as part of a package of measures to reduce the costs and delays of civil litigation. Lord Woolf has been citing the success of various U.S. schemes to support his proposals. For example, he notes the system of the Court of Appeals in the District of Columbia which employed full-time mediators assisted by senior attorneys who acted without charging.¹⁵ However, Lord Woolf is also being criticized for failing to take sufficient account of moves in the U.S. and Australia toward flexible "appropriate dispute resolution" and for responding to short-term crises rather than framing long-term solutions.¹⁶

II. CONCERNS

All these moves and proposals raise a series of questions. How far should the courts go to become the sponsors of settlement? What are the long-term projections for the proposed solutions? How could the success of such schemes be evaluated? Is it not likely that goals such as cost savings and reducing the caseload of the court will conflict with other goals, not least of which is justice? As I stressed at the outset, we need to look closely at the diversity of interests behind the apparent consensus of support and ask what exactly is the effect of ADR procedures on disputants and the course and outcome of legal disputes.

My own research on medical negligence litigation illustrates some of my concerns. The Department of Health in Britain is very interested in sponsoring and evaluating the use of mediation in medical negligence cases. I have no doubt that in appropriate cases, mediation could lead to settlement of a claim to the satisfaction and benefit of all concerned. I also have no doubt that medical negligence litigation is frequently both divisive and inappropriate and can exacerbate hostility between the parties, whereas mediation may reduce hostility and reconcile the parties. My concern, however, is what may happen to the accident victim's legal rights under such a scheme. Mediation can place very strong psychological pressure on claimants to settle for less than the amount a court would award. In what sense is this a "good thing?" It is clear that a priority for the Health Service is to reduce the costs to itself of medical negligence claims. But, should the

¹⁵ Frances Gibb, *Woolf Urges Court Mediation*, THE TIMES (London), Oct. 22, 1994, at 11.

¹⁶ Roger Smith, *Lords of Little They Survey: The Investigations of Lord MacKay and Lord Woolf Will Fail Unless They Join Forces, Says Roger Smith*, THE INDEP., Jan. 4, 1995, at 23.

courts systematically support low settlement and the undermining of legal rights?

It is also necessary to consider the possible functions served by the comparative formality of court procedures that could be lost if more informal procedures are substituted. Concerns about the superficial attractiveness and subtle dangers of informality permeate the socio-legal literature.¹⁷ Hazel Genn's analysis of tribunals¹⁸ illustrates, for example, the problems created for participants by a disjunction between a cozy, user friendly, informal procedure on the one hand and the formality of the decision itself on the other. Her study shows clearly how ordinary people appearing before employment, social security, and other tribunals were confused by a process that is apparently informal, and yet, is confined to strictly legal criteria in the decisions it produces. They found it difficult to understand that the decisionmaker in an *informal* hearing was constrained to strict application of the rules and unable, for example, to be sympathetic to their individual circumstances. Her study also makes very clear that lack of legal representation is a serious disadvantage at tribunal hearings, even though legal representation may appear to run against the attempt to move away from formality.

Lastly, I raise again the question, what really happens to access to justice? Do, or will, such moves towards ADR as those currently being proposed address the problem that in the U.K. the vast majority of the population is neither rich enough nor poor enough to afford the courts? Despite Lord Woolf's apparent confidence that the introduction of ADR procedures will improve access to justice,¹⁹ it is hard to see how it could do so. It will be unfortunate if reducing court delays and costs to the public purse are viewed as automatically improving access to justice, and if concerns over costs lead to the introduction of ADR procedures that worsen problems they are ostensibly intended to cure.

¹⁷ See Weinstein, *supra* note 1, at 243 n.2.

¹⁸ Hazel Genn, *Tribunals and Informal Justice*, 56 MOD. L. REV. 393 (1993).

¹⁹ See, e.g., Gibb, *supra* note 15; Heather Mills, *Woolf Tries to Make Justice For All A Reality; The Senior Judge Who Has Been Given the Job of Reforming the Conduct of Civil Cases Outlines His Radical Plans to Heather Mills*, THE INDEP., Nov. 14, 1994, at 6.