Kluwer Mediation Blog

Legal costs and 'Mediation Receptivity'

Charlie Irvine (University of Strathclyde) · Sunday, September 13th, 2015

In 2006 Frank Sander produced his 'Mediation Receptivity Index'(22 *Ohio State Journal on Dispute Resolution*, 599-618). The MRI would be a way of discerning the extent of 'mainstreaming' or 'institutionalization' of mediation in different US states. It doesn't seem to have caught on, but among the questions Sander lists are:

PROVIDERS
– number of professional mediators
– number of mediation firms
– extent of court programmes and numbers referred

INSTITUTIONAL SUPPORT
– total public funds devoted to mediation
– number of professional schools teaching mediation, numbers of students, academic journals
– presence of *'potential movers and shakers on behalf of mediation'*
– mediation legislation
– court rules on mediation
– executive branch orders to increase use of mediation by state agencies (pp. 600-601).

By most of these standards Scotland is a 'low-MRI' jurisdiction (almost no court programmes; less than 0.5% of civil cases mediated; less than half a dozen mediation firms; although it does have significant public funding for family and community mediation). I have written before about some of the reasons for this (see 'The Sound of One Hand Clapping: The Gill Review's Faint Praise for Mediation' 2010, 14 *Edinburgh Law Review* (1) 85-92). However, another factor often goes unnoticed when people attempt to compare disputing cultures: the legal costs regime (known in Scotland as legal expenses). In other words, who shoulders the cost of litigation?

While it's personally challenging for mediators to see cases charging off along the road to the courts, spare a thought for the parties. They have to pay for the privilege. It will probably astound readers from other jurisdictions that the 2013 Taylor Review of Expenses and Funding of Civil Litigation in Scotland makes no mention of mediation. Nor does it tell us the actual costs of litigation to those involved.

To find that information I had to go back to the Report of the Scottish Civil Courts Review. Published in 2009, leading to legislation in 2014, its 674 pages contain numerous neglected

nuggets among which are collected statistics on the costs of litigation (pp. 280-283). While a little dated, they are sobering.

It looks reasonably worthwhile to take high value cases to Scotland's highest court (the Court of Session). For those obtaining £150,000 or more the ratio of **costs** to the **value of settlement** was 15:100. However, move down the value chain and things changed: where the settlement was between £50k and £100k the ratio was 111:100; between £20k and £50k, 159:100 and under £20k an eye-watering 222:100. Just to spell this out, where a case settled for £10,000 the total of both parties' **recoverable** legal costs was on average £22,000 (the actual costs could be almost twice that).

The review proposed removing lower value cases from the Court of Session and reserving anything with a value of up to £100,000 to the Sheriff Court, which deals with the great majority of civil business in Scotland. This was in fact done by the Courts Reform (Scotland) Act 2014. However, the Sheriff Court is not much better. For settlements between £50k and £100k the ratio was 65:100; from £20k to £50k it was 101:100; under £20k it was 202:100.

To put this in context, in 2013 the average award of damages for a personal injury action (road traffic or employment) in the Sheriff Court was £9,511 (Taylor Review, p.v). So it looks as if the Scottish justice system is providing a service in which the total cost of litigating runs at twice the average award. Why do people continue to use it?

One possible answer lies in the costs regime common on this side of the Atlantic, indeed in most of the world. In contrast to the USA, in Scotland the 'loser pays'. (This is often known as the 'English rule' on costs – see T. Eisenberg & G. P. Miller, 2013. 'The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts' 98 *Cornell Law Review* (2) 327-382). This means that successful parties can expect to recover a proportion of their legal costs from the other side. I say a proportion because the Taylor Review acknowledged that in Scotland it could be as low as 50% (in contrast to nearer 80% in England and Wales; p. vi).

Nonetheless one can speculate about the psychological impact of the regime. Even if I am aware that my legal costs may be as great as, if not greater than, the sum I'm likely to recover, if I have a strong belief that I'm in the right I may carry on because I believe the other side will pay my costs in the end. This is likely to compound and be compounded by confirmation bias, delightfully defined by Wikipedia as *'the tendency to search for, interpret, favor, and recall information in a way that confirms one's beliefs or hypotheses while giving disproportionately less attention to information that contradicts it.'* It is stronger where people are emotionally aroused.

Confirmation bias may explain another puzzle: under the 'English Rule' unsuccessful litigants pay not only their own costs but those of the other side. Remember the 100:202 proportion? That means the loser of a £10,000 case is also paying over £20,000 in costs. Once again we need ask why people would continue with litigation under those risks. In fact they don't: as in many other countries the number of cases proceeding all the way to a hearing (called a Proof) is low, probably under 5%. But like the metaphorical lobster in a pot, the true position is only revealed gradually. The whole process of litigation is intended to reveal to each side the strength and depth of the other's case – but this takes time (and expense). Lawyers know that the closer parties get to the date of Proof the more likely the case is to settle. Settlements on the steps of the court are common.

Confirmation bias is probably compounded by a related phenomenon: overconfidence. This means

that we generally have greater access to information that confirms or boosts our perspective; lacking access to contradictory information we attach undue importance to the data that lead us to believe we are correct. We are then surprised, the nearer we get to the day of a hearing, that the other side doesn't share our views, and even more surprised if the judge doesn't! And this doesn't only affect parties. Lawyers have also been shown to be vulnerable to overoptimism, boosted by overconfidence (see Delahunty et al, 2010. Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes, 16 *Psychology, Public Policy and Law* (2) 133–157).

As for a solution, that's harder. The 'American Rule' on costs is not without its problems. Entirely innocent people can end up paying large sums to defend themselves against the powerful or the vexatious. My guess, however, is that the costs regime is a more significant factor than has been recognised. The appealing vision of cost-free litigation, perhaps made doubly attractive by the thought of our (vanquished) adversaries paying double, may lead some to plough on with ill-advised and disproportionate legal action. It may be time to add legal costs to Sander's Mediation Receptivity Index.

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