

LAW157 Consolidated Notes

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Topic One – Introduction to ADR (BLUE)

What is ADR?

- Any method of dispute resolution which occurs outside a judicial setting
- Usually utilises a third party
- Three main types:
 - Facilitative: third party assists in managing the process of dispute. Includes mediation and facilitation. HELP
 - Advisory – involves a third party who investigates the dispute and provides advice on the facts and possible outcomes. Includes investigation, case appraisal and dispute counselling. ADVISE
 - Determinative – third party investigates the dispute (possibly a formal hearing) and makes a determination. Includes adjudication and arbitration. May or may not be binding. DETERMINE
- NADRAC – National Alternative Dispute Resolution Advisory Centre

Definitions and differences in process

- Differences in process can occur in response to the following:
 - Length of the process and the formality of it
 - Different elements for different processes
 - Role of a third party/ies
 - Role of the parties themselves
 - Subject of the dispute
 - Reporting and referral requirements
 - Objectives of the process
 - Philosophical underpinnings
- “mediation abacus” – variables relating to levels of intervention and qualifications

Why teach ADR?

- ADR is becoming an increasingly important aspect in dispute resolution. There is now a larger size and variety of cases that are being decided by ADR processes. Skills in ADR are a crucial aspect in the modern day legal profession.

Christopher Moore (1996) The Mediation Process: Practical Strategies for Resolving Conflict

- All societies, communities, organisations and interpersonal relationships experience conflict at one time or another in the process of day to day interaction. **Conflict is not necessarily bad, abnormal or dysfunctional; it is a fact of life.**
- We need alternative dispute resolution practitioners to acknowledge and accept that conflict is not necessarily bad, it is not abnormal and it is not dysfunctional. Conflict exists when people are in competition to achieve goals which are perceived to be or actually are incompatible.
- But, conflict may go beyond competitive behaviour and acquire the additional purpose of inflicting physical or psychological damage on an opponent, even to the point of destruction.
- Unfortunately many people in conflict are unable to develop an effective process to deal with the psychological barriers to settlement or develop integrative solutions of their own → that's where ADR practitioners come in. They help people resolve conflict that they themselves cannot resolve.

Jeremy Gromly, Chair of NADRAC (in Sourdin Alternative Dispute Resolution)

- **There is nothing wrong with dispute, it is normal.**

- Just as dispute is healthy we know that unresolved disputes are costly, damaging and debilitating. They interfere with ordinary discourse. They bring productive activity to a halt. They generate animosity. They fracture otherwise good human relationships and they can interfere with any field of activity in which resolution does not occur.
- We recognise not only a right to dispute but also a need and even an obligation to resolve our disputes. Usually that is what we do. Only a tiny sliver of daily disputes find their way to the courts. Indeed only a tiny sliver of the disputes of daily life are amenable to judicial determination. Of those that are, only a small proportion have to be determined by a judge because the rest are settled by agreement between the parties. **Courts are the first to recognise that and encourage parties to resolve their disputes.** Courts and judges have been one of the great supporters of ADR → **courts do not resolve disputes they determine them by applying the law to the facts.**

Judy Gutman, Tom Fisher, Erika Martens – Why teach ADR to Law Students? (2006) 16(2) Legal Education Review

- Pg 145 – **ADR courses put back everything law school took out, reintegrating humanity and common sense into the dispute resolution process.**
- Black letter, common law, studies removed the humanity and common sense and we should teach ADR to put that back.
- Referred to study by Nolan – knowledge of mediation enhances law students lawyering skills. Even if they never mediate in practise it enables them to think in a problem solving manner and to consider underlying needs and interests → it enhances law students lawyering skills.

The Bigger Picture

- There is a large size, variety and dimension of cases that are capable of being resolved by ADR. However there are others that are not – e.g. Channel 7 case where the judge pleaded with the parties to settle the case which was refused and a decision was given and a cost order made – the costs were reported to be in the vicinity of \$100M

Case of Jaundice & Jaundice

- Testator had multiple wills – litigation ensued for many years consuming £60000-70000 in legal costs. By the time the litigation was concluded there was nothing left in the estate for distribution

P R Callaghan SC, Roles and Responsibilities of lawyers in mediation (27 July 2007)

- [5] referring to *Jaundice & Jaundice* → the lawyers have twisted it into such a state of bedevilment that the original facts of the case have disappeared. It is about a will and trusts under a will, or it was, it's about nothing but costs now.

Argyle Diamond Mine

- Provides an example of using ADR techniques to prevent dispute.
- Agreement was made between the mining company and indigenous community → participation agreement
- The agreement ensures that the mining activities will provide benefits to the indigenous people beyond the life of the mine.

Kirby J – ADR

- Kirby J used ADR to resolve a dispute.
- The dispute was set to run in a SA court for 18 months. Kirby resolved it in a week.
- Illustrates the power of ADR when the practitioner is well trained and knows what they are doing.

America is the leader in ADR, followed by Australia, followed by England

- English case of *Susan Fahiti v Forstead House School Trust* (2005) EWCA CIV 765
 - [27] – *shudder to think of the costs of the case. As the court has settled many of the principles in stress of work cases litigants really should mediate such cases as the present. Of course mediation before trial is infinitely preferable to mediation before appeal, but it is a great pity that neither form of mediation has taken place in this case, or if it has, it has not produced a result.*
 - £25000 in costs

Continuing development of ADR

- Even in crime there are moves afoot in relation to turning dispute resolution solutions to criminal issues – i.e. criminal facilitation, mediation, circle sentencing.
- ADR is used in customer complaints training – REM acronym. Respond to emotion, Explore the solutions, and move to Resolutions.
- Another example is the equine influenza outbreak – ADR was used to resolve compensation disputes.
- Live Cattle Export Scandal – currently negotiations and facilitation are being undertaken to resolve issue prior to a court hearing.

What is the A in ADR?

- The A is generally referred to as 'alternative' → but is this really correct?
- It has been argued by [Lawrence Street \(\(1992\) 66 ALJ 194\)](#) that it is not 'alternative' - the use of alternative implies that it is in competition with the judicial system which is not true. It is really an **'additional'** branch of resolution