

knock for knock?

In an imperfect world, one of the costs of dealing with people is that we will suffer knocks. If you play rugby you expect to be thrown about – if you do business with other people you come to expect that things may go wrong.

It is not universally accepted however that, in order to survive and thrive in this environment, one should identify how best to lick one's wounds and continue playing the game, rather than measuring the knock for the purpose of determining the "reciprocal knock"!

That would be a hard philosophy for someone who, in good faith, believed himself to have behaved honestly and properly and to be the victim of a claim which is ill-founded not only in law but in morality - in other words the victim of an opportunist pursuer (plaintiff).

John Sturrock QC has been at the forefront of promoting mediation in Scotland as a progressive method of dispute resolution. He describes mediation as “a flexible and confidential process in which an independent individual, the mediator, helps people to work together to find practical solutions to their disputes or differences. The parties themselves decide the outcome, the terms of any agreement between them and how to take matters forward.”

The reference to “practical solutions” rather than “enforcement of rights” suggests that, if parties to a mediation are serious about seeking a resolution, they need to come prepared for a change of approach. Would that not be required of their lawyer also?

“The lawyers who really make best use of mediation for their clients are those with a range of modern skills and flexibility in thinking and problem solving. They are able to engage with their clients in a constructive way, built on trust, respect and independence, so that they can give advice and guidance which is sometimes robust and not necessarily what a client thinks it wants to hear. However, they will help their client to see the big picture, to keep in mind the objectives and the alternatives to a resolution and they will work with the mediator to help address the understandable feelings of injustice or anger. They will analyse risk and cost, appreciate that there are usually two (or more) sides to most stories – and will seek to work collaboratively with other lawyers.”

Can we foresee a time when someone we all consider to be the “honest victim” will be drawn to mediation - not because it holds out the prospect of saving massive legal fees and valuable management time and avoids the uncertainty of litigation before judge and/or jury, but because it is instinctively the right way to proceed in this world of hard knocks?

John Sturrock reminds us that “we have to be careful before making assumptions about “opportunism” or “(dis)honesty”. Most people are doing the best they can in the world as they see it. It's just that their world can be very different from someone else's. The great thing about mediation is that, if done well, it gives each party a real opportunity to tell its story and to be heard – and to hear the other story. I am constantly amazed at the power of bringing together seemingly hard-nosed commercial people who, when engaged privately with their counterpart, begin to realise where he or she is coming from. Then, really creative things can happen. And, of course, if the “victim” really is such, this opportunity to express how things really are or feel can often lead to major shifts by others. I know that to be so as I have seen it happen regularly – and this requires really skillful handling of the process.”

Even the foremost evangelists for mediation accept that sometimes there is really no alternative to litigation. But should not the lawyer, faced with a client at the “sore end” of a damaged business or family relationship, rather than answer the question “what are my rights?” after analysing the facts and diagnosing the cause of the breakdown, instead offer a range of outcomes and a menu of steps which might lead there?

John Sturrock thinks so. "It is something of an irony that, in this world of "rights" and therefore of "wrongs", there is such a significant shift occurring world-wide towards a recognition of underlying interests, needs, aspirations and concerns. Mediation helps people to look to the future and develop their options - and to find solutions which work. Such an approach has so much more potential and is so much more in line with much of modern business thinking. The lawyers who adopt this approach with and for clients are the lawyers who will gain stature and business in the years ahead".

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