opinion

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This week, two lawyer friends of mine have been reading the latest Court of Appeal decision on alternative dispute resolution (ADR),the clinical negligence case *Halsey v Milton Keynes* (2004). Let me introduce them. Brer Rabbit is a mediator. He is delighted to see that *Dunnett v Railtrack* (2002) has now been upheld and fleshed out. Better still, it is now clear that every litigation solicitor has a duty to consider mediation with their client. Bliss it is in this dawn to be alive.

Brer Fox is a litigator. The sympathetic half of his brain was never very highly developed and over the years has withered away altogether. He hates mediation. It spoils his sport and kills his billings. He has read *Halsey* too, and there is a toothy glint to his smile. How come?

Brer Fox says he can now advise his clients that, unless a case is borderline (50:50), costs sanctions can probably be avoided. (Remember, none of Brer Fox's cases are ever 50:50. He hasn't described a case as less than 75:25 in his client's favour since his third week in pupillage/articles.) After *Halsey*, to agree to mediate would be a concession that the case is not, after all, a slam dunk.

Within 48 hours of the publication of the judgment, I received a note on the case entitled 'A New Dawn for Mediation' from an ADR organisation, and one from the litigation department of a City firm asking the distinctly nocturnal question: "Are costs sanctions for a refusal to mediate now dead?" Very puzzling.

Most of the guidelines in *Halsey* represent excellent sense. It is the guideline dealing with "the merits of the case" that causes concern. *Dunnett* had a simple and inspiring message: however strong your case may be, mediation may avoid the costs of litigation and provide a more satisfactory solution for both parties. Why? Because a patient explanation and perhaps an apology may be all that is needed. (Susan Dunnett had already lost at first instance and was about to lose again for the second time on appeal, when Railtrack fatally declined to mediate her dispute.)

The words of Lord Justice Brooke in *Dunnett* that Brer Rabbit has inscribed above his bed are these: "A mediator may be able to provide solutions which are beyond the powers of the Court to provide." The merits guideline in *Halsey* can be encapsulated as follows: if a party to litigation reasonably regards their case as better than borderline (and ultimately wins) then it is unlikely (other things being equal) that their refusal to mediate will be considered unreasonable. Frankly, this is difficult to reconcile with *Dunnett* (although the Court is careful only to disapprove the judgment of Mr Justice Lightman in *Hurst v Leeming* (2002)).

In a court near you, Brer Fox will soon be arguing that the *Dunnett* principle has been radically restricted. If *Dunnett* costs orders are perceived to be on the way out, then the Government may well start looking at making ADR compulsory under the rules. Bad news here, too. *Halsey, obiter dictum*, makes it clear that this court would regard ordering any unwilling party to mediate as a breach of their Article 6 right of access to the courts. This will have rocked the Department for Constitutional Affairs, under whose flagship Central London County Court Scheme judges are now able to order mediation appointments to take place. In the US, many states now have compulsory ADR and those rules have survived constitutional challenge. Brer Rabbit does not think the Article 6 argument will survive if it is raised specifically and argued fully on appeal. He might be right.

The courts surely have a role in protecting parties from the testosterone of their legal advisers. If *Halsey* reinforces the impression that it would now be professionally negligent for a litigation lawyer not to raise the possibility of ADR with their client, then that is all to the good. But on costs, this judgment seems to complicate and cut back the message of Brooke LJ's judgment in *Dunnett*. At the moment, we have the puzzle that both Brer Rabbit and Brer Fox are happy. It may take a year or two to solve this one.

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Senior managing partner: Jeanette Miller
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Total number of solicitors: Five
Main practice areas: Claimant personal injury, civil litigation, wills and probate
Key clients: The public
Number of offices: One

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By Jodi Bartle

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