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Pre-Action Protocols and Pre-Action Dispute Resolution Processes: Horizons Near and Far

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Abstract
This article explores the role of 'alternative' dispute resolution in the context of the publication of Part 1 of the Civil Justice Council (CJC) Review of Pre-Action Protocols, to which the author contributed. The relationship between the CJC Report and the Master of the Rolls' vision for the future of digital justice are considered as are the most salient details of the Report's proposals, not least mandating dispute resolution engagement, digitalizing portals to manage pre-action steps and gather rich data, and a process for raising alleged failures to comply. The article concludes with consideration of further improvements which the use of technology and rich data may bring, on the near, medium and far horizons.

Keywords: alternative dispute resolution; ADR; mediation; early neutral evaluation; ENE; negotiation; pre-action protocol; settlement; artificial intelligence; AI; funnel; digital pathfinder; deep learning; reinforcement; sanctions; non-compliance; rich data.

[A] ALTERNATIVE DISPUTE RESOLUTION AT A TIME OF CHANGE

This article returns to the topic of what has often been called alternative dispute resolution (ADR) and considers it in the specific context of the forthcoming reforms to pre-action protocols under the legal system in England and Wales. This is timely and relevant because at the time of writing and of publication of this Special ADR Section (Part II) of *Amicus Curiae* the intention of the Court Service, Ministry of Justice and, equally

significantly, the judiciary itself is to create a seismic shift in the role of ADR specifically in the pre-action period before any claim is issued and to ensure that pre-action protocols integrate with both ADR and with expanding use of computational and internet technology.

The context is a recent history of consideration of mandatory ADR, the Civil Justice Council (CJC) Report of 2021 (CJC 2021) reaching conclusions as to its permissibility in human rights terms, and the expected publication, almost simultaneous with this paper going to press, in early 2023, of the first Report of the CJC Working Group on pre-action protocols, of which this author was a member and also a member of the specific sub-group on digital technological aspects of the pre-action protocol process. Central to that Report is consideration of how the pre-action protocols can incentivize and give effect to the wider public policy push to implement effective ADR in the pre-issue period of a legal dispute.

Turning further ahead, this article engages in some forward thinking, considering possible future developments in the pre-action ADR process and how technology as part of that may assist in the pre-action period. Some of the observations here, especially the more forward-looking aspects in Part E of this paper, formed part of this author's address at the University of Leicester's conference on 2 December 2022, entitled '[A]DR & Neutral Evaluation in the Reformed Civil Justice System' at which the Master of the Rolls also spoke, and it will be noted that observations by the Master of the Rolls are quoted (from various publications) in this article, illustrating the significant degree of engagement taking place with the sitting senior courts judiciary on this topic.

For the purposes of this article and its discussion of how ADR out of court does, and will, more and more fully mesh with the pre-action protocol process, I will use the expression (with a deferential nod to the preference of the Master of the Rolls to drop the 'alternative') 'dispute resolution' henceforth, albeit that of course a trial is also a form of dispute resolution, to refer to any and all forms (lawful) of resolution of disputes of a generally legal nature, either wholly or partly without judicial or other adjudicative court intervention. (See also the reference to this author's own 'Historic Abuse Resolution Procedure' (below page 349 & n 2) as a species of hybrid dispute resolution proposal in court after issue, but with pre-action elements relating to packaged social and psychological support for a victim in that specific civil litigation field, laying groundwork for an investigative narrative judgment.)

[B] 'I WAS FRAMED': LOSING FACE AND MISSING YOUR DAY IN COURT—HOW WE FRAME 'JUSTICE'

We all know the image: the movie where the protagonist is in grave jeopardy. This may be (in a farce) a risk of some social disaster, or it may be (in a legal thriller) a risk of some enormity of injustice even unto death in Old Sparky or the Chamber. It often arises because someone has been 'framed'. Framing is the relatively well-known term for how the general perspective one applies to perception of a set of facts can affect what one decides.

As Tversky and Kahneman (1981) say:

> Explanations and predictions of people's choices, in everyday life as well as in the social sciences, are often founded on the assumption of human rationality … 'decision frame' [refers] to the decision-maker's conception of the acts, outcomes, and contingencies associated with a particular choice. The frame that a decision-maker adopts is controlled partly by the formulation of the problem and partly by the norms, habits, and personal characteristics of the decision-maker. It is often possible to frame a given decision problem in more than one way. Alternative frames for a decision problem may be compared to alternative perspectives on a visual scene.

It seems to this author that much of the way in which lawyers, policymakers and law-reformers think about the resolution of disputes outside of court is based on the dubious heuristic that rational people will tend to reduce the risk-and-cost penalty to themselves, and hence that if resolving a dispute without a court decision is likely to yield something better than taking the risk of a fallible judicial decision then it should, logically, be pursued. In other words an assumption of logical and self-interested behaviour. Such a heuristic is dubious because in the human world, a world beyond logic where other considerations come into play, things do not work quite like that, but lawyers and policymakers may well do so. A delightful metaphor was deployed by Mark Randolph (2010) in his discussion of why, especially among non-lawyers, the opportunity to resolve matters (in this instance by mediation) is not taken up as often as it might be:

> Imagine for a moment that mediation is a product—a stain remover—that can be purchased from any supermarket. Almost all who have used it praise it highly. … cheap, quick, is easy to use, and saves time, cost and energy. On the adjacent shelf is another stain remover called litigation. Almost all who have used it are highly critical of it: it frequently fails to deliver its promise of success: it is extremely costly, very slow, and takes up huge amounts of time, money and energy.

> Yet people queue up to purchase litigation, and leave mediation on the shelf.

The desire to choose the expensive, slow and unreliable product described by Randolph may be about individual notions of what justice actually is. Looked at through Goffman's lens, a 'framing' of the dispute resolution process can be seen as composed of social interaction activities (here, as part of the dispute and possible resolution) which are 'bounded by theoretical expectations of the participants' (Goffman 1974). See, for example, discussion in De Girolamo (2020). Litigants do not always act as if they are the rational beings we may hope them to be, bounded by self-interested and logical expectations,[1] and instead they confound us by pressing on to a losing fight or to a Pyrrhic victory. This may very well be because to them the dispute is 'framed', especially where lay people are concerned, in terms of binaries of 'winning' or 'losing' and also is mixed up with self-esteem, a loss of face (perhaps with a neighbour), or just plain anger driven by a sense of injustice. Once 'framed' in that way the idea that one might avoid going to court, that one might actually even *avoid issuing a claim in the first place*, becomes unappealing and may feel like a concession, and moreover one too great to bear.

Important, too, may be framing considerations arising from societal perceptions of 'justice' and its association with a judicial process of some sort leading to a *denouement*: an untying of the knot, an unravelling, or in plain terms 'a day in court'. De La Mare (2020a) has observed that 'The role and exclusivity of the physical courtroom has been embedded as a cardinal principle or assumption of English open justice' and it may be said that perhaps 'justice being seen to be done' is a part of the psyche of society to the extent that it becomes mixed up with what it means to 'be seen [by others] to win' for the sake of one's own personal sense of justice. A settlement out of court behind either physically or digitally 'closed doors' perhaps does not achieve that sense of justice for many.

Arguably therefore resolving a dispute by way of dispute resolution and never 'having your day in court' may be a disincentive to engage in dispute resolution, and perhaps all the more so where personal values and personalities are engaged such as in a neighbour dispute. Lindsey

[1] One may here point out that models of expectation of dispute resolution which assume rationality and self-interested logic lean implicitly in the direction explored for example by Habermas in relation to the notion of the 'ideal speech situation' applied to the context of dispute resolution where participants in a dispute have the goal of reaching mutual understanding, have equal chances of participating, are not externally constrained from evaluating argument, and aim towards agreement about what is right (Habermas 1979). The 'real world' is one in which the ideal conception of negotiation is, rather, as Habermas also puts it, at most 'a foil for setting off more glaringly the rather ambiguous developmental tendencies in modern societies' (Habermas 1989).

(2020) argues (in the context of the sense of justice in non-physical, remote, hearings, but it would seem applicable *a fortiori* where *no* hearing at all takes place):

> The 'majesty of the law', judicial prestige and authority, the value that court room spaces hold in our culture, and the ritualistic experience of going to court all play a part in this perception of 'having your day in court'. Further, the perceived coldness and distance of the virtual space from a human perspective is clear from reading the reflections of non-legal professionals … . Something material and experiential is patently missing from the virtual court room, not least the ability to pick up subtle cues of behaviour which extend beyond audio.

The need for the 'day in court', too, in other instances may be associated in some deeply personal cases with the sense of devaluation which a victim of an injustice may experience such as in civil damages cases arising from non-recent child sexual abuse. Those claims are typically brought against institutions such as schools or churches, where there is no doubt about the abuse. The issues revolve normally around the level of damages, yet the victim may well feel that the point of the case is not, in fact, damages but about the sense of justice arising when their personal life experience is heard, valued and considered. There is a desire that lessons be learned so that a life-experience greatly affected by child abuse is not wasted and the likelihood of others experiencing the same is reduced. Such a desire may well be shared by both victim and (for example) charity trustees and insurers on the defendant side. However, the law is about money, in what is after all a personal injury claim. The court trial process and the build up to it whether pre-action or after issue of claim necessarily focuses on 'how much' the harmful experience and its lifelong consequences 'are worth', and hence argument and evidence can and usually do concentrate on the extent to which a victim would have (for example) done well at school but for the abuse.

The process in turn leads to consideration (even though the claimant has long since reached adulthood) of his or her school reports, how well siblings or parents did, how well-behaved the child was before the abuse, the company they kept, and so on, under the umbrella of sympathy and acceptance that the victim is, for all that, truly a victim. Unsurprisingly the victim may feel re-abused whilst on their journey to the culmination at trial, and often one sees claimants who lose contact with lawyers and do not pursue claims to the end. In that 'frame' therefore justice is more about the victim perceiving that they are, and them *actually being*, heard, valued and learned from by society and not simply gaining a payment from an opponent to buy them off and cause their own lawyers to terminate a conditional fee agreement in the face of a reasonable (financial) offer.

This recurring pattern led the present author to propose and discuss a form of post-issue ADR[2] in such cases which aims to have an agreed investigative collaborative court process, and *not* to settle privately out of court for money, which can place the victim under the control of the insurer (as perceived proxy for the abuser, psychologically), in which the process is designed to have synergy with psychological support and as far as possible recovery of the victim and at the same time enable institutional learning from victims' life experiences (Independent Inquiry into Child Sexual Abuse (IICSA) 2016: 197; 2019: ch 7, para 68 'The initial stages of a claim'; and McCloud 2017).

We see therefore that dispute resolution is not as simple a concept as 'settlement out of court', and indeed one may also have dispute resolution *without* perceived justice. It is against that far from simple background that one turns to the near and far horizons of dispute resolution in the pre-action period.

[C] ADR PUBLIC POLICY: COMPULSION AND DIGITAL FUNNELLING

Having set out the above caveats as to what is meant by dispute resolution one turns to the current official vision of the near future for dispute resolution in the protocol period before litigation. The present direction of travel within the United Kingdom court system, and certainly the policy emphasis, is that it is desirable in the common, public interest and the context of limited resources in courts, where we should deal only with fights which need to be fought there, to seek to have disputes resolved before issue of any claim. Vos (2021: para 6) argues:

> I think that common law jurisdictions like England & Wales and Ireland need completely to re-think the way we resolve civil, a term I use to include family and tribunals disputes.

If it is desirable in many instances to get parties to settle out of court more often than they do at present in the pre-action period, then what is needed may be an effort to 're-frame' the idea of resolving the dispute in the pre-action period in the eyes of the protagonists so that it becomes more appealing or so that they are incentivized to do so.

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[2] The proposed 'Historic Abuse Resolution Procedure' in which the parties work towards a narrative, investigatory, judgment, rather than solely a damages decision or settlement, and the abuse survivor receives social and medical support to help them through the process from the outset funded by insurers for the institution irrespective of case outcome. The outputs would then feed usefully back into business regulation within institutions and authorities and make better use of the valuable experiences of abuse survivors in improving child protection.

Doing what the Master of the Rolls proposes is no mean feat in circumstances where the jurisdictional reach of the judge does not, for most purposes at least, subject to well-known exceptions such as pre-action disclosure, extend to the period before the court is seized with a claim. Perhaps a part of the process of 'encouraging' litigants to engage in ADR is the hoped-for change in perception of dispute resolution, abandoning the term 'alternative' so that it becomes expected and normal. Comments and speeches by the present Master of the Rolls Sir Geoffrey Vos are clear enough:

> ADR should no longer be viewed as 'alternative' but as an integral part of the dispute resolution process; that process should focus on 'resolution' rather than 'dispute' … it is exciting to see the HMCTS reform project delivering online justice. All kinds of dispute resolution interventions will be embedded within that online process (Courts and Tribunals Judiciary 2021).

Compulsion

Irrespective of terminology, the concept of mandatory dispute resolution in court claims is not a new one. The debate over compulsion has historically been dominated by the decision in *Halsey v Milton Keynes* 2004.[3] In *Halsey*, the Court of Appeal considered the role of mediation in the civil claims system and, in the process, implicitly contributed to a two-tracked debate as to whether it is *desirable* to have a civil system which mandates mediation, and whether, leaving aside considerations of desirability, such, if actually mandated by the courts, would be *legal* in terms of article 6 of the European Convention on Human Rights. In what has become something of a conceptual obstacle to mandatory ADR ever since, Dyson LJ, as he then was, said this in *Halsey* at paragraph 9 when considering legality:

> to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived … but such waiver should be subjected to 'particularly careful review' …: see Deweer v Belgium (1980) 2 EHRR 439, para 49. … it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if … the court does have jurisdiction … we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.

3 See also precursor cases *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803; *Dunnett v Railtrack plc* [2002] EWCA Civ 303, [2002] 1 WLR 2434; *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 Lloyds Rep 379.

Still further at paragraph 10 the court went so far as to describe compulsion of ADR as 'wrong'—and hence also undesirable.

> if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

The court set out guidelines to be applied when considering whether the unsuccessful party in a claim had acted unreasonably (and hence faced costs risks) in unreasonably refusing mediation (summarized from *PGF II SA v OMFS Company 1 Ltd* 2013, per Briggs LJ at 22):

a. the nature of the dispute;
b. the merits of the case;
c. the extent to which other settlement methods have been attempted;
d. whether the costs of the ADR would be disproportionately high;
e. whether any delay in setting up and attending the ADR would have been prejudicial;
f. whether the ADR had any reasonable prospect of success.

Given its quite restrictive approach to even the limited penalty of imposing costs orders where a party has not cooperated in seeking out-of-court resolution, and its outright rejection of compelling mediation, *Halsey* was, unsurprisingly, described as 'the judicial anomaly threatening the UK mediation system' (Peschl 2022).

Rowing back from *Halsey*

Case law subsequent to *Halsey* has sought to define what is considered to be a 'reasonable' engagement in mediation or an 'unreasonable' refusal to engage or cooperate. In *PGF v OMFS Company 1 Ltd*[4] the Court of Appeal held that silence in response to an invitation to mediate amounted to an unreasonable refusal because parties were expected to engage with a serious invitation to participate in ADR:

> The constraints which now affect the provision of state resources for the conduct of civil litigation (and which appear likely to do so for the foreseeable future) call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really need it, with an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR … Just as it risks a waste of the court's resources to have to try a case which could have been justly settled, earlier and at a fraction of the cost by ADR, so it is a waste of its resources to have to manage the parties towards ADR …, where they

[4] And see *Burchell v Bullard* 2005: para 43; *Rolf v De Guerin* 2011: para 46.

> could and should have engaged with each other in considering its suitability, without the need for the court's active intervention (*PGF II SA v OMFS Company 1 Ltd* 2013: para 27 per Briggs LJ).

Judicial 'chipping away' of *Halsey* continued with, for example, Ward LJ's query in *Wright v Michael Wright (Supplies) Ltd* 2013 as to whether the observations relating to mandatory mediation in *Halsey* were *obiter*. Distinctions began to be drawn more openly as to the difference between ordering a party to engage in ADR (in effect, by implication implying a threat of penal notice if they did not do so) on the one hand and ordering parties to make reasonable efforts to do so: *Uren v Corporate Leisure (UK) Ltd* 2011; *Mann v Mann* 2014; and notably *Bradley v Heslin* 2014 at para 24 where Norris J held that:

> I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.

A decisive turn to mandating pre-issue dispute resolution in the protocol period

With such strong observations as those in *Halsey*, one might have anticipated that the door was closed to notions of compelling dispute resolution, but the recent period has seen a decisive turn away from *Halsey*'s approach to article 6. It led to the long-anticipated CJC Report into pre-action protocols, which also engages with digitalization of ADR.[5]

The ultimate departure from *Halsey* originated in part in reliance on European Court of Justice (ECJ) case law. In *Alassini v Telecom Italia SpA* 2010 the ECJ held that an obligation in law to engage in ADR before resorting to litigating was compatible with article 6. Thereafter in *Menini v Banco Popolare Società Cooperativ* 2018 the ECJ considered what were the necessary features of a system requiring ADR whilst remaining compatible with article 6:

> 60. … the ADR procedure must be accessible online and offline to both parties, irrespective of where they are.
>
> 61. Accordingly, the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection,

[5] The author was on the relevant Working Group and chaired the digital sub-group within that group. However, observations here, insofar as they may (especially in Part E) go beyond the Report, are wholly the author's own views and should not be attributed to the CJC or the Working Group unless they are quoted from the Report.

> provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs—or gives rise to very low costs—for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.

In retrospect perhaps the impending decisive shift away from *Halsey* in England and Wales, at least in terms of wider dispute resolution processes, was seismically signalled by rumblings in the form of an amendment to the Civil Procedure Rules (CPR) in 2015,[6] by which provision was added ('for the avoidance of doubt', according to the Explanatory Notes to the Statutory Instrument, signalling the draughtsperson's sense of humour in view of the debates over mandatory ADR which had been in play for years) by which CPR rule 3.1(2)(m)—the court's power to order any party to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective—was augmented with the express statement 'including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case'.

The amendment was considered by the Court of Appeal in *Lomax v Lomax* 2019, and *Halsey* was distinguished, the court noting at 26 that a compulsory early neutral evaluation (ENE) was not an unacceptable constraint on article 6 rights. In *Telecom Centre (UK) v Thomas Sanderson Ltd* 2020 the present author judicially set out a draft template order for directing non-binding ENE, in mandatory terms under rule 3.1(1)(m) in what is now the King's Bench Division (see eg McCloud 2020 or Guise 2022). In the English and Common law field ENE is a species of judge-led dispute resolution which generally adheres (as can be seen from the template order in *Telecom Centre*) to the principle that a judge who has been involved in that process then does *not* act as the trial judge later. Other judicial approaches are, however, possible and can be effective, albeit challenging in European terms in relation to article 6 of the Convention. Whilst outside the scope of this paper, it is to be noted that the Chinese legal system adopts a process where the judge acts as mediator but may then go on to give an adjudication if the ideal of a settlement is not reached (for a discussion, see Waye & Xiong 2011).

The CJC issued its report *Compulsory ADR* in June 2021 and concluded that, subject to considerations of the sort canvassed in *Menini*, mandating ADR in litigation was capable of being compatible with the Convention.

[6] Civil Procedure (Amendment No 4) Rules 2015, SI 2015/1569.

One route, and the route which we shall turn next to consider because of its direct relevance to the pre-action protocol period, was summarized thus: 'Compulsion can equally well be achieved by simply mandating participation in ADR as an automatic requirement for commencing or proceeding with litigation' (CJC 2021). The Master of the Rolls following the 2021 report signalled a shift (in terms which echo, in part, the guidance in *Menini*, above) towards positively requiring parties to engage, meaningfully, in ADR:

> In my view, the direction of travel ought to be clear. It should be possible … to direct a party to attempt to reach a consensual resolution through mediated interventions. The mandated process should not, of course, be costly or cause delay in judicial resolution. But none of that should mean that parties can, as they sometimes do, resolutely refuse to consider mediation. Being entitled to one's day in court is not the same thing as being entitled to turn down appropriate and proportionate attempts to reach consensual solutions (Vos 2021: para 38).

Vos (2022a) describes near-horizon plans in terms of implementing a digital portal system with what are termed as three 'funnel' layers as depicted in Figure 1.

The immediate interface for disputants will be a website and/or application where any party contemplating litigation can find details of

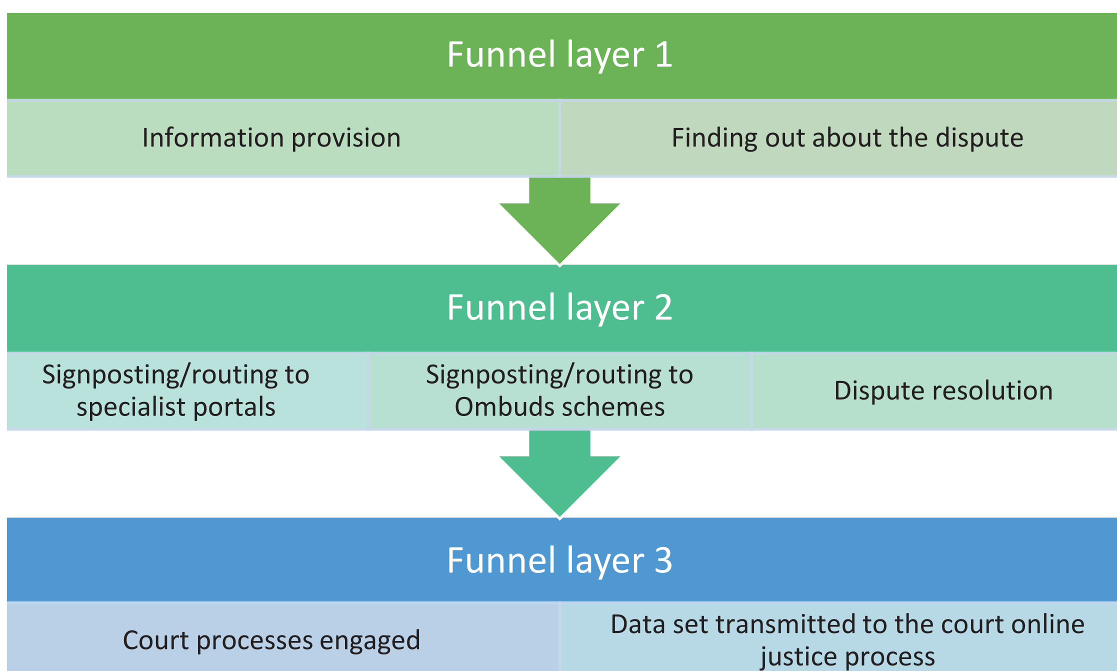

Figure 1: The three 'funnel' layers for implementing a digital portal

how to pursue claims and a system of signposting or diverting users to the relevant specialist digital portals, or in some instances ombudsperson services or tribunals. At the second stage the focus is on ensuring that a dataset is gathered about the dispute and that a process of dispute resolution is facilitated. The third layer of the funnel is the automatic transmission of data about the dispute from the previous layers into the court digital justice process.

The funnels, or rather the second-stage portals to which potential litigants (at this stage perhaps best called 'disputants') effectively digitalize and operationalize the required steps and procedures in the pre-action period, amount to the digital incorporation of the pre-action protocols. As Vos (2022b) puts it:

> If the portals, which effectively replace the pre-action protocols introduced after the Woolf reforms in 1999, cannot resolve the dispute, the idea is that a single data set created within the portal would be transferred by an Application Programming Interface (API) directly into the digital court process (para 11).

However, foreshadowing the conclusions of the 2023 CJC Report into pre-action protocols, due at time of going to press, it is plain that the intention is not only to operationalize pre-action requirements and to gather data but also that built into the system at the pre-action portal stage is a *requirement* to attempt to resolve issues consensually (with the author's own emphasis in the quotation): 'The objective of the pre-action portal is quickly to identify the issues that truly divide the parties. Once those issues are identified, attempts *must* be made to resolve them consensually' (Vos 2022c).

We shall return later to look ahead to the possibilities which arise once one posits the full digitalization of the pre-action process and the collection of data, in Part E of this paper where the author expands upon outline ideas set out to the 2022 conference '[A]DR & Neutral Evaluation in the Reformed Civil Justice System' held as this paper was going to press, and which go beyond the proposals in the 2023 CJC first paper on protocols but which flow naturally from it and provide a solid base for future research and the enhancement of broadly civil justice (including family law property cases).

[D] THE 2023 CJC REPORT ON PRE-ACTION PROTOCOLS: THE RELATIONSHIP BETWEEN PROTOCOLS AND DISPUTE RESOLUTION

The CJC Final Report (Part 1) with which this paper was timed to coincide is an understated piece of work, based as such things are in the language of how respondents replied and what the views of the Working Group were. Yet careful consideration of the document reveals a high degree of underpinning for the aims and objectives of the funnel approach proposed by the Master of the Rolls in the various quotations cited here. This section will turn to consider the key elements which impact on dispute resolution. The report and its annexed draft Practice Direction (PD) and draft Notice of Failure to Comply are, it must be stressed, recommendations by the CJC Working Group and will only become part of the CPR if adopted by the relevant rule, PD and Protocol-making bodies (and even then may be changed when and if implemented), but the report marks a substantial turning point for the likely future role of dispute resolution.

The new explicit obligation to comply with protocols

The approach of the new draft General Pre-Action Protocol (PD)[7] and report is much more clearly mandatory than hitherto. Out goes the original text: 'Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take' and in comes, at paragraph 1.1, instead the mandating of compliance so that failure would without doubt be a breach: 'The pre-action protocols set out the steps the parties must take before starting proceedings. The parties must not start court proceedings without first complying with a protocol. Compliance with a protocol is mandatory except in urgent cases.' In, also, comes a mandatory duty not only to cooperate with each other but, expressly, a duty of honesty. Paragraph 2.1 of the draft states that 'Co-operating with each other means that the parties must be honest with each other at all times. Providing false information without an honest belief in its truth can lead to severe sanctions, including criminal sanctions.'

The three steps

The influence, albeit not expressed, of the Master of the Rolls' thinking in terms of the three-stage funnel discussed above appears early in the proposals where we see the introduction at paragraph 4.1 of a now

[7] The report annexes a draft which is entitled Draft General Pre-Action Protocol (Practice Direction) and Joint Stocktake Template.

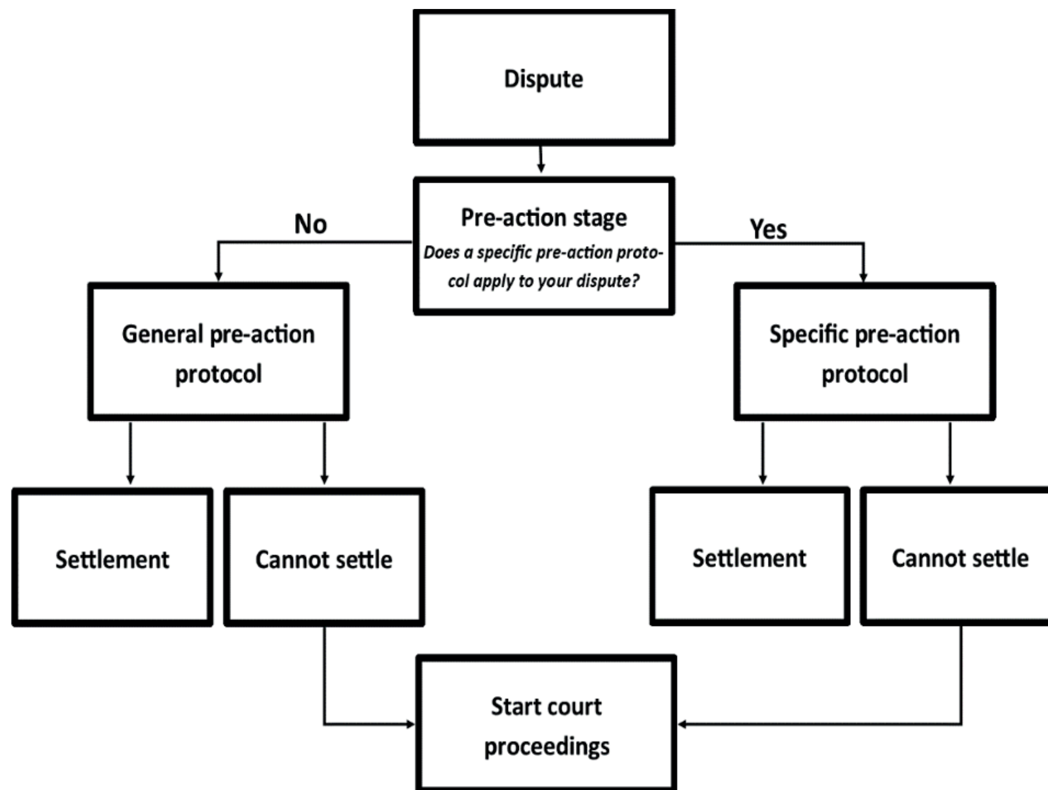

Figure 2: Diagram from appendix 2 to the CJC Report 2023

explicitly mandatory sequential three-step procedure to be adopted in all cases when following a Protocol, namely: (i) early exchange of relevant information by all parties; (ii) engaging in a dispute resolution process; and (iii) completing a joint stocktake report prior to issue. This does not differ greatly from the 'advised' approach in the original PD on Pre-Action Conduct and Protocols but is clarified by being more explicit about the sequence, and that clarity will be of use when courts need to consider whether any step has not been sufficiently complied with, especially after service of a Notice of Breach, which is discussed below. The flowchart of pre-action steps is set out in Figure 2 and is a copy of a figure from the draft PD annexed to the CJC Report.

The express obligation to engage in dispute resolution

The culmination of the *Halsey* debate and the gradually waning influence of the decision appears at paragraph 1.5 of the draft PD: 'By engaging with the protocols, the parties must try to resolve their dispute fairly, within a reasonable time, and at proportionate cost.' And (at para 4.11): 'The parties to any dispute are therefore required to engage in a dispute resolution process with each other prior to any proceedings being issued.'

Non-compliance with protocols: an entirely new notice procedure

It may be recalled by those familiar with it that in the sphere of landlord and tenant work, under the Law of Property Act 1925, section 146, where a tenant is believed to be in breach of obligations under the lease formal notice to remedy the breach can be given by serving what is conventionally referred to as a 'section 146 notice'. The proposed PD creates something which may be seen as the pre-action distant cousin of such notices, adapted to the context not of breaches of leases but of breaches of the requirements of a pre-action protocol or the PD.

Unlike the section 146 notice in landlord and tenant law, the procedure is not mandatory, but the framework set out is likely to offer a means to ensure *that no party can be in any doubt that it is being alleged that there is non-compliance*, thus mitigating against the risk of debate over whether, when a court is later asked to impose sanctions, there has been an 'ambush'. The draft sets out not only a procedure which can be followed in order to make a formal allegation of breach but also provides a standard form notice which may be used.

Arguably the creation of this new very simple procedure will assist non-lawyer litigants in person in the sense that, if they receive a notice alleging a breach of the protocol, they will be aware in plain terms of the allegation of breach, what the other side believes they should do to remedy it, and of the potential consequences if a breach is later found to have been committed. Furthermore if one turns one's mind to the reality that at present it is not commonplace for breaches of protocols to be penalized, the use of the formal notice of non-compliance process in proper form will serve as encouragement to courts to give more aggressive consideration to sanctions where a breach is found and where a party was duly served with the standard form Notice of Failure to Comply and then did not take steps to remedy a breach.

Notably the draft proposed standard Notice of Failure to Comply sets out clearly the significance of what it contains and sets out the core duties of litigants in the pre-action period so that the materials which the party serving it then sets out by way of what failure to comply is alleged and how it should be remedied are invariably set in the context of those duties: no litigant will in future be able to claim they did not understand what is required in the pre-action period. The Notes reiterate that 'parties must comply with all procedural steps under the protocol' and give notice that the party served *must* complete any required procedural steps to remedy the failure within a specified period of time stated in the form

and which at present is proposed in the report to be seven days. It warns the defaulting party that the Notice can be drawn to the attention of the court and 'when' (not if) the court considers imposing sanctions for a failure. It stresses that, whilst use of the notice is not mandatory, if it is used then it will be a factor which the court takes into account in relation to whether to impose sanctions. In addition to the Notice itself the draft PD specifies at paragraph 5.1 that, whilst in general 'without prejudice' communications cannot be considered by a court, the court can be shown any communications between the parties that suggest or invite steps by way of dispute resolution, or which respond to or comment upon such a suggestion or invitation (for example a reply from a party refusing to remedy a breach or conversely a constructive response which proposes some other way to progress matters than that set out in the Notice of Failure to Comply). The court can also look at evidence of the fact of any meetings or dispute resolution communications and details of who attended.

In the concluding section of this article the author considers the potential future for how digitalization of the portals process may assist dispute resolution via heuristics, rich data, artificial intelligence (AI) and reinforcement learning. However, in passing, a topic outside the scope of this article which might be considered in future is whether AI systems may be capable of 'flagging' cases where there may have been failures to comply, such as unresolved Notices of Failure, and drawing these to the attention of the first judge seized of the case if the matter goes to court. If flagged sufficiently early, such as at the time an attempt is made to issue a claim, the judge could in principle be given powers to impose increased issue fees, veto the grant of a fee exemption, or impose a requirement on a defendant to pay the issue fee for the claimant if the defendant has acted unreasonably, thus offering the parties a last incentive to stay out of court and back down before committing to a potential use of court resources on a greater level.

[E] CONCLUDING REMARKS: THE DIGITAL FUTURE, RICH DATA AND THE PRE-ACTION PROCESS IN AN AI WORLD

Digital systems can offer important opportunities for the collection of rich datasets relating to disputes and the pre-action period:

> Another idea that the WG considered was whether portals could be used to collect data on settlement proposals for use by researchers after the case was finally resolved. Ultimately, a policy decision needs

> to be made as to how 'visible' to others the process of negotiation ought to be: it may be desirable that the history of the negotiation be available after the event so that processes of settlement and settlement rate data can facilitate research and better understanding of those processes in the future. This data collection would, of course, require party consent but where negotiations are uploaded to portals via any of the options outlined above, the possibility of making this information available to researchers after the parties have resolved their dispute, is worth exploring further (CJC Report 2023: para 2.19).

This 'rich data' could therefore even include material on how and in what terms settlements are reached and how they relate to the issues in the dispute, provided safeguards in terms of non-identifiability of the data and protections via encryption or blockchain approaches are in place. We have seen in the foregoing discussion that the current policy vision for creating digital portals will handle much of the compliance and data provision required in the pre-action protocol period. The collection of rich data and not merely statistics would afford, for what may be the first time on any large-scale systematic basis, for academics and rule- or law-makers, the opportunity to do at least three things:

(i) to research settlement processes and strategies and better understand what it is that can serve as an obstacle to settlement;

(ii) if a case could be followed from start to conclusion (including, if it fails to settle, through to trial seamlessly from portal stage to judgment) then, if combined with the collection of exit survey data obtained from parties as to their experience of the justice process, we may start to improve our understanding of what it is that court users experience as a genuine sense of justice and satisfaction or, indeed, what can lead to a lack of satisfaction and a sense of justice not being done in any given case; and

(iii) the collection of rich data could feed into exciting possibilities for the future of AI and digitally enhanced dispute resolution, based on truly evidence-based information.

This article will conclude by focusing just on the third of the above possibilities and explore some speculative themes for the medium-distance and further horizon of civil justice which the author outlined in her address at Leicester University in December 2022 alluded to above.

The basic digital pathfinder concept

We have seen that mandatory requirements to engage in dispute resolution are on the immediate horizon. From the author's perspective, this is a welcome and long-awaited development and crucial to restoring

the civil and family justice systems to a greater degree of efficiency and the targeting of resources where they are most needed.

However, one must sound a note of, if not caution, then at least realism: if efforts to engage meaningfully in dispute resolution are to be mandatory then consider a statistic sourced from a briefing note released by the House of Commons Library in 2021 (Sturge 2021): in a typical pre-Covid year the courts as a whole received 4.2 million cases and more than half were civil in nature (ie around 2.1 million or more claims). Most claims settle, and only around 19 per cent are defended (Sturge 2021: 8). Even given the 'good news' that most claims settle even without a current mandatory requirement for dispute resolution, 19 per cent of 2.1 million cases is self-evidently still a substantial figure. One can anticipate a large demand for forms of assisted dispute resolution such as mediation or ENE by 'neutrals' in the pre-action period. That in turn points to the potential for resource shortages in terms of people such as mediators, and it also demands that access to such people is streamlined via the digital portals.

The question of ease of access to mediators and other dispute resolution professionals or volunteers is perhaps the easier challenge to address: a well-designed portal system could and, in the author's view, should routinely be a basic form of what the present author terms a 'digital pathfinder' which provides to the parties specific links to sources of help in resolving disputes, tailored using heuristics to the value of the dispute, the parties' locations (where face-to-face processes are considered) and the subject matter of the dispute. One can realistically hope that the systems will propose lists of registered professionals and costs and (making more generous assumptions about system design) also hope that it may be possible for parties to book online dispute resolution or mediation immediately, online, via APIs (application programming interfaces) which interface with the work diaries of dispute resolution professionals so as to know their availability and create immediate bookings and pay any booking fees online. This could, it is suggested, greatly improve take-up of resolution processes by removing practical obstacles in the way of disputing parties: if the metaphorical horse is led to water, it may very well drink, and a good way to ensure that it goes thirsty is to fail to lead it to the water, or fail to make the water available at all.

Keeping costs of resolution proportionate to claim value and complexity poses challenges given the modest value of many claims. A potential solution, firstly, would be to ensure the portal system lists services intelligently so that it does not provide high-cost links but draws instead

on its own prior knowledge of fee ranges stated by specific service providers suitable for the dispute in hand. An elaboration which the author favours and which it is submitted would help to reduce costs pressure and potential excess profit-making would be to introduce an automated quoting service whereby parties could propose a maximum cost and the system could then actively seek responses from service providers, or where the case is automatically 'proposed' to a range of providers who then in effect compete in the digital marketplace by proposing their fees digitally. The model is a simple one and very much like, for example, eBay or indeed most forms of online shopping where one may 'shop around' to find the same product offered at lower cost by particular sellers.

The advanced digital pathfinder concept

What, though, of the challenge in terms of the availability of sufficient numbers of providers in the first place, to engage with the new demands which will arise for dispute resolution? The obvious response is that there will need to be enhancement of the numbers of people or organizations offering dispute resolution services. That may take much time to develop or prove unachievable: and one must consider alternatives.

The concept of the 'advanced' digital pathfinder as elaborated here within a civil or family justice system could, it is proposed, go much further than providing ease of access and competitive, intelligent pricing and service selection. The author's experience of AI and what has become known as 'deep learning'—hailing back to proof-of-concept work in the 1980s, often then referred to as distributed learning when it takes data-driven forms of the general 'neural net' type—suggests that the following propositions may be tenable (on technical foundations, see eg Rumelhart & McClelland & Ors' 1987 classic exposition):

(i) deep, data-driven learning can thrive if it is fed rich data of the sort which may now become available from the digital justice system; and

(ii) the law and procedure of dispute resolution, and indeed the parameters of a dispute and the parties' desired objectives, can serve as forms of constraining heuristics to deep learning systems targeted at that rich data.

The above two points raise the possibility of creating AI-based systems which learn actively from the datasets of real-world disputes, and settlement or trial outcomes, and which progressively improve the realism with which a technological dispute pathfinder might be able to prompt parties towards not only types of resolution process suitable for

their dispute but also, potentially, to begin to offer hints as to possible resolution terms. One could envisage a system which says, based on its understanding of a particular dispute:

> 'Dear Mrs Smith, and Generic Kitchens Limited: The Digital Pathfinder, given what you have provided about this dispute, has researched its database of disputes nationally which seem similar to this one. In more than 90% of cases relating to kitchen-fitting disputes under £10,000 where the parties disagreed about whether the work was of suitable quality, and where the customer was willing to ask for repairs or a discount, the parties agreed to an average of a 15% price reduction, and in more than half of cases which settled, an element of repairing the disputed defects was agreed, sometimes with a price reduction as well. You may wish to discuss something along those lines.'

And note that feedback could be sought automatically about whether it was a helpful suggestion or not, as part of learning reinforcement by the system in how it interprets dispute documents.

As the pathfinder system envisaged here gains more and more rich data, it may on the further horizon become technically possible, *at least in specific categories* of well-defined dispute such as family finance division on divorce, to create systems which can be more specific in terms of proposing a range of tailored proposed outcomes about which the parties may want to discuss, going beyond the general and condescending into ranges of (say) settlement values based on how similar cases were resolved. Furthermore, by having systems which follow a case through to judgment after trial, for non-settled outcomes, the system could begin to learn from its accuracy or inaccuracy in 'predicting' outcomes.

In the still more far future but not in the realms of fantasy, again likely constrained to specific case categories, *if and only if such systems demonstrated an acceptable degree of reliability in predicting outcomes*, it could be deemed unreasonable for a party to fail to accept the proposal, and possibly a concept of 'proceeding at your own risk on costs' could be introduced at that point if a party or parties unreasonably carry on to trial and the outcome is within a range suggested by the digital pathfinder system much as one might in the event of a part 36 offer.

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References

Civil Justice Council (June 2021) *Compulsory ADR* London: Civil Justice Council.

Courts and Tribunals Judiciary (2021) 'Mandatory (Alternative) Dispute Resolution is Lawful and Should Be Encouraged' 12 July 2021, quoting the Master of the Rolls' response to the CJC report on compulsory ADR.

De Girolamo, Debbie (2020) 'The Opening Statement in Mediation: A Goffman Analysis' in Maria Moscati & Ors (2020) *Comparative Dispute Resolution*, Research Handbooks in Comparative Law London: Edward Elgar.

De La Mare, Tom (2020) 'Coronavirus and Public Civil Hearings' Blackstone Chambers 20 March 2020.

Goffman, Erving (1974) *Frame Analysis: An Essay on the Organization of Experience* Lebanon: Northeastern University Press.

Guise, Tony N (2022) 'Neutral Evaluation for Construction Disputes' Evaluation 23 March 2022.

Habermas, Jurgen (1979) *Communication and the Evolution of Society* Boston: Beacon Press.

Habermas, Jurgen (1989) *The Theory of Communicative Action*, vol 2 Boston: Beacon Press.

Independent Inquiry into Child Sexual Abuse (IICSA) (2016), 'Accountability and Reparations Investigation—Transcript of Inquiry Seminar Wednesday 30 November 2016' London: IICSA.

Independent Inquiry into Child Sexual Abuse (IICSA) (2019) *Accountability and Reparations Investigation Report* 19 September 2019 London: IICSA.

Lindsey, Jaime (2020) 'Virtual Hearings, Participation and Openness in the Court of Protection' UK Administrative Justice Institute 8 April 2020.

McCloud, Victoria (2017) 'Court Processes in Historic Child Sexual Abuse Claims: A View from the Bench' seminar at Barts and the London Hospital, academic session for psychiatrists, 1 November 2017 (unpublished).

McCloud, Victoria (2020) 'Judicial Early Neutral Evaluation' Series 2 1(3) *Amicus Curiae* 487-495.

Peschl, Romy (2022) 'Halsey: The Judicial Anomaly Threatening the UK Mediation System' Legal Compass 24 May 2022.

Randolph, Mark (2010) 'Compulsory Mediation?' *New Law Journal*, 2 & 9 April 2010, 499.

Rumelhart, David & James McClelland & Ors (1987) *Parallel Distributed Processing: Explorations in the Microstructure of Cognition* (2 vol) Cambridge: MIT Press.

Sturge, Georgina (2021) *Court Statistics for England and Wales* Report CBP 8372 London: House of Commons Library, 23 December 2021.

Tversky, Amos & Daniel Kahneman (1981) 'The Framing of Decisions and the Psychology of Choice' 211 *Science* 30 January 1981.

Vos, Geoffrey (2021) 'Mediated Interventions within the Court Dispute Resolution Process' GEMME Lecture, Dublin, Ireland 28 October 2021.

Vos, Geoffrey (2022a) 'The Future for Dispute Resolution – Horizon Scanning' Society of Computers and Law Sir Brian Neill Lecture, 17 March 2022.

Vos, Geoffrey (2022b) 'British Irish Commercial Bar Association: Keynote Address' 27 April 2022.

Vos, Geoffrey (2022c) 'Speech by the Master of the Rolls to the Worshipful Company of Arbitrators' 27 April 2022.

Waye, Vicki & Ping Xiong (2011) 'The Relationship between Mediation and Judicial Proceedings in China' 6(1) *Asian Journal of Comparative Law* 1-34.

Cases

Alassini v Telecom Italia SpA [2010] ECR I-02213 (Joined Cases C-317-320/08), [2010] 3 CMLR 17)

Bradley v Heslin [2014] EWHC 3267 (Ch)

Burchell v Bullard [2005] EWCA Civ 358

Dunnett v Railtrack plc [2002] EWCA Civ 303, [2002] 1 WLR 2434

Halsey v Milton Keynes General NHS Trust and Steel v Joy [2004] EWCA Civ 576, [2004] 1 WLR 3002

Hurst v Leeming [2001] EWHC 1051 (Ch), [2003] 1 Lloyds Rep 379

Lomax v Lomax [2019] 1 WLR 6527

Mann v Mann [2014] EWHC 537 (Fam)

Menini v Banco Popolare Società Cooperativ [2018] CMLR 15

PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288

R (Cowl) v Plymouth City Council [2001] EWCA Civ 1935, [2002] 1 WLR 803

Rolf v De Guerin [2011] EWCA Civ 78

Telecom Centre (UK) v Thomas Sanderson Ltd [2020] EWHC 368 (QB)

Thakkar & Another v Patel & Another [2017] EWCA Civ 117, [2017] WL 11884

Uren v Corporate Leisure (UK) Ltd [2011] EWCA Civ 66

Wright v Michael Wright (Supplies) Ltd [2013] CP Rep 32

Legislation, Regulations and Rules

Civil Procedure (Amendment No 4) Rules 2015, SI 2015/1569

European Convention on Human Rights 1950

Law of Property Act 1925