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February 7, 2011



J o h n O ' S u l l i v a n

Babies and Bath Water

Mediation is frequently promoted on the ground that it reduces the cost and delay inherent in litigation, and in this way it increases access to justice.

Leave aside the issue of whether mediation reduces cost and delay. Does it increase access to civil justice?

If "justice" is the impartial application of the law to evidence in accordance with the rules of procedural fairness, the answer is obviously, No. In mediation the parties resolve their dispute through agreement.

What mediation can do however is increase access to affordable dispute resolution.

This of course is a worthwhile goal, but it is important to remember that it is not the same thing as increasing access to justice.

The common linkage today of 'mediation' and 'access to justice' indicates that we are in danger of conflating the two: that we may be slipping into the habit of thinking mediation delivers justice.

There is a bright line between mediation and traditional civil justice. To put it in commercial terms, they are very different products.

Mediation is being embraced in many common law jurisdictions to solve the problems of civil justice. But in our exuberance for dismissed actions today, are we keeping an eye on the consequences for tomorrow?

We are entering a world in which the majority of Ontario civil litigation lawyers in their careers will likely never conduct a trial to judgment. The corollary is that judges will preside over fewer and fewer civil trials. As the ranks of civil trial counsel and judges thin out, the trial will atrophy as a civil dispute resolution option. As more disputes are mediated, the flow of civil judicial precedent will decrease.

Unquestionably, the cost of civil justice is now beyond the reach of most individuals, and a large swath of corporations too. It is clear that something has to be done about it.

But in mediation should we see salvation? Or are we throwing the baby out with the bath water?

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