BREAKTHROUGH! - THE MYTHS AND MAGIC OF MEDIATION

Dr Karl Mackie CBE

Karl Mackie's inaugural lecture at the University of Westminster, in his capacity as Visiting Professor of ADR, May 2005

Every mediator and mediation organisation can quote you numerous cases where parties who have been locked in the legal system, advised by lawyers who if asked would say they always wanted to find a reasonable settlement for their client, suddenly emerge from one or two days of mediation with an effective agreement despite often years of battle, deadlock, failure to agree.

Let me tell you about the example of a sex and race discrimination and harassment case involving a black female police officer. It involved complaints over a 10 year period, had been in the legal system over two years and had gone to the Court of Appeal, then remitted to an employment tribunal for a full hearing on liability. The hearing was estimated to run for three months, with over 100 police officers due to be called to give evidence. A few months before the tribunal, the case came to mediation and settled in 2 days yet within two days the parties had achieved an agreement that resolved all the issues between them.

Mediators writing on mediation have sometimes been known to use the term 'magic' to describe their experiences with the process, or certainly to imply it. Sceptics often find this off-putting, or lacking credibility and begin to talk about 'zealots' or suspect mythology.

What is going on here? Why does this strange result so frequently emerge, and why does it take so long to emerge? Indeed why did it take so long for the legal system to recognise the role that mediation can play? And are there limits to what mediation can do? You can read article after article on the mediation process which describes these experiences and how the process works, yet come away no wiser as to *why* the process achieved what it did. This is no doubt because most discussion of ADR is framed in terms of its role in the legal system.

I want in this lecture to look at the whole question of the psychology of why mediation appears to deliver, at the sources and character of mediation magic, and also its limitations.

The first point to note is that we need not necessarily expect to find remarkable talents and events to explain the impact on mediation. Remember a simple match can start a forest fire, a Naked Chef can lead to a nation cutting back on chips for children. Causes are not necessarily proportionate to effects. This is one of the themes of a marvellously stimulating book by Malcolm Gladwell, *The Tipping Point*. In *The Tipping Point* he describes how unexpected and seismic shifts in social changes and fashions take root, using examples such as the sudden adoption of Hush Puppy shoes as a fashion item, the outbreak of sexually transmitted diseases in Baltimore, or the sudden reduction in antisocial behaviour on the New York subway. A key message of the book is to remind us all of how actions or changes in behaviour by individuals or small groups of individuals, in the appropriate circumstances, can make a transformative and exponential difference to many more lives around them, sometimes to all our lives.

This phenomenon of 'the tipping point' is also at a humbler level played out every working day now within our legal system, in the breakthroughs that occur in deadlocked commercial and civil actions, as mediators work with lawyers and their clients to bring to a sudden conclusion

what have been long-running disputes and conflicts. Something about this relatively simple process can make all the difference – not in every case but in a clear majority of cases – between an action continuing to fester and stay unresolved or instead reaching settlement and allowing parties to put an issue behind them.

As a founding director and Chief Executive of CEDR, I have been privileged to play a part not only in the experience of the tipping point in many fascinating individual cases, but also to be influential in an organisation that was intended by the creative lawyers who founded it, itself to create a tipping point in relation to the whole practice of civil litigation both in this country and in Europe. The mission was to promote Alternative Dispute Resolution, or ADR, which has become for many synonymous with mediation as a technique but is of course intended to be much broader than mediation. But it was more than just promotion. A key objective was to achieve a real change in the mindset and practice of the legal profession and legal system.

That there has been a successful tipping point phenomenon in the England and Wales civil justice system can hardly these days be denied. Beginning as an early innovation in court directions in the mid-1990s, ADR became an explicit and integral part of the new Civil Procedure Rules of 1999 in terms of being part of active case management by the judiciary including encouraging use of ADR and helping parties settle cases (CPR Rule 1.4 (2)), allowing for judicial direction into ADR (Rule 26.4), and creating potential cost sanctions (part 44 (4) (a) and (5). Mediation is an explicit part of the general Practice Direction governing pre-action conduct where specialist Pre-Action Protocols do not already apply; and there are now a growing number of court schemes around the country experimenting with ADR as part of civil litigation procedure, with the approval and engagement of the Department of Constitutional Affairs.

ADR also became the subject of a formal UK government pledge in 2001 when the Lord Chancellor announced that the government would use ADR in all appropriate cases where the other party agreed to it. ADR is being considered in terms of how it might apply within the new structure of the tribunals system in the UK, and is the subject of active experimentation by ACAS, the statutory body concerned with employment disputes.

The concept of ADR, and the language associated with it, is now becoming commonplace and located within government policy that is dispensing with the traditional sense of the litigation system being the overriding focus of dispute resolution, in favour of the notion of 'proportionate dispute resolution'.

In preparation for this lecture I also undertook a survey of the language used by the top 50 law firms to describe what traditionally was called the litigation department - 36 of the top 50 firms, 72% now use the term 'dispute resolution' to describe this part of the firm. One of the firms most associated with litigation as a specialism, Herbert Smith, was one of the first to survey its clients on ADR, and is recently reported to have initiated a major strategic review of its practice in relation to litigation and ADR – to be led incidentally by a partner who is also a Board member and trustee of CEDR.

Interestingly during this same period of ADR campaigning, there has been a significant decline in litigation itself – although this cannot all be credited to ADR but is connected with the effect of the civil justice reforms generally as well as other social trends. But there has been a remarkable decline in litigation proceedings – in the High Court proceedings issued

have dropped from 374,000 in 1990 to 14,000 in 2003; and from 3.3 million in the County courts, to 1.57 million in 2003.

In the United States too despite popular perception of litigation as a true all-American sport, the love affair with the courts appears also to have run into trouble. Scholars are now debating extensively a phenomenon described as "The Vanishing Trial". Despite the well-known lawyer and lawyering population explosion in the USA, and significant growth in litigation proceedings, *trials* as such have dropped not only relative to the number of legal actions, but also in some courts in absolute terms. In the federal courts, legal proceedings almost doubled between 1976 and 2003 but the number of actual trials was halved taking trials as a percentage of proceedings, to just over 1% only. In the state courts, jury and non-jury trials in the same period appear to have dropped by over 20%.

Again this vanishing trick cannot solely laid at the door of the magic of ADR practice. Though seen to be partly responsible, it is also a feature of concern regarding the uncertainty of outcomes of jury trials in civil disputes and, as in the UK, of much more active pre-trial interventions by the courts.

ADR is not only however an out-of –court phenomenon. It has taken up a recent niche in litigation practice in relation to case law and precedent around the question of when the courts can apply cost sanctions against parties who unreasonably refuse to take part in ADR. There have been a series of important High Court and Court of Appeal decisions confirming the courts' recognition of the role ADR plays in an effective and proportionate civil justice system following the civil procedure reforms, beginning with *Cowl v Plymouth City Council* covering public law, to *Hurst v Leeming* and *Dunnett v Railtrack* in civil actions, *Cable & Wireless v IBM* in relation to enforcement of ADR contract clauses, through last year's important decision in *Halsey* regarding criteria for costs awards, to the most recent decision in *Burchell* v *Bullard*.

All such case law incidentally is now regularly reported in a special section of CEDR's website, EDR Law. Let me note in passing CEDR's deliberate use of 'E' rather than 'A' DR to symbolise that we are now talking not about an 'alternative' practice, but about what has become an 'effective' mainstream process for the legal system and one that is at least parallel in status to litigation practice. Indeed it is probably now so mainstream that it is only a matter of time before there will also be legal actions against advisers and mediators for claimed malpractice in relation to ADR advice and procedure, something already well established in the US and to a lesser extent Australia.

One of the remarkable parts of the story of mediation's history here when it comes to be written, is the support given by the senior judiciary to ADR, despite in most cases having limited or no experience of ADR in their professional history compared to the younger generation of lawyers now – [Lord Woolf in Cowl, etc.. Quotes]

Across on our European mainland while developments have been limited until a few years ago, there have been recent significant developments in legal reform, experimentation and practice in countries such as France, Italy and Holland, and in Scandinavia. A survey last year by CEDR and one of our member firms, CMS Cameron Mackenna - published as *The EU Mediation Atlas* - found evidence of ADR experimentation in virtually every member EU country including the new accession countries.

The successful examples available now in many major common law jurisdictions have assisted acceptance of the concept, and importantly the European Commission itself has come around to endorsing the idea of mediation complementing what the courts do – last year producing a proposed directive on civil and commercial mediation which is aimed at promoting the concept that mediation and litigation be seen as equal elements in the civil justice system and also sketching out key areas where it may be helpful to harmonise European legal systems to assist acceptance of the mediation process. This would cover areas of legal framework such as the confidentiality of the process, enforceability of settlement agreements, and the treatment of limitation periods where parties choose to mediate.

Outside Europe one can point also to numerous other examples of mediation practice developing in civil justice systems, generally correlated with the scale of the problems with domestic litigation systems, but increasingly as in mainland Europe, just a reflection of the fact that there is an intellectual and procedural model available which others can learn from. The USA, and countries such as Australia, Canada, Hong Kong in its pre-China days, and the UK, have been flagships for this process on a global scale, but it is also now playing some role in many other parts of the world such as in Asia, Latin America, and most recently Africa.

I do not intend in this talk to go any further into the detail of the history and global spread of ADR – you may be pleased to hear. The significant feature to which I do want to draw your attention, is that this falls very clearly into a classic tipping point phenomenon. Remember that all of this reform has taken place against a specialist professional context that has been notable for its resistance to change, its traditionalism, its sense of self-importance and expertise. Yet the adoption of ADR- at the prompting and by the leadership of a relatively small group of people - has happened within a relatively short space of less than fifteen years in the UK and less than around twenty-five years internationally.

And it is more strikingly not only adoption as a concept and mindset change, but increasingly as a genuine area of practice – last year CEDR's services arm alone conducted just under 700 mediations, and we estimate that we represent probably only a quarter of the commercial mediations taking place, leaving aside any growth in family or community mediation.

There is of course much further to go, and more resistance than I am acknowledging in sketching the field so briefly. But the impact is there, and the magic of ADR here to stay in the civil justice system. Recognition of this impact and tipping point character of what has happened, was expressed by Lord Justice Dyson in giving the lead judgment in last year's major ADR decision, *Halsey*, when he commented that 'The value and importance of ADR.... have been established within a remarkably short time...'.

I will leave to another occasion a fuller explanation of how ADR as a reform movement became such a tipping point within the civil justice system. Part of the explanation for this success is the fact that it is enormously assisted by the fact that – despite all the early scepticism and resistance, the process does actually work.

I therefore want to share with you tonight some thoughts on what it is about the process of mediation that helps it work and gives it in itself a peculiar tipping point character - of how it succeeds so often in tipping a negotiating deadlock or impasse into an agreement. It is a phenomenon of breakthrough that occurs so often in severely deadlocked cases that it can give

the process a sense of magic or mystique to those unfamiliar with it, even to those practising it (for example, putting the words 'mediation' and 'magic' together into Google, calls up 182,*000* entries).

The statistics of mediation working are again fairly well known – hovering around 70 to 80 per cent settlement at or soon after mediation in the voluntary referrals CEDR and others undertake, though the figures drop in the more constrained court-annexed mediation schemes down to somewhere between 35 to 65%.

And this is to take the simplistic starting point that we should define success in terms of settlement rates. 'Success' in mediation can be defined as more than just achieving a settlement. Mediation also often helps parties narrow the differences between them, or creates part-agreements, or just ensures that the parties have the satisfaction of knowing that they have done their best to find an alternative route out of conflict. Value is therefore created even in many unsettled cases, though this is a more controversial area in terms of costs and benefits assessment in the research.

There have been many descriptions in the literature, and in training programmes, over the years of *how* the process works, but very few of *why* it works, and yet this is perhaps the most significant issue to address – particularly if we want to improve its success and effectiveness. 'Why?' is often missing, both in terms of psychological explanations and in terms of jurisprudential discussion. The absence of explanation in itself can make proponents sound as if they are from the magic circle, unable to explain with any credibility what apparently works very simply despite previous deadlock – A Sudden Outbreak of Common Sense – to quote the brilliant title of an early book on the subject by Andrew Acland.

I remember being pulled up short a couple of years after CEDR began its mediator training programmes. A Scandinavian researcher with a psychology background came to research our work and training. She asked me the simple question "what theoretical model of mediation underpins your training?" This brought home to me that in reality our training was intuitive and pragmatic, in the best British tradition – actually originally partly borrowed from successful American practice. It was not really the product of a sharply delineated theory of why mediation works, of which there has been comparatively little literature. Not a great deal has changed since the famous American jurist Roscoe Pound many years ago said of mediation that "it's all very well in practice, but where's the theory?".

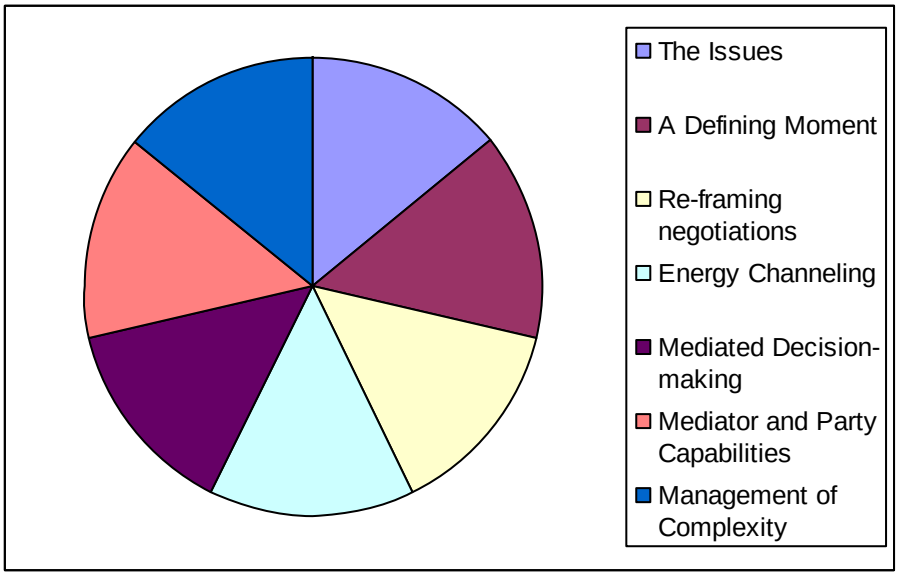
However it would be hard to look for one theory of mediation, any more than it would be helpful to ask, what is the theory of the court system? There is not in my view the one big theory to explain mediation, so much as a constellation of at least seven key elements which together create the chemistry of a successfully mediated negotiation.

In the world of negotiation, we often talk of 'expanding the pie' or 'slicing the cake', so perhaps I should stick to the idea of mediation as a recipe. One can have the various ingredients but the success of a recipe depends on the nature of the individual ingredients, in what proportions and timing they are mixed, and how and when they are brought together and heated or treated to a point of readiness.

Let me take the analogy just one stage further. Here's one I prepared earlier – the mediation pie chart. The slices are labelled with different ingredients which represent the key

parameters of understanding the dynamics of a conflict mediation. The fact that they are of equal size in this chart is not intended to suggest that they are of equal weight. They will always vary according to the circumstances and people involved in a particular conflict. Like the common law, mediation works with each case on its particular facts, rather than applying only common principles, but the principles and earlier experience of all parties help inform the nature of the process and potential outcomes. Finally the ingredients I have listed themselves are general terms which cover a number of important sub-headings, each of which can influence the effectiveness of a mediation process.

WHY MEDIATION WORKS – KEY MEDIATED CONFLICT INGREDIENTS



The Issues
A Defining Moment
Re-framing negotiations
Energy Channelling
Management of Complexity
Mediated Decision-making
Mediator and Party Capabilities

The Issues

Intuitively one would assume that whether mediation can work must be related to the issues actually in dispute. And most early *resistance* to using mediation is founded on this reasoning – the case is too complex, there are different legal opinions, the experts can't agree, there is too much at stake, there is too little at stake. I have heard all the excuses in my time. And they feature prominently in the research reports of the reasons given by lawyers for saying mediation is unsuitable for a case, (for example see the extensive work by Professor Hazell Genn on court-annexed schemes).

But they are usually just that, excuses that indicate an unwillingness to try mediation rather than which prove its unsuitability. The issues at stake give in practice very limited indication of whether mediation can work, as opposed to the human dynamics in the case. Issues are of course naturally very relevant to the substance of discussions and the outcomes possible in a case. And they can have an important bearing on other key elements such as details of procedure, and appropriate mediator capabilities. They can be good indicators of when

mediation might be *especially* appropriate, rather than inappropriate, such as where a court outcome is very uncertain, or where the parties are in a continuing relationship. These are therefore good reasons to include the nature of the case as an important ingredient as to *how* mediation might work, but only in the extremes are the nature of the issues themselves very useful as a guide of whether and when mediation will or will *not* work.

Most of us in fact have learned to turn this question around and say that the simpler question to answer is to state the cases for which mediation is *not* suitable. This follows both from the theory of mediation and the experience of practice. At the level of theory, mediation is little more than assisted or structured negotiation – therefore it follows that the only real test theoretically is to ask whether the nature of a particular case makes negotiation intrinsically unacceptable. If it is, then perhaps mediation is unsuitable. The obvious areas are where a party seeks a public precedent, summary judgment or rapid injunctive relief in their case, which applies to a very limited range of cases. Outside that, it is tougher to find examples of cases where disputes are theoretically incapable of negotiated outcomes. Indeed we know that most civil actions in the major common law systems even before ADR, settled out of court but usually late in the day and after much time and cost. ADR is appropriately termed also accelerated dispute resolution.

And one could make the test even more stringent – and ask not just whether a case is unsuitable for negotiation, but whether it cannot benefit from a *dialogue* between the parties – there are many cases where mediation does not achieve settlement but it does enhance understanding and narrow differences between parties. So even in precedent-setting cases, mediation ought to be part of the tools of thinking lawyers and the legal system.

Unsuitability is therefore much more to be judged by criteria connected with more difficult areas to judge in advance, of particular party circumstances and likely dynamics of dialogue between the parties when confronted by a mediator.

Turning to the practice, I can say as someone who has worked in this field from a time when every prior excuse was made as to case unsuitability, having seen it operate across thousands of cases, and in virtually every kind of context you can name, from IT and maritime cases, through to corporate acquisitions and public law cases, that part of the magic and fascination of mediation is its flexibility to deal with myriad circumstances and issues – given willingness to engage with it.

Let me outline briefly one case as an example of where mediation might have been held to be a non-runner. A group of animal rights activists had obtained documents on animal experimentation in a major pharmaceutical company, with harrowing descriptions of the nature and results of experiments, photographs, and details of staff and drugs used. They had proceeded to publish a large section of this which they claimed would not only expose the company's unlawful activity, but also the failings of government inspectors. The company persuaded a court to issue a temporary injunction to prevent publication, on grounds of breach of commercial confidentiality and potential harm to staff, and went on to seek a permanent injunction. The campaigners argued there was a public interest right to publish, despite being confidential material. The case came to a two-day mediation. Despite even my prior assumption that it was an unlikely case to settle, the company ultimately agreed to publication of the bulk of the report, barring details of individual staff on the grounds of possible personal danger to them, and particular of drug compounds used on grounds of

commercial sensitivity. Although the lawyer for the campaigners thought that the case could be a major precedent for issues of privacy law, the campaigners were more interested in early exposure of the type of experiments being undertaken and the consequences for the animals being used, while the company wanted most to protect its staff and commercial secrets.

Though a fascinating case, there are far more cases where of course mediation is simply about money changing hands in damages compensation, and the process merely assists parties to agree a number and direction of payment.

In summary, issues remain central to the parties' communications and risk analysis in mediation, and therefore to the role of the mediator and the process of mediation, but are less of a clue as to when mediation works.

A Defining Moment of Purpose and Procedure

One begins to understand better why mediation works with the concept of a defining moment. Parties in conflict are normally doing just that – engaging in conflict. Engaging in conflict *reduction or resolution* is a different focus, a different purpose. To find and importantly live out that purpose, parties normally have to find a focal point for a change of emphasis or direction and behaviour, and mediation provides that. Important and emotionally-charged social transitions, such as marriage, death, coming of age have evolved their own social rituals to capture the occasion. Even more does conflict require this.

Even where parties have themselves begun to focus on conflict reduction, their efforts are often fragmented, ineffective and prone to revert to conflict engagement rather than conflict reduction – for reasons I will return to later in discussion of conflict dynamics.

My point here is that entry to mediation offers a doorway to a more formal embrace of a new purpose, and a procedure which both matches that purpose and is designed to enhance it. Whether parties in conflict get there by contract, by court order, or by reason of mutual weariness with fighting each other, mediation can offer a more formal focus for transition and therefore potential transformation.

Several important elements of mediation procedure are designed to reinforce the power of this defining moment, to enable the parties to negotiate effectively or the mediator to assist. First, commercial mediation stresses as a key factor a *legal framework* that is intended to release parties from any inhibitions about disclosure or concession-giving – by emphasising, usually in a prior written mediation agreement, that the process will be *confidential and without-prejudice* to alternative routes to remedy a difference through the courts or otherwise. This gives the process its aura of flexibility, freedom of discussion and relative risk-free character compared to adjudicative processes where the third party declares a binding judgment.

An important additional ground rule written in to standard mediation agreements, is that parties will be represented by someone with *authority to negotiate a settlement* – this particular provision is often a source of debate amongst mediators, because of the frequency in practice where this requirement is diluted by the constraints on many commercial and public sector decision-making requirements, either from insurers, boards, or other higher authority. However it ensures a focus on the key element of ensuring some *client engagement*

and client ownership and control rather than continuing delegation of responsibility to lawyers or a less senior manager.

Another important understanding associated with mediation procedure is the *flexibility* for the mediator to manage meetings in a range of ways, joint or private, plenary or sub-group meetings. And private meetings are usually held to take place also with a rule of confidentiality, so that parties can disclose positions or information to the mediator without it being shared with another party unless it is shared knowledge already, or on the basis of authority to disclose. Again this encourages a sense of an occasion of privacy, of sharing of confidences, and a further tool for mediators to apply as part of information-gathering or influencing.

A standard format has emerged of brief opening sessions for parties to present their case to each other and the mediator, followed by break-out for shuttle diplomacy while the mediator explores with each party their case and their desires for settlement, followed by further joint meetings at least to draft settlement terms if not to negotiate in more depth. However unlike the trial system, mediation procedure is not set in a rigid framework and mediators are encouraged in our training to adapt this basic model to the parties and the case as they deem appropriate, and to learn from experience which methods are likely to get best results in any situation.

The critical point in terms of why mediation works, is that mediators are not constrained in terms of how they shape the structure of dialogue and in particular can determine who speaks to whom, whether joint sessions are working, whether parties will welcome the safety of private communications with the mediator or a smaller group rather than plenary sessions, what setting in other words will have optimal impact to create a tipping point for negotiation breakthrough.

The mechanics of procedure described like this of course only give a sense of the skeleton of the process, rather like describing football in terms of a game where there is a choice of when to kick a ball, and who to kick it to in order to score. The human reality is much more fluid, a constant interaction between the pressures of seeking to explore, understand and wrestle with substantive issues, while progressing the dynamics of discussion in a way that induces a sense of momentum and ultimately agreement. It can be ordered but also often verges on a sense of seeking to manage chaos or of trying to herd cats, or perhaps leopards or Hells' Kitchen to extend our analogy.

It can be an incredibly tough and demanding process, with periods of frustration and anger, despair and grievance being par for the course. This brings me to the next key element in understanding the dynamic of mediation, the reality of negotiation in conflicts.

Re-framing Negotiations

The potential effect of a mediator on negotiation or conflict dynamics, is at the heart of why mediation works and important to understand. (There can be significant differences between 'conflict negotiation' and 'negotiation of differences' which affect the character of a mediation but not the key roles played by the mediator.) I would summarise it as a process of adding a skilled resource dedicated to management of a project which no one else can own so completely – a mediator can usually claim to have only one overriding interest, helping

everyone reach settlement – not advocacy, not fairness, not evaluation. These may be important subsidiary elements in some cases, but they are always secondary to a mediator's primary role.

It is true that good negotiators ought also to aspire to this objective of finding a deal that suits everyone, and many people find mediation training of immense value to improving their understanding and skills in how to step into the other parties' shoes, but a mediator can do this much more easily, and vitally, be *perceived* by all parties as being able to do so.

To understand in more depth how this factor plays out in any negotiation, it is helpful to refer to *three classic tensions* in negotiation and see why the mediator can best juggle with these tensions in a way that makes impasses less likely.

Tension One – Fight or Flight Reactions in communication and decision-making
Tension Two – Creating versus Claiming
Tension Three – The Political Landscape of Settlement Decision-Making

1. Fight or flight

Observing conflict from a distance can be fascinating for most of us, even entertaining. That is why our television screens are filled nightly with soaps which thrive on conflict, our newspapers love conflict stories, if you read the How To books on coming up with a best-selling novel, most of them insist that any good novel will have to be based on a conflict of some kind; our daily office and relationship gossip thrives on it – think back on your conversations today – indeed gossip is frequently consciously and subconsciously designed to stir up further conflict, but not for the story teller.

Place us however in the middle of a conflict that is personal to us and focused on us and where we personally can be harmed or lose out, and this perspective changes dramatically. For most people conflict is not a comfortable situation to be in. It induces easily more primitive human reactions in our physical and emotional states, usually described in psychology and biology as the 'fight or flight' reaction that is wired into our central nervous system– we become more adversarial and aggressive, or we seek to avoid and escape uncomfortable situations.

These modes can be expressed in overt physical manner or they can be displayed in more subtle body language and verbal communication or lack of it. Flight results in diminished communication, inability to assert what we really feel, desire to exit the situation quickly; fight results in tendencies to aggressive displays, groupthink, biting comments, distorted communication, posturing. Which mode we adopt in any situation, and how we express it, is dependent on many factors of personality and upbringing, education, the issues at stake, who or what is threatening us, and the social context.

Against this background incidentally it should not be difficult to gauge why the research consistently indicates that voluntary take-up rates for mediation tend to be low unless strongly directed by the courts or policy measures, or where all parties have reached the point where the pain of continued litigation is worse than trying mediation. Getting around the table together to talk things through, is not an easy decision to make, frequently the last thing

people feel like doing when our natural reaction, our essential wiring, is telling us to opt for fight or flight.

Nor do lawyers – even assuming knowledge and enthusiasm for the process – find it easy to tell an aggrieved client on their first consultation that they should meet the other party and try to settle. This offends both flight and fight reactions, and may not be consonant with expectations of the role of lawyer.

The language and tactics of lawyers frequently exemplify both modes – with expressions like 'let's keep our powder dry' (the gun metaphor), 'let them blink first' (posturing and facing down), 'let's talk when we get more information' or 'when they concede this principle'(flight to prepare for fight).

An individual mediator can often do little to influence entry into the process. Thus the importance of court-directed mediation and lawyer professional commitment to the process. However, once the parties are actively engaged, the mediator brings a unique dimension to the fight-flight mix, to soften the negative impact of both modes, and to channel communications more effectively. How they do so of course partly relies on skills and choice of process, but many of these are inherent to the process, are not rocket science, and easily taken at least to a certain level before the fight or flight reaction returns.

First, for example, mediation often restores *real* and actual *communication* where it did not previously exist. It is surprising how little time usually the parties and advisers in a dispute have spent with each other in face-to-face communication in the course of an action – when I first entered this field I found it astonishing, contributing also to what I called pre-CPR 'dispute drift'.

The legal process has a wonderful ability to enhance both fight *and* flight at the same time. Lawyers shield clients from each other, yet raise the adversarial nature of the conflict by working up all its dimensions through reasoning in correspondence, pleadings, and in evidence and argument. Clients are usually not able to confront the other party's adviser directly.

So refined is this process that even the advisers often have hardly met face to face – they have also performed the flight reaction at a personal level, but refined and professionalized the fight reaction in often unhelpful and abusive correspondence. Before the CPR requirements of appropriate conduct, abusive and dismissive correspondence was the norm in litigation, now it has to be more artfully abusive. To take it to its finest ritualistic level, they then leave the ultimate combat process to the trial advocates, the Bar, who play out yet further refined verbal duels before the judge while the client sits behind the gladiators observing the display until it is their turn to squirm or pontificate in the witness box. In fact the classic common law model was for the advisers to exit from the final fight by collapsing into a deal on the steps of the court as the case suddenly becomes high risk and flight becomes flight from trial stress rather than from the other side.

In contrast to all this, the mediation process initially encourages direct dialogue. Clients and advisers often meet for the first time, or for the first time in a while, and have an opportunity to face up to what the other side are actually saying or likely to say in court, in the mediation opening session. This is later further enhanced by hearing from a neutral third party, some

observations on their current situation – like a judge but without the power or the risk of an opinion counting against them. It is the closest however that they will get to a day in court without its formal rituals.

Mediation therefore, by highlighting personal contact and engagement of clients with an ability to settle by negotiation, restores conflict to a level of personal ownership, but in a process that has a neutral manager who can hold the ring and keep order to deflect fight inclinations on the one hand, and defer flight ones on the other. Mediators therefore physically enhance communication at a very simple level.

While re-establishing communication, the mediation process also is able to give the parties space from overt conflict if that is appropriate. Most commercial mediations have relatively short joint opening sessions, particularly where there is real personal rather than commercial or legal conflict. Indeed in the most intense cases where parties find it uncomfortable to be in the same room together, mediation is sometimes conducted without the parties ever meeting in parallel track discussions. This usually occurs where there have previously been particularly hurtful relationships – in family businesses some times, in ethnic conflicts, or sex or race harassment cases – (though surprisingly in family mediation private caucusing is not commonly used unlike in commercial mediation).

Further mediation can powerfully filter the tone and spirit of communication. The private session or caucus allows safer and uninterrupted communication, even where aggressive, in confidential sessions between mediator and each party. Parties can feel safer to tell the whole story as they see it, and what they need, free both from the discomfort of either adversarial negotiation – their opponent is not present - and also free from the stress of formal court examination and cross-examination. It is close to a 'day in court' without its fight or flight dangers or its risks.

The mediator can also enhance communication between parties by providing a verbal bridge between them – summarising and reporting discussions with each party, in a way that can offset likely fight or flight reactions if the discussions had been direct and abusive or unhelpful. Mediators can reframe and rephrase what parties say in a way that they judge will be most powerful when heard by the other party, the mediator being privy to an overview of the interests of each party and their sensitivities.

The fact of mediator neutrality and independence can have one further powerful effect in terms of offsetting fight and flight risks. Negotiation offers or assertions are frequently bedevilled by the phenomenon known in the literature as 'reactive devaluation'. This is techno-speak for describing how we will always assume the worst interpretation and intention if an offer or statement comes from someone we already distrust, whereas we would treat it more positively if we heard it from a friend or someone at least detached. Mediators can propose offers or restate party positions in a way that separates the people from the proposal - sometimes even presenting a proposal as originating from the mediator and not the other party – thus allowing it to be viewed more objectively.

So mediators can neutralise and defuse fight reactions, while providing a safe channel for longer and deeper communication to replace fight or flight reactions. This particular element of the psychology of why mediation works cannot be underestimated, and plays out not just in the fairly basic ways I have outlined but also in many of the subtler aspects of the process. It

is captured in many sayings about the process - 'mediation turns up the volume on dialogue', 'mediation is turbo-charged negotiation'. It just has the intrinsic potential, and not for very complex reasons, to make communication safer, more structured and therefore more effective and more powerful.

By contrast the adversarial legal system can be said to have suffered from the law of unintended consequences. It turns up the volume on the fight reaction in allowing the appointment of paid gladiators, while lengthening and deepening the flight from the original genuine conflict through extensive disclosure processes, interim procedural points, and client meetings with separate legal teams that give the illusion of progress with the problem being little nearer actual solution or outcome. The flight process itself creates further material to fight over.

One of the largest cases we ever handled at CEDR began with the lawyers showing us 22 closely typed pages of interim hearings, actions and appeals on preliminary points, which had taken place over the previous five years. They both conceded that they were no further ahead in terms of resolving the problems between them or even making this complex litigation much simpler, but they were both several million pounds out of pocket – or rather their clients were.

2. Creating v Claiming

This capacity of mediation to enhance communication has a direct impact on the second major tension in conflict negotiations – how to divide up the pie in terms of potential costs and benefits for the parties in an agreement. Negotiation theorists have long recognised that we can approach negotiations in a problem-solving way or as a posturing, positional statement of 'I want £X' versus 'you offer £Y' and let's haggle, bluff or otherwise manipulate our communications till we get to a mid-way point. If I claim £1 million outstanding work done as advised to be my best case by my lawyer, you will offer as little as possible or even better with a skilful lawyer prove damage caused by defective service or goods and so counter-claim £10 million in lost business to disprove or overwhelm my claim. Positions therefore get stuck quickly as each side sees the other naturally as initially unreasonable, and subsequently intransigent and aggressive as the battle ensues and builds up.

Positional approaches to negotiation have attracted critiques for many years from theorists such as Mary Parker Follett who almost 100 years ago spelt out the possibilities for integrative versus distributive bargaining. Roger Fisher and William Ury of the Harvard Negotiating Project developed this concept into a claim that most negotiations can be improved by a principled approach to negotiation, and offered various tools for applying this. More recently Lax and Sebenius of the Harvard Business School have described at length how every negotiation carries an inherent tension between seeking to expand the possibilities for settlement by being open about one's needs and searching for creative solutions, versus slicing the ultimate pie the parties agree they can share – creating versus claiming run alongside each other in every negotiation and conflict.

At the emotional level this tension also plays out in the clash between a perceived need to be seen to be tough in order to sustain hard bargaining, versus displaying empathy or sympathy with the other side which may lead to exploitation.

Mediators, just by defusing hostility and encouraging more genuine communication, inevitably make it easier for parties to be open to more objective examination of options, and

to the search for creative solutions. At its most basic, mediators therefore build a better foundation for any natural inclinations and talents of parties and their advisers so they can get on with the job of negotiating in a more constructive atmosphere, allowing them to escape from fixed positions.

Of course this is often not enough or the parties would not have got deadlocked in the first place. So the next task of the mediator is to *actively* assist creative problem-solving. Mediators are often well placed to do so, just because their preliminary communications with the parties have helped give them a better bird's eye view of all parties' interests, needs and wants, while more detached in appraisal of what can work given the other party's revealed interests.

The mediator can also help craft substantive negotiating offers. They can discuss proposals and options that parties might feel too sensitive to risk discussing directly with the other party. They can test possibilities without either party having to commit, and encourage trade-offs and concessions that their private discussions have led them to believe may prove acceptable.

Finally, and probably one of the most challenging areas of mediation practice, the mediator can help challenge fixed negotiating positions of the parties, can argue the case for re-appraisal of the case and the potential negotiating outcomes, can help parties re-assess their position and risks in order to change their view of the best outcomes available. This is one of the most undeveloped areas of training practice and keenly debated in terms of how far it is appropriate for a mediator to go. Importantly, however, it is clear that again mediation defuses the tension between creating and claiming while enriching the reality of each party's contribution.

3. The Political tensions in Mediated Negotiations

There is a final tension in the negotiation process which mediators have to deal with, and that I want to highlight as it is so often a critical element of any mediation. In commercial and legal mediation, it is rare to have two individual parties in combat over a solely personal agenda. For a start there is the question of the dynamic between the client, and their adviser. Although strict theory suggests that lawyers merely reflect client interests, it is rarely so simple. Lawyers and clients frequently bring different expectations not only to their understanding of legal risk, but to perceptions of appropriate or effective settlement levels. In some cases clients defer to lawyers as to what is an appropriate level of settlement, in others they may differ substantially from their legal team in their expectations and wants. And in many cases clients are not entirely frank with their lawyers, or even clear about their real judgments when pressed.

In passing let me also say that the economic interests of advisers are not always irrelevant to the question of the attractions of a settlement at all, as well as its value. Some cases cannot or are difficult to settle just because of the build up of legal costs. And commentators have frequently referred – and not just jokingly – to lawyer resistance to ADR because it can be perceived to stand for Alarming Drop in Revenue. This is more commonly associated however with *resistance* to taking part rather than to the dynamics of the process once parties engage in it – though lawyer fee systems such as conditional fees, contingency fees and just plain and simple costs recovery may all be influences on advisers when considering with clients whether a particular offer from the other side makes sense.

And it is not just the politics of representatives and clients which can affect negotiating dynamics. One also can have the professional or personal agendas of other members of the negotiating team either at the mediation , experts, project managers, or others, or outside the mediation - insurers, boards, partnership committees and others.

What do mediators bring to this political landscape? Again the power of mediation is that mediators just can more objectively sense, and safely investigate, bring to the surface, and explore the impact of these factors in assisting or blocking a settlement. Often this is information which can be shared with the other party, and helps illuminate for them the sticking points in getting to a settlement and what they can do about it, or whether they have to modify their positions because of it. The impartiality and negotiation focus of the mediator, is what helps let this particular genie out of the bottle, when it may go unnoticed in formal litigation proceedings and be beneath the surface in direct negotiations.

Energy Channelling

The intervention of a neutral has a very basic effect that is often overlooked, just in terms of the flow of energy in an intergroup setting. Very often prior to the mediation, even where the parties have been in contact – and I mentioned that earlier even this baseline of energy is often missing – it will have been confrontational contact, head-to-head. The result is a narrowing of focus and of potential, of energy burst followed by exit or weariness, and desire to discontinue. Sailors know that going head-on to the wind leads to a sailboat just stalling. We talk of parties being 'locked' in conflict, and quite literally they are often stuck, frustrated at the lack of ability to shift, the sense of being trapped in an unpleasant or unproductive exchange.

The presence of a mediator forces the parties quite simply to turn in another direction, away from their opponent and towards the mediator, the third party, the third position. The basis of conflict becomes an objective *object* of discussion rather than a partisan contest, as parties try to encompass the third party's perspective and educate the mediator. Just as younger university lecturers often don't fully understand a subject until they teach it, educating the mediator and other party can help a party re-evaluate their own case.

This process is symbolised in some mediation training by the emphasis of the use of the flip chart by mediators to turn party's attention away from their opponent and instead reflect upon a mirrored summary of what they appear to be saying. I remember a group of civil servants being highly amused to see CEDR offering a continuing professional development programme of a half-day just on the use of the flip chart. It seemed extreme to spend half a day on the use of a flip chart, but this crystallises the degree to which mediators in fact recognise that they can help parties by turning their attention away from opponents to a more objective viewpoint – even without mediator evaluation.

The psychological result is also a significant redirection or renewal of energy, and often a release of pent-up energy into a new phase of activity, interest and challenge. In addition, by nature and training, mediators are inculcated in values of optimism about settlement potential despite seeming obstacles, and therefore can bring qualities of patience and persistence which are vital in helping sustain the momentum required to find a breakthrough solution.

Finally the focus of mediation is very much on the here and now, and the future, what deal today will allow you to get on with life tomorrow. Energy which had been focused on problems in the past, normally an energy-draining state, is diverted to a freedom to act without the shackles of being tied into a conflict or the clutches of the legal system. In the process itself mediators can frequently sense that breakthrough is about to occur when the parties appear to find suddenly new sources of energy for dialogue. The next element in the mediation pie is also related to this question.

Management of Complexity

Psychologists have long understood that there are limits to the human cognitive ability to attend to or juggle items of information – summarised in the classic article by George Miller 'The Magical Number 7 + or – 2'. Thus the traditional limit on the length of telephone numbers!

In conflicts, parties have generally to juggle both their emotional mental space, their cognitive understanding of the issues, and their reading of the other party and its team as well as their own constituency. They will often have built up significant detail and repeated discussions around the issues, have heard varied stories from witnesses, qualified advice from lawyers, experts, and financial advisers, and are struggling with how to make the most of procedural options for them to resolve the case. In other words in most cases and conflicts, parties easily get to a point of finding it difficult to see the wood for the trees.

Mediators too have to struggle across some of the same terrain and to quickly get on top of the case and the issues. However they normally, at least at the entry stage, are uncluttered by the emotional backdrop and history of the case, and enter the case on the basis of an overview of all parties' positions, based on written materials and probably brief telephone conversations with advisers. Although this can be demanding in terms of mastering the brief in a complex case – and parties often insist on sending large chunks of pleadings and existing documentation in addition to the standard summary statement of case, - mediators should still be both fresher and able to focus on the big picture compared to the minutiae of the case.

Typically in mediation therefore, with mediator assistance, discussions quickly come to focus on the core issues at stake rather than being muddied by the swirl of material previously researched by the parties' and their advisers, and focus on current needs rather than past obsessions or grievances.

Equally, as managers of the process, mediators are better able to take a view on which members of the teams are most likely to assist in concentrating on the key issues and progressing them in negotiations. This role of negotiation project manager to manage complexity, becomes even more critical in multiparty cases, in international cases, and in complex cases generally.

Again the mediator's defined role in the process, and perceived independence, puts the mediator in a better position than any parties to fulfil this essential management function.

The result is again also a very different dynamic from that found in direct negotiations, and is especially useful in complex project situations where a project mediator can focus entirely on

the quality of communication. In complex cases, mediation is really just an expression of the best and simple principles of project management, that dedicated resource needs to be applied to provide an overall project perspective and manage successful progress of the various specialist contributors.

Decision-making in mediated negotiations

Deciding to settle is always a choice. The purist view of legal negotiation or mediation would suggest a rational calculation of risk by lawyers and parties. In this model, one would emphasise the parties' ability to understand the law and facts of the case, likely witnesses and expert evidence, likely damages to flow and judicial principles that will be applied – in order to predict a probable outcome and therefore current settlement value.

Thus if a pedestrian was knocked down by a cyclist – what witnesses were there to the accident, how do the cyclist and pedestrian stories compare, what corroborative evidence is there, what injuries have been sustained and what is the normal schedule of damages for such injuries and likely costs of recovery?

Decision-making becomes linked to a rational matrix of predicted outcome (that is, benefit) against a perceived cost, then set against the offers being made to compromise by the cyclist or their insurer. This is the traditional view of mediation as being conducted 'in the shadow of the law' or 'litigotiation' in Marc Galanter's classic term.

The mediator's role in such a presumed rational and orderly world therefore becomes one of helping parties reassess their legal position in order to make a more refined judgment – some mediators would do this by helping communicate better the points being made in the separate rooms; others (perhaps the majority) would use their experience, common sense or legal knowledge to reflect back what they are hearing and ask challenging questions, so that parties can effectively confront their own case in a mirror and realise how it must look to an outsider; others still would discuss the risks and costs, financial and otherwise, in running the case on and hope that this brought a sense of realism to discussions; another category of mediator might be tempted to pass a view on the basis of the summary case they have heard in an attempt to influence positions. (One famous American mediator was rumoured to run a very successful practice by making an invariable habit of telling every party after the opening session that their case was lousy, thus reducing every party's expectations from the outset.) Finally, many mediators would use all these techniques or at least have them up their sleeve to adapt to the particular case circumstances and parties.

So much for the rational vision. And many legal mediations run exactly along these lines. The pedestrian has 60% chance of success in his legal case so argues for 60% of damages measured according to normal personal injury scales. The cyclist team point out some exaggeration in the quantum of damages and the time and legal costs it will take for the cyclist to recover, so offer half of the 60% value. Then the parties haggle or give–and–take till they get to something mutually acceptable.

However there is another dimension of the magic of mediation in many cases. Often even apparent legal conflicts operate at several levels which take conflicts into other areas than strictly legally rational, including personal desires to settle or escape the stress of litigation, or commercial desires to end a case or achieve a particular negotiation outcome for commercial

reasons rather than reasoning based on legal risk. Alongside this, the literature on decision-making in psychology and behavioural economics, is increasingly exposing also how much of normal decision making itself can be said to be subject to a variety of biases which are relevant to the role the mediator can play.

Let me unbundle therefore some of the elements operating in the typical case. First we have the phenomenon of lawyer and client overconfidence or *optimism bias* in risk-taking and assessment. Experience and research demonstrate that in working up a case, lawyers and clients in the process tend to convince themselves and each other of its merits and come to overestimate their chances of success. The lawyer and the client are speaking to each other, usually several times, to understand the case. The client may also be sharing their sense of grievance with friends and family who are likely to further enhance the client's sense of justification or grievance and reinforce their interpretations of the case. This process of establishing a set of worldview from a partisan team has long been recognised in the psychological literature as 'groupthink', and links to overconfidence.

To add to this, the search for evidence or expert support is likely to be subject to further biases in decision-making known to social scientists as *confirmation* and *attribution* biases. Having developed an initial theory of a case, we psychologically tend to seek out and notice the evidence most likely to confirm our own view, and to downgrade the material that does not support this view as compared to a review by someone who is not involved or of an opposing view. Equally we tend to attribute to the other party illegitimate motives compared to our own reasonable vision of the world, and to react by devaluing the arguments they put forward compared to how we might treat our own arguments or those made by allies.

Thus we have the common phenomenon leading to deadlock in legal negotiation - parties whose respective estimates of the chances of success add up between them before mediation or trial to at least 120% success potential. Neither party is really persuaded of the other's case. (This finding also helps throw more sympathetic light on the apocryphal mediator who went around telling every lawyer that his case just doesn't add up!)

Thus the neutrality of the mediator is a real psychological phenomenon, of someone who enters the process at least initially without the confirmation bias that each party has built up over time, and someone detached not only from over commitment to a cause but also free from a sense of scepticism that each side already feels about the other's case, arguments and proposals.

Inherently therefore the mediator will provide a countervailing balance and reality check to both parties. This does not necessarily apply in every case, nor does it necessarily mean that the mediator will find himself or herself mid-way between the parties on substantive issues and judgements, but the mediator will often genuinely be *emotionally* equally detached between the parties as to where right or a balance might lie – at least to start with.

Add to the over confident lawyer complication, the phenomenon of over-trusting clients or clients with themselves unrealistic expectations, and you have a heady mix to deal with as a mediator in terms of managing risk analysis discussions while keeping party confidence. Fortunately many lawyers and clients, once forced to focus on these issues in a mediation forum, and face to face with the other party, come to learn that the other side is not merely being difficult or stupid – just listening to their own lawyer!

And equally many lawyers do find themselves with unrealistic clients, and welcome the independent intervention of the mediator to help their client rethink their position and objectives. The mediator's impact on confirmation bias is an inherent feature of independent intervention, but it will be influenced by such issues as how entrenched in their views parties are, the credibility of the mediator in terms of challenging or implying or providing an independent view, and all the other normal factors of the psychology of influencing and persuasion that mediators and party negotiators bring into the process.

Mediators can therefore help parties appreciate the legal risk assumptions they are making, can help them reflect on them and hear them played out in discussion between lawyer and mediator, and so adjust their thinking on where the balance of right or aspiration might lie by disengaging it from emotional as well as intellectual investment.

If legal mediation was just a case of assisted logical risk analysis, mediation would not be quite so interesting or successful. What supplies another part of the magic, is that there are other important, and often overriding, drivers behind decision-making in any conflict. Legal risk is only one dimension, albeit an important one, even in the most court-locked of combats. The magic of mediation as a technique has been to innovate within the litigation system a decision-making forum that can genuinely reflect the fact that in most negotiations something else is going on other than risk analysis made on the basis of legal principles.

First, whatever the lawyer may have said on risk analysis, regular litigators also know two simple truths – first even the best case can go wrong on the day with erratic witnesses or judges; and second it is all very well to talk in terms of refined probabilities, 65 – 35% probability of success or whatever; the judgment outcome will actually be a case of 100 or zero per cent normally, so litigation is always a high risk throw of the dice. It is often better to opt for the certainty of an offered compromise, even if a little below a theoretical or mathematical deal, than risk a zero outcome and dissatisfied client.

Mediators can therefore often exploit and highlight for parties the downside risk of continuing with a particular claim or level of claim, can pierce the balloon of overconfidence. Again psychological research on decision-making indicates that people are more often driven by fear of loss than hope of gain except in exceptional circumstances.

Nor, as I have stressed, is legal risk analysis the only – often not even the main – issue in conflict decision-making. The typical client is driven by many other motivations than merely the law. Time may have taken its toll of a first flush grievance. At a personal level, our cyclist or pedestrian may have reached the point where the pain of continued legal action becomes over time from the start of a case, a cost in itself to be avoided now whatever the value of the outcome seemed at the outset. Priorities may change significantly while waiting for the law to take its course for any number of reasons – our cyclist may be on the point of getting married and have lost interest in a legal action; or be thinking of a career change or a move overseas. Or as the day of reckoning approaches, it is not only the lawyer who worries. Clients may begin to worry about the stress of giving evidence, or inconvenience of time off for proceedings. And so on.

These kind of what we can call in legal terms 'peripheral' risk factors, may in fact be central to settlement motivations in many cases, sometimes not picked up by legal advisers. These

peripheral factors may loom especially large for businesses that want to get on with their core business, which is usually not litigation. (And not only central to settlement motivation of course; equally these other motivations may in some cases exacerbate motivation *not* to settle - needing the money for other purposes, or increased grievance and desire for vindication. Thus one case with exactly the same facts might settle, where another one not).

Mediators can therefore be assisted by, but certainly need to be alert to, many different motivational drives which influence litigation settlement decision-making which are entirely personal or commercial and may be nothing whatever to do with traditional legal risk analysis. The defining moment effect and mediator techniques allow better expression of these motivations.

There is one final factor in conflict decision-making which gives mediation especial power, and can be immensely satisfying – for advisers as well as mediators. Because the process concerns party-determined outcomes and not court-determined, outcomes can be as flexible and creative as parties may need and be willing to agree to. Contracts can therefore be rewritten; new employment offered or new business agreed; apologies or acknowledgments given; public announcements agreed – there is no limit usually to what can go into the settlement.

In other words mediation can relate to party remedies, rather than the parties constrained by what the courts offer, typically limited to damages or an injunction. Thus the longstanding recognition in clinical negligence cases, that patients have often been driven to legal action and compensation claims because they have no mechanism to satisfy their frustration with their injury in any other way – when they may have wanted organisational change, an explanation of why an operation went wrong; a commitment to protect patients from the same problem in future. And they usually have to deal with the same organisation again, the NHS. Equally clinicians often feel freer to engage in a genuine conversation with a former patient than in a high risk litigation procedure.

The settlement in the Alder Hey Hospital retained organs litigation which settled by mediation was a typical example of such a structure – parents of children whose organs had been used for research purposes apparently without permission of the parents achieved a settlement which not only offered a core element of compensation, it also provided for a garden of remembrance, an apology from the institutions involved, a public statement by a government Minister, a plaque outside the hospital to commemorate the children and their families. None of these would have been available through a court judgement – in a case incidentally where the legal principles were highly uncertain.

The chemistry of settlement motivation as between parties can therefore be a complex and uncertain equation. All of this is equally true of direct settlement negotiations of course. However I hope that I have said enough to show that mediation provides unique foundations for creating a legitimate and disciplined space for such discussions to emerge and be explored, a vehicle in the shape of the mediator to assist in enabling communications that are less tainted by normal adversarial fight and flight dynamic, a purpose and values focused on client concerns and not just legal agendas, and a defining moment for parties to take the opportunity of a new phase. Once these foundations have been enabled, the final and important factor can then be released to give the process yet further potential, the icing on the cake, as it were.

Mediator and Party Capabilities

You will notice that I come last to the issue of talents and skills, whether of mediator or parties. This is a deliberate choice. I wanted to emphasise and bring home how much of the foundations for mediation magic arise from the inherent structure of the process itself and its psychological impact and potential. The foundations for effectiveness are very much already present. Often the challenge for the mediator is to know just how best to let the process take its course, and not to get in the way of it or of the parties by imposing the mediator's own agenda or solutions. This is particularly the case in situations where the parties have significant negotiation capabilities on their own account, but lacked a disciplined forum and atmosphere – sometimes even a meeting opportunity - in which these qualities could be effectively engaged.

The case for mandatory court-directed mediation – and I do not want to get into the details of that debate tonight but it is one of the most critical in relation to mediation and the civil justice system – is founded on the fact that left to their own devices parties will not wish to give an indication of weakness, to each other to clients, or will suffer from fight and flight reactions which will certainly delay and impede the opportunity to engage with each other directly. Court-directed mediation overcomes this initial inertia in a simple way, and allows a powerful process to take over – a court endorsement for a possible defining moment of resolution. Near mandatory or mandatory schemes therefore ally well with the potential for mediation. I have seen many cases of mediation stages in commercial contracts for example where sophisticated business managers delay the triggering of the mediation stage rather than face the reality of their situation, engrossed as they are in continuing fight or flight impulse.

Of course process on its own can never be enough without the talent of effective mediators, advisers and indeed parties – mediation after all empowers the parties and allows them to take control of their own outcomes by way of negotiation and negotiation decision-making. The mediator can only help provide the opportunity for them to grasp.

Nevertheless the elements in the mediation recipe I have already outlined give important clues as to which talents mediators need to have to be effective, and how they and the parties can enhance the power of the process, can make a difference between lower and higher settlement rates.

Mediators begin with an advantage in being able to exploit the foundations of independent influence that have been created by adoption of the process. Whether they do so depends on the credibility they bring to the process and can create within it, how they help parties understand the significance of this defining moment, how they help the parties address the issues at stake, how they uncover party motivations and interests and assist parties to engage in problem-solving, how effectively they facilitate the parties' re-evaluation of their case and the options and alternatives they face, what skills of persuasion and influence they can deploy.

Because so much of the process terms on human relationships, it is importantly not just a matter of skills and techniques, it is also critically something to do with the perceived integrity of the mediator, and the personal qualities and personality of mediators as well as that of the other parties and advisers.

The exact ingredients in a particular negotiation will determine which skills, talents or personal qualities mediators or advisers need to bring for greatest impact – this may be management of meetings, assistance with simplifying the issues, helping hold up a mirror to the parties of their real situation and the realistic options available to them or just creating enough of a social ritual to allow parties emotionally to move on.

An ability to convey integrity and independence, energy, optimism about settlement, patience and persistence, continued ability to act with impartiality and diplomacy, able communication and problem-solving skills are usually fundamental qualities that are common requirements in every mediation.

In considering the magic of mediation, however, too much stress can be laid on the qualities of the mediator. It is equally important, often more important, to have parties and professional advisers who are willing and able to exploit the process to best effect, who genuinely do seek ways out of impasse. However skilful a mediator, it is a process founded on ownership by the parties – if they do not really want to settle, then they will not. The strength of the process is to uncover how often in conflicts, parties do really want to settle or work things through, but have not had the effective means or occasion to do so, or who have been too focused on fight or flight rather than on real regulated decision-making via effective engagement with the problem and the other party.

Of course one of the by-products of having capable advisers trained in effective negotiation, is that they may feel they do not need a mediator. Many lawyers who attend mediation training note that it has changed the way they negotiate, sometimes that it has changed their lives even. They learn from immersion in the role of a third party, how powerful it can be to genuinely listen to what an opponent is saying, and work with that material to problem-solve rather than to score points. They also learn how easy it is for parties to develop partisan perspectives in their views of a conflict. Such learning gives lawyers vital skills to settle more cases on their own it is true, but from all I have said it should be apparent that nothing can quite replace the dynamic inherent in a full mediation process.

Indeed it is also noticeable how many lawyers emerge from our mediator training very anxious to be mediators. The magic of the process is very engaging. Many mid-career litigators find that it appears to offer them a way out of what I call 'litigator's menopause' – a realisation mid-career of how often adversarial battles which held initial excitement and attraction for them as younger professionals, do not generate the results they expected, and often ends up with clients losing, both literally and even when they apparently succeed in the courts.

Many barristers in particular have commented to me that once they have enough mediation experience, they find it difficult to switch back into adversarial advocacy mode, as they can see its weaknesses all too easily now from a third-party perspective.
Regretfully I have to reveal however that many more lawyers are interested in finding their own salvation as mediators rather than finding salvation for their clients, - once again proving the power of the personal agenda - so we have a field where supply of mediators outstrips demand for mediations from clients and lawyers who are immersed in their regular fight or flight mode. Another fascinating part of the field I will not venture into tonight.

It should be apparent from all I've said that mediation is not guaranteed to get a result and is by no means an arena for the naïve or unskilled. But its success rates indicate that the process itself is powerful in the hands of a skilled neutral negotiator. In getting a better understanding of why mediation works, it should be easier for parties, advisers and mediators to consider which of the elements in the negotiating dynamic have most power and influence in any set of circumstances. It can be a framework for reflection and choice of tactics.

For example the higher the level of conflict and potential fight or flight tension, the greater should be the focus on the management of space and proximity issues. (The importance of this element is well described in Jane Corbyn's insightful book on the Oslo Peace Accords, *Gazza First,* in terms of how it was necessary to have a slow build-up of meetings and understanding between Israelis and Palestinians from an initial stand-off situation, just so that a base of trust could be established.)

Equally one can more easily see that the closer a dispute moves to the stage of turning on subtle questions of bargaining items for exchange, the more mediation skills should focus on negotiators with skills in crafting negotiating options, in managing and exchanging concessions.

The greater the difference over risk assessment, the more the mediator should be chosen who can bring some weight to helping parties re-assess their risks through reality-testing skills.

Similarly one may be able to make broad judgements on how different mediation sectors – family, labour, commercial, political – may call for different emphases in the slices of the pie and how mediation should work in that sector even if there are superficial similarities between the broad process used. However every mediator knows that cases also turn always on their particular facts so any judgement would have to be fairly broad-brush.

So there we have it – mediation in the field of conflict is a rich recipe with many possible variations according to chef and mix of ingredients and personalities, a heady mix of the mundane, myth and magic. The *myth* of mediation is to believe that it is somehow a mysterious area of alchemy and mystique, that it requires unusual human talents, or is appropriate in only unusual circumstances. It is very much rooted in the basics of human conflict dynamics, with many able negotiators who can adapt to it, and needed for many more situations than one finds it called upon because of our continuing Stone Age wiring into a 'fight vs flight' blockage.

Equally this rootedness in basis human dynamics is also the source of its magic – the offer of a very resilient, flexible process that is uniquely well placed to release a combination of social ritual, of human energy and talent, of group and individual communication management, of simplification, reality-testing and decision-making under risk, that can help bring power and colour to an initial mix of raw and unpromising ingredients. The cumulative effect of these factors is what brings cases so often to a point where they can suddenly break out of previous fixed deadlock. This is both the myth and magic of the mediation tipping point in conflict.

How then do we best harness this commonsense magic to make it happen more regularly, and can we help the magic of mediation become a deeper magic? I would end with five suggestions for all of us involved in shaping policy and practice in the field.

First, experimentation is vital to enhance our understanding of the ingredients of the mediation mix. It should be clear from all I have said that mediation's potential should not be restricted to an auxiliary tool of litigation. It has the power to enhance decision-making wherever dialogue is tainted by conflict or potential sensitivities likely to be correlated with fight or flight reactions – day-to-day employment situations, planning inquiries, politics – these are all arenas where this situation is not uncommon.

Second, and linked to this, we need to understand how best to make mediation not a specialist distress purchase, a niche of the litigation profession, but as part of a normal social ritual in many different settings, because it works. The legal system in particular can and is already addressing this potential by accepting mediation as a parallel track to the courts – in court rules and European Union initiatives. The process deserves further endorsement as a regular management, organisational and community norm – not a final desperate effort when there has been too much pain. The mediation industry therefore needs to address how different delivery mechanisms and business models of mediation practice enhance or reduce this potential – we need to find for more clients the mediation fast food version of Jamie Oliver.

Third trainers and educators need to understand negotiating dynamics even better so that we can find the tipping points in conflict with even more ease. And in this connection the interplay between the law and bargaining in the shadow of the law needs to be reviewed regularly.

Fourth we need to recognise that resolution as a goal is only a part of the potential for mediation's magic. In the most entrenched conflicts, mediation can also restore momentum to negotiation, clarify differences and alternative ways of resolution, lead to partial agreements and a sense of progress in the most intractable conflicts.

Last but by no means least, tipping points require communication and leadership from the right people. Tipping points more often than not require proactive and engaging communicators. Mediation has come a long way from the early days of its promotion, but it can and should continue to be needed, at a macro-level and in every case of conflict leadership.

This recalls for me finally one of my favourite efforts by a mediator to define the process, using a musical rather than culinary metaphor – and focus globally a case of bye bye American Pie?

"There is in our work as mediators, when it is going well, a peculiarly American blend of learned structure and conventions, and improvisation strongly supported by talent and intuition. It is jazz: there are a few orthodoxies and a lot of ad hoc ensemble invention" – Howard Bellman.

Let us go with the groove. Thank you.