Active Adjudication:

What Steve Jobs and Chivalrous Knights can tell us about Adjudication

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I will start with an analogy about adjudication systems, and the adversarial system in particular. It involves taking us back to the 1970s when a young Steve Jobs was sitting at the table with a group of computer engineers talking about what the new Macintosh© computer should be like. Being experts, and based on their needs as programmers and code developers the engineers have all kinds of ideas about what the computer should be able to do. At some point in the conversation, Steve asks, but what if ordinary people need to use this computer? The experts point out that this ordinary person would obviously hire one of them. This ordinary person could hardly be expected to properly use the machine on their own. Had Mr. Jobs listened only to this group, the resulting computer would not have been as user friendly as it turned out to be.

The point of course, is that the principle was to design the thing so that it could be, as much as possible, fully useable by the people who would actually use it.

I acknowledge that this is far from a perfect analogy. First, Apple computers are not really as intuitively obvious as they maybe could be. Second, in the traditional adversarial system, the key concepts are not in computer code. They're in Latin.

The reason that the traditional adversarial system is not user friendly to people other than lawyers is that it has several centuries of tradition. The British Common Law antecedent was trial by combat. Eventually, richer people realized they could hire champions to fight for them. These battles were governed by rules of chivalry. Gradually, the adversarial system evolved and instead of knights, it was possible to have lawyers to represent the combatants. In addition,

instead of the rules of chivalry, there were complex rules to ensure a fair fight and a judge to ensure that the rules were followed.

A myth that is critical to this system is that each party has the resources to retain their own champion and that they make an informed choice of who to retain.

In reality, the contest is not always equal. As adjudicators, we are often faced under-represented parties, and increasingly, the users of our systems are self-represented.

This necessarily means that the traditional adversarial system is often highly unsatisfactory as a model. It is recognized that it is up to adjudicators to adjust things so that self-represented or unequally represented parties get a fair hearing.

An important reason that this can sometimes be so difficult is a fear of doing too much, being too active. It is like Lord Denning is hovering in the background with his famous injunction:

> A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict.
> *Jones v National Coal Board* [1957] 2 QB 55.

There are a number of court decisions that have overturned decisions of lower courts or tribunals because the reviewing court felt that the decision maker had entered the arena and gone too far. These have been excellently reviewed by

Freya Krystianson and others[1]. I think it is important to recognize that almost all of these decisions happened because the decision maker was operating in an adversarial system context and went beyond the norms. These cases typically explicitly refer to the arena, and/or to the rules of the game. Discussion about the problem of power imbalance is often discussed in game terms as well, such as levelling the playing field.

The increasing reality is that in many systems, self-representation is the norm. And, when parties are represented proceedings under the traditional adversarial system have a tendency to become highly protracted affairs with enormous costs to the participants and to the system. Both of these pressures mean that the traditional adversarial system can be a huge access to justice barrier.

I propose to look at how active adjudication can reduce or eliminate the barrier, first for self-represented litigants and then in cases where the parties are represented.

Active adjudication is a way of changing the arena approach to adjudication. Lorne Sossin has identified active adjudication as an approach that lies somewhere between the adversarial system and the inquisitorial system. Unlike the inquisitorial system, the issues are still defined by the parties but unlike the adversarial system, the adjudicator may become directly involved in bringing out the evidence.

In *Baker*, the Supreme Court of Canada discussed the parameters of a fair hearing:

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[1] Active Adjudication or Entering the Arena: How Much is Too Much? Freya Kristjanson and Sharon Naipaul CDN. JOURNAL OF ADMIN. LAW & PRACTICE [24 C.J.A.L.P.]

> [T]he purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
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> Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817

Baker goes on to set out the contextual factors that will influence how the adjudicative approach will be assessed:

- The nature of the decision being made and the process followed.
- The nature of the statute pursuant to which the body operates.
- Importance to the people affected
- Legitimate expectations of the parties
- Choices of procedure made by the agency itself.

Two of these factors – the expectations of the parties and the choice of procedure by the agency or tribunal – help explain why it is not appropriate to engage in active adjudication when this is not how things are typically done at a tribunal or in a court.

At the same time, courts have also been clear that it is necessary for adjudicators to make a proceeding accessible and fair, especially for self-represented parties.

So within the parameters of the context of the hearing, it is necessary to have a fair and open process that gives an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

What does an opportunity to put forward views and evidence mean?

It seems clear that there are procedural and substantive aspects to this.

Procedurally, it is self-evident that an accessible system has to be comprehensible to those without legal training and experience. This is best addressed in system design but also needs to be dealt with by adjudicators in the hearing itself.

One approach is to explain the rules at the outset of the hearing. Unless this is done very skillfully, a mini-lecture on the rules of procedure and evidence is unlikely to be absorbed and for many self-represented people is likely to contribute to a sense that the system they are hoping will resolve their dispute is too complex for them to actually access.

Unless there are obvious issues that need to be addressed at the outset, consideration can be give to dealing with things as they arise.

And, when dealing with things as they arise, it may be possible to focus on the underlying fairness principles that underlie the rules, rather than on strict application of the rules themselves.

Another form of active adjudication of procedural issues is to not deal with them unless it is critical to do so. For example, at the outset of a hearing, there may be issues about the admissibility of a document not earlier disclosed. Similar issues may arise about whether a witness will or will not be called.

I often find it difficult to deal with these because I am not clear how the hearing is going to unfold. The document or witness may or may not be important. Dealing with these sometime technical issues at the start of a hearing can cause stress for a self-represented party and may prove to be unnecessary. If possible, I may propose to defer dealing with the admissibility question until after hearing evidence. In this way, I have a much better understanding of the context of the proposed evidence. Very often, by then, the document or witness is no longer very important. The applicant may realize that the evidence is not critical, or the respondent may realize that it doesn't really object to the evidence.

The most significant active intervention in the hearing process is questioning by the adjudicator. And this addresses both procedural and substantive elements of the hearing.

Questioning by the adjudicator can happen in many different ways.

At the Human Rights Tribunal of Ontario, we are typically faced with an unrepresented applicant and a respondent represented by counsel. Some adjudicators propose that, in this scenario, the adjudicator will primarily question the applicant. Different adjudicators approach this differently. Some essentially do an exam in chief and expect that the respondent's counsel will want to do a full cross-examination.

However, others do a fuller questioning, asking question that would typically be of a cross examination nature as well as evidence in chief type questions. This can mean that there are only a few, or no questions that the respondent needs to ask. The applicant is always of course given the chance to raise anything that has not been covered.

Some active adjudicators will, in appropriate situations, hear evidence from more than one witness at a time. This can be as simple as asking for clarification of a point that should not be in dispute from another witness.

To take a workers' compensation example, the worker is testifying that he believes that his arm pain started when a new machine was introduced in the plant. He can't remember when this was, but thinks it was in the winter of 2011. As it is obvious that the worker is having trouble fixing the date when the new machine was introduced, the adjudicator asks the foreman who is present as the employer's witness if he can recall when the new machine was introduced. The foreman recalls that it was introduced immediately after a new production line was started in the spring of 2012. The worker agrees that this is when the new machine was introduced.

In a passive adjudication model, the worker's testimony that the machine was introduced in the winter of 2011 would become an issue to attack him on during cross-examination, and an issue that should not have been in dispute becomes a disputed point and may raise issues about the worker's credibility on a point that should not raise credibility. In this scenario, there may still be an important question about whether the arm pain did actually start with the introduction of the new machine. However, what has happened is clarification

of a point that is a matter of historical record and not a credibility issue so that the focus can be on the issues that really are in dispute.

As a side point, this intervention could save time when it comes to writing the decision. Rather than having to set out the apparently conflicting evidence about when the machine was introduced, the decision can simply record that, at the hearing, the parties agreed it was introduced in the spring of 2012.

Questioning of more than one witness can be more extensive than this. It is possible to have two or more witnesses contributing their part of the story chronologically or issue by issue, hearing from each witness about his or her involvement as the chronology builds. In some, albeit rare, cases, this approach can lead to a resolution of the issues in dispute because the parties all come to a mutual understanding of the history of the matter. If it does not do this, it can at least isolate and identify the issues that are in dispute from those that are not.

This sort of approach will not work as well when there are fundamental credibility issues at play. In that event, active questioning by the adjudicator will typically be followed by cross-examination by the other party.

Intervention by the adjudicator in cross-examination can also be helpful. It sometimes happens that a party seems incapable of answering even simple basic questions put to them in cross-examination, even if they answered exactly the same question some time earlier when giving their own evidence. This can lead to a very protracted and frustrating experience for all concerned.

An intervention with the adjudicator posing the question, or possibly reframing the question can keep things moving along.

Active adjudication when the parties are represented

Turning now to active adjudication when the parties are represented, I will make two main points.

First, the fact that a party has a representative does not mean that the representative is capable of actually representing the needs and interests of the party. This is a problem because there is a natural tendency to refrain from more active adjudication if a party is represented.

Generally speaking a party who is under represented is likely to fare worse than a party who is self-represented.

Systemically, this is unfair because the party is likely to have decided to retain a representative because of a fear that the system will not otherwise be accessible to them. However, they do not necessarily have any basis to determine how to select a representative or lack the resources to have a competent representative. They then end up worse off in the hearing, and have to pay.

It may therefore, be appropriate to treat under-represented parties as if they are self-represented, both in terms of procedural and substantive matters.

The second point is that active adjudication, including having the adjudicator ask most of the questions, can be highly efficient.

Consider a simple case, where there is an applicant and one respondent witness. In a traditional adversarial hearing, to hear the evidence of these two people involves hearing the same history four times as each person is examined and then cross-examined.

All or most of this questioning may be accomplished more efficiently if the adjudicator primarily asks the questions.

Consider also that a representative may not be able to know what areas the adjudicator thinks are important. This can lead to a lot of time pursuing questioning that is of no assistance to the adjudicator.

A quick note on bias concerns.

I would say that the following are guiding principles in regard to fairness in active adjudication questioning by the adjudicator:

1. The questioning should be consistent with the issues as framed by the parties. The adjudicator should refrain from exploring issues that have not been raised by the parties.
2. Always show respect.
3. Ensure that the parties understand the procedure and have a chance to ask questions about it and to raise concerns as they arise.
4. Refrain from asking questions that the parties would not be allowed to ask.

Conclusions

1. In some circumstances, active adjudication is necessary in order to ensure an accessible and fair process.

2. The question of how active the adjudicator should be is determined by the tribunal's usual practices and the reasonable expectations of the parties. If active adjudication is not part of a tribunal's usual culture, it can nevertheless be raised as an option with the parties and can proceed on consent.
3. Active adjudication of procedural matters involves looking at the underlying real fairness and not only on an application of the rules of procedure and evidence.

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