

## **The Distortion and Destruction of ADR: A Grim Fairy Tale**

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**Once upon a time, in a fabulous land called the United States of McPherson, there existed a fair and functional civil justice system.**

**The ultimate forum to resolve conflicts was called trial by jury. But in McPherson, there were alternatives before one reached the marvelous trial. These alternative forms of dispute resolution were called, interestingly, forms of alternative dispute resolution (ADR). And, the wise leaders of McPherson determined that it would be good to have three different forms.**

In each conflict, the participants first attempted resolution by the alternative known as negotiation. The two sides came together with their representatives and presented their thoughts, perspectives and positions. Then they tried to develop a solution to the dispute.

But sometimes the participants were very angry about their conflict, and then negotiation didn't work. In these cases, where negotiation had brought the sides closer together but they couldn't quite agree, they went on to the next step of ADR, called mediation.

Mediation was generally most helpful following negotiation, because the sides had already aired their grievances and positions, and had already defined the parameters of a settlement. So the job of the mediator had nothing to do with justice, but only with bringing the two sides to a point where they were both saying "yes." Often "yes," or the point of compromise, occurred at a fair and just point. (Sometimes it did not.)

When mediation failed, however, the dispute could move toward the next level of alternative dispute resolution: arbitration.

The three forms of ADR recognized in the U.S. of McPherson were so effective that only five percent of all disputes required a trial. This saved the taxpayers a great deal of money and benefited society as whole.

One day, a gnome from the Union of Liability Leprechauns (the ULL) started thinking about the system. The gnome was not interested in justice or anything like that, only in finance. He observed that when the mediation form of ADR was utilized appropriately --as a follow-up to negotiation--the gnome's peers in the ULL generally had to spend more money to resolve the conflict.

"Aha!" thought the gnome, "If mediation became the primary form of ADR and negotiation were eliminated entirely, then we would be able to discover the position of a McPhersonite and still make an inadequate and inferior offer!" ("And," the gnome thought happily, "since we can make our paltry offer through the mediator, the other side won't see us chuckling!")

When the gnome returned home and spoke to his fellow gnomes, his idea was hailed as brilliant. All of a sudden, the citizens of McPherson found that their system of alternative dispute resolution was becoming less and less effective. They had been tricked. Their representatives would agree to mediation as a first step, without negotiation, because the gnomes assured them that they would "come to the table" with sufficient money to settle the dispute. The representatives of the citizens of McPherson assumed that "sufficient money" meant a fair and just result. But the gnomes defined "sufficient money" as sufficient to settle the dispute to their own satisfaction, as determined by their internal decision-making process! It wasn't really a fair offer; just a tactic.

So the clever gnomes couldn't lose! With mediation as a first step, only two results were possible: they could settle the dispute with minimum expense; or they could walk away, never dealing directly with McPhersonite problems or demands, yet still having learned the position of their adversaries!

But over time, the gnomes started to notice that this change in the sequence of settlement modalities was causing more trials. And this substantially increased the money they had to spend to settle grievances. So even though it was they who had perverted the ADR system, the gnomes decided to pay some McPhersonite legislators to change the "unfair" laws. The wisest McPhersonites saw this sad process for what it was, and gave it a name: "Tort Deform."

The system continued to break down, and the gnomes' calls for change became louder and more insistent. The raging dispute caused two important things to become lost in the debris of rhetoric.

The first was that underlying every grievance was a citizen who had suffered a very substantial injury because of another's negligence. The second was the concept of fairness. In the original system, if someone was found to be guilty of negligence, they were required to pay reparations. They were punished for being negligent. But the rhetoric had twisted the debate to focus on whether the victims of negligence should be punished for being victims, by the elimination of their rights, and the negligent be rewarded, by having laws granting them immunity.

The gnomes watched this metamorphosis with glee. They realized that nobody was focusing on the real issues any longer.

In all the confusion, the laws were changed. Negligent parties were absolved of being negligent. Victims lost their rights. Soon, no one bought insurance, for there were no risks left to insure against! Without insurance profits, the ULL ran massive budget deficits, and finally collapsed. Without litigation, the gnomes had no work, and starved.

The Union of Liability Leprechauns and the greedy gnomes became victims of their own evil plot, and the wonderful civil justice system in the United States of McPherson (which changed its name to the "United States of Palsgraf") was gone forever.

**Morals:**

1. **"If it ain't broke, don't fix it."**
2. **"Beware of gnomes seeking mediation."**