Why do so many cases settle at the door of the court?

As all lawyers know, a common feature of modern litigation is how opposing parties, who have already had many opportunities to find a compromise, seem to settle on the eve of trial, just when all their hard work – not to mention their hard spent legal costs – is about to find expression in front of a judge.

It's rather like building a space rocket to reach the moon but, just before lift-off, deciding to take a bus to Southend instead.

While this is frustrating for the solicitors and advocates (and no doubt irritating for the court administrators), there is one set of participants who are mightily relieved – anyone who is about to take the stand.

This is because (to stretch my analogy) witnesses are the fuel that gets burned when a litigation rocket is in flight.

They will have worked with their lawyers to prepare written statements and build a strong evidential case. These statements will be tested hard by clever men and women who are strongly motivated to undermine them.

What's more, these tests are administered in open court, most often in public, through a withering process called cross-examination.

The harsh reality of cross-examination

Not well understood, cross-examination involves the opposing side spending hours poring over witness statements word by word, line by line, and comparing them with other material such as letters, emails, diaries, social media posts and other witness statements, all the while hunting avidly for anything that is inconsistent.

And they nearly always do find something.

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In fact, where an inconsistency can't be found, there is a high possibility evidence was fabricated or concealed. To a trained advocate this is much more damning than the occasional evidential infelicity.

Any inconsistencies will be listed by the opposing lawyer, who is doing their best to predict the answers to their questions about them (as the rubric states, "never ask a question to which you do not know the answer"). As a result, the poor witness can be herded into an evidential corner, exposed as a liar or an idiot, discredited in the eyes of the judge and humiliated in the eyes of those watching.

Who would not choose to avoid such a fate if they could?

What price a change of heart?

Is it stage fright that causes so many cases to settle so late in the day?

Or does the awful prospect of cross-examination make an offer that previously seemed unreasonable suddenly seem rather attractive?

Whichever, the outcome is the same: a total, and wholly avoidable, waste of time, energy and money.

How you can protect both your dignity and your purse and still settle your case

You can save time, money and avoid public humiliation when you negotiate early, with your eyes open.

Because in mediation, the parties don't have to prove their cases.

They simply have to assert them convincingly.

These assertions will be tested thoroughly by the parties themselves, with the help of an impartial mediator. It's amazing how often this informal and private process helps parties see the real merits of their case.

The insight mediation provides generates momentum toward settlement, which is why around 80% of mediations do reach settlement.

With no need for any witnesses to be burned in the process.