

trustmediation

~ not-for-profit dispute resolution ~

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Personal Injury Mediation: what is coming down the track and when will it hit me?

(or will the mediation “no-go” areas will be continue to survive?)

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From 1999 to 2007 PI practitioners could risk ignoring ADR and mediation without much real chance of being hurt by costs sanctions. In December the PIBULJ article “A review of developments in personal injury mediation and mediation economics” began with the statement: “Mediation has not generally had a successful track record with personal injury practitioners and insurers.” This article will spell out how and why things are starting to change and what PI practitioners might do about it.

During 2007 several organisations whose job it is to develop mediation took a look at how mediation was faring and decided that it was time to step up a gear. This resulted in the Civil Justice Council’s ADR Committee (CJC), the Civil Mediation Council (CMC) and the Ministry of Justice (MoJ) holding a think tank meeting at Cobham in Surrey. Forty stakeholders attended and these included members of the judiciary, ADR providers lawyers and representatives of the MoJ. This was not a low-powered event: the members of the judiciary included the Master of the Rolls, Head of Civil Justice and Lord Justice Moore-Bick, the Deputy Head of Civil Justice, who together head the Civil

Procedure Rule Committee.

A number of discussion papers were debated and a range of areas for reform and further study were identified.

These included:

- (1) Preparing a “Mediation Code”. This might, if adopted, have similar standing to the Rehabilitation Code. It would set out best practice and guide parties and their lawyers on when and how to use mediation.
- (2) Examining whether and how the CPR in relation to mediation might be strengthened. There was discussion on whether existing rules could be utilised more effectively – perhaps by formalising pre-action obligations by way of a mediation ‘declaration’ by each party at the time when proceedings were commenced. (This might be along the lines: I have not yet mediated the claim because further medical evidence is required, but I will be prepared to consider mediation once the further report is available). A number of different options regarding the CPR were considered; these were modified during the discussion and are to be developed further with a view to consultation.
- (3) A review of mediation awareness training for lawyers, those involved with advising
 - parties about options for dispute resolution and judges and
 - mandatory training requirements at all levels (undergraduate, professional training and continuing professional development).

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It was recognised that some training is available, and some at a high level. Given, however, the viewpoint of the MoJ and the courts that settling cases by mediation is now part of mainstream of dispute resolution, it was felt that training should be more extensive than is sometimes available and should perhaps form a mandatory, not optional, component in training courses.

The Conference resolved that the Proportionate Dispute Resolution Team of the MoJ, the CJC and the CMC work together, with important input from the ADR Committees of the Law Society and the Bar Council, in pursuing an agreed programme of activity arising from the Conference. That activity will probably involve putting proposals forward for consultation and then forwarding them for consideration by the Civil Justice Council and the Rule Committee.

Are we likely to see a step change in the use of mediation? The writer's view is that some of the possible reforms are likely to relate to the mediation "no-go" areas that currently exist. One example of a no-go area can be demonstrated by the National Mediation Helpline statistics. These, apparently, demonstrate that only a quarter of courts are currently referring cases to the Helpline. Another example is personal injury work generally. The article in PIBULJ, December 2007, "A review of developments in personal injury mediation and mediation economics" cited Professor Genn's evidence that there was an "overwhelming tendency" for personal injury lawyers to object to mediation.

So, if changes are coming down the track, what steps should practitioners take, apart from the obvious one of becoming familiar with the use of ADR and mediation? The wait and see option might be tempting, but, quite apart from not taking the opportunity to use mediation to settle cases, it would be making the dangerous assumption that ignoring mediation was without risk. This is not the case. See, for example, the new conduct rules:

Solicitors' Code of Conduct 2007

Rule 2

2.02 Client care

(1) You must:

- (a) identify clearly the client's objectives in relation to the work to be done for the client;
- (b) **give the client a clear explanation of the issues involved and the options available** to the client;

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Guidance on the new Code includes the following:

Guidance to rule 2 – Client relations

When considering the options available to the client (2.02(1)(b)), if the matter relates to a dispute between your client and a third party, you should discuss whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes. There may be costs sanctions if a party refuses ADR - see *Halsey v Milton Keynes NHS Trust and Steel and Joy* [2004] EWCA (Civ) 576. More information may be obtained from the Law Society's Practice Advice Service.

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Further, with reference to the costs sanctions referred to in the box above, some solicitors and insurers are now taking proactive steps to simultaneously suggest mediation and create a costs risk for the opponent who unreasonably refuses. A model of such a letter appears below. A refusal of such a suggestion which states the *Halsey* reasons for refusing to mediate will negate or at least reduce any costs risk. Anything less runs the risk of a sanction. A more positive viewpoint is that use of such a letter might lead to either successful settlement negotiations or a successful mediation; it will, at least, pose a costs risk to the other side. The switched on pi litigator will be giving some thought to these issues as the use of mediation in this jurisdiction continues to develop.

Tim Wallis

Tim Wallis, mediator and solicitor, is chair of the ADR Committee of the Civil Justice Council, a member of the Civil Mediation Council, a director of Trust Mediation Limited, which specialises in personal injury mediation, and a director of Expedite Resolution Limited, which both specialises in mediation in the insurance and commercial sectors and offers "how to make best of use mediation" training services.

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DRAFT MODEL MEDIATION OFFER LETTER*

Dear Sirs,

Claimant's Name v Defendant's Name Mediation Invitation - Without Prejudice Save As To Costs

Further to this matter, and the recent developments in this claim, we believe that we are now in a position to settle this claim.

We propose to do so through mediation which is certainly proportionate and offers, in our view, the best opportunity for all concerned to see this case independently scrutinised and reality-tested in circumstances where a neutral third party will benefit from our mutual consideration of the issues.

We believe that mediation is often more effective than a simple joint settlement meeting, especially where the mediator is independent, knowledgeable and skilled in the issues. Mediation is then effective, economic, and swift. In our view, this is an obvious case for mediation and we would be glad to enter into it with an open mind. We propose, therefore, that we jointly appoint a mediator through [ADR provider].

You will know that at a mediation no witnesses or experts are required, you do not need to be represented through counsel, and there are no preconditions – save that everything that takes place there is confidential and without prejudice. Our client would attend with full authority to settle and an open mind.

As to location - we would suggest either of our offices. Alternatively we understand that [suggest suitable rooms that may be hired as a neutral mediation suite] .

As to dates - we have in mind:

- (a)
- (b)
- (c)

If these are unsuitable then we would be glad to consider alternatives.

The time estimate is [three to four hours / as appropriate]. We would agree to bear half the costs of the mediation up front on the basis that they (and the legal costs of the mediation) are recoverable costs and disbursements subject to CPR Part 36 rules. We understand that some ADR providers may offer a fixed mediation fee which can be less than half the cost of a CMC.

In inviting you to mediate, we have in mind the principles espoused by Ward LJ in *Burchell v Bullard & others* [2005] EWCA Civ 358 and recently in *Egan v Motor Services (Bath)* [2007] EWCA Civ 1002 as well as the relevant paragraphs in the White Book on conduct in CPR Parts 44.3 and 44.5.

The courts are strong supporters of mediation and we are sure that the costs judge would see the point we would make if you refuse to engage in the process. We hope that will not be necessary. We consider that our underlying offer is sensible and should lead to a rapid resolution of this case. We look forward to hearing from you as soon as possible.

Yours faithfully,

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