

trustmediation

~ not-for-profit dispute resolution ~

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End of the war?

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Mediation has not been embraced by personal injury lawyers in the past, but their hostile attitude is changing. Jon Robins reports

'We find ourselves right in the middle of a major war,' declared Martin Cockx, partner at the Manchester claimant firm Amelans, in a 2002 interview. He was talking after his firm scored a number of victorious battles with defendant insurers (*Callery v Gray*, *Sarwar v Alam etc*) and was clearly relishing the fight.

In the same interview, co-partner Andrew Twambley drew on the Hollywood blockbuster 'Gladiator' to illustrate the scale of the fight. He cast his firm as the Russell Crowe character Maximus and the insurance industry was – yes, you guessed it – the evil Roman empire.

There is a clue in the militaristic rhetoric as to why mediation has failed to become part of the personal injury (PI) legal landscape, while it has taken off elsewhere. Gladiators do not go in for alternative dispute resolution (ADR), not if they can have a good old punch-up in court. In fact, the pre-*Callery* mediation famously only made matters worse.

It is a sign of the times that Amelans is backing a new initiative called Trust Mediation, chaired by the former vice-president of the Court of Appeal, Sir Henry Brooke, to promote mediation exclusively in the area of PI. Has Amelans gone soft? 'There is a time for fighting and a time for talking,' replies Mr Cockx, who, as well as being director of the PI marketing network Injury Lawyers 4U, is a volunteer director and mediator with Trust Mediation.

He says that he has already been accused by one of his friends of 'selling out' by backing ADR. 'I said to him: "Have you tried mediation?". Has a lawyer ever had a client who has gone to trial, won, and turned around outside of court and said: "Thanks for your help that was great; I have just been called a liar by a young barrister for the last three hours and I really enjoyed it." He points out that the so-called costs war has died down. "There was a time when we were going to detailed assessment perhaps 12 times a week, but now it is twice a month,' he says. "The whole trial process is an immense strain on the clients and, from a solicitor's point of view, if you are a conditional fee practice, the financial risks are huge. Mediation is a win-win situation.'

There is 'absolutely no reason in principle why mediation should not be as successful in PI cases as in other forms of litigation,' says Sir Henry. He provided leading judgment in the 2002 case of *Dunnett v Railtrack*, where the Court of Appeal famously used, for the first time, its powers under the Civil Procedure Rules to deprive a successful party of its costs for failing to mediate.

But why have PI lawyers (both claimants and defendants) failed to embrace mediation? 'There is resistance in the market,' Sir Henry says. 'It is a very well-established market that has always dealt with the negotiation of claims in a particular way and they are reluctant to go further. It's all to do with a human resistance to change.'

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Trust Mediation is a not-for-profit organisation, whose directors are also Tim Wallis, former president of the Forum of Insurance Lawyers (FOIL) and chairman of the Civil Justice Council's ADR committee, and Frances McCarthy, former president of the Association of Personal Injury Lawyers (APIL) and ex-Civil Justice Council member. The initiative reflects a pan-industry perspective, and a July meeting before its launch brought together APIL and FOIL members as well as liability, motor and legal expenses insurers such as Abbey Legal Protection, Axa and QBE Insurance (Europe). The Motor Insurers Bureau and claims administrators Broker Direct have also been involved in talks.

In the background is Professor Dame Hazel Genn's recent research (*Twisting Arms*) which looked at the use of mediation schemes in London County Court in 2004/5, featuring automatic referral on a random basis (hence 'twisting arms'). There was, effectively, a court direction to mediate, subject to a right to object by demonstrating that mediation would be inappropriate for a particular case.

So did automatic referral to mediation work? Not really, Mr Wallis reports. One or both parties objected in more than eight out of 10 cases. The problem was the somewhat ambivalent ruling in *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576, where the Court of Appeal said lawyers should 'now routinely consider with their clients whether their disputes are suitable for ADR'.

'The overall impact on mediation was decidedly negative,' says Mr Wallis. 'The judgment contained a number of caveats about mediation, one of which was described by Professor Genn as a "killer punch". Mediation may be a "good thing" but you don't have to do it, [that] seemed to be the court's message.'

PI lawyers came in for flak in the Genn report. 'A stark and persistent finding... was the overwhelming tendency of personal injury cases to object to mediation,' she found. 'The lack of interest in mediation on the part of defendant insurance companies is intriguing, given the potential for reducing overall costs through mediation.'

Mr Wallis believes that the time is right for a more conciliatory approach to disputes. 'We've had the cost war that led to an adversarial approach to be taken between some claimant solicitors and insurers which could be described as hostile from time to time. But the other aspect is that there have been various significant settlements in the cost war which came about through mediation under the auspices of the CJC, where Frances McCarthy and I carried out mediation between the insurers and the claimant lawyers.'

He adds that there are now three agreements which have been incorporated in the Civil Procedure Rules, such as predictable costs for road traffic cases. 'The interesting thing that has happened is that senior people on the insurance side and on the claimant solicitor side have personally been involved where face-to-face meetings had reached an impasse but mediation had achieved settlements which were certainly more creative than anything a court could have done,' he says. 'Without that, it would be really difficult to see Trust Mediation being formed.'

So what cases would be appropriate under the Trust Mediation scheme? The answer to that lies in the fee structure, Mr Wallis replies. 'Compared to QCs who do international big-ticket mediation for QC-style fees, the fee structure for our first offering is £1,000 plus £150 administration.' He says that it is a price which puts them 'not at the lower end of the fast-track but certainly at the higher end of the fast-track and multi-track'. He also reckons that there is 'absolutely no reason' why costs disputes cannot be mediated

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in this way.

Sir Henry points out that Trust Mediation will be running as an 18-month pilot, concentrating on cases above £25,000 in value. What about low-value claims? 'We're taking it one step at a time. It's early days,' he adds.

There are a number of commercial operators already active. Maurice Nichols is a mediator for the Centre for Effective Dispute Resolution (CEDR) who specialises in PI cases. 'It does feel like early days and the up-take so far has been surprisingly small,' he reports. At what point is there enough value in a case for it to become worthwhile mediating? 'It is difficult to be prescriptive but certainly over £25,000 for traditional mediations.' However, he adds that he is talking about 'traditional mediation where you need three rooms and both parties to commit their time for a whole day and the involvement of the mediator'.

He says: 'Even if you get a mediator relatively cheaply, which you can, you are taking an insurance claims-handler away from his office for a complete day and there is a cost over and above that of the mediator.' However, he adds that CEDR is developing telephone mediation schemes where parties can mediate via videoconferencing.

The claim resolution specialist InterResolve runs a fixed-fee scheme for bodily injury claims which offers fixed legal, medical and mediation costs for claims. 'One of the main problems for mediation is that bulk of claims comprises small claims and there has never been a mediation scheme for claims where the cost of mediation is roughly equal to the value of claims. That's why there has been a tiny take-up. We've created a very low-cost, high-volume approach to mediation, and it has been very successful.' So far, 80 firms have signed up to its Law Alliance, mainly small practices, although there have been larger players such as Mr Wallis's old firm Crutes which have joined up.

In October, InterResolve launched a telephone mediation service for insurers to resolve PI claims over a year old, after concluding a pilot scheme with AXA. Under the pilot, the average cost of telephone mediation was £175 per party with a settlement rate of 88%. Typically, mediations took less than one hour.

Mr Cockx reckons the higher-value claims are a very small minority of the profession's claims. 'If you ask anybody, they would probably say that between 1% and 2% cases would exceed £50,000.' However, he quickly adds: 'Even if cases are worth £5,000 to £10,000, and it is just over £1,000 to successfully mediate cases like that, everybody is saying that the legal costs to conclude an action are 43 pence in the pound. Frankly, it does not take long to run up a bill of over £1,000.'

Jon Robins is a freelance journalist