

trustmediation

~ not-for-profit dispute resolution ~

Tel: 0207 353 3237 Fax: 0207 583 9521

www.trustmediation.org.uk info@trustmediation.org.uk



Trust Mediation Limited
218 Strand
London
WC2R 1AT

Gazette

Mediation is not a quick fix

Thursday 28 June 2007

While backing mediation for personal injury claims, Terry Renouf says it may not suit all cases and mandatory referral is not the answer

Mediation works. This is the unequivocal message from this firm, from other defendant practitioners, and from our insurer clients.

Our collective experience is that the overwhelming majority of mediated cases do settle. It is therefore with some disappointment that I read the article suggesting defendant personal injury lawyers are to blame for 'defeating mediation', based on research carried out for the Ministry of Justice (MoJ) by Professor Dame Hazel Genn (see [2007] Gazette, 31 May, 1).

There is further disappointment for supporters of mediation in that the MoJ consultation paper about reforming the claims process fails to mention either mediation or alternative dispute resolution anywhere within the proposed new pre-action process for resolving injury claims.

The recent mediation research itself makes depressing reading, on many levels, for the advocates of mediation: first, the very high rates of objection to mediation (both parties objecting in 49% of cases, claimants in 7% and defendants in 20%); second, the decline in successful mediations to less than 40% of cases referred; third, the concerns among all parties about the costs of preparing for and attending a mediation; and fourth, the delay in resolving cases referred to mediation.

Hence – and not surprisingly – we see a conclusion in the report raising serious doubts as a matter of policy about the value of the automatic referral to mediation of personal injury cases.

Yet while this appears a stark and pessimistic conclusion, the detail of the report is perhaps more positive. It is worth noting that at those case management conferences that followed a rejection of mediation, the district judge made orders accepting that the case was not suitable for mediation in three-quarters of instances. This would seem to be a very high rate of rejections but on closer examination the response of most practitioners – whether claimant or defendant – was not an outright 'no' but generally a 'maybe, but not yet'.

And perhaps the most pertinent finding in the report is that 'the explanation for success or failure at mediation is likely to be found in the individual characteristics of the case, or the parties, or the mediator or some complicated mix of these factors'.

Quite – it depends on the case and I suggest that an automatic referral to mediation was always unlikely to yield the positive results that are generally seen where mediation takes place with agreement of the parties.

Although it is undoubtedly the case that there are cultural issues surrounding mediation in personal injury cases, proportionate dispute resolution should be the aim of every legal representative, whether claimant or defendant.

Registered Office 218 Strand
London WC2R 1AT
Company Number 6375267
(England and Wales)
Chairman Sir Henry Brooke

*trust*mediation

~ not-for-profit dispute resolution ~

Tel: 0207 353 3237 Fax: 0207 583 9521

www.trustmediation.org.uk info@trustmediation.org.uk



Trust Mediation Limited
218 Strand
London
WC2R 1AT

Mediation is not a quick fix and will not suit every case. Within the context of litigated claims, I would suggest that the better course of action would be for the courts to consider a 'mediation indicator' checklist, rather than to impose a mandatory referral process.

The profession should work together to provide proportionate and cost-effective dispute resolution services to clients, including negotiation, alternative disputes resolution and mediation, or litigation where required. The polarised approach suggested in the article is simply unhelpful at a time when claims processes are under review and when the regulation of the profession as a whole is undergoing fundamental changes.

So let us agree that mediation works in appropriate cases – and let's set about identifying them and resolving them quickly in all our clients' best interests.

Terry Renouf is national senior partner of Berrymans Lace Mawer