

trustmediation

~ not-for-profit dispute resolution ~

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Research¹ released by the Ministry of Justice carried out by Dame Hazel Genn and others evaluated two Court based mediation programmes which were operated by the Central London County Court. The first provided insight into the uptake of an early automatic referral to mediation which was made on a random basis by the Court and the second followed a voluntary mediation scheme which has been operating in the Court for over 10 years. Some of the findings of the report have attracted debate. In particular, the report said “the lack of interest in mediation on the part of Defendant insurance companies is intriguing, given the potential for reducing overall costs through mediation. Unless the defence side of the personal injury equation changes its strategy, it is hard to see how a large proportion of the current case load of the County Courts can be encouraged to embrace mediation”. Is this really fair?

One aspect of the research that is disappointing is that the authors could find no significant effect of mediation on a case duration, i.e. there was no strong evidence to suggest that a case that was referred to mediation would settle any quicker than a case that was not referred. Indeed, one clear benefit of mediation to parties involved in the resolution of personal injury claims would be if mediation can be seen to speed up the settlement process. Claimants would then receive their damages earlier; solicitors would receive their fees earlier; and the Defendants and insurers would reduce the life cycle of the claim which should result in an overall claim saving.

The underlying difficulty with Court based mediation schemes is that by the time the parties are required to look at the issue by the Court, the parties are too far down the road in terms of time spent on the case and the costs spent on the case for the real benefits of mediation to come into play. Indeed, the Research indicates that mediation can be seen as an additional layer of costs, increasing legal costs by £1,000 to £2,000. It is perhaps not surprising therefore that in many personal injury cases the parties object to mediation or settle the cases before replying to the Courts on the question of suitability.

The anticipated costs of mediation in lower value cases is a cause for concern for two reasons. First, many lower value personal injury cases will settle in any event without the parties having to pay the costs attributable to mediation. Mediating will simply add another unwelcome layer of cost.

Secondly, whilst it has to be acknowledged that the various County Court based mediations schemes represent extremely good value for the costs of mediator's fees, mediations still require preparation and attendance on the day. The costs of mediation are not a party and party item of recoverable cost. Parties usually agree to bear their own costs of the mediation. If mediation is successful the question of the Claimant's costs can be one aspect of the negotiated settlement on the day. However, if mediation is unsuccessful and the case goes on to be settled by negotiation then the Claimant's costs of the mediation are not recoverable from the Defendant unless the Defendant agrees. In a low value case there is a risk that costs effectively come out of the Claimant's damages and so that in itself can be prohibitive.

It is not enough for mediation providers or indeed the Courts to seek to incentivise the parties involved in personal injury disputes by reference to the potential to save both Court costs and trial costs. On the basis that the vast majority of personal injury cases (in contrast with non-personal injury cases) are already settled by negotiation and very few reach a resolution in Court, it is perhaps therefore not surprising that insurers and

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their lawyers need to be persuaded of a greater role for mediation to play in the resolution of personal injury claims.

In the current climate where we have significant emphasis on pre-action conduct by reference to protocols with the rules encouraging the parties to settle and with litigation being regarded as very much the last resort then clearly mediation should be considered at the stage when negotiations have broken down but before proceedings are issued. If the current mediation process does not embrace the concept of taking place at a much earlier stage in the settlement process so that clear benefits in terms of earlier case resolution and saving on legal costs then it should be changed.

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