



A review of Trust Mediation Limited, developments in personal injury mediation and mediation economics.

Trust Mediation Limited is a neutral not-for-profit company, dedicated to providing mediation and other ADR services for the personal injury sector. This article will look at this new company, who is behind it, the issue of mediation being used (or not) for personal injury claims and the economics of mediation. The vast majority of claims will be settled by routine negotiation. Where that does not happen, for some reason, it is starting to become accepted that mediation has a number of different benefits to offer.

Trust Mediation was set up earlier this year by Chairman and mediator Sir Henry Brooke, who recently retired as Vice President of the Court of Appeal, and five other mediators who are solicitors or barristers by training. The company's base is at 218 Strand, London, a mediation centre located immediately opposite the Royal Courts of Justice.

Launching the company Sir Henry said:

"This organisation is unique - it draws on the best ideas of established players and then takes them to the next level. The directors and members of Trust Mediation are highly committed to mediation, they are highly experienced volunteers who will not be paid for their board duties, and the company provides notable personal injury mediators nationally for a fixed modest fee, using mediation suites in more than a dozen key locations. Frankly, this is exactly what mediation should be about - trust, neutrality, expertise, availability and affordability."

Trust Mediation is running a pilot mediation scheme. This is designed to demonstrate that settling personal injury claims by mediation

- works well
- is cost effective (£1,000 for a 4 hour mediation, £150 admin fee, VAT where applicable, no extras)
- works for the benefit of claimants, lawyers, insurers and funders.

An Advisory Council, with representatives from all quarters of personal injury business, will have the objective of ensuring that Trust Mediation is customer driven. They will be asked to ensure that the company provides the type and quality of mediation required by personal injury claimants and those who manage personal injury claims, and that it has a pricing structure that reflects the market cost of mediators and the administration of mediation (at cost). Trust Mediation deals solely with personal injury claims.

By and large, mediation has not previously had a successful track record with personal injury practitioners and insurers. "Twisting arms: court referred and court linked mediation under judicial pressure", is a mediation evaluation report by Professor Dame Hazel Genn. The following findings appeared in the report:

- "A stark and persistent finding... was the overwhelming tendency of personal injury cases to object to mediation...."
- "The lack of interest in mediation on the part of defendant insurance companies is intriguing, given the potential for reducing overall costs through mediation."

In contrast to this, however, there are indicators to suggest that attitudes to mediation

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in this sector are now changing.

Indicator 1 – continuing senior judicial approval of mediation.

The following remarks were recently made by Ward LJ in referred to Egan v Motor Services (Bath) Ltd :

“In so many cases . . . , the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often.”

The Master of the Rolls endorsed these words at a Law Society conference in October, adding:

“I agree and, as we sometimes say in the Court of Appeal, there is nothing I can usefully add. “

Indicator 2 – District Judges, as well as senior members of the judiciary, are now using costs sanctions where a party has unreasonably refused to mediate.

An example is RC Skinner v PRs of Ian Smythe (deceased) and Parkfield South West Ltd (2006) LTL 22/12/2006. Here, District Judge Harvey in Exeter County Court, noted that the defendant in a personal injury claim had refused to mediate. In making no order for costs against the claimant (who had continued the action against a defendant director after a co-defendant limited company had conceded liability) he took into account all the circumstances including concerns about the defendants’ ability to pay and a refusal to mediate.

Indicator 3 – the Pre Action Protocol

The Pre-Action Protocols have been strengthened and the PI Protocol says the parties may be required to provide evidence that alternative means of resolving their dispute (this includes mediation) were considered. It goes on

“... litigation should be a last resort, and ...claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.”

Indicator 4 – the experience of practitioners abroad – and in this jurisdiction

Those who have studied the practice of mediation abroad, in countries such as Australia, Canada and some states in the USA, report that it is frequently and successfully used in personal injury claims. The legal systems are different but the dynamics of settling claims, and the benefits to all of settling sooner, are very similar. In this jurisdiction lawyer mediators such as Tony Allen, a Director at CEDR, and Paul Hughes, Partner at Crutes Law Firm, can testify to the successful use of mediation in numerous personal injury claims.

Indicator 5 – other developments in the mediation field relating to personal injury.

The mediators behind Trust Mediation are not the only people to reach the view that

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the time is now right to make more mediation services available in this field. InterResolve is operating its Bodily Injury Claims Scheme and is also experimenting with telephone mediation. CEDR are also trying telephone mediation, which is seen to have possible applications in lower value cases. Further, a number of insurers, such as Axa and Allianz, are running mediation pilots and training schemes.

When looking at what works, and what does not, in the personal injury sector it is impossible to avoid looking at the economics. Mediation may be good for the parties to the claim, but mediation will only work if the economics are right all round.

The general benefits of mediation, such as the potential for earlier settlement, the ability to break impasse and provide extra legal elements such as an apology, are well understood and do not need amplification. In the personal injury field, if one looks more closely at the economics, there is the potential for additional economic benefits over and above those usually quoted.

On the claimant side, the key potential economic benefit might be described as "Managing Partner delight". Mediation can be used as a tool to secure early settlement. The prospect of increased turnover of claims by early settlement, reduced "lock-up", improved cash flow, and, consequently, improved profitability might be enough to attract the attention of many managing partners. They might question whether their firms have the necessary skills base and whether they are, in fact, looking closely enough at the achievability of these objectives.

Are such economic benefits really achievable? Consider the following examples.

Preparation costs: preparing for mediation is usually less expensive than preparing for trial or even for proceedings. One does not need a trial bundle to mediate. For mediation all that is needed (as with any other kind of negotiated settlement) is sufficient information to make a business decision.

Cost bonus arising from litigation avoidance: Commencing proceedings usually means a step increase in both sides' costs. Claimants who appreciate this settlement opportunity can, in compliance with the Pre Action Protocols, seek to take advantage of it. In some cases a defendant might prefer to move towards its upper bracket on damages as a "peace premium" to avoid proceedings.

Negotiating costs: a potential cash flow bonus arises from the fact it is usually necessary for those attending a mediation to have full information available about cost and disbursements incurred to date. There is no reason why, when settlement is agreed, costs cannot be agreed at the same time on terms that they are to be paid forthwith.

From the defendants' economic perspective, any approach which can reduce life cycle without a disproportionate increase in expense, will usually find favour.

Another factor, closely allied to profitability, is worthy of consideration: risk management. Mediation is a risk management tool that provides the ability for the claimant's solicitor to explore (and, where appropriate, avoid) the risk posed by litigation/trial. The organisation funding the claim, be that an insurer or a union, may be particularly interested in using mediation in this way.

In conclusion, a commercial approach to profitable personal injury work demands the

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ability to obtain and deploy all of the available skills and methods available. Trust Mediation is one of the organisations now saying that mediation is available in the personal injury sector, is affordable and, in the right cases, has a lot to offer.

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Tim is a mediator and solicitor, and a founding director of Trust Mediation Limited. He is also chair of the ADR Committee of the Civil Justice Council and a director of Expedite Resolution Limited, a company offering mediation and "how to use mediation" training services in the insurance and commercial sectors.

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