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MEDIATION IN PERSONAL INJURY DISPUTES

by Judith Kelbie and Jonathan Dingle¹

It is sometimes said that mediation is a modern phenomenon but any study of history suggests that from the earliest times the role of a neutral third party as a conciliator rather than as an adjudicator has been recognised. This is not an article to dwell too much on the past but the fact that mediation in its varied forms has a long and honourable history reinforces the view that it is an invaluable weapon with which to hold back the onward march of litigation.

Professor Derek Roebuck has written a short paper entitled the "*Myth of Modern Mediation*" in which he traces in outline the use of mediation through many centuries and in many parts of the world. In England there were at least two occasions when, if events had taken a different turn, mediation might have assumed a prominent role much earlier than has in fact been the case.

At the time of the Civil War in England that resulted in the death of King Charles I in 1649 serious consideration was given to abolishing the common law courts and replacing them with mediators to deal with civil disputes. Every parish would choose three men to act for a year as peacemakers or mediators. But the Commonwealth of Oliver Cromwell lasted only a few years and the King's courts resumed their place when Charles II came back to England in the summer of 1660.

The second example is two centuries on: in the mid-nineteenth century the reform of the legal system was being widely discussed in England and it was proposed that local courts should be established to deal with small claims. One of the leaders of the movement for reform was Lord Brougham. He suggested that the judges of these courts should conduct mediations and arbitrations as well as trials and he pressed this idea as hard as he could. But the idea was rejected and the County Courts Act 1846 was passed without any such provision.

Just over 160 years later, the tide has finally turned. There is a wide consensus in many parts of the world that mediation should be supported and encouraged as a sensible and cost-effective alternative to litigation. Litigation is in general slow and expensive. The powers of a court, though at first sight wide and impressive, are in practice quite limited. An order to pay a sum of money or the refusal of such an order is the usual outcome of contested litigation. The process being adversarial can destroy relationships and bring lasting bitterness. Moreover the decision of a court or other tribunal, including an arbitral tribunal, may often have to be in black and white terms and may not adequately reflect the shades of grey that a fair and just appraisal of the rival merits of the parties requires.

The value of mediation

Mediation brings a number of additional benefits if it succeeds - as it does on over 77% of occasions according to the latest surveys conducted by the National Mediation Helpline and leading providers. It is much more flexible than litigation and it is simpler and cheaper and quicker. Solutions can be adopted that no court could order or might even think about. But perhaps the single characteristic that stands out as the core value of mediation is that it returns control to the individual and enables the individual to look to the future rather than to the past.

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Personal injury practitioners will know that almost all litigation is concerned with the evaluation of facts or evidence within the confines of legal structures of past events. Rights and duties, and breaches of rights and duties, are examined and tested by reference to legal norms and the result of this examination is determined by the court or tribunal as a judgment about the past. Mediation, though it takes place in the context of past events, can and should (when properly conducted) seek solutions that the parties themselves can choose and that, in many cases, will enable the parties to work together in the future.

How so in personal injury litigation? In many employers' liability cases there are many options - rarely sought in conventional litigation - to involve the employer in the provision of future solutions. Even in road traffic accident cases it is surprising what insurers can offer at little cost to themselves when imaginatively discussed. Examples seen in mediations conducted recently by the authors range from private healthcare provision to motability, and from car insurance to mortgage guarantees.

The role of mediation

Mediation has now become a recognised profession. Those who practise as mediators have an increasingly important part to play in resolving disputes of all kinds and thus relieving some of the tensions that exist in society in the modern complex world. As Lord Justice Sir Brian Neill said recently (September 2007) at the European Mediation Conference in Vienna:

"As I see it mediation has no obvious boundaries. It can be employed to assist with disputes at the very bottom of the scale or in disputes between countries. Wherever one looks one can see that people who are thinking about the future are considering new areas where mediation can provide a civilised method of dispute resolution."

Indeed perhaps the most dramatic example is in the playground - possibly at a school near you. The authors have been impressed by the interest in mediation shown by the young and by the rise of peer mediation in schools to resolve playground conflict. Children as young as six, seven, or eight are being trained to take the role of mediators to resolve conflict.

If mediation can be readily accepted and enthusiastically adopted by school children - why is it not embraced by personal injury litigators?

In her recent (July 2007) research entitled "Twisting Arms" Dame Professor Hazel Genn suggested that personal injury lawyers had conflicting interests. Conditional Fee Agreements, the desire for full litigation fees, and a lack of time obstructed their enthusiasm for the obvious benefits of mediation.

It was suggested in the discussion of her report that there was an unwillingness too to expose clients to mediation for fear of being sued for under-settlement or settling without sufficient information. But perhaps the strongest reason for personal injury's failure to embrace mediation is ignorance of procedures, finding a mediator and cash-flow benefits.

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The function of mediation

To be effective mediation must satisfy three key criteria:

It must be affordable – the cost must be proportionate to the amount in dispute. One of the weaknesses of much conventional litigation is that the costs grow so that they overshadow what is in dispute. In England and Wales the National Mediation Helpline has been established by the joint efforts of the Civil Mediation Council and the Ministry of Justice. It has made mediation affordable to an increasing number of disputants through a fixed price menu.

But the scheme is not free from problems because the level of remuneration available to the mediators is very low. Many people are troubled by the fact that, though mediation provides a most valuable means of access to justice for people of limited means and is regarded as being in the public interest, to date the funds provided by the State in England to support work in this field are very limited.

The second criterion is the availability of mediators. In major disputes leading mediators can travel to provide the parties with benefit of their expertise. But in the great volume of lesser disputes the availability of trained mediators in the locality of the parties is imperative.

This leads to the third criterion – the ability of the mediator. The success of mediation as a process depends in part on the willingness of the parties to engage in the process but also on the quality of the mediator. Mediators can be compared to singers because the aim of both is towards the attainment of harmony. Just as singers must try to develop empathy for their roles so must mediators strive to understand the parties' needs and perspectives. Lilli Lehman in her book on how to sing said that the first duty of a teacher of singing is to teach how to listen. It is the first duty of a mediator to learn how to listen. It is by listening that one may be able to detect the notes that though at first discordant may be woven into a harmonious whole.

It is hard to improve on the words of the seventeenth century French jurist Alexandre de la Roche who was a great admirer of the skills of Saint Augustine as a mediator and who wrote:

"...to be a good mediator you need more than anything patience, common sense, an appropriate manner, and goodwill. You must make yourself liked by both parties and gain credibility in their minds."

The Civil Mediation Council in the United Kingdom has been taking great strides to set standards for mediators. Accreditation has been in place for organisations for two years and there is a cohort of experienced, independent, and professional personal injury mediators offering their services at rates well below the £2,000 to £3,000 per day sought by some organisations.

Typically personal injury mediators of quality are available for £1,000 to £1,250 plus VAT including travel and preparation across the country. Good ones will willingly discuss their approach to mediation openly and provide a comprehensive CV citing the firms that have used them.

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The future

Mediation is now an unstoppable force. While there may not be a sudden surge in mediation in the immediate future, the Civil Mediation Council has set an annual 15% year on year growth as its target for the next five years. This would result in a doubling of the number of mediations by the end of that period.

As part of that process a number of groups now specialise in personal injury mediation. The latest, launched in September 2007, is the not-for-profit organisation "Trust Mediation" set up by Sir Henry Brooke, the charismatic former Vice President of the Court of Appeal who delivered the leading judgment in *Dunnett v Railtrack plc*.

In launching this group in which offers specialist personal injury mediators to the market place at cost, Sir Henry said that it had been created with through meetings with APIL, the Bar Council, Injury Lawyers 4U, the Law Society, and FOIL. They discussed better dispute resolution with liability and legal expenses insurers such as Abbey, AIG, AXA, 80E, QBE and Zurich as well as the Ministry of Justice and the Civil Mediation Council. The result was

"a not-for-profit organisation whose members are almost evangelical in their commitment to mediation. Its directors give their time for free, and it provides leading personal injury mediators nationally for a fixed modest fee, using mediation suites in more than a dozen locations."

"Frankly," added Sir Henry "this is exactly what mediation should be about - trust, neutrality, expertise, availability, and affordability".

Whether this scheme or others like it come to change the way the personal injury profession think remains to be seen. The benefits to clients from early non-contentious settlements should be clear. The benefits to Claimant lawyers from happier clients and improved cash-flow are obvious and ATE insurers will soon be asking questions if they remain on risk when mediation ought to have been offered - or accepted.

Panel solicitors for Defendant insurers will also be asked tough questions. At least three major insurers are now rewriting their protocols to require mediation to be offered by their claims handlers or panel solicitors as part of their standard operating procedures in all but suspected fraud cases worth over the predicted new fast track limit.

With the courts increasingly imposing costs sanctions on parties who unreasonably refuse to mediate, and with rule changes likely in 2008, it will soon be as professionally negligent not to offer (or accept) mediation in all but the most certain liability and quantum cases as it is not to make a CPR Part 36 offer. Personal injury practitioners will need to respond to these changes by ensuring that they know how to offer to mediate, to engage an appropriate mediator, and to represent their client at the mediation. This may require training - in house or commercially - and if so it is likely to be a sound investment.

Changes are afoot and no personal injury professional can afford to be left behind. Cromwell's New Model Army of mediators is finally at the gates!
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