

# trustmediation

~ not-for-profit dispute resolution ~

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## **Sir Henry Brooke's talk to MASS at its AGM, Manchester on 22 November 2007**

Thank you for allowing us to talk to you for a short time today. Six of us have just launched a new non-profit making mediation service called Trust Mediation. Its mediators will be specialists. We will be concerned only with mediating personal injury and fatal accident disputes, including disputes about costs. Although there are six of us to begin with, our numbers will grow if there is a demand for the service. I have been asked to tell you why we have launched this company. Tim Wallis will then have a short question and answer session with Martin Cockx, so that Martin can tell you why as a claimants' solicitor he is such a strong believer in mediation in PI claims.

These two, and the other three – Frances McCarthy, Judith Kelbie and Jonathan Dingle - all have immense experience of PI litigation today. So far as I am concerned, I have been involved with PI litigation for over 40 years. When I was a junior at the Bar in the 1960s and the 1970s, I was usually instructed by plaintiffs' solicitors, from all over the country. Over the last 40 years I have watched a number of attempts to reform PI litigation. None of them have really worked, in the sense that if claims can't be settled early, the claimant gets less and less involved in the process, and the claims get more and more expensive to handle. Recently I watched all this in my last five years in the Court of Appeal when I was acting as a referee in the costs wars.

Mediation is now being used more and more in other types of litigation. After a slow start it is now gaining favour in PI circles – particularly with cost aware insurers. I am told, however, that PI mediation remains in the hundreds rather than the thousands per year despite a 85% success rate when the mediator is a specialist.

I am surprised by this slow take-up, both from a client and a solicitor perspective. My own experience of mediation as a way of solving disputes has been very positive. I have now conducted 25 mediations on my own since I retired from the Bench 14 months ago.

I can tell you from my direct experience that for the parties mediation is a far more satisfactory way of resolving disputes, because they are directly involved. They can understand at first hand from a third party neutral the risks of going on, and they can compare those risks with the downside of settling for less than they hoped for. When they shake hands at the end of the day, and when they thank me for helping them – nobody has kissed me yet - there is an obvious feeling of relief all round that the claim has been settled and they can get on with other things.

So claimants do like it, and some liability and ATE insurers like it. And as the Ministry of Justice is getting more and more concerned about the high cost of providing judges in courts to try disputed cases which still very often settle at the door of the court, those concerned with the administration of justice like it.

So far as the senior judiciary are concerned, Ward LJ knows a great deal about mediation. He said last month in a case called *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."*

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Chairman Sir Henry Brooke

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Very soon afterwards the Master of the Rolls, who is of course Head of Civil Justice, referred to this judgment in a lecture he was giving. He said:

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

Next week, the Civil Justice Council, the Civil Mediation Council and the men from the Ministry are going to lock forty of us up in a country house for 24 hours to discuss how mediation can be embedded more firmly in our civil justice system, so that we don't just move straight from a failed negotiation into expensive litigation. Nobody wants to make mediation compulsory, but it may well become far more difficult to turn down the suggestion of mediation if you want to recover your litigation costs in full if you win.

It is against this sort of background that we are launching Trust Mediation. It is a non-profit making company limited by guarantee. We are each putting £5,000 of our own money into it, as initial interest-free loan capital, because we believe in what we are doing. We have read all the reports on the different mediation schemes, and we have constructed a model which we hope meets most people's worries about PI mediation.

The mediators will all have a great deal of knowledge of PI practice. They will charge a fixed fee of £1,000 plus VAT for a three or four hour mediation, which will include any travelling and other expenses. There will be a fixed administration fee of £150 plus VAT, plus the fee for the venue (at cost) if the parties do not provide the venue. We will limit ourselves at the start to claims worth over £25,000, and ideally we want to mediate them between the time when the initial claim is turned down and the time when the claim gets issued. We have discussed the scheme twice with people of great experience from all sides of the PI industry, and they have liked the idea. We will now have an Advisory Council composed of the same, or similar people, which will meet at least once a quarter when we will have a very frank discussion of how things are going and will welcome everybody's views. If the idea isn't a success, we will wind it down after 15 months.