

ADR in Case Management: The Post-Churchill Landscape for Injury Litigation

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Introduction

My firm was sued by a former client for damages for professional negligence arising from a personal injury claim. This was back in the day, mid-nineties, before the Woolf reforms. As a fledgling partner (with some experience of claims for personal injury and professional negligence) I was asked to review the file. The claim was two years into proceedings and going nowhere fast. It was set to roll on for several years, a procedural quagmire. I had recently attended a mediation training course and just returned from an ADR study tour in the USA. This no doubt influenced my recommendation that we opt for the then quite new approach of mediation.

Fast forward a month to the day of the mediation. Our legal team was bolstered by senior people from my firm and the insurers, all interested to see this new concept in action. By late afternoon, this group of seniors were, not to put too fine a point on it, “hacked off”. We had started at 10am and, apart from a short opening meeting and a couple of very brief chats, we had barely seen the mediator. It was all rather tense, and I was more than a little unsure about what had seemed like a good idea. The phrase “waste of time” was not actually uttered but this was clearly the mood in the room.

The mediator finally reappeared, explaining that he had been working hard in the other room where the claimant had, eventually, changed his position. We agreed, when asked by the mediator, if we could make a marginal shift in our opening position which we had discussed with him earlier. We did so..... and a Tomlin order was signed before 5pm. As briefcases were being packed in a light-hearted atmosphere, my senior partner walked behind my chair and murmured, “That wasn't such a bad idea, was it?”.

Our post-mediation review concluded that the mediator probably spent most of his time with the claimant and his advisers in the process of reality testing.

This live experiment, together with my studies in the USA, taught me that mediation had a significant role to play in the type of claims I worked on and was a successful process which could deliver earlier settlement. These were the foundations for my decision in 2007 to quit my role as a litigation partner and become a mediator. Since then, I have mediated hundreds of personal injury and clinical negligence claims.

The purpose of this narrative is to introduce my theme for this piece: ADR will become more closely integrated into the work of those who handle personal injury and clinical negligence claims during the course of the next year. I contend that this will favour those who embrace and deploy ADR (and their clients) compared with those who follow an instinct to avoid it.

This article will start with my predictions made in 2014, outline ADR definitions and why they are important, briefly note the well reported landmark decision of *Churchill v Merthyr Tydfil CBC*¹ and the subsequent CPR changes, explore recent case law, and take a look at the new judicial template for a Churchill order—all through the lens of the personal injury and clinical negligence practitioner.

¹ *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416.

2014

In 2014² I suggested there would be a very significant move, over a 5 year period, towards more collaborative and efficient ways of dealing with claims, as the consequence of the following drivers for change:

- the impact of the Jackson reforms (namely the combined effect of proportionality, case management, cost budgeting, QOCS and DBAs), Mitchell procedural issues and the move away from the hourly rate;
- the continuing consolidation of the market and the consequent increase in competition and
- the continuing deterioration of the court service as fiscal cuts bit, the court staffing situation became more pronounced, court fees increased and judges' lists grew.

These drivers, I reasoned, would inevitably place a new commercial focus on the way claims were dealt with. Marking my own homework, over 10 years on, I would say that the fundamental analysis was broadly correct (B+), particularly in relation to clinical negligence, with NHS Resolution introducing their mediation scheme in 2016 (A), but that, in relation to personal injury work, my estimate of a 5 year time frame was too optimistic (C).

2026

As at the start of 2026, most personal injury practitioners, with some significant exceptions, have avoided or steered clear of ADR, preferring to use traditional approaches such as direct negotiation, Pt 36 or joint settlement/round table meetings. However, although I readily concede that my timing about when lawyers in this sector would adopt ADR was awry, I suggest that the “writing on the wall” about the increasing importance of ADR in civil justice generally, as outlined below, is such that ADR will soon become commonplace in this sector also.

ADR-Definitions

It may be helpful to pause here and define terms, because the language of ADR is often a little confusing. It is important to do this for two reasons. First, although “ADR” and “mediation” used to be synonymous, that is no longer the case. Different forms of mediation are emerging and there is a growing interest in, and recognition in the CPR of, Neutral Evaluation (also called Early Neutral Evaluation). Secondly, the Master of the Rolls in *Churchill* made it clear that the Court of Appeal were referring to a range of ADR procedures (including, but not limited to, mediation). He studiously avoided “ADR” in the judgment and referred to “non-court-based dispute resolution” (a phrase which has not been followed in the CPR, or elsewhere). Following *Churchill*, therefore, parties and their advisers need to be alive to the various different forms of ADR. Commenting on the court’s case management powers post *Churchill* Lady Chief Justice Carr put it this way:

“...the parties will need to play their role. **They will need to consider, constructively and further to the CPR’s overriding objective, which process might best suit their circumstances. They will need to inform the court of this view.** And, as importantly, judges will need to be familiar with the different forms and their features, so that they can properly assess which is best-suited.”³

The following are working definitions of ADR and some the processes used for personal injury and clinical negligence claims.

² [2014] J.P.I.L., Issue 3 2014 ADR, Mediation and How and Why it will be Embraced by Personal Injury Practitioners and Insurers.

³ Lady chief justice calls for sustainable funding and digital transformation of courts | Law Gazette The Lady Chief Justice speaking at London International Dispute Week, April 2024.

Alternative Dispute Resolution

There is no generally agreed definition of ADR. The Glossary in the Civil Procedure Rules has this broad description:

“Collective description of methods of resolving disputes otherwise than through the normal trial process.”

Routine negotiation and arbitration would fall within this definition.

The following definition is tighter and arguably more accurate:

“Dispute resolution involving one of a number of structured processes, usually with the intervention of a third party, which do not lead to a legally binding outcome imposed on the parties.”

This definition helps make sense of the table below which demonstrates the features of the various forms of dispute resolution and how they fit together.

The Dispute Resolution Spectrum			
Negotiation (Traditional dispute resolution)	ADR		Decision
Email/letter/phone	Mediation (Facilitative)	Mediation (Evaluative)	Court trial
Part 36 offers		Early Neutral Evaluation (ENE)	Adjudication
Face to face / joint settlement meeting		Non-binding arbitration	Arbitration
<i>Non-binding</i>	<i>Non-binding</i>	<i>Non-binding</i>	<i>Binding</i>
<i>No third party</i>	<i>Third party involved</i>	<i>Third party involved</i>	<i>Third party involved</i>
<i>Voluntary</i>	<i>Voluntary</i>	<i>Voluntary</i>	<i>Not voluntary (Mandatory rules once process starts)</i>
<i>Without Prejudice</i>	<i>Without Prejudice</i>	<i>Without Prejudice</i>	
<i>Confidential</i>	<i>Confidential</i>	<i>Confidential</i>	<i>Court not confidential</i>
<i>Most control by parties</i>			<i>Least control by parties</i>

This table should not be regarded as permanent or static. ADR tools are inherently flexible and can be modified, by agreement, to meet the needs of the parties. They can also be combined; for example, one model used for high value personal injury claims is Neutral Evaluation with mediation.⁴

⁴ See “Neutral Evaluation with David Pittaway KC” October 2023: <https://www.trustmediation.org.uk/webinar-recordings/>.

Mediation (Facilitative)

References to plain “Mediation”, will usually mean Facilitative Mediation which is the most commonly used form of ADR in this jurisdiction. Here, the mediator, a trained, independent neutral, works with the parties, communicates with them and provides a structured environment for their negotiations which, in personal injury and clinical negligence claims, ordinarily reach settlement on the day or shortly afterwards.⁵

The mediator will not provide legal advice or evaluate the merits of the case but rather focuses on facilitating the parties interactions. The mediator may be proactive in challenging the parties and they lawyers—a process called reality testing—and will make it clear that responsibility for achieving an outcome rest with the parties, not the mediator.

The process is not binding on the parties—unless and until they reach a final agreement.

Facilitative mediation is suitable for cases where the parties are willing to engage in a collaborative process and have a genuine desire to explore whether there are reasonable terms for settlement.

(Some defendants sometimes use mediation to explain why they are of the view that no liability attaches to them and to ascertain if there is any reason for them to change this view. Most mediators consider that to be a legitimate use of mediation providing the purpose of mediation is made clear at the outset).

Evaluative Mediation

Evaluative mediation is where the mediator, in addition to facilitating the negotiation process, also provides an evaluation of the case. This process varies from facilitative mediation in that the mediator will, in addition to working with the parties and facilitating negotiations, also, if all parties consent, offer a non-binding evaluation of the claim.

The evaluation will take into account all that the mediator has seen as well as their view of the respective strengths and weaknesses. The evaluation may be expressed as an opinion of the likely outcome at trial or a view about the sum which the claim is likely to settle for in light of the preceding negotiations.

Evaluative mediation is suitable where the parties want a more directive and structured approach and want the benefit of the mediator’s authoritative evaluation. Interest in this form of mediation has grown in recent years and may continue to grow as the courts give parties stronger encouragement to use ADR and mandate its use but, historically, little use has been made of this process.

Neutral Evaluation (also called Early Neutral Evaluation)

Neutral evaluation is a process where a neutral evaluator provides a non-binding opinion on the merits of the case. The evaluator is typically a retired judge, a KC or an experienced lawyer or mediator.

Neutral evaluation is suitable for cases where the parties want an expert opinion on the likely outcome of the case, if it was to proceed to trial. It is open to the parties to agree, if they so wish and are legally competent to do so, that they will regard the evaluation as binding.

Churchill and subsequent ADR developments—the further writing on the wall

2023 saw the Court of Appeal, in *Churchill*, reconsider the hitherto leading case of *Halsey v Milton Keynes General NHS Trust*⁶ and decide, contrary to that case, that the court could lawfully stay proceedings for, or order, the parties to engage in an ADR process. This was subject to the provisos that any order did not impair the essence of the claimant’s right to proceed to a judicial hearing and was proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

⁵ Trust Mediation find about 80% of mediations result in a settlement on the day or shortly afterwards.

⁶ [2004] EWCA Civ 576

Subsequently, in 2024, the CPR was amended to give “teeth” to the *Churchill* decision. Notably, the overriding objective was amended, so as to specifically refer to ADR, and the court’s case management powers were amended to confirm that they extend to ordering parties to engage in ADR in appropriate cases. Further, there were provisions for costs consequences where a party failed to comply with an ADR order or unreasonably failed to engage in ADR.⁷

From May 2024, parties to many small claims disputes, worth less than £10,000 must attend mediation through the Small Claims Mediation Service (SCMS).⁸ The MoJ has stated that the requirement to mediate may be extended to higher value claims in the future. In July 2025 the Online Civil Money Claims system introduced mandatory use for legal representatives and a new pilot for automatic mediation referrals for certain road traffic accident claims (claims under £10k, no personal injury, liability disputed).⁹

These procedural developments all took place against the backdrop of the Civil Justice Council’s review of the pre-action protocols. These recommend significant changes in the pre action space including the early exchange of relevant information, engagement with a dispute resolution procedure, and, if the matter cannot be settled, a stocktake review by the parties with a view to narrowing the issues in dispute.¹⁰

Post *Churchill* case law—the line taken in respect of parties objecting to ADR

The most significant ADR case since *Churchill* is *DKH Retail Ltd & Ors v City Football Group Ltd*.¹¹ This concerned a trademark dispute and a claimant’s application for a mediation order shortly before trial. The defendant made a series of submissions opposing the application. In summary:

- (1) The court should only order mediation where there was a realistic prospect of success. This is not the case here, mediation will fail and both parties seek a judicial determination.
- (2) Settlement negotiations between commercial parties with experienced solicitors had been unsuccessful. Realistically, any possible settlement would already have been reached.
- (3) It is too late in the day. The trial is imminent.
- (4) The defendant had very limited availability for the period when mediation could take place.

The court, although recognising there was some merit in these submissions, dismissed them all. As to the first two submissions. Miles J said:

“... the parties come through ADR to recognise the desirability of settling for less than their strict legal rights and compromising their positions. Experience shows that mediation is capable of cracking even the hardest nuts. The process sometimes succeeds in cases where the parties appear at first to have intractable differences.”

Miles J also noted that the range of options available to the parties to resolve the dispute through mediation could include extra-legal elements (regarding the trademark) and thus went beyond the binary answer a court could provide.

Miles J also agreed that the application was late in the day. Against that, however, he said there could be a short sharp mediation, the parties’ positions having been crystallised through pleadings and the service of witness statements. As to the submission on availability, the judge was confident that the parties would find a workable date for the mediation. In due course they did so and, as the postscript to the case report notes, settlement was achieved.

⁷ Civil Procedure (Amendment No.3) Rules 2024 (SI 2024/839) (July 2024). (CPR r.1.1(2)(f), r.1.4(2)(e) and r.3.1(2)(o); r.28.7(1)(d) and r.29.2(1A) and r.44.2(5)(e)).

⁸ <https://www.gov.uk/respond-to-court-claim-for-money/mediation>.

⁹ <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51r-online-court-pilot>.

¹⁰ For a summary of the recommendations and links to the source documents see <https://communities.lawsociety.org.uk/news-and-features/the-civil-justice-council-review-of-the-pre-action-protocols/6003248.article>.

¹¹ *DKH Retail Ltd & Ors v City Football Group Ltd* [2024] EWHC 3231 (Ch).

This case demonstrates the sea change following *Churchill* and the CPR amendments: the decision to engage with ADR, or not, is no longer about a potential costs risk at the end of the day (which could always be extinguished in a late settlement agreement): it is now in the hands of the court, at any stage of the proceedings. All parties will need to keep this front of mind when considering ADR as a case progresses.

In parenthesis, and for balance, some case reports demonstrate that there are members of the judiciary who, it appears, when exercising their discretion, remain to be persuaded by the benefits of ADR. An example is *Assensus Ltd v Wirsol Energy Ltd*,¹² where Constable J decided not to penalise a refusal to mediate:

“In circumstances where the prospect of mediation or other ADR seeking was vanishingly small, the decision not to incur costs (some of which would be irrecoverable) in mediating was not unreasonable. Therefore, the absence of a mediation in this case does not justify any reduction in (the Defendant’s) costs.”

Curiously, as mediator Tony Allen has pointed out, the court was not referred either to *Churchill* or the CPR amendments.¹³

The probability is that this case (and the case relied on by Constable J, *Gore v Naheed*¹⁴) will, looking now at the case law in the round, come to be regarded as outliers. The issue of the merits of the case (or the defence) to the decision on whether to engage in ADR has been debated in the courts since it was recognised as a relevant factor in the then leading case of *Halsey*. See, for example, *Garritt-Critchley v Ronnan and Solarpower PV Ltd*¹⁵ and *Bristow v Princess Alexandra Hospital NHS Trust*, the court in both cases rejecting arguments that a refusal to mediate was reasonable because the parties were too far apart. In *Garritt*, HHJ Waksman QC said (para.22) that:

“Parties don’t know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience.”

Other examples are *DSN v Blackpool Football Club Ltd*¹⁶ and *Stoney-Andersen v Abbas*¹⁷ where the court noted:

“It is a commonplace that both sides are told by their lawyers that they will win. But they cannot both be right. Indeed, sometimes, both sides are wrong.”

DKH Retail Ltd in 2024 was but another case which followed this line. There have also been a number of cases following *Churchill*¹⁸ including three cases where the court has contemplated mediation for a second or third time in a particular case.¹⁹

Post *Churchill* case law—failure to engage in ADR and the timing of ADR

CPR 44.4(5)e provides that the conduct a court may consider when exercising its discretion on costs includes:

¹² *Assensus Ltd v Wirsol Energy Ltd* [2025] EWHC 503 (KB).

¹³ <https://learn.cedr.com/blogs/halsey-is-not-quite-dead-despite-churchill-but-should-be-soon>.

¹⁴ *Gore v Naheed* [2017] EWCA Civ 369.

¹⁵ *Garritt-Critchley v Ronnan and Solarpower PV Ltd* [2014] EWHC 1774 (Ch).

¹⁶ *DSN v Blackpool Football Club Ltd* [2020] EWHC 670 (QB).

¹⁷ *Stoney-Andersen v Abbas* [2023] EWHC 2964 (Ch) at [56].

¹⁸ *Northamber PLC v Genec World Ltd* [2024] EWCA Civ 428; *Conway v Conway and another (Rev 1)* [2024] EW Misc 19; *Dover Farm Developments Ltd v Smith* [2025] EWHC 2862 (KB); *Ivey v Lythgoe & os* [2025] EWHC 2325 (Ch) and *Fernandez v Fernandez & Os* [2025] EWHC 2373 (Ch).

¹⁹ *Heyes v Holt* [2024] EWHC 779 (CH) at [50]; *Francis v Pearson, Francis v Burston* [2024] EWHC 605 (KB) at [87]–[92]; *Pentagon Food Group Ltd and os v B Cadman Ltd* [2024] EWHC 2513 (Comm) at [114].

“... whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution (emphasis added).”

This gives rise to a question: how will “engage” will be interpreted?

There is authority for the proposition that parties who respond to an offer of ADR with silence, or by dragging their feet, are unlikely to be found to have engaged.²⁰

What, however, of the party that attends an ADR session but then takes no active part? Will the court pierce the veil of the contractual confidentiality provisions in an agreement to mediate and consider whether that party has failed to engage in the conduct of the mediation? In *EAXB v University Hospitals of Leicester NHS Trust* (unreported²¹) the court considered the conduct of a defendant during a joint settlement meeting. The defendant instigated the meeting but then took the position that it had no offers to make. The claimant successfully argued that such an approach was entirely inappropriate, and this was one of the reasons why the claimant secured indemnity costs.

In *Appiah v Leeds City Council*²² the court ordered the parties to consider ADR and “... any party not engaging in any proposed ADR must serve a witness statement giving reasons within 21 days of receipt of that proposal.” A defendant responded to a claimant’s ADR offer stating that it was prepared to engage, asked about the form of ADR that was contemplated and required sight of the claimant’s expert evidence before proceeding. The court held that the party receiving the offer had not engaged in the ADR proposed and so was in breach of the order:

“(The party receiving the offer) did not begin to engage in ADR within 21 days of (the other party’s) proposal; they expressly stated that their view was that expert evidence should be served first.”

Further exploration of how “engaged” is to be interpreted seemed likely.

This takes us into the question of timing: when is ADR to be engaged in? Could the defendant in *Appiah* have avoided the problem by serving a witness statement saying they wanted to see the expert evidence? Possibly, but possibly not: In *PGF II SA v OMFS Co*²³ the court held that awaiting information which was required to evaluate the claim, by way of disclosure or from expert reports, was not a legitimate reason in the circumstances of that to refuse to mediate. The court stated:

“Either parties know or are prepared to assume that certain facts will be established or, during the course of a mediation, such information is made available, often on a without prejudice basis. (The saving of costs is achieved or attempted) by the parties being prepared to compromise without necessarily having as complete a picture of the other parties’ case as would be available at trial. It might well be a legitimate reason for postponing a mediation if essential information was requested and refused,”

So, if you are saying “Yes, we will mediate—but later” that, on its own, is not good enough. You need to give explicit reasons relating to the circumstances of the claim, in writing, at the time of refusal, and these must be consistent with the continually developing case law. Bare assertions (“not appropriate at this stage”) run the risk of being rejected. Careful drafting is essential.

With careful drafting and good reasons, engaging in ADR may be postponed and the costs risk can be avoided, or at least mitigated, as the following cases show:

²⁰ *PGF II SA v OMFS Co* [2013] EWCA Civ 1288 and *Thakkar v Patel* [2017] EWCA Civ 117. Note, however, that silence does not always result in a costs penalty: *R (Crawford) v Newcastle Upon Tyne University* [2014] EWHC 1197 (Admin) and *AL v A* [2021] EWHC 1761 (QB) at [43].

²¹ <https://www.kingschambers.com/case/satinder-hunjan-qc-successful-in-establishing-liability-and-securing-indemnity-costs-for-downs-syndrome-arising-out-of-a-failure-for-organising-urgent-appointments-for-a-combined-test/>.

²² *Appiah v Leeds City Council* [2025] EWHC 1537 (KB).

²³ *PGF II SA v OMFS Co* [2012] EWHC 83 (TCC); [2012] 3 Costs LO 404, at [45.1].

- In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*,²⁴ a construction case, the TCC did envisage that mediation should be delayed until after disclosure.
- Similarly, in *Ivey v Lythgoe*,²⁵ which concerned a professional negligence case, the court ordered mediation but also ordered that Particulars of Claim be served in good time (four weeks) before the mediation, so that the other party knew the case it had to meet.
- Finally, in *Ellis v Ellis & Ors (Re: Care (Decd))*,²⁶ the judge found that: "...it was perfectly reasonable for (Party 1) to wait until after the CCMC to consider whether mediation was appropriate at that stage. This is particularly so because (Party 3) had refused to disclose the evidence in support of his case, and in circumstances that he was uniquely positioned to know the evidence he had available in support of his (claim)."

In the multiparty Grenfell Tower litigation the timing of mediation was considered recently. The court acknowledged that all parties must participate in a mediation and participate effectively. Following submissions from the respective parties the court said:

"The court and some of the parties have observed that mediation is often not a one-stop shop and that the parties may return to ADR on more than one occasion in the course of the life of the proceedings, but we consider that it is not in accordance with the overriding objective or the spirit of mediation to put the parties in the position where some are, for understandable, if to some extent overstated, reasons concerned that they lack the information which will underlie a successful mediation and that there is, as a result, a real risk that the costs of the mediation itself may be wasted. We also have taken into account (the) point that a party with less deep pockets, ..., could quite probably not afford to participate in multiple mediations."²⁷

This decision demonstrates that when considering the timing of mediation as part of its case management duties, The court will take all of the circumstances of the case into account.

The Practice of Mediation in Personal Injury and Clinical Negligence claims

Clinical Negligence Mediation

In 2016 the NHS Litigation Authority established a mediation scheme in the following year it changed its name to NHS Resolution and embarked on a "strategy to deliver fair and cost effective resolution, by getting to the right answer quickly, safely, and reducing the number of (litigated claims)". NHS Resolution said that mediation and ADR are fundamentally aligned with this strategy.²⁸ Other medical defence organisations and NHS Wales have also become users of mediation. Having embraced mediation, NHS Resolution now also uses other forms of ADR, including Resolution Meetings, Stock Take Process and Early Neutral Evaluation (ENE).²⁹ Similarly, Trust Mediation now offers, in addition to mediation, neutral evaluation and arbitration. ADR tools are flexible and can be tailored to the needs of parties and work-types.

The following tables illustrate Trust Mediation's experience of mediating clinical negligence claims

²⁴ *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2014] EWHC 3546 (TCC); [2014] 6 Costs LR 1026.

²⁵ *Ivey v Lythgoe* [2025] EWHC 2325 (Ch).

²⁶ *Ellis v Ellis & Ors (Re: Care (Decd))* [2025] EWHC 2609 (Ch).

²⁷ Grenfell Tower Litigation [2025] EWHC 3276.

²⁸ <https://resolution.nhs.uk/wp-content/uploads/2020/02/NHS-Resolution-Mediation-in-healthcare-claims-an-evaluation.pdf>.

²⁹ <https://resolution.nhs.uk/services/claims-management/alternative-dispute-resolution/>.

Trends in Clinical Negligence Mediations (sample 1229 mediations 2017–24)

STAGE	PRE-ISSUE	PRE-CCMC	RESOLUTION RATE
2017	27%	29%	79%
2023	53%	53%	71%
2024	51%	61%	78%

VALUE	£750K+	£100K+
2017	17%	37%
2023	38%	09%
2024	47%	10%

It will be noted that the resolution rate (% of claims settled on the day of the mediation or shortly afterwards) has remained quite constant. Also, at the outset only 27% of claims were mediated pre proceedings and by 2024 over 50% were settled at this stage.

The second table demonstrates that the mediation process is effective whatever the value of the claim and that by 2024 nearly half of the claims mediated had a value in excess of £750k.

Online fixed time mediations offer a cost-efficient approach to lower value claims.

Mediation is now embedded in the clinical negligence sector in England and Wales. Trust Mediation still encounters lawyers attending a mediation for the first time, but this is now less commonplace.

PROCEDURE

Personal Injury Mediation

As mentioned above, mediation has not, with some exceptions, been greatly used in personal injury claims. Times are changing as the following examples demonstrate.

At an APIL conference held at Celtic Manor in May 2025, two personal injury lawyers joined a panel discussion, one claimant and one defendant. David Withers, Irwin Mitchell, said that whilst clinical negligence lawyers may have slightly more developed processes when it comes to engaging in ADR, mediation was being used for personal injury claims. He gave instances of mediations concerning liability, quantum, claims involving a degree of complexity, claims involving reinsurers, claims against multiple defendants, points of principle (how young is too young for contributory negligence?) and issues involving state funding and double recovery. Additionally, he had come across stock take meetings and relationship building mediations. He was a big believer in the benefits of finding common ground, narrowing the issues, and arguing about the right areas in the right way.

Chris Eccles, Clyde and Co, made it clear that he was not a stranger to mediation either. He explained that sometimes mediation is for the benefit of the defendant as much as the claimant, and it is in everyone's interest to press on with mediation if the result of the mediation is that the parties can resolve the case and can get over whatever stumbling block they have. He recommended that parties and their lawyers go into mediation with their eyes open and consider it as a really positive option in the right case. He added that in his view most insurers, most defendant lawyers and probably most claimant lawyers would accept that many personal injury cases, even the biggest cases, can be resolved before reaching the stage of issuing court proceedings. This was subject to the proviso that the parties speak to each other, understand what each party needs, in terms of their evidence, so they can get that in place and get to a meeting within a reasonable timeframe.

Overall, the Celtic Manor discussion made it clear that the personal injury lawyers still regarded the traditional settlement tools of negotiation, Pt.36 and JSMs as very useful, but no longer thought of them as the only way to go about dispute resolution.

The Bristol Mediation Orders

HHJ Ralton, in Bristol, was regularly staying cases for mediation (including personal injury and clinical negligence cases) long before the *Churchill* decision. This was on the basis of his interpretation of the CPR, which has been borne out by subsequent events.

The type of Order that was made, early in the proceedings, pre *Churchill*, was:

Upon consideration of the Directions Questionnaires

And upon the court considering that this case is appropriate for mediation.

IT IS ORDERED THAT

1. The claim is allocated to the Multi Track and reserved to HHJ Ralton until the listing of any costs and case management conference;
2. The claim is stayed until [date] to enable mediation to take place;
3. Any party may apply to extend the stay to enable completion of the mediation provided such application is made no later than 7 days before expiry of the current stay.
4. Within 7 days of the expiry of the stay the parties shall jointly report to the Court whether mediation has taken place; and
 - a) If the mediation has not taken place, a note of the reasons why not;
 - b) If the claim has been settled or settled in part or one or more issues have been resolved, provide a schedule of the terms of settlement and a draft of any consent order required from the Court.
 - c) If the claim has not been settled a draft of the directions agreed or requested with an updated case summary.
5. This order has been made without a hearing. Any party may apply to the court for reconsideration of this order at a hearing provided such application is made within 7 days from service on them of this order. Any such application shall be reserved to HHJ Ralton.

Post *Churchill* and the CPR amendments the form of the Order is that “The parties shall engage in ADR in the form of mediation in accordance with this Order, pursuant to CPR Rule 3.1(2) (o).” The latter provides that the court may “order the parties to engage in alternative dispute resolution”.

Solicitor James Weller of Thatcher and Hallam LLP and counsel Justin Valentine of St John’s Chambers, Bristol recounted their experience of three mediations following Bristol mediation orders during 2025. Two were personal injury claims and one was for clinical negligence. All three reached settlement, two on the day and the other shortly afterwards.

James Weller told Trust Mediation that he found the mediation orders really useful. “They sped up the cases—they took a year or two off the claims”. He added that the claimant’s objective is usually to settle the claim, to settle sooner rather than later, and without going to court if that can be avoided. He and his counsel, Justin Valentine of St John’s chambers, Bristol found the mediation orders were useful in getting the defendant to the table. Justin Valentine added that it was important to have sufficient condition and prognosis evidence to properly value the claim and he had come to the view that parties tend to listen more to the other party’s strong points if they were presented by a mediator rather than their adversary. His experience was that with some claims a settlement would not have been reached without a mediator.

Judicial training on ADR is aligned with recent developments and there is now judicial guidance in the form of a *Churchill* template for a “Draft Order—Mediation Referral” with an accompanying Guide to Litigants Ordered to engage in ADR.³⁰ The wording of the template is:

DRAFT ORDER—MEDIATION REFERRAL

Upon the court reviewing the court file [and hearing submissions from the parties].

And Upon the court considering that the Overriding Objective of dealing with cases justly and at proportionate cost will be furthered by the parties actively engaging in alternative dispute resolution.

IT IS ORDERED that:

1. The claim is stayed until [.....] and the parties shall endeavour to settle the issues between them by using mediation or another form of alternative dispute resolution. The parties are referred to the attached Guide to Mediation.
2. On or before [...] the parties shall write to the court either (a) to confirm that the matter has settled and provide a draft Consent Order or Tomlin Order for approval by the court; or (b) to request further directions from the court, stating what further directions are required and providing a draft Order, to be agreed if possible; or (c) to request an extension of the stay, setting out how much additional time is requested and why.
3. [*If this Order has been made without a hearing*: This Order has been made without a hearing and any party affected by it may apply to the court to set aside or vary the Order within 7 days of service of the Order].

Conclusion

The decision in *Churchill*, the follow on procedural changes and the case law including *DKH Retail Ltd* have established ADR, and mediation in particular, as a central component of civil justice. ADR is embedded in the practice of commercial, construction and shipping practitioners, is becoming established in clinical negligence practice and, after an extended period, is now impinging on the personal injury sector. Personal injury lawyers need to be aware of the full range of ADR processes and the developing case law. From a proactive perspective, when and how could you, or should you, seek to use ADR (noting that claimants like the earlier settlement that ADR can deliver) and how do you respond when the court or other party suggests ADR? A detailed knowledge of the case law is a necessity when seeking to avoid or mitigate the potential costs risks and exposing the other party to such risks. Is your firm or department set up with an ADR strategy for your cases and the skills and materials to deal with these matters?

³⁰ Copies are published in the White Book Vol.1 paras.30.1 and 3GN.1. (This reference will be valid from the date the next edition of the White Book 2026. Before then the following reference can be given: <https://www.trustmediation.org.uk/churchill-orders/>).