ADR, ODR and Digital Justice:

The Resolution of Personal Injury and Clinical Negligence claims now and in the future

Tim Wallis

Mediator, and Director at Trust Mediation & Trust Arbitration

1st edition June 2023

CONTENTS

Trust Mediation

specialist personal injury and medical negligence mediators

Foreword

"The future is already here –

it's just not evenly distributed yet."[1]

Legal practitioners, insurers and defendant organisations in the personal injury and clinical negligence claims sector in England and Wales and, more importantly, the users of their services, are facing a wide range of potent forces for change. Some of these forces have been operating for some years whereas others are more recent, but they are all now operating simultaneously and will have the consequence of significant changes to the way in which claims are resolved.

These forces for change are:

- Civil justice policy: the integration of ADR and technology in a new digital justice system.
- Economics: the extension of fixed recoverable costs ("FRC")
- ODR: the development of technology, AI and decision science for claims.
- Social expectation: the "click now" society has created a public demand for transactions in the digital world to move quickly, combined with a dissatisfaction with justice processes

I have examined a range of source materials, summarised them and then, as a veteran litigation solicitor[i], qualified mediator and director at Trust Mediation and Trust Arbitration, added my own observations. Sections of this paper can be read on a stand-alone basis (or skipped if you are familiar with the material in any particular section) but are together intended to lead to my conclusion and recommendations. The purpose of this paper is to review all of these changes as they affect the personal injury and clinical negligence claims sector, consider what impact they will have and tentatively suggest strategies for dealing with them. I hope that it will assist organisations and individuals in the sector, some of whom I've worked with for many years, to be fully aware of and prepared for the impending fundamental changes. I anticipate that this White Paper will provoke debate and discussion, not least with the suggestion that litigators must prepare to make a shift from the traditional adversarial mindset if they are to deal with the current and forthcoming changes to the civil justice environment.

Tim Wallis
Director and Mediator at Trust Mediation
Director at Trust Arbitration

Introduction

The wave of rapid developments in technology and artificial intelligence that is currently sweeping the world will affect many aspects of our lives. Personal injury and clinical negligence claims will not escape these developments, not least because in this jurisdiction there is already considerable momentum behind the implementation of a digital justice system.

One of the key subjects of this paper is the integration of Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) into a digital justice system. To the extent that this involves a recognition that the vast majority of claims never get anywhere near trial, this is nothing new. Back in the 80's, before many of today's litigators and claims handlers were born, the American Professor Marc Galanter invented a word: "Litigotiation." His purpose was to emphasise his observation that essentially the claims process is not about trial but rather the strategic pursuit of settlement by using the court process. Settlement is achieved, he argued, by using litigation to gain strategic advantage in negotiation. The process of seeking settlement before trial has been here for a very long time.

There have been developments in the means used to reach settlement and since the nineties ADR, primarily in the shape of mediation, has been increasingly used. It has developed in some areas more than others; it has been used routinely for many years in commercial litigation and in the last five years has established a secure foothold in the field of clinical negligence claims, as discussed in section 5. With personal injury claims, however, ADR has been much slower to take off, although it has been growing. This is notwithstanding the view of some personal injury lawyers and claims handlers that ADR is unnecessary in this field and merely represents an additional layer of expense. I suggest, to those who still hold to these views, that they might review the report of Senior Master Fontaine's second case management conference of the Grenfell Tower Litigation[ii]. This report is mentioned in section 2 and demonstrates how ADR is front and centre of those complex personal injury proceedings.

So, ADR, or DR as Sir Geoffrey Vos, Master of the Rolls has suggested, is here – it's just not very evenly distributed.

Another subject of this paper is the anticipated impact of technology on claims handling and dealing with disputes online. Again, it is possible to get a view into the future by looking at some developments that have already taken place. The Covid pandemic proved to be an accelerant regarding the use of technology for dealing with claims and for many the new normal involves hybrid working and the permanent adoption of tech that initially came into use as an emergency measure. As section 7 will show, however, technology and software has been developing rapidly, and the online tools and processes now deployed by some have already moved on from applications such as Zoom and MS Teams.

As with ADR, the advance of technology in civil justice is not restricted to this country. Many jurisdictions worldwide face the same rising problem: How to provide more access to justice, quicker and with less money? That circle is being squared by "tech" and ODR and this can be demonstrated by a review of this website:

https://remotecourts.org

This site was launched in March 2020, at the beginning of the pandemic, as a systematic way for remote-court innovators and people who work in justice systems to exchange news of operational systems, as well as of plans, ideas, policies, protocols, techniques, and safeguards. Today, there is input from 168 jurisdictions that have hosted online or remote hearings of one sort or another.

The resolution of claims is really a simple concept. Usually, although not always, it is solely about getting the right sum of money from the paying party to the receiving party at the earliest time. In practice it often becomes complicated, protracted, frustrating, stressful and expensive. The following sections will take a look at the impending developments that seek to solve these problems in the personal injury and clinical negligence sector, consider their impact and suggest some strategies that may be deployed to manage that impact.

2. What is ADR? What is ODR? How are ADR and ODR relevant to claims?

ADR

Alternative Dispute Resolution is usually taken to refer to a number of voluntary processes that enable parties to resolve a dispute without having to go to court. A significant feature of ADR processes is that they are usually less formal and less adversarial than litigation.

As ADR is now very much part of the litigation process there is a move, as suggested above, to drop "Alternative" and move towards a label such as "Dispute Resolution" or "Negotiated Dispute Resolution". ADR is no longer alternative, but no one knows what to call it now.

A number of different ADR processes are shown in *Image 1*.

Image 1

The Dispute Resolution Spectrum

Negotiation	**ADR**		**Decision**
Phone/letter/ e mail	Mediation (Facilitative)	Mediation (Evaluative)	Court trial
Part 36 offers		Early Neutral Evaluation (ENE)	Arbitration
Face to face / joint settlement meeting		Non-binding arbitration	Adjudication (Statutory – construction disputes)
Non-binding	*Non-binding*	*Non-binding*	*Binding*
Voluntary	*Voluntary*	*Voluntary*	*Not voluntary (Mandatory rules once process starts)*
Confidential	*Confidential*	*Confidential*	*Court not confidential*
Most control by parties	→	→ →	*Least control by parties*

Traditional negotiation (by phone, e mail or at a joint settlement meeting) can technically be described as ADR, in that it has the objective of resolving a claim without going to court.

However, ADR is often taken to mean a process involving an independent third party neutral, such as a mediator, whose role it is to work with the parties and their representatives to reach a mutually acceptable agreement.

The most commonly used form of ADR in England and Wales is facilitative mediation. Here, the mediator's role is to facilitate the negotiation process and work with the parties to identify their underlying interests and concerns, rather than imposing a solution or offering legal advice. The objective is to enable the parties to make informed decisions and find a solution that meets their needs and interests.

The role of an evaluative mediator, on the other hand, is to give an assessment of the merits and value of the claim as well as the likely outcome if it were to go to court – and the mediator may also provide suggestions for settlement and facilitate negotiations between the parties.

In early neutral evaluation (ENE) the independent neutral will consider the documents and evidence relating to the claim along with submissions (oral or on paper) and provide a non-binding evaluation of the likely outcome at trial. The parties can then use the evaluation as a basis for negotiating settlement. This approach is now being used in some personal injury and clinical negligence claims.[iii]

Arbitration and adjudication are more akin to the judicial process, in that the neutral third party hears evidence and decides the claim, but they can also be taken to fall under the ADR umbrella in that they are alternatives to court.

The bottom three rows of *Image 1* demonstrate how ADR processes are ordinarily voluntary, confidential and not binding (until the point when an agreement is reached).

Another fundamental aspect of ADR is that the processes are inherently flexible and can be tailored to suit almost any type of claim or dispute. The Case Studies in sections 5 and 6 below show how ODR and ADR processes are being used in lower value claims (online arbitration in personal injury road traffic claims) and higher value claims (mediation and early neutral evaluation in personal injury and clinical negligence). The question is not Is ADR suitable for my claim? Rather it is Which ADR process could be adopted and tailored for this type of claim?

Although "ADR" and "mediation" have become synonymous in this jurisdiction, ADR covers a range of processes and mediation is but one tool in the box.

An important rider to add: The need for ADR never arises in respect of claims that can be settled swiftly by traditional negotiation.

ODR

Online Dispute Resolution, like ADR, has no generally accepted definition. This is an American Bar Association definition:

> "(ODR) uses technology to resolve or facilitate the resolution of disputes. The broader view …. is that ODR includes the use of technology by a human facilitator, either exclusively or as an adjunct to face to face alternative dispute resolution (ADR processes)…… A minority consider ODR limited to dispute resolution processes conducted entirely by technology, without a human facilitator."

This approach gives rise to the suggestion that the dispute resolution process will include two parties, an independent neutral, who can be considered to be the third party, and also technology, which can be considered to be the fourth party:

> "ODR in its more recent conceptualisation involves a "fourth party" to dispute resolution – the technology itself. The fourth party may assist either a third party such as a mediator, for example, or the parties to the dispute themselves. Some authors suggest it is necessary to think also of a "fifth party", the service providers who deliver and produce the fourth party technology."[iv]

Daniel Rainey, an experienced American mediator and ODR expert, prefers a more relaxed and pragmatic definition:

> "The use of information and communications technology to fulfil any of the basic functions of dispute engagement."[v]

Everyone involved in dispute resolution already uses technology. The extent to which it is used, as we move into the era of a digital justice system, is changing rapidly – although not at the same pace for everyone: some people will still be negotiating and exchanging offers by email or post while others are routinely using online portals, artificial intelligence and predictive analytics.

For more information about ODR see:

ICODR INTERNATIONAL COUNCIL FOR ONLINE DISPUTE RESOLUTION

https://icodr.org/

How are ADR and ODR relevant to personal injury and clinical negligence claims?

In May 2008 Sir Anthony Clarke M.R. (as he then was), delivered a speech to the Civil Mediation Council Conference, saying that ADR

> "….must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any expert evidence is required and whether a Part 36 Offer ought to made and at what level."

ADR has now become an integral part of the litigation process, albeit that it is more deeply embedded in some areas of work than others. In many areas of commercial litigation, one example being solicitors' negligence claims, ADR (in the form of mediation) has been established for well over a quarter of a century. During this period the "Litigation Department" in many law firms has been re-named "Dispute Resolution". The uptake of ADR

and mediation in personal injury and clinical negligence claims has been much slower but the Case Studies below will examine the parts of these sectors where ADR is being routinely used.

Some legal practitioners and insurers in the field of personal injury remain of the view that ADR processes, other than traditional negotiation and joint settlement meetings, are superfluous to requirements. This paper seeks to establish that it is at least worth reviewing whether that approach is future-proofed in light of the matters discussed in the remaining sections of this paper, namely:

- ADR developments that have already taken place (see the Case Studies);
- the imminent Government/MOJ policy changes;
- the general economic pressures on the cost of claims, and
- the advance of technology and ODR.

It should also be noted that mediation is not the only form of ADR. It is one of the tools in the toolbox. Other ADR processes such as evaluative mediation and Early Neutral Evaluation (see the beginning of this section) are now attracting some attention in this sector.

For an example of the current deployment of ADR in personal injury claims in 2022 see the report of the judgment of Senior Master Fontaine in the second case management conference of the Grenfell Tower Litigation. It may come as a surprise that at the case management conference of this major piece of complex personal injury litigation there was a major focus on how, when and why ADR should be used. The Senior Master made a detailed review of parties' submissions on ADR and said:

> "I consider that the ADR process being established is the obviously appropriate course to attempt before proceeding with litigation involving more than 1,000 Claimants and multiple Defendants. Although it may be that not all issues will be capable of settlement, it is highly likely that there will be a sufficient number of settlements and/or narrowing of issues so that when the stay is lifted more efficient progress to resolution of these claims can be made in the litigation."[vi]

It is notable that the court imposed a stay for ADR in circumstances where one large group and the defendants agreed to a stay for ADR but another large group of claimants opposed ADR.

The Grenfell multi-party litigation should not be regarded as an outlier. Trust Mediation has been mediating personal injury claims since 2007. Nor it is the only 2022 personal injury case. For example, Yip J in Wilson & Os v Bayer & Os (unreported) [The Pirmodos litigation]:

> "Acknowledging that the Defendants may have good reason not to wish to enter into ADR…..Mediation may offer solutions that are simply not available to the court. Without prejudice to the applications before the Court and without having formed a view on the merits, I encourage the parties to explore all options for resolving these proceedings."

Also, in Merit v Navis 2022 EWHC 221, an accident claim:

> "I appreciate that the Second Defendant insurer has a strong view on the case, but it will also have the experience to know that that is no reason for not attempting mediation. In fact it sometimes underscores the reason for attempting a mediation…"

Mediation is particularly useful where the circumstances involve high emotion and is helpful where negotiations get stuck for some reason. The success of mediation with clinical negligence cases suggests that the process can be used with the same effectiveness in personal injury claims (as happens, for example in the USA).

Might the adversarial mindset of lawyers and insurers in the common law mould be a reason for the comparatively slow take-up of mediation in this sector? This question is explored in a later section. Certainly, some litigators and or their clients say they prefer the certainty of litigation, particularly where they consider that they have a strong claim. Although some cases need to go to trial, and should do so, the decision to press on for trial does not always turn out to be the wisest course, at least according to these two senior members of the judiciary:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."[vii]

> A party dismissed a proposal to mediate as "an expensive waste of time". The Court of Appeal thought differently and considered that the case was ideally suited to mediation. "Instead" said Males LJ, "…because none of the parties was prepared to be reasonable, they marched on with colours flying to the disaster which the trial proved to be for them all."[viii]

3. The benefits of ADR – economics and client satisfaction

ADR processes usually deliver on their potential of facilitating earlier settlement which means the economic and wider objectives of both the paying party and the receiving party are met.

There is a range of ADR processes and the ability to choose the right process, and when and how to deploy it, means that those with ADR skills can deploy ADR flexibly and in a manner most likely to achieve the benefits available depending on the circumstances of the particular claim.

This outline of benefits focuses on the most commonly used ADR process, mediation. It should not be inferred that mediation is the only or best form of ADR. Other ADR processes deliver different benefits. Also, it is clear that ADR is certainly not suitable for every case. For example, ADR is not required where:

- It is likely that the case will be settled by traditional negotiation.
- One of the parties needs to invoke the power of the court. For example, where an injunction or a precedent is required or where a test case needs to be decided.

The generic benefits of mediation

The following outline is an analysis by several Trust Mediation mediators of the benefits of mediation following many years' practice of mediation and discussions with clients.

To the writer, the most palpable demonstration of the benefits of mediation is apparent when the mediator enters the claimant's room (be that a room in lawyer's office or a virtual room) after a claim has been settled. The relieved phrase "It's over!" is used frequently and there is often a reference to the claimant's voice having been heard.

The benefits of mediation:

- Settlement rate.
    - The settlement rate[ix] at mediation is high.
    - In Trust Mediation clinical negligence claims approximately 80% will settle on the day of the mediation or shortly afterwards.
    - The settlement rate is higher with personal injury claims and the rolling average is often in the region of 90%.

- Time: Earlier settlement.
    - Approximately 70% of Trust Mediation's clinical negligence mediations are conducted prior to the Costs and case Management Conference and over 50% take place before the issue of proceedings.
    - In personal injury and clinical negligence claims specialist lawyers can and do use their expertise to advise on resolution at mediation without the full trial standard work-up.

- Cost: Lower cost
    - It is axiomatic that earlier settlement means reduced costs.
    - The impact of the pandemic, the development of video-conferencing facilities and the development of ODR platforms is making the cost of online mediation proportionate for lower value claims. (The travel cost of the parties, the lawyers and the mediator is often disproportionate in lower value claims.)

- Risk assessment and risk management
    - Mediation provides an excellent forum to both assess and manage risk. The information and understanding of the other side's claim gained at mediation may fortify your pre-mediation view that you should push on to trial - or cause you to make a radical reappraisal. The mediator may bring you information which may not have been disclosed in a two-way negotiation. It is easier to deal with a surprise at the mediation rather than halfway through trial.

- Better for claimant
    - Mediation places the claimant at the centre of the process and gives the claimant a voice. Feedback from claimants, particularly in clinical negligence claims, suggest that this is incredibly important to them. Claimants often say that the day of the mediation is the first time they have felt heard since the claim started.
    - The stress and uncertainty of litigation is not eradicated by mediation but it is very much reduced. The informal mediation environment is also beneficial for any lay defendant or personnel of the defendant organisation who may be involved.
    - One of the unique features of mediation is that it can facilitate extra-judicial remedies such as an apology or explanation of steps that have been taken to prevent a recurrence of the index incident. Again, these matters can be incredibly important to the claimant and often transpire to have been the reason why the claim was brought in the first place. Extra-legal elements sometimes crop up in Employer's liability claims as well as clinical negligence claims.

- Unlocking claims
  The mediation process can unlock claims which *should* settle by negotiation but have not done so. The process is particularly useful for claims where:
    - there is a gulf between the parties on liability and or quantum (such a gulf is a reason to mediate and not, as is often claimed, reason not to mediate);
    - litigation has become highly adversarial and or the parties have arrived at entrenched positions;
    - there is high emotion (fatal claims, injuries to children);
    - the parties dislike or distrust each other and
    - there are multiple parties (be they claimants and or defendants).

- Negotiation skills
    - A beneficial by-product for regular users of mediation is that the process enables the lawyers representing parties at the mediation to develop and hone their negotiation skills. (A mediation is, like a joint settlement meeting, a great forum for negotiators.)

- Positive feedback
    - Follow-up after a mediation invariably produces very positive feedback from both claimants and lawyers.

- Mindset change
    - When a claimant law firm regularly mediates with a defendant law firm and its insurer or defence organisation a collaborative mindset often develops and this is a valuable benefit. Trust Mediation sees this leading to an increased ability of the parties to settle claims without ADR and also the development of specific and more refined ADR processes.

In short, resolving claims efficiently is more likely to be achieved if the professional dealing with the claims has the expertise to deploy a range of dispute resolution skills and processes. Or, to put it another way:

> "If your only tool is a hammer then every problem looks like a nail."

The table below details the benefits particular to the individual stakeholders in a mediation.

Mediation benefits – by party	
Party	**Benefits**
Claimants (and also lay defendants and defendant organisation's personnel)	• a voice in dealing with the matter • extra-judicial elements eg apology • earlier resolution ("It's over!") • less stress for claimant and family • less litigation and cost risks • ability, in online mediation, to participate from home – with support from the legal team online
Claimant law firms	• risk assessment and risk management • satisfied client • cash-flow benefit from earlier settlement (mediation = WIP to cash) • increased efficiency and reduced costs arising from developing a collaborative relationship with "the other side" • increased efficiency and reduced costs from working online • opportunity to develop advanced negotiation skills
Defence law firms	• satisfied clients as a consequence of earlier settlements, reduced costs and the ability to offer the client a series of dispute resolution skills • opportunity to develop advanced negotiation skills
Counsel	• ability to deploy negotiation skills and work with a mediator to achieve client objectives
Insurers	• risk assessment and risk management • reduced life cycle of claims with associated benefits in reduced operation expenditure • increased efficiency and reduced costs arising from developing a collaborative relationship with "the other side" • increased efficiency and reduced costs from working online • opportunity to develop advanced negotiation skills

4. Lower value personal injury claims. Case studies: Claims Portal, the OIC Whiplash Portal and online arbitration.

Anyone involved with low value personal injury claims in England and Wales will need no introduction to the Claims Portal (also known as the MoJ Portal) and the more recently established OIC Whiplash Portal. These portals, which are examples of ODR platforms, have been operating for some time and now between them handle hundreds of thousands of claims each year. The writer is familiar with both having formerly chaired Claims Portal Ltd for its first 10 years or so and having had a peripheral involvement in the early days of the MoJ design consultations concerning the OIC platform.

The Claims Portal

https://www.claimsportal.org.uk/

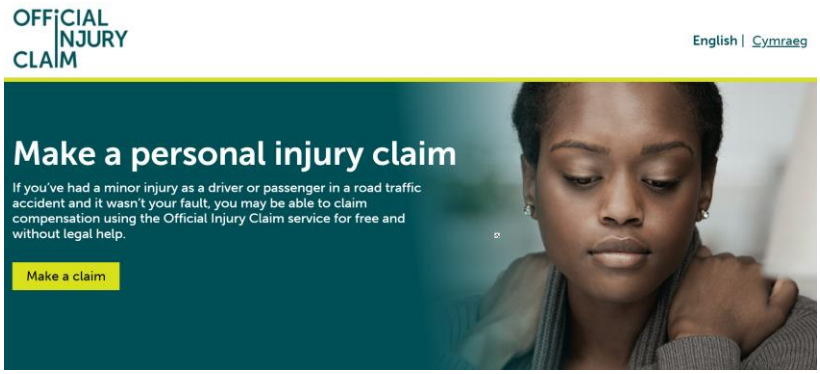
The Claims Portal, initially introduced in 2010, is a tool for processing personal injury claims up to the value of £25,000. The Portal deals with pre-issue road traffic, Employers' Liability and Public Liability (EL/PL) personal injury claims where liability is admitted. It is an efficient electronic communication tool and enables the parties to reach settlement by traditional offer and acceptance messages.

A claim must be issued via the Portal before court proceedings are issued. If the defendant denies liability or the value of the claim cannot be agreed, the claim must proceed to the County Court.

Since 2021 most of the claims that used to be dealt with by the Portal have now been diverted to the new OIC Whiplash Portal. The Portal continues to process road traffic personal injury claims with a value between £10,000 and £25,000 and all EL/PL claims up to the same value.

The importance of fairness and transparency, which enables users to trust tech solutions, is dealt with in section 9 on Standards, Ethics and Data Protection. On this subject the Claims Portal sets a good example of a strong governance model: it is governed by a board of directors on which claimant organisations and insurers are equally represented, with the assistance of an independent chair[x]. This is a model which might be looked to as tech and AI become more integrated in the civil justice system.

The OIC Whiplash Portal



https://www.officialinjuryclaim.org.uk/

The OIC Whiplash Portal has dealt with low-value personal injury claims since 2021. It was designed by and built at the direction of the MoJ to enable claimants with road traffic personal injury claims up to a total value of £10,000. It has had a somewhat difficult start:

- Although it was intended that claimants would bring their claims on the Portal without the assistance of lawyers, 90% of the claims have been made by legal representatives[xi].
- The teething problems often associated with new software took a considerable time to resolve and were probably exacerbated by the fact that 90% of the users were claimant law firms with high volume operations and entirely different in nature to the anticipated user base of individual claimants.
- The new arrangements did not provide any guidance on the valuation of claims where the claimant had suffered both a whiplash neck injury and additional injuries. This uncertainty resulted in a backlog of claims. It was hoped that the Court of Appeal guidance in January 2023 given in the test cases of Rabot v Hassam [2] Briggs v Laditan [2023] EWCA Civ 19 might assist but a level of uncertainty remains.
- The OIC statistics for December 2022 show that 424,855 claims have been made via the Portal and of those 20% have settled. The average time from claim to settlement in the last reporting period was 227 days, about 7.5 months.[xii]
- The current arrangements mean that, where liability or quantum cannot be agreed by the parties, the claimant has to leave the digital online Portal and make a paper-based claim in the County Court which already has record-breaking backlogs. (Bizarrely, the OIC process has been designed so that if liability and quantum are disputed the claimant may need to leave the OIC Portal and go to court not once but twice!)

A Justice Select Committee inquiry has been opened to review these and associated problems.[xiii]

Had market research been undertaken and been able to identify in advance that 90% of users would be claimant law firms the obvious solution would have been to extend the Claims Portal rather than re-invent the wheel.

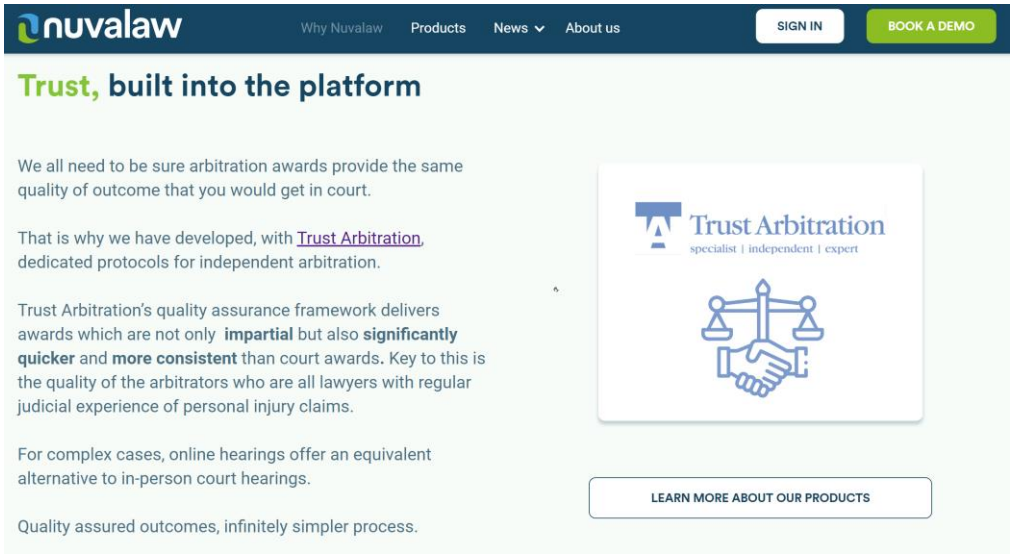
The OIC Whiplash Portal is run by the Motor Insurers' Bureau on the instructions of the MOJ. The interests of users can be expressed via a user group[xiv] but it has no ability to make decisions (in contrast to the Claims Portal – see above).

From an ADR perspective the main problem with the new Portal is that, just like its predecessor, the Claims Portal, it passively permits the resolution of claims but if the parties cannot agree settlement the only dispute resolution tool is ….. the court. The MoJ's rather opaque reasons for dropping the ADR mechanism in the original design of the new OIC Portal and its evidence base for doing so remains something of a mystery.

There are ADR mechanisms which are capable of resolving these claims and are in fact doing so in the private sector:

<u>Online Arbitration</u>

Nuvalaw and Trust Arbitration operate a joint venture that provides an ODR platform enabling OIC, Claims Portal and Fast Track claims to be resolved online by an agreed, quality assured, arbitration process within a SLA period of days, not months.



https://www.nuvalaw.com/

During 2021 the new online platform was live tested with a series of Claims Portal claims which would otherwise have been ultimately dealt with by the court at Stage 3 hearings. The average time from inception to award during the pilot was 3 days.

Claimants were able to receive damages months earlier than they would have done by waiting for a court hearing. Nuvalaw reports that it calculated a 53% fixed cost saving to the insurer, compared with the court process, and an estimated 55-80% saving on carrying costs.xv

An additional and unexpected benefit of the online arbitration service was that the claimant law firm and insurer clients participating in the pilot developed a collaborative relationship which further reduced friction points in dealing with claims. Nuvalaw are building on this foundation to offer a structured negotiation facility which will obviate the need for arbitration in many cases. This is an example of how using and ADR process can assist in moving away from the adversarial mindset to one which is more collaborative.

The 3 day turnaround was not maintained as the service scaled up but Nuvalaw and Trust Arbitration currently comply with the current contractual SLA period of 11 days. (This period will be slightly longer where the arbitrator needs to seek clarification on the platform of one or both parties.)

All law firms and insurers that have run pilots have been satisfied with the economics and the quality of the outcomes and have gone on to sign up as users of the service. The market share of both claimant law firms and insurers is significant. Organisations that have given public testaments to the joint venture include Admiral, Minster Law and NewLaw.

At the request of clients the service is being extended from quantum only claims to claim where liability is in dispute and the service is being extended to other types of claim.

Another organisation, Claimspace, has also developed an ADR offering. It reports that it has achieved average settlement times of 6.7 days and an average £550 reduction in claims costs for insurers.[xvi]

ODR platforms are not unusual. British Columbia's Civil Resolution Tribunal[xvii] blazed the trail several years ago. In this country there are suppliers such as Resolver[xviii] and RDO[xix] who provide platforms to ombudsmen and organisations dealing with such matters as flight delays[xx] and traffic penalties.[xxi] Also, insurers will be familiar with the work of the Financial Ombudsman Service[xxii] which resolves thousands of complaints recourse to the courts.

Why, the question remains, did the MoJ not design a dispute resolution platform that could resolve disputes? Why not resolve claims in days or weeks rather than putting claimants in court queues for many months? The flexibility of ADR and the versatility of ODR platforms are capable of providing a more efficient solution which would serve the interests of both claimants and policyholders. Fairness to all stakeholders can be assured by robust and independent governance arrangements and a route to court can also be provided in cases where that is necessary.

Low value personal injury claims – the future.

The Civil Justice policy changes and the ODR/Tech Developments described in later sections of this paper will have a significant impact on how these low value claims are dealt with in the future.

Additionally, there are economic pressures which will also force change. The dramatic change to the costs landscape following the whiplash reforms is resulting in continuous consolidation in the claimant law firm market and the outcome will be a small number of large organisations dealing with these claims. The volumes will be large and the margins thin. These organisations, along with insurers, will need to have efficient claims handling processes which deliver the right outcomes quickly and at a low cost. ADR has the flexibility to deal with this challenge, and online arbitration by independent neutrals is certainly one solution.

5. Higher value claims. Case study: Trust Mediation: experience of the NHS Resolution mediation scheme and personal injury mediation

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

Trust Mediation is a provider of specialist independent mediators for personal injury and clinical negligence claims. The current 20+ mediators all have extensive experience as solicitors, barristers or doctors and they include Kings Counsel and lawyers with judicial experience. All are registered with the Civil Mediation Council and many have decades of experience as mediators.

Client feedback since Trust Mediation was established in 2007 has been consistent in appreciating the input of specialist mediators who are expert in their field and have a deep understanding of claims in this sector. These attributes enable mediators to swiftly establish rapport and work quickly through evidence the nature of which they are very familiar.

In 2016 NHS Resolution (known at the time as the NHS Litigation Authority) set up a mediation scheme with the focus of resolving clinical negligence and personal injury claims in this country. Two independent mediation providers were selected following a public procurement tender: Trust Mediation and CEDR.

NHS Resolution pays the mediation fees in cases where liability is admitted (in whole or in part) and in every case where the claimant is unrepresented. In other cases fees are by

negotiation but invariably the arrangement is that costs follow the event, which means that if damages are paid so are the fees.

The NHS Resolution report evaluating the scheme in 2020 said:

- Between December 2016 and March 2019 a total of 606 mediations were carried out.
- Of these 74% saw a resolution of the claim at the mediation or shortly afterwards.
- "Mediation is proven to be an effective forum for claims resolution by providing injured patients and their families with the opportunity to receive face-to-face explanations and apologies. Time can be spent listening and responding to the particular concerns of a patient and their family. The process provides a platform to claimants, patients and their families to articulate concerns that would not ordinarily be addressed in other forms of ADR."
- "There is overwhelming evidence of the benefits of mediation, for patients, families and NHS staff."[xxiii]

The number of mediations dropped with the onset of the pandemic but mediation soon migrated online. This new way of mediation worked so well that now, in 2023, the majority of mediations at Trust Mediation are conducted online. Meeting online is not quite as effective as meeting in person but online mediation does offer many benefits. For example, mediators report that claimants are more relaxed and volunteer that they are happier dealing with the mediation from home rather than a lawyer's office.

Trust Mediation's findings about online mediation are not unusual. A survey in the USA by the Equal Employment Opportunity Commission in May 2022 found that most of the survey participants preferred online mediation over in-person mediation. Also, they believed procedural fairness, distributive justice, and access to justice were greater in online mediation. 92% of claimants and 98% of employers would conduct online mediation again. 60% of claimants and 72% of employers were satisfied with the outcome of the online mediation, a rate higher than the same measure taken for in-person mediation previously.[xxiv]

Milestones, settlement rates, earlier settlement and "Business as usual"

2022 saw Trust Mediation pass the milestone of 1,000 clinical negligence mediations where the defendants were backed by NHS Resolution.

In these cases and those backed by other defence organisations such as NHS Wales, MDU, MPS and MDDUS, the Trust Mediation settlement rate, that is to say the number of mediations that settle on the day or shortly afterwards, is invariably a little under or a little over 80%. This figure is higher than many would have expected bearing in mind that (a) parties tend to refer difficult claims (b) the cohort of claims include some where joint settlement meetings (JSMs) have not produced a settlement and others where the Defendant asks for a mediation to explain why it takes the view that the claimant does not have a valid claim.

In the early days of mediation many claims were mediated close to trial. There has been a sea change in recent years and in the calendar year 2022 Trust Mediation saw over 50% of its mediations take place prior to the commencement of proceedings. These statistics mean that many claimants received damages much earlier than would otherwise have been the case. All concerned eliminated a great deal of risk and the paying party saw a significant reduction in costs.

The next statistic of note is that (surprisingly, to the writer) the settlement rate of claims which mediate before proceedings is just the same as the rate for those mediated after the start of proceedings.

These figures respond to the assertion made by some that a claim cannot be (or should not be) mediated until pleadings, evidence and expert evidence have been exchanged.

A commonly held view about mediation in the early days of the NHS Resolution scheme was that it may be a process which is suitable for claims were there is a high emotional content but where the damages value was relatively low. In fact, mediation has proved successful right across the range, including claims of the highest value. Over 40% of cases mediated by Trust Mediation involve sums in issue over £750,000.

In April 2023 Julienne Vernon, Head of Technical Claims at NHS Resolution, speaking at a Trust Mediation event, summed up her organisation's view on the scheme with this phrase:

"Mediation is business as usual."

If mediation has been successful in clinical negligence claims, what about personal injury claims?

Before the NHS Resolution scheme started in 2017 the majority of claims mediated by Trust Mediation related to personal injury. The settlement rate was usually in the order of 90%. Some clinical negligence mediations were undertaken but there was a lower settlement rate and these mediations were usually more difficult because of the adversarial nature of clinical negligence litigation.

Since the NHS scheme started, however, most Trust Mediation mediations are of clinical negligence claims. This shift is undoubtedly attributable to the scheme and the NHS Resolution initiative. There is an obvious challenge to personal injury practitioners and insurers: if mediation can work for clinical negligence claims, to the satisfaction of the parties and the lawyers, why cannot it work as well for personal injury claims (as indeed it does in other jurisdictions such as the United States, Canada and Australia). The answer usually given is that personal injury claims are resolved by traditional negotiation and JSMs which means that ADR represents an additional layer of expense and does not have a role. There are a number of counterarguments to that. First, mediation usually takes place at an earlier stage than JSMs and offers the opportunity of important client benefits: earlier settlement for the

claimant and a greater saving of costs for the paying party. Secondly, the claimant is involved in the process, can have their voice heard and participate in the discussions, particularly if they involve extra-legal elements. Thirdly, the small percentage of mediations that do not result in a settlement do often narrow issues and alert parties on the issues to focus on during trial preparation and at trial. These and similar issues are explored in Professor Pablo Cortes work on the increasing role of ADR in civil procedure[xxv].

The fact that cases not settled at a JSM are often then referred to mediation leading to a settlement demonstrates that the mediation process does have additional dimensions to offer. Finally, it should be emphasised that all resolution methods have a role to play; it is not a case of Mediation Good, JSM Bad or vice versa.

Those lawyers and insurers whose approach is that mediation is unnecessary in this sector, or that it may be useful in very limited circumstances, will be challenged by the forthcoming policy changes and the increasing use of technology in resolving claims. PI claims will not be ring-fenced against these developments. This is not merely a self-serving mediator's opinion: on 13 March 2023 Asplin LJ, speaking at a Westminster Legal Policy Forum conference, called for a change in attitude towards mediation from the judiciary and legal profession. John Hyde reported the judge as saying the justice system was "in the midst of a sea change" and that elements of the sector were still in a "transition phase".[xxvi]

The issues raised here will be explored further in section 8 which deals with the impact of policy and tech changes on the traditional adversarial mindset.

Future developments for personal injury and clinical negligence claims

In addition to the policy and tech changes outlined in the next sections which are likely to see an increase in the uptake of mediation in this area there are a couple of emerging trends.

There is certainly a trend to mediation taking place earlier and, particularly, pre-proceedings. It never has been necessary to assemble a trial bundle to settle a case and experience shows that regular users of mediation refer cases earlier as they become more experienced.

Early neutral evaluation is also becoming more popular, both as a stand-alone event and as part of the mediation process. This "mix and match" approach is an example of the flexibility of ADR.

Finally, a word about some important people, the clients. Be they claimant or paying party they have a common interest in early resolution.

6. Civil Justice policy direction in England and Wales

Taken together, the recent civil justice reforms and the current MoJ and judicial policies show that the implementation of a new digital justice system is now underway. ADR is becoming embedded and integrated into that system – "..sewn into the fabric of the CPR"[xxvii]. This is happening now and the various ongoing reforms and policies referred to are outlined below.

Much of the current CPR focuses on the trial and the procedure leading to trial. Court trials will remain adversarial, although not all of them will take place in a physical courtroom. The online rules of the digital justice system, however, will be geared towards the resolution of claims rather than trial. They will have a heavy emphasis on the elements of dialogue and compromise that are necessary to reach settlement. ADR steps will be built into the system. Sir Geoffrey Vos, Master of the Rolls, has led reform in this area in recent years. He has coined the phrase:

"The emphasis should be on resolution not dispute."

In preparing this section of the paper I have frequently referred to Professor Pablo Cortés' excellent research article "Embedding alternative dispute resolution in the civil justice system: a taxonomy for ADR referrals and a digital pathway to increase the uptake of ADR"[xxviii] and commend this to the reader.

The HM Courts & Tribunals Service (HMCTS) court modernisation programme started in 2016 to introduce new technology and working practices, move activity out of the courtroom, streamline processes and bring in online services. According to the National Audit Office it has not been an unalloyed success to date[xxix] but a start has been made and this does represent the foundation of the digital justice system.

The Online Civil Money Claims (OCMC) service

This digital service, which is part of the modernisation programme, has the following procedural steps which integrate online negotiation and mediation:

(1) Claim submission. Pre-action information about mediation is provided and the defendant is able to make a without prejudice offer the online platform.

(2) Telephone mediation, followed by case management if the parties opt out or cannot reach settlement.

(3) Judicial decision. There may be a face-to-face hearing, an online hearing or a papers-based decision.

The service has:

- issued more than 378,000 claims since its introduction in March 2018
- achieved a 95% user satisfaction rating
- settled 50.4% of the 9,560 mediation appointments made in 2022
- issued 97,315 claims in 2022
- achieved an average of 24 days to reach a settlement and
- has been was expanded to deal with claims up to £25,000 (where issued by legal representatives).xxx

Mediation for small claims

Participation in ADR (a free 1 hour telephone mediation) is set to become mandatory for small claims.[xxxi]

The relevance of small claims

Reforms to procedure for small claims are often, when successful, applied to higher value claims. For example, the Claims Portal for lower value claims was initially available for road traffic claims with a value up to £10,000. After 3 years the financial limit was extended to £25,000 and the scope extended to Employers Liability and Public Liability claims.

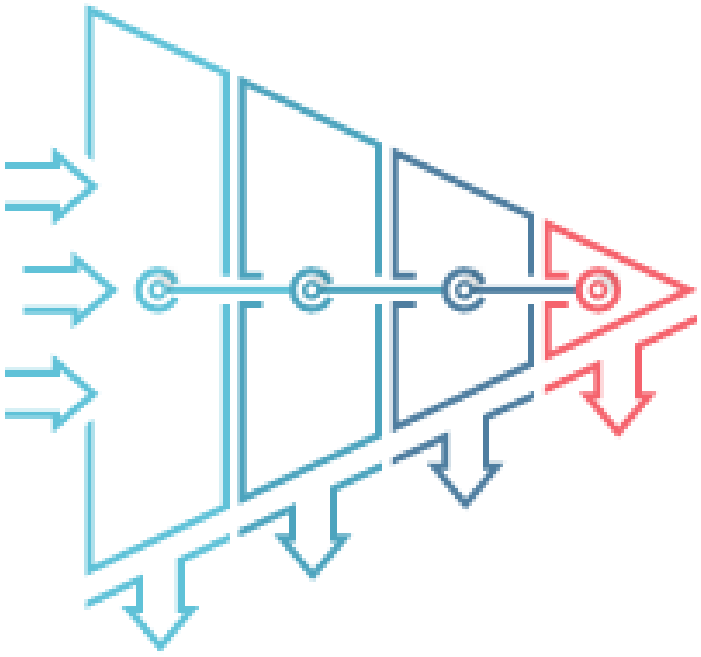
Another example is the Nuvalaw-Trust Arbitration online arbitration service. After the initial pilots of the service on Claims Portal Stage 3 Claims clients asked: Can we use this for higher value claims? Private dispute resolution providers will follow the same pattern as the courts – start low down and build out.

At a Leicester University conference in December 2022 Sir Geoffrey Vos was asked to comment on the notion that the scope and ambition of the civil justice reforms was to be confined to certain areas of work or bulk, low value, claims. He responded, most robustly, that this was most certainly not the case.[xxxii]

The Vos Funnel

In 2021 Sir Geoffrey Vos introduced what he termed a "fundamental generational reform of the civil justice system". His vision is for an integrated online dispute resolution system in which all claims will begin online. All claims will start in an online front end or "funnel" and then proceed through three stages, unless they reach settlement first.

The diagram below is represents this concept.



Stage 1 is Case Intake (the left hand side of the diagram). All claimants will start here and will create a "single transferrable data set". This data set will be transferred onto the next stage, unless the claim is settled or abandoned.

Stage 2 is Pre-Action Portals. This is a series of private and public portals/ODR platforms run by a variety of organisations including ombudsmen.

Stage 3 (the red part of the funnel on the diagram) is Determination. This may be by public (courts) or private (arbitration).

The concept of a single data set that can be transferred to the next stage makes complete sense. Those dealing with personal injury claims may think that this what should have happened at the outset with both the Claims Portal and the OIC Whiplash Portal. (Claims exiting these digital systems are required to progress on paper.)

ADR will not be a single event which takes place before or after the claim moves on to the online court process. Rather, there will be a series of mediated interventions which will propose how a claim may be resolved at every stage of the process. This has been described as Continuous Dispute Resolution rather than Alternative Dispute Resolution[xxxiii].

In April 2023 the Ministry of Justice affirmed Sir Geoffrey Vos' thinking and stated that it wants to see an "exponential increase" in dispute resolution tools like the Official Injury Claims (OIC) portal.[xxxiv] A few days later RDO and IPOS Mediation announced a joint venture for an online dispute resolution system for small businesses drawn up under the government backed LawtechUK programme. The platform aims to provide an affordable and easy to use platform for SMEs to recover unpaid debts through online negotiation, mediation and arbitration.[xxxv] A question arises: How will this vision be delivered? The answer is in the following paragraph.

Online Procedure Rules Committee (OPRC)

This Committee was established in 2022[xxxvi] and has very similar standing to the Civil Procedure Rule Committee for England and Wales. The purpose of the committee, with its legislative backing, is to bring coherence to pre-action regimes. It will provide governance for the digital justice system and data standards to ensure that platforms connect to the court system electronically. It will also supervise the technical environment in which the platforms are operating. So, the mechanism to implement an online or digital dispute resolution service and the "funnel" is already in place. Similarly, with small claims, the rules to build ADR into the process (that is, to integrate mediated interventions) are also in place. Small claims are the starting point of these reforms, not the end.

Fixed Recoverable Costs (FRC)

FRC will apply to personal injury claims with a value between £25,000 and £100,000 where the cause of action accrues on or after 1 October 2023. Unexpectedly, FRC will also apply to clinical negligence claims in this bracket where breach of duty and causation have been admitted. The proposals for introducing FRC for clinical negligence cases up to £25,000 are being dealt with separately by the Department of Health and Social Care (DHSC) and so are not part of the new arrangements.[xxxvii] (Incidentally, it does seem curious that claims of £25,000 to £100,000 are to be made subject to FRC before a scheme for claims under £25,000 has been devised.)

This policy change is a paradigm shift. The move away from the hourly rate will create an entirely different focus for law firms' business models. The duty to secure the best result for the client does, of course, remain but profitability will depend upon lawyers' skill and experience in resolving claims efficiently and early.

ADR processes can be deployed to deal with this changed economic dynamic. This has been demonstrated by the interest shown by insurers and law firms in the Trust Arbitration and Nuvalaw online arbitration service for low value fixed fee road traffic claims. Where margins are low and there is a premium on dealing with claims efficiently, a swift and inexpensive ADR option is attractive.

Pre-Action Protocols (PAPs)

Nicola Critchley, President of FOIL, recently mentioned in the Law Society's Gazette an ongoing review of PAPs which, she said, "will hopefully see them given real teeth, with a requirement for far stricter compliance and with penalties for non-adherence".[xxxviii] The suggestion was that new PAPs may include a requirement for parties to engage in some form of alternative dispute resolution.

Thoughts on policy direction

"Joined-up" is a phrase that is not frequently associated with civil justice policy but the above snapshots are consistent with civil justice, and therefore personal injury and clinical negligence claims, moving in the direction of a digital justice system which will have online rules and procedures that concentrate on resolution at least as much as they do on trial. ADR processes will be woven into pre-action and pre-trial procedures. Also, as will be evident in the next section, much of the implementation of these policy objectives depends on…. tech.

7. ODR, Tech and claims

Introduction

This section will start with a brief word on ChatGPT, add a little on Sir Geoffrey Vos's tech vision, looks at some **ODR platforms** and then some **ODR tools and processes**, all with personal injury and clinical negligence claims in mind.

Chat GPT

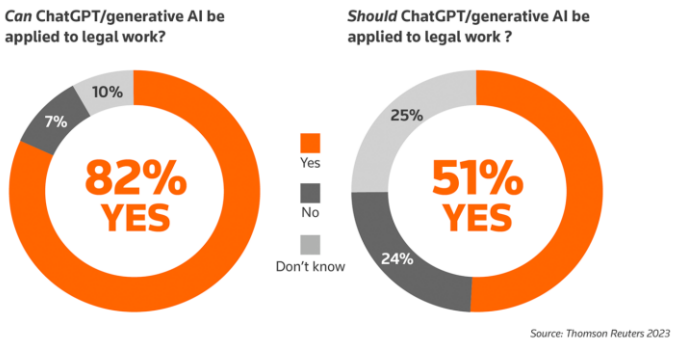
This seems an obvious starting point with Tech. When this paper was initially conceived, a few months ago, Chat GPT had not hit the headlines. As the last section of the paper was being written Chat GPT4 announced its arrival. By the proof-reading stage numerous governments were expressing concern and the pace at which Generative Al models were developing was being described as "terrifying". A FTSE chief executive was quoted:

"It is happening, and it's happening at a pace that I don't think anyone expected ... Frankly, the real world is struggling to catch up with the artificial."[xxxix]

These AI developments will undoubtedly have a profound impact on lawyers, their clients and how claims are dealt with.

The table overleaf depicts the findings of a survey of over 400 lawyers at large and midsize law firms in the USA, UK and Canada carried out by Thomson Reuters in March 2023.[xl]

Figure 1: **Attitudes towards ChatGPT and Generative AI for legal work**



Roi Amir, the chief executive of USA based AI provider, Sprout.ai, has predicted that AI will inevitably be used in the handling of claims because it can sift through and review data at a significantly faster rate and with more accuracy than humans. This will enable claims handlers to make better risk management decisions and free them to carry out more high-value and customer centric tasks. Sprout.ai's research suggests that there is every incentive for insurers and others dealing with claims to take this route because a good claims experience is a good predictor for people renewing their policy:

- 62% of people that had a good experience on the claim side are likely to renew their policy.
- 89% say they are likely not to renew the policy after a bad claims experience.[xli]

Exploration of Chat GPT is underway in one firm in the clinical negligence sector in this country. Fletchers, a tech-savvy, specialist personal injury firm which invested in AI some time ago announced in April 2023 that it is working on ways to harness the power of technology related to ChatGPT to help make early decisions in medical negligence claims.[xlii]

Sir Geoffrey Vos' view:

> "….legal services will need to add value, and dispute resolution will need to make as much use of generative AI as is consistent with user confidence."[xliii]

The rest of this section should be read on the basis that most of the developments, platforms and AI tools described are likely to be impacted one way or another by the development of generative AI and other AI tools in the near future.

Sir Geoffrey Vos on dispute resolution and tech

Leaving aside Chat GPT for the moment there follows some observations made by the Master of the Rolls in the context of the developing civil justice system. Speaking at a Law Society event he said:

> "(future generations) "will not accept a slow, paper-based and courthouse-centric justice system. If that's all that's available, new generations will look for other means of dispute resolution. And it's for that reason that the use of technology by the courts is not an option – it's inevitable and essential."[xliv]

At an international dispute week conference he added:

"Many lawyers think that the highest pinnacles of digital justice are achieved by using Teams, Webex, Google Meet or Zoom for a dispute resolution hearing, perhaps even involving arbitrators located in different countries. They might also think that the use of e-filing and PDF bundles or a digital document disclosure programme will turn the current systems into state-of-the-art automation of the dispute resolution process. I respectfully disagree."[xlv]

The Master of the Rolls went on to propose a radical shift from systems and processes founded on "strict analogue rules" to a form of digital justice which reflects and exploits the information age. So he is saying that the application of tech is not just about speed and efficiency and is also about doing our work in an entirely different way. He added that the adversarial systems founded on an exchange of pleadings, which of course all pi and clin neg claims handlers and litigators are steeped in, were created for a different era. Note how the word "adversarial" keeps cropping up.

In the claims arena many aspects of the changes envisaged by the Master of the Rolls will be experienced by lawyers and insurers through the medium of ODR platforms (or "Portals", usually the words are interchangeable). There follows a review of ODR platforms currently available and then a note about some ODR and AI Tools and Processes.

ODR Platforms

ODR Platforms are not new. All personal injury lawyers dealing with lower value claims are well aware of the Claims Portal (established 2010) the OIC Whiplash Portal (2021).

The Traffic Penalty Tribunal[xlvi], which perhaps is not so well known, has been a leader in digital claims handling. The Tribunal, which for its formative years was led by its former Chief Adjudicator, Caroline Sheppard OBE, introduced a digital case management system in 2006, an ODR platform called Fast Online Appeals Management in 2016 and video hearings in 2018[xlvii].

The matters the Tribunal deals with are less complex than most personal injury claims but this does not detract from its impressive functionality as an ODR platform. 12% of the 35,000 cases filed online annually are resolved within 1 day, and 78% are resolved within 1 month.

Parties can communicate and upload evidence by phone, video conference, chat, text, email. There are continuous asynchronous hearings. The design and execution of the platform is user focused.[xlviii]

Similar platforms have been developed by Ombudsmen. This type of ODR platform has a greater focus on resolution than the current personal injury portals which passively facilitate resolution by simply facilitating offer and acceptance messages rather than by actively resolving disputes on the platform.

The following ODR platforms have been recently developed (or are being developed) in various parts of the world.

CREK

https://crekodr.com/

The architect and founder of CREK is ODR pioneer Chittu Nagarajan who leads a team that focuses on building technology that helps people resolve their disputes efficiently and effectively. Their goal is to make the resolution of disputes easy and inexpensive with intuitive technologies that expand access to justice.

Chittu Nagarajan was, along with another ODR pioneer, Colin Rule, a founder of an ODR company called **Modria**, now part of a USA corporation:

Tyler

https://www.tylertech.com/solutions/courts-public-safety/courts-justice

Tyler's courts and justice software solutions help agencies share data among all of the offices in the justice system in the USA and elsewhere.

Nuvalaw

https://www.nuvalaw.com/

The platform provides a claims eco-system including structured negotiation facilities and, in conjunction with Trust Arbitration, an online arbitration service for personal injury claims which is tailored to the needs of claimant lawyers and insurers.

Resolver

https://www.resolver.co.uk

This platform facilitates the making of complaints by consumers seeking redress. When complaints escalate Resolver can help by working with ombudsmen and regulators to achieve resolution.

RDO

https://www.resolvedisputes.online/index.html#features

RDO's platform is created by dispute resolution experts from around the world who understand the ADR and litigation processes. It comprises case management, dispute resolution tools and insightful data analytics.

As mentioned in section 6, in May 2023 RDO and IPOS Mediation announced a joint venture for an online dispute resolution platform for small businesses drawn up under the government backed LawtechUK programme. The platform aims to provide an affordable and easy to use platform for SMEs to recover unpaid debts through online negotiation, mediation and arbitration.[xlix]

Immediation

https://www.immediation.com

Immediation™

Immediation claims to be the world's most comprehensive end-to-end dispute resolution software for data intake, management, collaboration and analysis.

Trialview

https://www.trialview.com/

This platform delivers the concept of a workspace whereby legal teams, counsel, judges, and clients can access a 'single source of truth'. Features include bundle creation, evidence presentation and video integration in one streamlined platform. The providers of the platform anticipate growing momentum for this approach "accelerated by advances in artificial intelligence (AI) and compounded by seismic shifts in our working habits, post-pandemic."

CourtCorrect

https://www.courtcorrect.com

CourtCorrect empowers teams with an AI-powered platform to process complaints and help to investigate and resolve the toughest cases in a manner which is fast and compliant.

Webnyay

https://www.webnyay.in

Webnyay is described as a sophisticated online dispute resolution ecosystem that provides an end to end digital platform for resolution of complaints and disputes in an efficient, speedy, flexible and inexpensive manner.

eBRAM

https://ebram.org

eBRAM stands for Electronic Business Related Arbitration and Mediation. It is a LawTech platform and cross-border ODR specialist providing Online Arbitration and Online Mediation.

ODR Tools and Processes

Digitalisation and artificial intelligence (AI) are advancing in business, economic and social life worldwide.

Civil Justice in this jurisdiction is “going digital” and simultaneously is developing a number of policies that are seeing ADR processes and tools integrated into the new digital system. Early signs of this are evident in the lower value pi claims environment.

ODR platforms are becoming prolific and are set to develop rapidly. The question for those dealing with pi and clin neg claims becomes: **how will AI tools and processes be deployed on these platforms?** This section will examine this question but begins with four introductory points.

First, personal injury lawyers and insurers are well aware of how technology and AI can be deployed in the claims arena. Applications known as **Colossus** and **Claims Outcome Adviser** have been available for many years and can be used to demonstrate the potential benefits and drawbacks of the deployment of algorithms.

New AI applications for claims are now appearing.

Example 1. Painworth.l This is a "robot lawyer" that uses artificial intelligence to automate personal injury claims for claimants in North America. Whether it crosses the Atlantic and

applies to become a member of APIL or MASS remains to be seen, but pi lawyers might be interested to follow how this organisation progresses.

Example2. AIR. Horwich Farrelly's automated injury recognition (AIR) system developed by their David Scott. AIR detects high-value claims in the Official Injury Claim Whiplash Portal and the Claims Portal by reference to indicators such as key words and phrases to identify claims likely to have a high value.[li]

Example 3. PREDiCT. A predictive data and analytics capability developed by Weightmans utilising data from over 1100 individual claims. PREDiCT provides actionable insights to drive improved performance around reserving accuracy, reduced lifecycles and overall indemnity spend.[lii]

Secondly, those dealing with mid and high level claims do not usually need to be aware of what is happening in the lower value claims environment. As suggested in section 6 on Civil Justice policy, however, developments with small claims are likely to be the harbingers of similar changes for higher value and more complex claims. That ODR platforms and AI do have a role to play with such claims is demonstrated by the Webnyay platform referred to above: it was initially developed, by lawyers with large law firm experience, for complex, document-heavy international arbitrations.

Thirdly, AI should not be thought of as a single black box of software that emulates human intelligence. Rather, it is a disparate set of tools and processes that can be deployed to carry out a variety of tasks. The following Wikipedia entry explaining AI amplifies this:

> Extract from Wikipeida:
>
> Artificial intelligence (AI) is intelligence—perceiving, synthesizing, and inferring information—demonstrated by machines, as opposed to intelligence displayed by non-human animals and humans. Example tasks in which this is done include speech recognition, computer vision, translation between (natural) languages, as well as other mappings of inputs. AI applications include advanced web search engines (e.g., Google Search), recommendation systems (used by YouTube, Amazon, and Netflix), understanding human speech (such as Siri and Alexa), self-driving cars (e.g., Waymo), generative or creative tools (ChatGPT and AI art), automated decision-making, and competing at the highest level in strategic game systems (such as chess and Go). [liii]

Finally and this is crucial, Chat GPTliv (and similar large language model[lv] generative AI processes[lvi] will make "….. AI accessible, practical, easy to use, and versatile for nontechnical users."[lvii] It will form a voice or text based interface between people dealing with claims and AI enabled ODR platforms. Translation: you won't need to be a geek to talk to AI based

claims tools and processes because Chat GPT and the like will act as a bridge or an API (application programming interface)[lviii] between the claims handler and the tech tool.

Examples of AI tools and processes

The following are but a few examples of the range of algorithms and AI, machine learning and data analysis tools, processes and applications which can be applied to claims. Some are about automation and of course many existing case management and office IT systems already use these. Others are more sophisticated and claims specific.

AI-powered document analysis can help lawyers and insurers to process large amounts of documentation e.g. medical records quickly and accurately.

Process automation can be used to automate routine tasks such as data entry and document processing.

Apps, chatbots and virtual assistants are already used by many organisations. For example:

inCase

inCase | Market Leading Legal App | Improve Client Communication (in-case.co.uk)

This client communication app is now reported to be used by 85 firms.

Fliplet

Fliplet: App Solutions for businesses

Provider of off-the-shelf solutions for mobile and Web Apps.

ODR platforms incorporating predictive analytics and "decision science" tools.

The following ODR platforms, which are potentially applicable to personal injury and clinical negligence claims, have already moved way beyond online case management and communication systems.

Predictive analytics can be used to forecast the likelihood of certain outcomes in litigated claims to help lawyers and insurers to assess the strength of a claim and to make informed decisions about settlement offers. LexisNexis report:

> "Womble Bond Dickinson has published a paper entitled: How Artificial Intelligence Is Impacting Litigators. It notes that "whether firms use AI varies greatly depending on firm size, with users tilted heavily towards larger law firms". It quotes a study which found that: "100% of law firms of 700 or more lawyers either were using AI tools or pursuing AI projects"." [lix]

Settle Index[lx] offers predictive analytics.

> "Based on the principles of decision analysis, the software augments lawyers' professional judgment, enabling them to model potential outcomes, simulate opponent viewpoints, and evaluate settlement strategies,.."
>
> "The SettleIndex platform also provides the monitoring of cases and collecting structured data on litigation. In turn the financial modelling creates a range of

metrics and performance indicators that law firms and clients can use to see case progress and the ability retrospectively to audit decision-making."

"And, over time, clients can build up proprietary structured data sets to inform future litigation strategy and measure performance."[lxi]

The next platforms, incorporate what may be termed "decision science" tools. As these offerings are quite complex it will be interesting to see whether and how they incorporate Chat GPT to provide a user-friendly interface. The second of these two has already developed prototypes that do just this.

Smartsettle

https://www.smartsettle.com

SmartSettle comprises a suite of sophisticated resolution tools. The following briefly outline two of them.

Smartsettle ONE is an "…intelligent negotiation app for two-party formal negotiations that can easily be reduced to a single numerical issue. Five sophisticated algorithms, including Visual Blind Bidding and Reward Early Effort motivate the parties to collaborate and virtually eliminate the tedious dance that characterizes ordinary negotiations. The result is increased settlement rates, saving time, money, and headaches." The app includes a visual bidding tool which also enables each party to make blind bids. A blind bid offer can be seen only by the party that made it – but if blind bids correspond or come within a specified range a settlement is reached.

Smartsettle Infinity is described as "the epitome of augmented intelligence." Users can "model, facilitate and manage any complex formal negotiation, build in interdependencies and constraints, and easily analyze and compare various options……. Infinity is suitable for almost any type of collaborative multi-party decision making application … and .. can be configured to support a wide range of decision making processes from negotiation, facilitation and mediation to adjudication and arbitration."

Next Level Mediation

https://nextlevelmediation.com/

This is a platform where, to use the language of ODR, the technology can be described as the fourth party that assists the third party neutral that assists the two parties in dispute reach resolution.

The website says:

> **"**NextLevel™ Mediation is a …Decision Science-based software as a Service (SaaS) company. NLM's powerful DS application takes participants down a clear path from the emotional to critical thinking. NLM's application aids clients in making more informed and logic-based decisions in the context of litigation, mediation and ADR. In the context of ODR, our application is a necessary tool in assuring that all parties true priorities are clearly understood."

In brief, this is a sophisticated case management and communication platform with a range of decision tools to assist litigators and mediators. The "decision science" tools include:

- questionnaires leading to priority assessments;
- risk analysis and risk assessment models;
- a decision tree and compound probability tool;
- a negotiation tool applicable to integrative and distributive negotiation styles.

Economic pressures, civil justice policy changes and the advance of technology are combining to make widespread adoption of such applications inevitable.

8. Embracing the Advancements in Policy and Technology within the Adversarial Tradition

This section contemplates the potential influence of a digital justice system, incorporating ADR and new technology, on the traditional adversarial mindset of experienced lawyers representing claimants in personal injury and clinical negligence claims.

Lord Woolf, Lord Briggs, and Sir Geoffrey Vos, as contributors to civil justice policy, have acknowledged that trial and trial preparation are merely aspects of civil justice procedure. They emphasise that the vast majority of cases, those which will eventually be settled or abandoned, deserve greater attention within the civil justice system. The incorporation of ADR and technology is now providing this much-needed focus.

An example is the development of the Online Civil Money Claims service, where ADR is integrated into a digital justice system. Professor Pablo Cortés[lxii] explains that this represents a shift from the adversarial, adjudicative paradigm, aligning with the concept of a "multi-door courthouse" introduced by Sander[lxiii] in the USA during the 1970s. The courts' role expands from preparing parties for trial to include dispute resolution options.

For experienced lawyers who have dedicated years or even decades to practising law within the adversarial tradition of the common law, this shift may initially seem disconcerting. However, it is vital to remember that the primary focus of the justice system should be on addressing the needs and interests of those using the system (the paying party and the receiving party), rather than exclusively considering the perspectives of lawyers and judges.

The diagram overleaf illustrates that most claims will ultimately be settled or abandoned rather than reaching trial. With this understanding, it is reasonable to suggest that a dispute resolution system should prioritise resolution while maintaining the importance of trial preparation for cases that will inevitably proceed to trial.

Stage of proceedings	*The required approach for litigators and claims handlers.*
Trial	Adversarial rules required. Adversarial mindset required.
Pre-Trial **and** **Pre-Proceedings**	The vast majority of complaints and claims do not reach trial. For every claim reaching trial there are between 90 and 99 that do not. The focus of the rules and procedures should be on resolution. **A resolution mindset is required.** It should also be borne in mind, however, that the claim may ultimately go to trial – and that negotiations in the shadow of the court, buttressed by costs rules such as loser pays and Part 36, have always been a form of dispute resolution. One of the reasons that mediation is powerful arises from the fact that a claim that does not resolve at mediation will invariably head for trial. **So there needs to be an adversarial mindset as well.**

It is crucial to recognise that adopting a dispute resolution focus does not mean abandoning the adversarial system. As Dame Professor Hazel Genn eloquently stated, mediation without the credible threat of judicial determination is like "the sound of one hand clapping."[lxiv] In other words, mediation may be perceived as a less adversarial process, but it only works if advisers possess the adversarial skills and experience necessary to advise clients on the potential outcomes of a trial and the pros and cons of proceeding to trial. The power of mediation lies in the fact that a claim unresolved at mediation will inevitably head for trial.

It is also important to note that each case might ultimately proceed to trial. Hence, negotiations conducted under the shadow of the court, bolstered by cost rules such as 'loser pays' and Part 36, have always been an integral part of dispute resolution.

Given the ongoing evolution in legal procedures, it is becoming increasingly clear that those involved in handling or defending personal injury and clinical negligence claims need to cultivate a balance between an adversarial mindset and a collaborative, dispute resolution approach.

While the traditional common law adversarial system has served lawyers in this jurisdiction well for many years, adapting to a more collaborative mindset can initially prove challenging. The following examples highlight some of the hurdles encountered by experienced practitioners during this transition.

Example 1. Some lawyers and claims handlers take the view that ADR is superfluous. They argue that their arsenal, comprising negotiation, Part 36, and trial, is sufficient for claim resolution. They see mediation as an intruder, a "competitive alternative to litigation," to quote CEDR mediator Tony Allen.[lxv] This perspective may stem from a misconception, possibly fuelled by overzealous mediators who have implied that every case should be mediated. As ADR and mediation become more integrated into the Civil Procedure Rule and the digital justice system, such misunderstandings should hopefully diminish. This misunderstanding has probably contributed to the lukewarm reception of ADR in the personal injury field and in clinical negligence claims until concerted efforts were made to implement and promote it.

The historical reluctance to embrace ADR in some areas is likely to give way to a more balanced appreciation of both adversarial and collaborative approaches. A preference for litigation or mediation isn't a binary question of good or bad; it's about choosing the most effective approach for the particular circumstances and people in each case. Also, as mentioned previously, mediation is but one of the ADR processes available; a case not suitable for mediation may be ideal for, say early neutral evaluation.

Example 2. A common assertion by lawyers is that ADR isn't suitable for their client's case due to vast differences in the parties' positions on liability, causation, or quantum. However, the majority of legal authorities posit that such discrepancies are precisely why ADR should be deployed[lxvi]. Grasping this concept may be easier if one can cultivate a dual approach, marrying the adversarial mindset we're trained in with a dispute resolution perspective.

Example 3. Some lawyers and insurers dismiss ADR as a fleeting trend, arguing that deviating from traditional approaches is not in their clients' best interests. At first glance, this appears reasonable - after all, experienced lawyers should know what's best for their clients. However, a different perspective was offered by one of the architects of the Civil Resolution Tribunal, Shannon Salter.[lxvii] Her vision was to mould the justice system around the needs of the people it served, urging legal practitioners to "do it through their eyes." Salter's comments highlight the importance of testing, retesting, and testing again with the people who will actually use the system, rather than relying solely on the assumptions and perspectives of legal and IT professionals.

These examples are not intended to argue the superiority of one mindset over another, but rather to illustrate why some practitioners accustomed to the adversarial system often find it counter intuitive to embrace the potential of ADR. With the impending changes to civil justice,

it is crucial that we both understand these changes and what drives them. It is also necessary to identify the support needed by those on the front lines of claims handling as they adjust to new approaches and tackle the technical aspects of these changes.

Accommodating both the adversarial and dispute resolution mindsets can indeed be intellectually demanding. I certainly found it a to be challenge when I was introduced to mediation. With training and experience, however, it is possible to develop the ability to effectively switch between the two mindsets. The integration of ADR into complex personal injury proceedings, such as in the Grenfell Tower Litigation mentioned in section 2 is a testament to this transformation. Embracing both mindsets will equip you to adapt to the changing landscape of legal procedures and enable you to contribute to and critically assess the design of the various ADR processes which will need to be integrated within the digital justice system.

9. Standards, Ethics, Fairness and Data Protection

We now know that alongside the myriad and enormous benefits of the internet there is also a downside which includes many serious problems. It will be just the same with many of the developments mentioned in this paper. The efficient processing of data can bring many benefits but has the potential for abuse. As this paper was being prepared a number of tech leaders called for AI labs to pause work on advanced AI systems for six months to assess the risks associated with such systems and the Government published a policy paper on the regulation of AI[lxviii]. There are concerns about AI being put to harmful or criminal use.

There are also longstanding concerns about algorithms and indeed any software used in consumer context being transparent and auditable: how do you know whether you have been treated fairly if you don't know how the algorithm got to its answer? The protection of clients' and consumers' data and privacy is going to be an increasingly heavy responsibility of law firms and insurers.

Balance and fairness are a crucial elements of a civil justice system and any dispute resolution process. There is a power imbalance between claimants and defendants in the personal injury and clinical negligence arena. A third party neutral can help with that but we now have to consider the impact of the fourth party, namely the software, AI tools and algorithms that seem set to become part of the system. The Colossus experience was mentioned above and in this connection the question can be posed: What role might that system be playing today had it enjoyed universal trust and confidence of all stakeholders? This question leads on to the issue of governance. How is independent oversight on behalf of the users of the software and AI systems going to be provided?

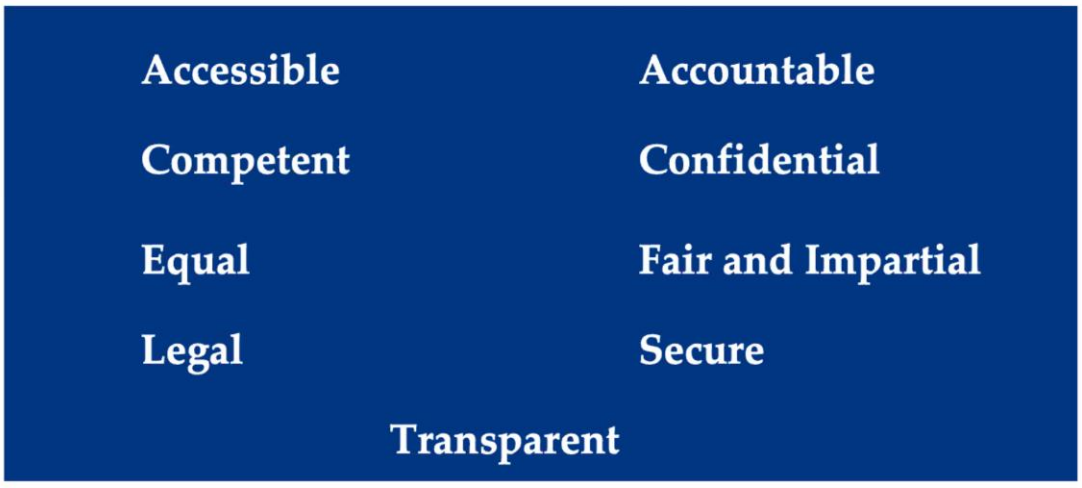
Further, it is essential that there are appropriate and properly funded arrangements for people who are digitally disadvantaged and or who need help or support in using digital systems.

So, in light of the above, it does not seem controversial to suggest that fair and ethical standards must be developed for the civil justice system as a whole and the technology and software in particular. A lead on standards has been taken by the International Council for Online Dispute Resolution (ICODR)[lxix] and copied below is an extract from its website together with an image showing the headings of the standards which have been developed and are available to be adopted or adapted.

The rule of law is a cornerstone of our civil justice system. The design and implementation of fair, transparent and balanced ethical standards are essential in maintaining the rule of law.

ICODR INTERNATIONAL COUNCIL FOR ONLINE DISPUTE RESOLUTION

odr.info NCTDR-ICODR ODR Standards icodr.info



"These ODR Standards apply to ODR practitioners and to technological platforms, systems, and tools when employed for dispute handling. They are interdependent and must be applied together. They can be useful for ODR software and system developers and to inform the public of requirements for ethical, technology-infused dispute resolution. Reference to "ODR" in the Standards includes people, entities, and technologies involved in implementing, hosting, or providing ODR services."

A copy of the standards is set out in the Appendix.[lxx]

10. Conclusion: recommendations and strategies for dealing with the impact of change

Legal practitioners, insurers and defendant organisations in the personal injury and clinical negligence claims sector and, more importantly, the users of their services, are facing a wide range of potent forces for change. Some of these forces have been operating for some years whereas others are more recent, but they are all now operating simultaneously and will have the consequence of significant changes to the way in which claims are resolved.

To summarise the previous sections in this paper, these forces for change are:

Civil Justice Policy: the integration of ADR and technology in a new digital justice system.

ADR already has a foothold in the sector and this is now becoming embedded in the Civil Procedure Rules ("CPR"). Many lawyers and insurers have for many years taken the view that whilst ADR may work in other sectors it is not really necessary here. There has, however, been a change in the field of clinical negligence. The NHS Resolution mediation scheme has, since 2017, demonstrated that mediation can be successfully deployed, even in a previously highly adversarial claims environment. The mediators involved in clinical negligence mediation are confident that the process can be equally successful with personal injury claims. The fact that when the mediation has, more occasionally, been used in personal injury claims it has produced a high settlement rate lends weight to that view.

The MoJ and the senior judiciary are united in pursuing an objective of a digital justice system. Here, a claim will start online in one of a series of pre-proceedings portals[lxxi]

and then be transferred, if not settled, to an online court system. Throughout it will be subject to a series of settlement opportunities or "mediated interventions". This approach is already live with the Online Civil Money Claims service[lxxii] and policy makers have clearly stated that this approach will be followed by higher value claims. This is not so much about ADR becoming compulsory but is rather a focus on designing a new online justice system, governed by a set of online rules, which will focus on consensual resolution (which is the outcome of the vast majority of claims) rather than trial (the outcome of a tiny minority).

These policy developments pose a challenge to those with a traditional, adversarial mindset by requiring them to take the counter-intuitive steps of learning, adopting and developing, in addition, a dispute resolution mindset.

Economics: the extension of fixed recoverable costs ("FRC")

The extension of FRC to personal injury and clinical negligence claims will be a paradigm shift because the abolition of the hourly rate will require law firms' business models and approach to claims to be fundamentally changed. One consequence will be a shift to earlier resolution and the tools that can help achieve this. Although this FRC development is part of Civil Justice Policy it is dealt with separately here to emphasise the importance of this economic force for change.

ODR: the development of technology, AI and decision science for claims.

The changes mentioned above are dependent on technology – a sector where, quite independently of civil justice, society is seeing an unprecedented rate of change with digitalisation, automation and the development of AI. A wide range of ODR platforms have been developed and are progressing from digitalising existing processes to using data and AI to predict claims outcomes. Robot judges may sound futuristic, as well as worrying, but how much human input is needed to deal with a whiplash claim where a medical report confirms the injury falls within the specified tariff at a particular level?

Chat CPT and similar models are now with us and many walks of life all over the world will be learning about the impact of these developments in the immediate future.

These technological developments give rise to serious risks regarding ethics, privacy, confidentiality and the reputations and brands of all organisations in the sector. Our internet age has clearly demonstrated the benefits and disadvantages of tech. The need to deal with such risks is of itself another force for change.

Social expectation

The "click now" society has created a public demand for transactions in the digital world to move quickly. Dissatisfaction with justice processes that seem, when compared with the services provided by the tech giants, to be slow and out of date will give rise to yet another force for change. Sprout.ai (a provider of an AI powered claims automation engine) has reported research that shows:

- one in five (21%) of insurance consumers expected claims to be resolved within hours and
- 100% of younger customers (aged 18-24) wanted resolution within a week.[lxxiii]

The Master of the Rolls adds:

> "(future generations) "will not accept a slow, paper-based and courthouse-centric justice system. If that's all that's available, new generations will look for other means of dispute resolution."[lxxiv]
>
> "Everybody in our modern society, certainly everybody under a certain age, does everything on their mobile phone. There is absolutely no reason why we can't provide the ability to vindicate legal rights online in a digital environment."[lxxv]

Recommendations

Although this sector has become accustomed to relentless, continuous change, the combination of the current forces for change is on a different scale and of a different nature to anything that has gone before. Our organisations and people need to acquire new skills, areas of expertise and work methods in addition to those already in place. The key strategies to deal with this might include:

- Develop or buy-in:
  - ADR and ODR skills
  - IT/AI skills

  and involve claims handlers and clients when doing so.

- Provide a programme of training to integrate these skills and competences into the organisation and then maintain and develop them.

- Develop a resource for adopting and maintaining appropriate standards and safeguards for privacy, data and client protection and ensuring compliance by those who you deal with.

- Investigate the role of change management bearing in mind the need to
    - foster and reward innovation (not something this sector is renowned for) and
    - deal with the clash between the impending changes and the traditional adversarial mindset (of the organisation as well as its individuals)
    - develop a collaborative approach to both individual case handling and innovative case handling arrangements with "opponents"
    - arrange for initial plans and training to be followed by robust measures for continuous improvement, auditing and accountability.

- Consider economic threats and opportunities arising from the above and review the business model including the business objectives, investment requirements and financial structure.

To conclude, the following questions and answers summarise the current situation:

What?
In the personal injury and clinical negligence claims sector we are used to constant change. But the changes that have now started are not just another amendment of the Civil Procedure Rules – they are of a different nature altogether.

So what?
These changes will require us to change our business models and the way we work.

What next?[lxxvi]
Preparation. Preparation. Preparation.

11. About Tim Wallis

One of the most experienced specialist personal injury and clinical negligence mediators in the country, Tim has been mediating claims since 1994 and was a founder member of Trust Mediation in 2007. As well as mediating hundreds of individual claims, Tim is also experienced at high-value multi-party mediations. He consistently demonstrates extraordinary empathy combined with a direct and determined approach that gets results.

The "deeply impressive" Tim Wallis has built a reputation as a specialist in mediating personal injury and insurance disputes. One market source observes that "he's a very measured individual and he's good at bridging gaps between people," while another comments that "he was very calm, collected and quietly effective." Chambers UK guide.

Professional experience:

- Mediation skills, honed over 20 + years;
- Litigation know-how and technical skills developed over 40 + years
- Authority from the leadership posts such as Managing Partner, Senior Partner, Company Chairman.
- ADR: Tim is a mediator, a director of Trust Mediation[lxxvii] and author of the ADR section in volume 2 of the White Book;
- ODR: Tim was chair of Claims Portal Limited for over 10 years and is director of Trust Arbitration[lxxviii]; and
- Civil justice policy: Tim is a founder member of the Civil Justice Council, a former member of its ODR Advisory Group[lxxix] and a current member of its ADR Judicial Liaison Committee.[lxxx]

About Trust Mediation

Trust Mediation provides mediation services to those seeking to resolve their cases without going to court. We are the UK's leading specialist personal injury and clinical negligence mediation company.

Independence, integrity and excellence underpin every aspect of Trust Mediation's service. From pre-mediation communications to supporting parties post-mediation, we are committed to providing a service solution that delivers high client satisfaction. This is achieved by working within a robust quality assurance programme that ensures compliance with our quality standards, statutory requirements, and service level agreements.

Trust Mediation are home to a group of mediators who are experienced personal injury and clinical negligence practitioners, and who also work as solicitors, barristers, KC's and doctors. They are committed to delivering quality and excellence and operate to the very highest professional standards.

All Mediators are registered members of the Civil Mediation Council (CMC), a charity that aims to promote the resolution of conflicts and disputes by encouraging mediation.

In December 2022, Trust Mediation were the first firm of mediators to reach the milestone of having conducted their 1000th NHS Resolution mediation.

About Trust Evaluation

Trust Evaluation
specialist personal injury and clinical negligence evaluation

Trust Evaluation is an Early Neutral Evaluation service provided by Trust Mediation Limited. Independent neutrals with a solid background in the personal injury and clinical negligence sector will provide an authoritative non-binding evaluation of a case, or a discreet aspect of it. The parties can use this evaluation to assist their own settlement negotiations or ask the neutral to go on to mediate. ("Eval-Arb"). The parties' submissions can be on paper, orally, online or face to face. If the parties so wish they can proceed to mediation post after the evaluation with a mediator who was not involved in the evaluation.

Trust Arbitration

Trust Arbitration

Trust Arbitration provides online arbitration services in a joint venture with Nuvalaw.[lxxxi] The service is provided over an ODR platform enabling OIC, Claims Portal and Fast Track claims to be resolved online, by an agreed, quality assured, arbitration process within a SLA period less than 2 weeks.

An additional and unexpected benefit of the online arbitration service was that the claimant law firm and insurer clients participating in the pilot developed a collaborative relationship

which further reduced friction points in dealing with claims. Nuvalaw are building on this foundation to offer a structured negotiation facility which will obviate the need for arbitration in many cases. This is an example of how using an ADR process can assist in moving away from the adversarial mindset to one which is more collaborative.

All law firms and insurers that have run pilots have been satisfied with the economics and the quality of the outcomes and have gone on to sign up as users of the service. The market share of both claimant law firms and insurers is significant. Organisations that have given public testaments to the joint venture include Admiral, Minster Law and NewLaw.

12. Thanks, acknowledgements, and declarations of interest.

Thanks to

Professor Richard Susskind, Shannon Salter, Colin Rule, Daniel Rainey and all at ICODR;
the two senior insurance claims managers who asked me curious questions;
Philip Hesketh, Ian Cohen and all colleagues at Trust Mediation and Trust Arbitration;
Willie Pienaar and all at Nuvalaw;
Graham Ross, Tresca Rodrigues, Professor Dominic Regan, John Spencer;
the proprietors of ODR platforms who have kindly demonstrated their pioneering work;
the Association of Consumer Support Organisations for their support on ADR and ODR
and those members of the Civil justice Council and directors of Claims Portal Limited, past and present, who have for many years informed, influenced and nurtured my interest in civil justice, ADR and latterly ODR.

Thanks also to
my mediation clients
and everyone I work with.

Also, I:

- acknowledge those who have directly or indirectly provided some of the ideas in this paper (not least Caroline Plumb whose article in The Times inspired the three questions repeated in the title and the conclusion[lxxxii]) and
- declare an interest: my "skin in the game" through the companies that I am a part owner of or associated with: Trust Mediation Limited[lxxxiii] and Trust ADR Limited, t/a Trust Arbitration[lxxxiv], which has an association with Nuvalaw[lxxxv].

So, back to my day job of mediating difficult and multi-party claims in the personal injury and clinical negligence field as well as commercial and agricultural disputes. Back also to my "side hustles" of helping to run the Trust companies and getting involved in developing ADR and ODR.

13. APPENDIX

ICODR INTERNATIONAL COUNCIL FOR ONLINE DISPUTE RESOLUTION

"These ODR Standards apply to ODR practitioners and to technological platforms, systems, and tools when employed for dispute handling. They are interdependent and must be applied together. They can be useful for ODR software and system developers and to inform the public of requirements for ethical, technology-infused dispute resolution. Reference to "ODR" in the Standards includes people, entities, and technologies involved in implementing, hosting, or providing ODR services."[lxxxvi]

ODR Standards require that online dispute resolution platforms and processes must be:

1. Accessible
ODR must be easy for parties to find within a system and participate in and not limit their right to representation. ODR should be available in communication channels accessible to all the parties, minimize costs to participants, and be easily accessed by people with different types of abilities.

2. Accountable
ODR systems must be continuously accountable to the institutions, legal frameworks, and

communities that they serve. ODR platforms must be auditable and the audit made available to users. This must include human oversight of: i) traceability of the originality of documents and of the path to outcome when artificial intelligence is employed, ii) determination of the relative control given to human and artificial decision-making strategies, iii) outcomes, and iv) the process of ensuring availability of outcomes to the parties.

3. Competent
ODR providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas. ODR services must be timely and use participant time efficiently.

4. Confidential
ODR providers must make every genuine and reasonable effort to maintain the confidentiality of party communications in line with policies that must be articulated to the parties regarding i) who will see what data, ii) how and to what purposes that data can be used, iii) how data will be stored, iv) if, how, and when data will be destroyed or modified, and v) how disclosures of breaches will be communicated and the steps that will be taken to prevent reoccurrence.

5. Equal
ODR providers must treat all participants with respect and dignity. ODR must seek to enable often silenced or marginalized voices to be heard and strive to ensure that offline privileges and disadvantages are not replicated in the ODR process. ODR must provide access to process instructions, security, confidentiality, and data control to all parties. ODR must strive to ensure on an on-going basis that no process or technology incorporated into ODR provides any party with a technological or informational advantage due to its use of ODR. Bias must be proactively avoided in all processes, contexts, and regarding party characteristics. ODR system design must include proactive efforts to prevent any artificial intelligence decision-making function from creating, replicating, or compounding bias in process or outcome. Human oversight is required in ODR system design and auditing to identify bias, make findings transparent to ODR providers and users, and eliminate bias in ODR processes and outcomes.

6. Fair and Impartial
ODR must treat all parties equitably and with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of ODR services. The obligation to disclose such circumstances shall be a continuing obligation throughout the ODR process.

7. Legal
ODR providers must abide by, uphold, and disclose to the parties relevant laws and regulations under which the process falls.

8. Secure
ODR providers must make every genuine and reasonable effort to ensure that ODR platforms are secure and data collected and communications between those engaged in ODR are not shared with any unauthorized parties. Disclosures of breaches must be communicated along with the steps taken to prevent reoccurrence.

9. Transparent
ODR providers must explicitly disclose in advance and in a meaningful and accessible manner: i) the form and enforceability of dispute resolution processes and outcomes and ii) the risks, costs

including for whom, and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context. The sources and methods used to gather any data that influences any decision made by artificial intelligence must be disclosed to all parties. ODR that uses artificial intelligence must publicly affirm compliance with jurisdictionally relevant legislation, regulations, or in their absence, guidelines on transparency and fairness of artificial intelligence systems. ODR must clearly disclose the role and magnitude of technology's influence on restricting or generating options and in final decisions or outcomes. Audits of ODR systems and platforms must identify metrics used to assess system performance, making the accuracy and precision of these metrics known and accessible to any ODR system operator and user. Users must be informed in a timely and accessible manner of any data breach and the steps taken to prevent reoccurrence.

14. ENDNOTES

[i] William Gibson, The Economist, December 4, 2003, and often quoted by Professor Richard Susskind.
[2] non-practising
[ii] Abdel-Kader v Kensington and Chelsea RLBC (Grenfell Tower Litigation) [2022] EWHC 2006 (QB).
[iii] See https://www.independentevaluation.org.uk Additionally Trust Mediation and Trust Arbitration are now joined by Trust Evaluation which provides and ENE service.
[iv] "An introduction to online dispute resolution (ODR), and its benefits and drawbacks" Charlotte Austin online-dispute-resolution-report-2018.pdf (mbie.govt.nz) The frequently mentioned metaphor of technology as a "Fourth Party" was first proposed in the book by the "father of ODR" Ethan Katsh and Janet Rifkin's Online Dispute Resolution (2001) https://odr.info/ethan-katsh
[v] "Integrating technology into your dispute resolution practice." D Rainey Eleven ISBN 978 – 94 – 6236 – 322 – 9
[vi] Abdel-Kader v Kensington and Chelsea RLBC (Grenfell Tower Litigation) [2022] EWHC 2006 (QB) at para 104.
[vii] John v Rees [1969] 2 All E.R. 274 at p.309 Megarry J
[viii] TMO Renewables Ltd (In Liquidation) v Yeo [2022] EWCA Civ 1409 (at paragraphs 38 and 40).
[ix] The settlement rate is taken to mean the percentage of cases that settle on the day of the mediation or shortly afterwards. Where parties do not settle on the day it is not unusual for discussions to continue between the parties and between the parties and the mediator.
[x] https://www.claimsportal.org.uk/about/about-claims-portal-ltd/
[xi] In the first quarter of 2023, for the first time, more than 10% of claimants were reported as having represented themselves (10.5%). https://www.legalfutures.co.uk/latest-news/motor-claims-fall-to-new-low-as-self-representation-creeps-up
[xii] In the first quarter of 2023 it was reported that the average time from claim to settlement in the portal rose to a record 238 days, up from 227 in the previous quarter. The OIC said: "This is to be expected as we are now seeing cases settle with more complex injuries and longer prognoses. It is likely to continue to rise." https://www.legalfutures.co.uk/latest-news/motor-claims-fall-to-new-low-as-self-representation-creeps-up
[xiii] https://committees.parliament.uk/work/7288/whiplash-reform-and-the-official-injury-claim-service/
[xiv] https://www.gov.uk/government/collections/official-injury-claim-advisory-group
[xv] Calculation available on request. Note: The actual saving depends on internal cost structures of the client.
[xvi] https://www.claimsmag.co.uk/2021/05/claimspace-adr-pilot-scores-highly-on-costs-and-timing/17839
[xvii] https://civilresolutionbc.ca/
[xviii] https://www.resolver.co.uk/
[xix] https://www.resolvedisputes.online/
[xx] https://www.moneysavingexpert.com/travel/flight-delays/#resolvertool
[xxi] https://www.trafficpenaltytribunal.gov.uk/
[xxii] https://www.financial-ombudsman.org.uk/who-we-are/make-decisions
[xxiii] https://resolution.nhs.uk/2020/02/12/mediation-in-healthcare-claims-an-evaluation/
[xxiv] https://mediate.com/the-eeoc-set-to-release-two-reports-comparing-online-and-in-person-mediation/

[xxv] "Embedding alternative dispute resolution in the civil justice system: a taxonomy for ADR referrals and a digital pathway to increase the uptake of ADR".
[xxvi] https://www.lawgazette.co.uk/news/moj-expecting-sevenfold-rise-in-mediation-workload/5115422.article?utm_source=gazette_newsletter&utm_medium=email&utm_campaign=MoJ+expects+sevenfold+rise+in+mediation+%7c+S%26G+to+offload+whiplash+work+%7c+Why+Rule+39+matters_03%2f14%2f2023
[xxvii] Asplin LJ, Westminster Legal Policy Forum: "Next steps for Alternative Dispute Resolution in England and Wales" 13 March 2023.

[xxviii] https://www.cambridge.org/core/journals/legal-studies/article/embedding-alternative-dispute-resolution-in-the-civil-justice-system-a-taxonomy-for-adr-referrals-and-a-digital-pathway-to-increase-the-uptake-of-adr/C262D5E21B271975D9339D066CA03350

xxix https://www.nao.org.uk/reports/progress-on-the-courts-and-tribunals-reform-programme/ and https://www.legalfutures.co.uk/latest-news/nao-castigates-rushed-court-modernisation-programme

[xxx] https://www.gov.uk/government/publications/hmcts-reform-civil-fact-sheets/fact-sheet-online-civil-money-claims

[xxxi] Ministry of Justice 'Increasing the use of mediation in the civil justice system' (July 2022) pp 12–18. https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system

xxxii https://www.lawgazette.co.uk/news/master-of-the-rolls-to-create-online-funnel-for-civil-claims/5107194.article

[xxxiii] Brett Dixon, Westminster Legal Policy Forum: "Next steps for Alternative Dispute Resolution in England and Wales" 13 March 2023.

[xxxiv] https://www.legalfutures.co.uk/latest-news/moj-wants-exponential-increase-in-dispute-resolution-tools 28 April 2023

[xxxv] https://www.lawgazette.co.uk/practice/joint-venture-to-turn-online-court-vision-into-reality/5115927.article

[xxxvi] Judicial Review and Courts Act 2022 ss22-24

[xxxvii] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1151873/extending-fixed-recoverable-costs-note-new-rules.pdf

[xxxviii] "Insult to injury" 17 February 2023 https://www.lawgazette.co.uk/features/insult-to-injury/5115187.article?utm_source=gazette_newsletter&utm_medium=email&utm_campaign=UK+sanctions+top+Russian+lawyer+%7c+Home+Office+%27monitoring%27+immigration+lawyers+%7c+Climate+crisis+and+courts_02%2f21%2f2023

[xxxix] Andy Bird, chief executive of Pearson, a leading textbook publisher. The Sunday Times 23.04.23

[xl] "ChatGPT & Generative AI within Law Firms" https://www.thomsonreuters.com/en-us/posts/technology/chatgpt-generative-ai-law-firms-2023/

[xli] "Here's where AI and ChatGPT can create quick wins for insurers. AI can help firms craft a new approach to customers." Gia Snape Apr 14, 2023 https://www.insurancebusinessmag.com/us/news/technology/heres-where-ai-and-chatgpt-can-create-quick-wins-for-insurers-442749.aspx

[xlii] "Law firm to "harness power of ChatGPT" for clinical negligence cases" https://www.legalfutures.co.uk/latest-news/law-firm-to-harness-power-of-chatgpt-for-clinical-negligence-cases 11 April 2023

[xliii] "AI to revolutionise work of both lawyers and judges, says MR" 24 April 2023 https://www.legalfutures.co.uk/latest-news/ai-to-revolutionise-work-of-both-lawyers-and-judges-says-mr

[xliv] https://www.lawgazette.co.uk/news/master-of-the-rolls-to-create-online-funnel-for-civil-claims/5107194.article

[xlv] htpts://www.judiciary.uk/speech-by-the-master-of-the-rolls-london-international-dispute-week-2022/

[xlvi] Traffic Management Act 2004

[xlvii] https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2020/09/TPT_Revolutionising-a-Service_2020.pdf

[xlviii] https://www.trafficpenaltytribunal.gov.uk and https://www.trafficpenaltytribunal.gov.uk/appeals-data

[xlix] https://www.lawgazette.co.uk/practice/joint-venture-to-turn-online-court-vision-into-reality/5115927.article

[l] https://www.painworth.com

[li] https://www.legalfutures.co.uk/latest-news/firm-uses-ai-to-spot-high-value-personal-injury-claims-in-portals

[lii] www.weightmans.com/products/predict/

[liii] Artificial intelligence - Wikipedia

[liv] ChatGPT is an AI chatbot created by OpenAI. It was trained on a massive dataset of text to generate human-like responses to prompts. What Is ChatGPT, and Why Is It Important? (howtogeek.com)

[lv] Wikipedia: Large language model (LLM) is a language model consisting of a neural network with many parameters (typically billions of weights or more), trained on large quantities of unlabelled text using unsupervised learning. LLMs emerged around 2018 and perform well at a wide variety of tasks. This has shifted the focus of natural language processing research away from the previous paradigm of training specialized supervised models for specific tasks. https://en.wikipedia.org/wiki/Large_language_model

[lvi] "Explainer: What is Generative AI, the technology behind OpenAI's ChatGPT?" https://www.reuters.com/technology/what-is-generative-ai-technology-behind-openais-chatgpt-2023-03-17/

[lvii] "How Transformative Will Generative AI And Other Tools Be For The Legal Industry?" Jan 23, 2023 Mark A. Cohen Forbes Business Policy

[lviii] An API, or application programming interface, is a set of defined rules that enable different applications to communicate with each other. https://www.ibm.com/topics/api

[lix] https://www.lexisnexis.co.uk/blog/future-of-law/using-ai-to-predict-litigation-outcomes

[lx] SettleIndex.com

[lxi] https://www.artificiallawyer.com/2022/02/03/meet-settleindex-the-new-litigation-analytics-platform/

[lxii] "Embedding alternative dispute resolution in the civil justice system: a taxonomy for ADR referrals and a digital pathway to increase the uptake of ADR" https://www.cambridge.org/core/journals/legal-studies/article/embedding-alternative-dispute-resolution-in-the-civil-justice-system-a-taxonomy-for-adr-referrals-and-a-digital-pathway-to-increase-the-uptake-of-adr/C262D5E21B271975D9339D066CA03350

[lxiii] Sander 'Varieties of dispute processing' (1976) 70 FRD 111.

[lxiv] https://www.otago.ac.nz › law › research › journals › otago828538.pdf Hamlyn Lectures in 2008 – "ADR and civil justice: what's justice got to do with it?"

[lxv] "Mediation in the shadow of the law – or sunlight?" Tony Allen "Mediation Matters" chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/Mediation_Matters_-_Issue_3_-_April_2023.pdf

[lxvi] See the passage from Merit v Navis 2022 EWHC 221 quoted on page 11.

[lxvii] "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal" Shannon Salter and Darin Thompson https://www.canlii.org/en/commentary/doc/2016CanLIIDocs136

[lxviii] https://www.gov.uk/government/publications/establishing-a-pro-innovation-approach-to-regulating-ai

[lxix] https://icodr.org/standards/

[lxx] Also available at https://icodr.org/standards/

[lxxi] The "Vos funnel". See page 30.

[lxxii] See page 29.

[lxxiii] "Here's where AI and ChatGPT can create quick wins for insurers. AI can help firms craft a new approach to customers." Gia Snape Apr 14, 2023 https://www.insurancebusinessmag.com/us/news/technology/heres-where-ai-and-chatgpt-can-create-quick-wins-for-insurers-442749.aspx

[lxxiv] https://www.lawgazette.co.uk/news/master-of-the-rolls-to-create-online-funnel-for-civil-claims/5107194.article

[lxxv] The Master of The Rolls Dreams of Digital Courthouses https://www.law360.com/articles/1594340/the-master-of-the-rolls-dreams-of-digital-courthouses

..

[lxxvii] Trust Mediation Limited.

[lxxviii] Trust ADR Limited, trading as Trust Arbitration.

[lxxix] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/previous-work/disputeresolution/online-dispute-resolution/odr-advisory-group/

[lxxx] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/alternative-dispute-resolution/

[lxxxi] https://www.nuvalaw.com/

[lxxxii] Rule of three can make the most of presentations. The Times, 22 May 2023.

[lxxxiii] Trust Mediation Limited company number 14736465 80 Mount Street, Nottingham, England, NG1 6HH

[lxxxiv] Trust ADR Limited trading as Trust Arbitration company number 13320031 80 Mount Street, Nottingham, England, NG1 6HH
[lxxxv] https://www.nuvalaw.com/
[lxxxvi] https://icodr.org/standards/