THE ROLE OF MEDIATION IN PERSONAL INJURY ACTIONS

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-INTRODUCTION -

In the last few months Lord Justice Rupert Jackson has suggested some fundamental changes to the way in which personal injury claims should be dealt with and in particular, has made some radical proposals to reduce the cost implications in civil matters – particularly personal injury claims.

Lord Jackson was asked by the Master of the Rolls to examine the whole area of civil litigation costs and to challenge the perception that mediation is not suitable for personal injury claims.

In a Cost Review report in 2010 Lord Justice Jackson specifically commented:-

'there is widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable at arriving at a reasonable outcome in many personal injury cases, and bringing satisfaction to the parties in the process. '

Lord Justice Jackson has suggested that a way to reduce legal costs and court time within civil matters is to increase the use of Alternative Dispute Resolution (ADR) and more particularly mediation in civil claims.

During the course of this handout I will explain precisely what is meant by mediation, what the effect of it is, explore the strengths and weakness of mediation, consider the likely costs as opposed to traditional court costs, the obligations on the solicitor to advise and finally the legal consequences of refusing to take up mediation or indeed any other form of ADR.

What is Mediation?

Mediation is a form of Alternative Dispute Resolution. Other methods which will not be addressed in this handout include but are not limited to: negotiation, concilliation, adjudication, arbitration. It is a form of negotiation which involves a third party mediator, who is impartial to the case. The 'mediator' is usually a professional and can be an expert in a particular field or indeed legally trained. Many Barristers are often also qualified mediators.

The main objective of all mediation is to resolve the dispute in question, however the parties may also have other objectives which they may wish to meet i.e. to preserve a business relationship. The benefit of mediation is that the parties themselves govern the agenda of the meeting and set their own objectives.

The parties usually meet at an independent office which is neutral ground to start a discussion. This could for example be the mediator's offices or a privately hired venue. The mediation itself is entirely without prejudice and therefore if parties have been unable to reach a satisfactory conclusion, theycan simply walk away and the case can simply proceed to litigation. If however, the mediation is successful, a mediation agreement is drawn up and signed by the parties to the dispute. This will then form a binding contract between them.

Parties can also ask for the agreement itself to be endorsed by the Court in a Court Order in a form similar to a consent order.

Once parties agree to try mediation, the mediator will require parties to sign a contract, outlining the agreed fees, who is responsible for the fees etc.

How does the actual mediation work?

Parties arrive at the designated office and are shown into individual rooms. For example if there are 2 parties to a dispute, party A will be shown into his room and party B into her room.

The mediator then shuffles between the two rooms to discuss the dispute with the individuals concerned and to discuss any potential compromises/ideas. Party A and Party B do not meet unless the mediator considers that it would be useful to do so. In practice however, many mediations often end in a round table meeting and discussion between all parties and mediator.

Parties can attend without legal representation if they so which, however in personal injury claims if there is a solicitor acting, it is usual for the solicitor to accompany the party concerned. The benefit of this is that the solicitor can advise the client of the risks of proceeding to court and also the reasonableness of any offers on the table.

The mediator will speak to each party to the dispute to ascertain the full background of the dispute, the issues in dispute and the objectives of the individual concerned. Once the mediator has obtained this initial information, he will then communicate separately between the parties reiterating the other's concerns, providing options, exploring possible common ground and whether an amicable conclusion can be made. There are different styles of mediation and therefore the details obtained by the mediator may vary slightly.

Mediation can also be conducted by telephone which may be a cheaper option.

Different styles of mediation

Facilitative

A mediator using this style of mediation will not direct parties to any particular settlement conclusion but instead will leave the parties themselves to have overall control of the content of the mediation and the objectives.

Evaluative

The mediator using this style of negotiation will help with suggestions for a suitable outcome between the parties.

Rights-based

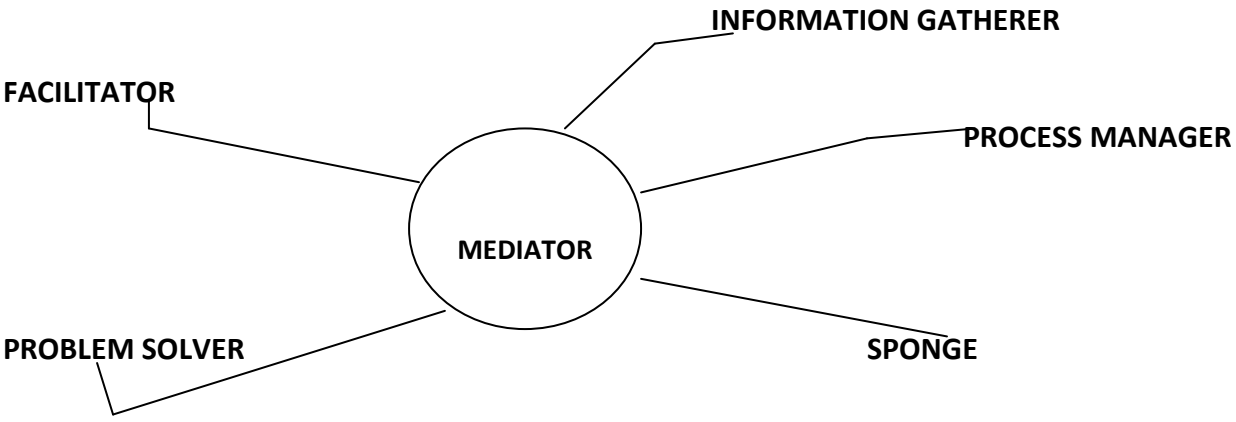
This type of mediator will usually have some legal experience/qualifications as he/she will ensure that any agreement reached will reflect the legal and statutory rights of the parties.

The style to be used will depend on who the parties to the dispute are and what exactly the dispute relates to. For example, a dispute between 2 local businessmen may call for facilitative mediation – especially if the parties want to try and preserve a business relationship for the future. A mediation for an accident at work in contrast may be more suited to a rights-based mediation, especially if the claimant is still working for the defendant.

The process of mediation can last anywhere from a few hours or up to several days depending on the level of the dispute and complexity of the case.

Skills of a mediator

A Mediator needs to have several skills to be successful in his task:-



Facilitator

The Mediator needs to be able to ease communication, defuse possible hostile atmospheres, needs to be calm.

Problem Solver

He/she must be able to bring clear, concise, creative/new ideas to the table to enable the parties to explore a settlement**.**

Process Manager

He/she needs to be able to keep the momentum of the negotiations/discussions going, especially when parties reach a stalemate.

Information Gatherer

The Mediator needs to have the ability to assimilate lots of information, to be able to absorb the information, to identify the key issues and any common ground which may assist negotiations.

Sponge

He/she must be able to soak up the parties feelings and frustrations and be able to keep a calm and impartial head.

The Civil Mediation Council

A Civil Mediation Council (CMC) was set up in 2003 and represents the interest of Mediators and Mediation Providers throughout England and Wales.

Some of its objectives are to:-

- Promote all forms of mediation
- improve understanding and awareness of mediation as a means of resolving conflict generally and as an alternative to litigation
- engage with government bodies and other organisations in promoting and developing mediation

- tackle issues that affect the civil, commercial and workplace mediation industry that influence the growth and future direction of mediation in England and Wales.

The council contains a list of qualified mediators and is a good starting point to any individual seeking a mediator. The council set up a National Mediation Helpline (see below).

Locating a Mediator & Cost

There are various agencies online which offer mediation services e.g National Mediation Helpline, Centre for Effective Dispute Resolution, Clerksroom.

The National Mediation Helpline (NMH) offers mediation at fixed rates starting from as little as £50.00 per person plus vat for 1 hour in small claim cases. NMH works in conjunction with the courts and was set up by the Civil Mediation Council (CMC) and the courts.

AMOUNT OF DISPUTE	FEES	TIME ALLOWED	ADDITIONAL TIME
£5000 – OR LESS (Small Claim)	£50 + vat £100 + vat	1 hr 2 hr	£50 per hour
£5001 - £15,000 (Fast Track)	£300 + vat	3 hrs	£85 per hour
£15,001 - £50,000	£425 + vat	4 hrs	£95 per hour

There are also many other internet companies who offer mediation services, some with specialist mediators.

Clerksroom mediation offers an 8 hour mediation for £2750(global) plus vat but this does not include venue hire. Centre for Effective Dispute Resolution (CEDR) also provides such services at competitive prices.

For clients who cannot afford to take up mediation, there is also an option to contact the local Citizen Advice Bureau who work in conjunction with **LawWorks.** LawWorks is a charity which offers pro-bono legal services to those who have financial hardship.

Who pays?

In cases where liability is admitted but causation and quantum are in issue, it is arguably for the Defendant to pay the costs of the mediation.

However if both liability and causation are in dispute, the cost is usually shared between the parties to the dispute. It is possible that if a mediation fails in these circumstances and the case then proceeds to trial, that the winner may be able to recover the cost of the mediation at the conclusion.

The issue of who pays the costs can be agreed between the parties at the time mediation is suggested.

As we shall see later on in the handout, there are cost implications if a party does not reasonably pursue mediation when it was offered or when it was appropriate in a case.

Advantages & Disadvantages of Mediation

ADVANTAGES	DISADVANTAGES
Without prejudice negotiation – parties can walk away if no compromise reached	Can be expensive depending on which mediator is used
Avoids the risk and uncertainty of Trial	If the mediation fails there are added costs of trial – no guarantees
Parties show a willingness to try and reach a compromise	Relies on the parties agreeing to participate
Can be quicker than Trial	If the mediation is successful it can be less profitable from a solicitor's perspective
Parties can maintain working and trading relations	May not be appropriate for more complex cases e.g. technical claims/those cases requiring expert evidence.
A mediator can help unlock negotiations when they stall	Relies on the expertise and skill of the mediator in keeping the mediation moving and keeping strong characters in check.
Confidential	The quality of mediators can vary
Win-win solution for parties. A compromise can be reached in which both parties benefit from unlike for example, a court order No judge present and the parties retain full control of the outcomes of the settlement.	The cost of mediation can vary depending on the mediator being used – there is no set band of fees.
No decision imposed on parties.	Where one party is afraid or intimidated by another if the mediator is not a strong character, the result can be unsatisfactory
Can be a way of having an apology/hearing an explanation from the other side	
Privately making amends without public judgments and trial	
Can be done by telephone	

Does mediation work?

Several mediation pilot studies have been underway in courts and tribunals over the last 3 – 4 years and the results have been encouraging.

In 2010 the Ministry of Justice conducted a pilot study of mediation in employment tribunals and the results proved to be very interesting:-

1. *Parties in 23% of the cases accepted an offer to mediate*
2. *But only 13% actually attended the mediation sessions*
3. *In all cases which were trialed for mediation, 57% of the cases successfully concluded*

In another pilot scheme operated by the Ministry of Justice 7500 small claims out of the 10,000 trialled, ended successfully.

96% of the mediation took place over the telephone.

In 2007, Professor Hazel Genn from Central London University conducted an evaluation of a mediation pilot scheme which had been in operation at Central London County Court. The results were that:-

1. *Where a dispute settled through the mediation process 61% of the parties and 90% of the representatives thought that costs had been saved.*
2. *Where the cases did not settle, 45% of parties and 55% of representatives thought that costs had increased.*
3. *Where the cases were settled at mediation, 73% of parties and 72% of representatives thought that time had been saved. Where it did not settled 56% of parties and 61% of representatives felt that the additional process of mediation had increased the overall timescales in the case.*

In 2005 a public awareness survey was conducted in Scotland by the Scottish Consumer Council. It was evident from the findings of this survey that awareness of mediation was not widespread .

1. *57% of the people interviewed had heard of mediation, 43% had not.*

2. *59% said they would consider mediation but 38% said they would not and 3% did not know*
3. *men and women were equally likely to use mediation*
4. 2/3 of those interviewed correctly identified the defintion of mediation

Introduction of compulsory mediation?

The introduction of compulsory mediation is currently under discussion in England and Wales and Lord Jackson's reforms go as far as only *encouragin*g mediation for all claims, especially small claims. Lord Jackson has also suggested mediation training for judges and including mediation training within legal professional training. It is still unknown whether mediation will be compulsory in this country but certainly the focus seems to be to encourage it's use and it may well be that mediation will become compulsory in time.

Mediation is already compulsory in some countries and has proven to be very successful in reducing costs.

In March 2011 compulsory mediation was introduced in Italy for civil and commercial disputes. Greece, Belguim and Australia also have a policy of compulsory mediation.

Some concern has been raised by Lord Justice Jackson and also Lord Justice Dyson in the case of *Halsey –v- Milton Keynes 2004* (see later notes) that compulsory mediation may affect an individual's human rights and Article 6 of the European Convention of Human Rights. (right to a fair trial). This has not been a problem for Greece and Belguim who are both signatories to the ECHR.

In fact Lord Justice Dyson in *Halsey* went as far as stating the following:-

'it seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right to access the court.'

This view has not been supported by other law lords such as Justice Lightman and Lord Phillips who have both publically stated that they do not believe that compulsory mediation would violate human rights any way. Instead they believe that mediation will simply slow down the process to trial. Arguably it could also avoid trial altogether.

Lord Justice Jackson has also encouraged the use/formation of specialist personal injury mediators – these could be qualified solicitors, Barristers or retired judges.

In March 2011 the Lord Chancellor Mr Kenneth Clarke announced that Lord Jackson's reform of costs in civil litigation is likely to be introduced in full. The Ministry of Justice is exploring the possibility of a 4 stage 'dispute resolution regime' within the courts – thus avoiding cases under £100,000 going to court at all.

The duty of the Solicitor in personal injury claims

Surprisingly, in practice, many solicitors are not fully aware of their obligations in relation to advising about mediation and some firms do not explore ADR at all. Whilst there is no obligation for a party to take up advice/offers on mediation, there are several obligations on the Solicitor acting to advise his/her client of different routes to resolving a dispute.

Professional Conduct

In any contentious matter a Solicitor is obliged under the Professional Code of Conduct rules to provide the client with the options for resolving the issue.

Rule 2.02 (1)b of the Solicitor's Code of Conduct requires a Solicitor to provide '*a clear explanation..of the issues..and options available.'* Guidance note 15 takes this further and states:-

'*when considering the options available to the client, if the matter relates to a dispute between your client and a third party, you should discuss whether mediation or some other alternative dispute resolution procedure may be more appropriate to litigation.'*

Personal Injury Protocol

As you will already know, pre-litigated personal injury claims are governed by a protocol. Parties are required to follow the protocol during this stage, failing which there can be cost consequences.

The protocol makes it clear that even during pre-litigated stages of a claim, consideration should be given to whether ADR is applicable.

The protocol specifically states:-

2.16 *'the parties should consider whether some form of ADR procedure would be more suitable than litigation…litigation should be a last resort….parties are warned..the court may have regard to such conduct when determining costs.'*

2.17 *'options for resolving disputes without Litigation…discussion and negotiation..mediation.'*

2.18 provides professionals with a link to external agencies specialising in ADR

Civil Procedure Rules

CPR 1.4.(1) '*the court must further the overriding objective by actively managing cases.*

CPR 1.4.(2) 'active case management includes:-

CPR 1.4.(2)e encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate.'

CPR 26.4 (1) 'A party, may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by ADR or other means.'

29PD.4.10 (9) states that when the court gives directions of its own initiative in Multi Track matters, consideration should be given to whether ADR is appropriate and the court may include this in the directions.

CPR 44.5(3)a while dealing with costs at the conclusion of the case *'the court must have regard to the conduct of all parties…including the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.'*

Making offers of mediation – cost consquences of refusal

There has been a wealth of case law in the last 10 years regarding the use of ADR in disputes. The courts have certainly made it clear in their decisions that they will not take a refusal to use ADR lightly and there may well be cost consequences imposed on a party who unreasonably refuses ADR. I will consider below some of the more important cases and also recent cases.

The starting point is with the case of Dunnett –v- Railtrack Plc (2002) 1 WLR 2434 (CA).

- case briefly concerned a dispute between the Claimant about a field next to a railtrack.
- Liability was in issue throughout and the dispute went to Appeal. The Defendant won the case at appeal but the parties were criticised for failing to consider ADR.

- The Defendant had denied outright to consider ADR and therefore at the conclusion of the appeal, it was punished by the court and denied their costs of the appeal.

Halsey –v- Milton Keynes NHS Trust (2004) 1 WLR 3002 (CA).

- This was a clinical negligence case. Mr H died while being treated in hospital and his wife alleged negligence on the part of the NHS Trust.
- She was unsuccessful at Trial and the NHS sought its costs as per the usual role 'loser pays the winners costs.'
- Claimant argued that they should not be entitled to their costs as they had been asked to mediate long before the case went to trial. The trust had refused these offers as it believed that it had a strong defence to the claim.
- Claimant argued that the trust should not be entitled to their costs from the date of the first mediation offer.
- Claimant lost at appeal and it was held that Defendant reasonable to refuse to mediate in that case.
- Court of appeal provided guidance for future cases and took view that the burden is on the unsuccessful party to show why there should be a departure from the general rule. A checklist was provided :-

    a. *The nature of the dispute*
    b. *The merits of the case*
    c. *The extent to which other settlement options have been explored*
    d. *Whether ADR costs would be disproportionately high*
    e. *Whether any delay in setting up would be prejudicial*
    f. *Whether the ADR had reasonable chances of success*

The Claimant's solicitor was criticised for writing letters inviting mediation as it was felt that these were made in an attempt to force settlement in a purely speculative claim.

Reed Executive plc and another –v- Reed Business Information Ltd (2004) EWCA Civ 887

- A trade mark infringement dispute

- Neither side had requested ADR prior to Trial
- Claimant won at trial and D appealed. Claimant invited D to use mediation at appeal stage. Defendant denied.
- D won the appeal and C requested that D be penalised in costs for failing to consider ADR. C lost in its argument. Court said (1) when C made the offer it was doing so from a position a strength as it had won the case at first instance (2) the proposal of ADR was very late in the day (3) D had a reasonable belief in its prospect of success and did in fact win at appeal level.

Burchell –v- Bullard (2005) EWCA Civ 358

- Building dispute. The builder mad a claim against customer for debt. Customer made counter claim arguing that work unsatisfactory.
- Both parties penalised for costs.
- Argument put forward that the case was too complicated for ADR.
- Lord Justice Ward stated that this was 'plain nonsense'.

Bradford & Another –v- Keith James 2008 EWCA Civ 837

- Boundary dispute on land
- Very high costs at trial.
- Parties criticised and Lord Justice Mummery stated :' *mediation should be made right at the beginning of the dispute ..and well before things turn nasty and become expensive.*

Rolf –v- De Guerin (2011) EWCA Civ 78

- small building contract between builder and homeowner
- Claimant won on liability and had £2500 damages. This was only a fraction of the sums claimed and the court considered that her counterclaims were excessive and exagerrated. She was refused her costs of the trial.
- Claimant appealed on costs. The defendant refused several offers to mediate until the eve of trial. The Court of Appeal exercised its discretion to make no order as to costs. It held that refusing to participate in settlement negotiations or mediation was, on the facts, unreasonable and ought to bear materially on the exercise of the court's

discretion. Indeed, Lord Justice Rix characterised the matter as "a sad case about lost opportunities for mediation".

Other useful methods of ADR in personal injury claims

Other methods often used in personal injury litigation are joint settlement meetings and round table discussions.

Round table discussions are just that! The parties to the dispute come together at an agreed venue to discuss the issues in dispute and whether there are possible compromises to be made.

Joint settlement meetings (JSM) work in much the same was a mediation i.e. separate rooms but instead of an independent 'mediator' being appointed, the meeting is coordinated by counsel for both parties. The Claimant, his solicitor and Counsel will attend together with the Defendant, solicitor and Counsel. Party A and Party B will then be shown to individual rooms and Counsel for both parties will meet at regular intervals in separate room to discuss issues and possible compromises. The perspective Barristers will then return to the room with the client to feedback issues etc and take further instructions.

Both the above forms of ADR are also without prejudice and so parties can simply walk away if the negotiations prove to be fruitless.

Conclusion

ADR does in my own experience work as it is an opportunity for parties to meet face to face to air their concerns and attempt to reach a compromise to a dispute. It can be a lot quicker than lengthy protracted correspondence and can be cheaper, especially if offered early on in proceedings. In addition, cases can be resolved without the risk of proceeding to Trial and therefore it may be a safer option for the client.

The courts certainly seem to favouring ADR as it means that less cases will proceed to Trial, resulting in less cost and also less use of valuable court time.

From a solicitor's perspective, it may not be ideal as obviously if a case settles early on, less legal costs will be incurred in that matter. As we have seen however, the solicitor has various obligations to make the client aware of the option to take up ADR and also to help the Court in furthering the 'Overriding Objective' and therefore there must be a risk to a solicitor who does not inform or take up ADR when appropriate.

Not only could a client complain about a solicitor who fails to address this issue but more importantly, if adverse cost orders are awarded against a client because of the failure to take up ADR, there may be issues about who pays these costs especially if the solicitor has not advised in this area. E.g could sue solicitor for negligence.

It seems that there is a lot of ignorance within the legal profession about the use of ADR and the benefits that it can bring in litigated matters. I believe that the recent proposals by Lord Justice Jackson can only help to increase awareness of this issue.

-Bibliography-

ONLINE RESOURCES

HMCS website

Council for Mediation

Centre for Effective Dispute Resolution

LawWorks

ADR Now

ARTICLES

Lord Justice Jackson 'cost review'

Halsey – mediation one year on – by Ed Sautter

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