Civil Justice Council

ADR and Civil Justice

A response by the Association of Personal Injury Lawyers
December 2017

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 25-year history of working to help injured people gain access to justice they need and deserve. We have over 3,000 members, committed to supporting the association's aims and all of whom sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, Governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

We welcome the opportunity to respond to the Civil Justice Council's consultation on alternative dispute resolution. APIL is an organisation which campaigns for access to justice for injured people. As such, our comments focus only on how the CJC working group's proposals relate to personal injury and clinical negligence claims.

APIL has an ongoing commitment to ensuring that claimant solicitors are aware of all forms of ADR and how they may be used to benefit injured people. ADR can work very well in cases in which there is an ongoing relationship to salvage, such as employers' liability claims; where more is required by the injured person than monetary compensation (such as an apology); and where negotiations have broken down or stalled.

An injured person should, following advice from their lawyer, be able to decide the best option of dispute resolution for them. Under no circumstances should ADR be forced upon unwilling parties by the rules.

1. ADR in personal injury cases – current position

ADR can be a useful option to resolve disputes during the life of a claim. Parties should always keep an open mind about different methods of resolving a claim. ADR will not be suitable in every case but can be successful when it is used appropriately. ADR can provide earlier and faster settlements, and provides an opportunity for the claimant to be involved in their own case. Even just an offer to engage in ADR can lead to settlement, with parties engaging in earlier sharing of information, narrowing of the issues and a resolution of misunderstandings.

We question, however, the need for reform of ADR in the personal injury claims process. There is already a great deal of work undertaken by practitioners in both lower and higher value claims before issue, to ensure that claims do not go to court unnecessarily. Figures from the Compensation Recovery Unit suggest that the vast majority of personal injury claims are resolved before they reach court, with only 15 per cent of claims registered with the CRU in 2015/16 being issued[1]. There is no sense in upheaving the way in which these cases are run, setting a barrier that must be crossed by litigants should they wish to bring a claim in court, if there is already a successful way of keeping most personal injury claims outside of the court.

1.1 Lower value claims

As recognised in the CJC's paper, the pre-action protocols and online claims Portal for low value road traffic, employers' liability and public liability claims, are already a form of ADR which must be undertaken before proceedings are issued in most low value claims. Lord Justice Briggs, in his final report on the civil court structure, set out that personal injury claims in the fast track are dealt with in a highly efficient manner through the Portal, which leads to many cases being settled without recourse to court.

1.2 High value cases

[1] 926,778 personal injury claims were registered with the Compensation Recovery Unit in 2015/16. Over the same period, 139,036 personal injury claims were issued in the County Courts.

In the highest value cases, joint settlement meetings can be an effective way to reach settlement without recourse to the court, once both sides have had an opportunity to consider all of the evidence. Mediation can also be of assistance in higher value cases where there are multiple defendants, where the claimant expresses an interest in being involved in the case, or where relations between the legal teams have broken down.

APIL, FOIL and a number of major insurers have also worked together to develop a best practice guide which helps to encourage settlement in cases involving serious injury, valued over £250,000 – *The Guide to the Conduct of Cases Involving Serious Injury*[2]. The guide has been well received, with 76 claimant firms conducting serious injury work, 13 major insurers and the Motor Insurers' Bureau all committed to working in accordance with the guide. The Guide is intended to help parties involved in these multi track claims resolve any/all issues whilst putting the claimant at the centre of the process. It puts in place a system that meets the reasonable needs of the injured claimant whilst ensuring the parties work together towards resolving the case by cooperating and narrowing the issues. In a survey to claimant participants in February 2017, 67% of those who responded to the survey indicated that the guide leads to greater collaboration with defendants towards resolution of the case. Where issues cannot be resolved through discussion, those signed up to the guide commit to consider all forms of alternative dispute resolution. The Guide helps to encourage buy-in to ADR from both parties.

1.3 Personal injury claims generally

As well as the Portal and accompanying pre-action protocols for lower value claims, there is a pre-action protocol for personal injury claims, and specific protocols for disease claims and for clinical disputes. There is a great emphasis on PI and clinical negligence practitioners to try to reach a solution before recourse to the court in all cases. All pre-action protocols include a requirement to consider alternative dispute resolution, and costs sanctions are used effectively by the court so that if one party does make an offer to engage in ADR, the other party must have a good reason not to come to the table.

There are also other tools in place to encourage early settlement, such as Part 36 offers. The costs and interest consequences of such offers are useful in bringing about a resolution to the claim.

Rather than compulsion, we believe that to encourage greater uptake of ADR, and to ensure that it becomes "culturally normal", the focus should be on signposting to ADR in the relevant places in the civil justice system. Personal injury is already "ahead of the curve" in this respect, too. As highlighted above, there are already various signposts to ADR in the personal injury claims process, such as the pre-action protocols and the *Guide to the Conduct of Cases Involving Serious Injury*.

2. ADR should not be compulsory

There are no statistics within the CJC's report to demonstrate the effectiveness of ADR in England and Wales. We question why there should be a push towards compulsion if there is no evidence to support its success. Section 7 of the CJC's report also states that the CJC has found it enormously difficult to gauge the success of overseas systems.

[2] http://www.seriousinjuryguide.co.uk/files/serious-injury-guide-20170810.pdf

We are concerned that an insistance on engagement with ADR in every personal injury case, either before issue or during the course of proceedings, will add to the costs of running a case and will ultimately lead to delay.

With personal injury law having undergone major reforms in the past five years, and with more reforms in the pipeline, we are also unsure how any moves towards compulsory ADR would sit. The changes underway should be permitted to bed down before there is any further overhaul of the process.

2.1 Encouraging ADR at source

We do not believe that ADR should be compulsory at any stage of a claim, or before a claim is brought. Individuals should have the right to choose the most suitable means of resolving their dispute. Access to justice is a cornerstone of our society. If organisations have set up a redress scheme to resolve disputes without the need to go to court, individuals should be able to access an independent lawyer first, to help them decide whether this is the best option for them. We are concerned that if individuals are forced to engage with a defendant's dispute resolution scheme without being able to discuss with an independent legal representative first, they may be – perhaps unknowingly - forced to agree to a settlement that does not meet their needs.

2.2 Encouraging ADR when proceedings are in contemplation

As above, ADR can be a useful method of resolving a case, and the parties should consider it at every stage. The pre-action protocols and directions of court require consideration of ADR, and the court effectively applies sanctions where ADR has been unreasonably refused.

Question 8 of the CJC's paper, though, asks whether there is a case for making some engagement with ADR mandatory as a condition for issuing proceedings. We question what "some engagement with ADR" is, and who will decide whether the threshold has been passed to enable the claimant to issue proceedings. It may be useful to have a requirement that parties fill in a form to state that they have considered ADR, but it must be assumed that if there has been compliance with the existing pre-action protocols and significant progress has not occurred in respect of liability, causation or quantum, then pre-action mediation is unlikely to be of any benefit.

Undertaking some form of ADR as a condition of issue would also be problematic if the claimant solicitor has been instructed just before limitation and has had to issue protectively.

We are also concerned that if it is a requirement to complete some form of ADR before being permitted to issue proceedings there will be insufficient resources available within the court process to support this. Previously, there was an after hours mediation scheme run by the court service, but this was discontinued due to a lack of resources. Levels of court staff are already being depleted and many courts have closed altogether in the past few years – we fail to see how there will be the resources available to comply with a compulsory ADR requirement. If there are not the resources available to meet the demand, cases will be delayed. We also question what would happen if the defendant simply denied the claim and refused to engage in ADR. In the Portal, if a defendant is being un-cooperative, or denies liability, the claim will drop out of the process and the claimant can issue proceedings. If

ADR is compulsory pre-issue, what will happen if the defendant is unco-operative? Not every case is suitable for ADR.

2.3 Encouraging ADR in the course of proceedings

The CJC working group's recommendation 11 sets out that there should be a new emphasis on ensuring parties address ADR properly when completing the directions questionnaire, and prior to the CMC. It sets out that the parties should be asked what attempts they have made to enter into an ADR process or to explain why they haven't done so.

Anecdotally, in personal injury cases, one of the main reasons for parties to refuse to engage in ADR is if one side does not have all of their evidence or has not had an opportunity to consider the other side's evidence. Particularly in higher value cases, all parties want to have all of their evidence and to have had a chance to consider the other side's evidence. The success of Joint Settlement Meetings in higher value cases is down to this form of ADR being undertaken once each party has their evidential "ducks in a row".

At present, any party that does not want to participate in ADR must produce a witness statement, setting out the reasons why they are not enaging in ADR, and this will be examined by the judge when they make a decision on costs. The current direction sets out that:

> "At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal [and not less than 28 days before trial]; such witness statement must not be shown to the trial judge until questions of costs arise."

Moving the assessment of whether the parties were right not to engage in ADR to earlier on in the process will simply mean parties will be more likely to use the fact that they have not obtained all of their evidence or not had chance to consider all of the evidence, to avoid engaging in ADR. The lack of evidence will still be the main reason for not engaging in ADR, and moving consideration of ADR to earlier will not resolve this, but will likely exacerbate it.

3. Clinical negligence claims

Throughout the CJC's paper, there are references to clinical negligence claims being suitable for compulsory ADR.

The question of whether ADR should be compulsory in clinical negligence cases is not straight forward. There are divergent views among practitioners as to whether, and how best, to introduce some form of compulsion. Any proposed changes are further complicated by the ongoing work to introduce a system of fixed costs for lower value clinical negligence claims. It is clear that if there are moves to introduce any form of compulsion, there must be detailed consultation with clinical negligence practitioners beforehand.

Claimant clinical negligence practitioners welcome engagement in alternative dispute resolution, but there must be real enthusiasm from both sides for progress to be achieved. Members report that the conduct of the defendant is a key factor in whether ADR is successful or not. Forms of ADR, such as joint settlement meetings, are often postponed or

withdrawn by the defendant, and this is becoming a more frequent occurrence due to the uncertainty surrounding the discount rate.

3.1 Encouraging ADR pre-proceedings

Throughout a clinical negligence claim, there should always be the option to enage in ADR. There may be benefit in introducing a stocktake period prior to issue. However, it must be assumed that if there has been compliance with existing pre-action protocols and significant progress has not been made, pre-action mediation is unlikely to be of any benefit.

It would not be appropriate to make engagement of ADR mandatory as a condition of issuing proceedings, for the reasons stated at section 2.2 above.

3.2 Encouraging ADR during the course of proceedings

As above, there should be an option for parties to engage in ADR at every stage of the claim, but it will not be suitable for all claims. With the changes afoot for clinical negligence claims at present, it is difficult to comment on whether there should be a greater push to compulsion in the course of proceedings. Generally, moving ADR to earlier in the process will be problematic – the parties will not have exchanged evidence evidence, and the defendant will often not closely examine the case until the defence is due. Quantum may also not have been fully investigated by the time of allocation. As with personal injury claims, there is already a provision in the direction order for ADR before trial, and parties that do not agree to mediation/ADR must provide a witness statement to explain why they will not take part.

4. Cost sanctions

We are concerned that tightening costs sanctions and broadening the scope of the *Halsey* guidelines will effectively make mediation compulsory in every case "through the back door". As set out above, ADR already works well in personal injury claims for certain types of case. Costs sanctions are effective in ensuring that parties consider, and engage in ADR when it is reasonable to do so. Costs sanctions mean that parties must think carefully about refusing to engage in ADR. Cases such as *Bristow v Princess Alexander Hospital NHS Trust*[3]*,* and *March v Ministry of Justice*[4]*,* demonstrate that a good reason must be provided in order for the party refusing to engage to avoid having to pay indemnity costs to the other side. In *Bristow,* the defendant took three months to reject the offer to mediate, and gave no good reason to refuse other than the fact that the case had already been set down for detailed assessment. The claimant received costs on an indemnity basis as a sanction for the defendant failing to engage in mediation. In *March,* a stress at work case involving allegations of abuse, the judge rejected the defendant's argument that it should not engage in alternative dispute resolution because the litigation was out of the ordinary as many other public bodies were at the time under investigation in respect of allegations of abuse. The judge failed to see "how widespread public concern about the abuse of people in care or other settings could properly be said to affect the conduct of the defendant in personal injury litigation brought against a member of staff. It doesn't take this ligation out of the ordinary. Claims against government departments are not uncommon. It does not entitle a defendant

[3] [2015] EWHC 822
[4] [2017] EWHC 1040 QB

to conduct itself without regard for the need to conduct litigation proportionately or to disregard an order for mediation. If the Defendant did not wish to engage in mediation for public policy reasons it must be prepared to take the costs consequences of that approach"

5. The problem of ADR and the middle bracket

If the case is in the mid-range value, the justification for the cost of ADR and how effective it will be needs to be considered carefully. The experience of the practitioners involved may also play a role in the lower uptake of ADR in these cases, as it is unlikely that a very senior lawyer will be acting on both sides in these cases, meaning that the opportunity to talk and mitigate the risk is often lost. The most effective ADR in these cases would be informal joint settlement meetings, but full JSMs or formal mediation would likely be too expensive. Regardless, it is inappropriate to force parties to undertake compulsory ADR.

6. Low value claims/litigants without means

There are a number of challenges facing low value claims, which must be borne in mind when considering how suitable ADR is for these cases. Where a litigant does not have legal representation, in personal injury cases they will most likely be up against a represented insurer, who is a repeat player in the process. Most litigants in person will not have the skills or knowledge to properly negotiate their way to a fair settlement, and with the planned increase in the small claims limit it is likely that the personal injury cases within the small claims track will become more complex, with issues such as exacerbated medical conditions and allegations of contributory negligence. The claimant will need to ensure that they have the right evidence to support their claim, and unsupported, we are unsure how this will happen.

Further, there are clearly issues with resourcing in this area. As Lord Justice Briggs stated in his final report on the Civil Court Structure, and the CJC references in this report, the small claims mediation service is constrained by the size of its team of mediators and is currently unable to meet national demand. It is also highly inflexible, with one date being proposed for the mediation to take place and if the parties cannot attend at this specified time and date, the case is deemed unsuitable for mediation. The court service also used to fund the National Mediation Helpline, but this was discontinued due to a lack of resources. Good quality mediation in these cases would come from proper resourcing, but it is difficult to see how it could be funded.

7. The on-line opportunity

See below section 9.

8. Judicial Evaluation

Early neutral evaluation (ENE) is not used often in PI cases, and we don't believe that it is realistic for ENE to have a greater role. An ENE in PI would not be a small undertaking – there will be a large amount of reading and consideration of evidence in order for the judge to be able come to a decision. Cases also rely on the correct evidence being exchanged between parties, and quite often, this only happens towards the end of a case, so ENE would not be possible.

9. Challenges for online dispute resolution

As set out in our response to Lord Justice Briggs' civil court structure review, we believe that personal injury claims outside of the small claims court should not be included within the online court. Even lower value personal injury claims can be very complex and there may be issues such as existing conditions exacerbated by the injury, or contributory negligence. The injured person will need to obtain medical evidence and file a schedule of loss in order to claim. Many people will simply not know where to begin and would risk being under-compensated if left to claim via the online dispute system which would primarily be geared up for (and much better suited to) "faulty goods" claims.

There are also issues of ensuring that the online court does not become a barrier to accessing justice. The online court further pre-supposes that everyone has access to the internet, and that they are computer literate, which in reality is not the case. In 2015, 14 per cent of households in Great Britain had no internet access (this figure was 22 per cent in Wales). Lowest usage is for those aged 65 and over, with only 45 per cent of that age group using the internet. Further, even where people have internet access, this may be slow or inadequate for them to complete the online court process. In December 2014, OFCOM reported that three per cent of premises in the UK still receive internet speeds of Page 8 of 13 less than 2Mbps, while 15 per cent have speeds no higher than 10 Mbps.5 It should also be noted that a significant proportion of the population do not have a smartphone – according to the ONS, in the first quarter of 2015, a third of households did not have a smartphone. Any schemes set up to help people access the online court must be properly funded, and there must be support available for vulnerable people and those who do not have access to the internet in their own home.

10. Challenges for mediation

Parties can be put off taking part in mediation during the course of proceedings, if court fees have already been paid. The recent increases in court fees will have exacerbated this, and anecdotally, members report that the high court fees mean that now more than ever, clients are expecting their case to go to court. In order to combat this, mediation costs should be paid by the losing side or through the client's ATE insurance if they are unsuccessful.

Claimaint clinical negligence firms would always welcome the opportunity for mediation, but there has to be a real enthusiasm on both sides for progress to be achieved. Both sides must be properly prepared beforehand so that their relative positions are clear. It must not simply be an exercise whereby there is a further layer of costs which does not provide any progress towards settlement.

Where mediation is seen by all parties to be a reasonable option, it is essential that the process is conducted by trained mediators with experience in personal injury litigation. APIL is working, together with FOIL and MASS, on a website which will house a register of personal injury and clinical negligence mediators. Members of the three organisations will be provided with a link to the reigster as a benefit of their membership, and this should make the choosing of a mediator to help with their claim easier.

- Ends -

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