

## **CAN MEDIATION WORK IN PERSONAL INJURY?**

### **ECLIPSE PROCLAIM PERSONAL INJURY AWARDS LECTURE**

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**LORD CLARKE OF STONE-CUM-EBONY**

#### **(1) INTRODUCTION**

1. Good evening. It is a great pleasure to be here in such fine surroundings and, much more importantly in such excellent company. I fear though that I may owe you somewhat of an apology. You were no doubt expecting to see the Master of the Rolls and Head of Civil Justice tonight. But, like David Tennant, who as we all know is soon to pass on the baton of piloting the Tardis to a younger man, I too have passed the baton on to – and facts cannot always be controverted – a younger man, although not by much. Shorn of my robes of office, my wig and gown now gone (although we have got a rather dashing new robe - fortunately only for high days and holidays), I stand before you as an ex-MR. And there is no nothing more ex than an ex-MR.
2. I will nevertheless do my best to provide you with an answer to the question posed by the title of my talk tonight: can mediation work in personal injury claims? I imagine that the winner of this year's *Mediation Achiever of the Year Award* would have a short, three letter answer to that question. I imagine that the CEDR members here tonight would give you the same answer. But, I

imagine that you might feel rather short changed if I simply said, yes, of course it can and left it at that. I must stress however that my answer is yes.

## **(2) WHAT IS THE ROLE OF MEDIATION IN PI CLAIMS?**

3. I put my cards on the table from the outset. In my opinion mediation has an extremely important role to play. Just as with mediation in general, it must be an integral part of our tools for the settlement of PI claims. I have, of course, made this very point before, but it bears repeating. In fact it is something that MRs, and ex-MRs, emphasize time and time again. Lord Woolf made the point in his two Access to Justice reports. He has repeated it consistently since. His most recent reiteration, as far as I'm aware, came at the start of October. At the London Litigation Solicitors' Association he once more emphasised how the reforms which take his name were intended to ensure that litigation was truly a last resort. He once more emphasised the central importance of mediation.<sup>1</sup> Lord Phillips has done the same.<sup>2</sup> And even Lord Neuberger, in the short time he has been MR, pitched in with his support when he gave his perspective on the management of claims in the current climate.<sup>3</sup>
  
4. Since 1995 there has been a consensus amongst the senior judiciary, and not just the *senior* judiciary, that, like Magna Carta, mediation is a good thing. Mediation works. It works for clients because it helps them achieve satisfactory settlements. It works for those litigants whose claims cannot, for

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<sup>1</sup> <http://www.lawgazette.co.uk/news/lord-woolf-slams-solicitors-cpr-failings>

<sup>2</sup> [http://www.judiciary.gov.uk/docs/speeches/lcj\\_adr\\_india\\_290308.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf)

<sup>3</sup> Neuberger MR, *A Judicial Perspective on the Conduct of Claims in Current Climate*, (23 October 2009) (Butterworths Conference, London) (<http://www.judiciary.gov.uk/docs/speeches/mor-financial-inst-conf-23102009.pdf>).

whatever reason, settle on their own, even with the assistance of experienced practitioners, many of whom are I know present here tonight. Mediation is good because, like all settlements, it reduces pressure on the courts and thus frees up scarce resources for other cases, which can then be resolved with less delay – which is something devoutly to be wished. They do not place any pressure on court time and resources. They thus enable those other claims to progress to judicial determination quicker. And, of course, it helps the court focus its scarce resources on those claims that require judicial determination.

5. We could of course be wrong – after all judges are not always right, which is probably just as well because otherwise the Court of Appeal and the Supreme court would be out of a job. That would be a great shame because I enormously enjoyed the last eleven years in the Court of Appeal and I am hoping to enjoy a year or two in the Supreme Court. So the judges could be wrong in thinking that mediation is a good thing. It could be the case that mediation is not a good thing; that it does not work. But tell that to those for whom it has been successful. The proof of the pudding is in the eating. There are of course many, many mediators here and throughout the rest of the world who believe it works for their clients: who see that it works for their clients. It could be the case we are all wrong. The simple fact is mediation does work. It works in commercial litigation. It works in shipping litigation. It works in insurance claims.<sup>4</sup> It works in employment disputes. It works. So why wouldn't, or shouldn't, it work in personal injury claims? Is there something about PI claims, which marks them out?

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<sup>4</sup> [http://www.cedr.com/index.php?location=/news/archive/20090723\\_126.htm&param=releases](http://www.cedr.com/index.php?location=/news/archive/20090723_126.htm&param=releases)

6. The Court of Appeal in the much-discussed (and unfairly denigrated) *Halsey* decision clearly did not think so. Lest we forget, it could see no reason why the well-known Ungley order (named after Master Ungley) ‘*should not . . . routinely be made . . . in general personal injury litigation. . .*’<sup>5</sup>
7. Perhaps, though, *Halsey* poured a degree of cold water on the growth of PI mediation. If it did, and I cannot really see why it should have done, provided of course that it is properly understood, that is to be regretted. The Court of Appeal clearly believed that PI claims were ones that were, in principle and in general, suitable for mediation. There might, of course, be individual PI claims which for one reason or another are not suitable for mediation. But that is true of any type of claim. However, the Court of Appeal understood PI claims to be no different to other claims. It was surely right to do so.

### **(3) INCREASING PI MEDIATION**

8. Given that PI mediation is a good thing how might we go about increasing its take up? There are perhaps a number of answers to that question.
9. The first, as I have said before, borrowing a phrase from our former Prime Minister, (and, who knows, future President of Europe) is ‘*education, education, education.*’ First, judges need educating. Those with case management responsibility for personal injury claims, including clinical negligence claims, should focus their attention on ensuring that the parties and

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<sup>5</sup> *Halsey v Milton Keynes NHS Trust* [2004] 1 WLR 3002 at para 33.

their representatives give *proper* consideration to mediation. In this respect robust case management ought to be robust in its pursuit of CPR 1.4(2)(e), which requires due consideration to be given to alternative dispute resolution, or ADR.

10. Second, practitioners need educating. In saying that I realise that many of you here tonight, and very many members of the legal profession generally, are already properly aware of mediation's importance and its applicability to personal injury claims. In June this year I expressed the hope that, as I put it then, if:

*“in the case of PI claims, . . . the large firms of claimant lawyers espoused mediation, it would soon be prevalent. So too, would it be prevalent if liability insurers did so.”*<sup>6</sup>

That was true then and it is true now, although at the time I said it, I was unaware that Thompsons, the national claimant law firm, had recently become a member of CEDR, as had AXA, who are of course large defendant insurers.<sup>7</sup>

Where they have led others will I am sure follow, as they should. But what of those that do not?

11. It may well be the case that those who do not educate themselves in mediation's benefits, who do not act on the court's robust encouragement, will run the risk of what might well become known as a *Brownlee* order. *Brownlee v Brownlee* was a decision of the South Gauteng High Court in South Africa.<sup>8</sup>

The parties had failed to mediate in a family dispute. The Court noted that

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<sup>6</sup>Clarke, *Mediation – An Integral Part of our Litigation Culture*, at [15] (<http://www.judiciary.gov.uk/docs/speeches/mr-littleton-chambers-080609.pdf>)

<sup>7</sup>[http://www.cedr.com/index.php?location=/library/articles/20090516\\_257.htm](http://www.cedr.com/index.php?location=/library/articles/20090516_257.htm)

<sup>8</sup> 2008/25274 ([http://www.cedr.com/gfx/BROWNLEE\\_JUDGMENT.pdf](http://www.cedr.com/gfx/BROWNLEE_JUDGMENT.pdf)).

there was no reason why they should not have mediated. In doing so it referred with approval to a number of English decisions, including *Dunnett v Railtrack*<sup>9</sup> and *Egan v Motor Services (Bath) Ltd.*<sup>10</sup> Interestingly, in paragraph 60 of his judgment Acting Judge Brassey said this:

*“ . . . I am persuaded that the failure of the attorneys to send this matter to mediation at an early stage should be visited by the court’s displeasure.”*<sup>11</sup>

The outcome of that displeasure was a cap on solicitor-client costs recovery.

12. It may well be the case that such an order will arise over here where legal representatives fail to act on the guidance given to them by the Court regarding the fundamental importance of mediation in general, and in personal injury claims in particular.

13. I should stress that I mention that this evening by way of a warning shot across the bows of those who are deaf to the calls for mediation and continue as they have always done. Practitioners should appreciate that the courts have wide powers and – who knows – they may have ever wider powers after that one person walking phenomenon, namely Lord Justice Jackson, has reported at the end of this year after carrying out the most thorough and wide ranging investigation into the manifold problems of the cost of litigation. His enquiry has of course included PI claims and I predict that it will be radical. I urge you all to co-operate him and to give his ideas a fair wind.

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<sup>9</sup> [2002] 1 WLR 2434.

<sup>10</sup> [2007] EWCA Civ 1002.

<sup>11</sup> 2008/25274 at [60] ([http://www.cedr.com/gfx/BROWNEE\\_JUDGMENT.pdf](http://www.cedr.com/gfx/BROWNEE_JUDGMENT.pdf)).

14. That said, I am a great believer in co-operation between parties to litigation.

The way forward for what have sometimes in the past been the warring factions – you know who you are – is to arrive at a consensus across the board. This includes agreeing to mediate much more than has been done in the past and agreeing processes for the benefit of the clients – not the lawyer. Claimants require access to justice at a reasonable cost, and defendants and their insurers also have a legitimate interest in settling claims at a reasonable cost. The excessive cost of dispute resolution increases the cost of living for us all. So I do not think that the way forward is ever more intrusive and penal orders made by courts, but co-operation between the parties and their lawyers. This means you.

15. That co-operation should involve more mediation – and I am not just saying that because when I retire I rather fancy becoming a mediator, which seems to me to be a very worthwhile and interesting life.

16. Of course it is not only the judges and the lawyers who require education about the benefits of mediation. The clients do too. They must learn that it can help them resolve their claim more efficiently and cost effectively than through litigation; that it can help provide them with an explanation why they were injured, and with that an apology – two things which are commonly desired by those who have suffered personal injury not least where it arises from clinical negligence and which formal litigation, at least in respect of the latter, cannot generally provide. It can also help them obtain a fair and

appropriate financial settlement of their claim. Again, the burden here falls on lawyers, mediators, and I should also say claims management firms, properly to educate their clients and ensure they are fully aware of all the options available to them: litigation and mediation options.

17. As in all things, education is the key. I am sure that given that education, personal injury mediation will not just become an integral part of our litigation culture, but that it will become a part of it that works for the benefit of all.

#### **(4) CONCLUSION**

18. I leave you with a cautionary tale which I often tell. It was one of the last cases I did as counsel long ago. A solicitor's letter to the other side a few days before trial read: 30 April 1992: we are astonished not to have received a reply of our tenth letter of today. I worry that things get worse and not better – ever more aggressive, when both parties and their lawyers should be ever more co-operative and ever less aggressive.

19. With the benefit of all in mind, it strikes me that I should follow the sage advice that '*no one ever made too short a speech.*' It has been a pleasure to be given this opportunity to address you tonight and don't forget that the message is that 'mediation rules OK'. Thank you for having me.