"No mediation please – we're litigators"

Mark Field examines why commercial considerations hamper the more widespread use of mediation.

As Professor Dominic Regan of City Law School London has remarked, "mediation is like sex – it is thought about more often than it is practised".

The so-called Woolf Reforms were embodied in the Civil Procedure Rules ("CPR") that came into effect on 26 April 1999. These reforms were intended to address the two main concerns that Lord Woolf had identified: the slow speed and great expense of litigation.

The hope was that if cases were resolved more rapidly, there would be a reduction in costs. Under the CPR, the management of cases is by the court, not by the parties' solicitors, and the parties are expected to conduct litigation in a way that fulfils the "overriding objective". The overriding objective has been expanded since its introduction such that the court is required to manage a case not only "justly" (the original requirement) but also "at proportionate cost".

One management tool introduced by the CPR was the allocation of cases to a track - readers of Modern Claims Magazine will be fully familiar with the multi-, fast and small claims tracks. Once the Defence has been filed, the parties' solicitors submit to the court a Directions Questionnaire (originally called the Allocation Questionnaire). The Questionnaire helps the court to decide the appropriate track for a case. It begins:-

A. Settlement
Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees.

For legal representatives only
I confirm that I have explained to my client the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to try to settle.

The confirmation required of legal representatives is given by ticking a box, and a "tick box" exercise it quickly became. How many insurers reading this article have been contacted by a panel solicitor, about to complete an Allocation or Directions Questionnaire, to discuss "the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to try to settle"? Yet that would be an ideal time to do so; the defendant's solicitor will have only recently received the file and will have brought a fresh eye to the negotiations which have taken place between the insurer and the claimant's solicitor. The defendant's solicitor will have identified the issues that prevented pre-litigation settlement and will have formed a view about how a settlement can be achieved. Of course, there will be some cases that cannot be settled at this stage, but are they the exception rather than the rule?

> **"It is surprising that insurers are not more pro-active in driving mediation**

Mediation vs JSM
In a personal injury multi-track action, the court typically issues two pages of case management directions. At the end of the second page, just before the direction in respect of the trial window, the court might direct the parties to engage in alternative dispute resolution ("ADR"). For solicitors this generally means a joint settlement meeting ("JSM"). But a JSM is hardly an alternative method of dispute resolution. The insurer and the claimant do not meet. They sit in separate rooms, each with their own solicitor while learned counsel battle it out in another room. A JSM is equivalent to court corridor negotiation without the pressure of an impending trial. Its success depends on the reasonableness of counsel for the parties. The parties themselves are not directly involved in the negotiations, merely receiving reports from counsel as the negotiations continue. The whole focus of the negotiations is upon counsel, who will often feel that conceding anything more than minor points or small amounts will be construed by the other as a weakness; the adversarial system is close to the heart of all litigation lawyers.

Section A of the Questionnaire refers to "a more formal process such as mediation". Whoever drafted the Allocation Questionnaire had clearly never experienced a mediation, for a mediation is far less formal than a JSM. For a start, the parties, rather than counsel, are at the very centre of the mediation process. They should be; it is after all their case. In a personal injury claim, the claimant can speak directly to the defendant's insurer. It is an opportunity for the claimant to make a real impression upon the insurer, who will be writing the cheque, in a way that is not possible at a JSM. This is particularly valuable where the insurer has reservations about the veracity of an aspect of the claim; what better moment could there be for the claimant to address those reservations?

Where the parties are so far apart that resolution by any method other than a trial seems unlikely, a mediation is preferable to a JSM. This is because it enables the mediator to explore, confidentially, how far each party is prepared to go to reach a settlement which,

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if done by a party’s counsel at a JSM, would be regarded by the other counsel as a sign of weakness. If there are weaknesses in a party’s evidence, it is far preferable to try and persuade the other party at a mediation rather than try to persuade a judge at trial.

Importantly, a mediation can be held at any time without the necessity of trawling, at great expense, through pages of case management directions to a JSM. With all the pre-litigation information and evidence required from the claimant and with an insurer who has drawn upon its experience to place a reserve upon the claim from the very outset, it is perfectly possible to reach a settlement without the large volume of evidence that might be required to convince a judge at trial.

Mediation is a voluntary and informal process: claimants’ solicitors should regard a mediation as an opportunity, rather than a ploy by the defendant to in some way take advantage of the claimant. The mediator is not a judge - the mediator does not decide the outcome; the parties remain in control throughout and unlike a multi-track trial, costs can be agreed at a mediation.

Whatever sanction may have been contemplated in 1999 for not engaging in ADR, the case of *Halsey v Milton Keynes NHS Trust* in 2004 provided sufficient justification for those who refused to mediate to avoid a sanction. It was not until *PGF II SA v OMFS Company 1 Ltd* in 2013 that the judiciary made it clear that a party who refuses or ignores an offer to mediate does so at its peril, running the risk of a costs sanction being imposed upon it. Notwithstanding this decision and the expansion (also in 2013) of the overriding objective to include dealing with cases at “proportionate cost”, mediation remained on the periphery in personal injury cases and the anecdotal evidence is that there it remains.

“The mediator does not decide the outcome. The parties remain in control throughout

Why this apparent reluctance to mediate?

A cynic would say that it is not difficult to see why: defendant litigation lawyers make money from defending. The Directions Questionnaire is completed when the case has only just begun. There is the opportunity ahead for chargeable work. Of course, the solicitor will think about settlement; it is common knowledge that most cases do settle. Early settlement may be good for the insurers but does nothing for the solicitor’s fee income. So “not yet”. Anyway, when the solicitor does think about settlement, mediation won’t be top of the agenda – “it’s just an added expense” is a typical objection to a mediation. But is it? Unlike a JSM, counsel is not required. Counsel is primarily an advocate. Advocacy skills are not required at a mediation. A defendant’s solicitor who has day-to-day conduct of the case should be perfectly able to deal with a mediation. The skills claimed by the solicitor’s internet profile and by the solicitor’s firm in its tender documents submitted to insurers are more than adequate for a mediation. For the solicitor, there will be the added bonus of the opportunity to develop a personal relationship with the insurer’s representative. If the mediation is successful (as the vast majority are), imagine the scene the following day in the insurer’s open plan office: “I was at a mediation with solicitor AB yesterday – it’s the first time I’ve been to a mediation. It was interesting and we settled the case. I thought AB handled the mediation really well”. Is that not a better way for the solicitor to cement the relationship with the insurer than attending a JSM and doing little of value because counsel is dealing with the case? Rest assured, the compliments paid to AB will be heard and remembered by colleagues in the insurer’s claims department.

It is understandable that a claimant’s solicitor may wish to have counsel at the mediation to provide re-assurance to the claimant, but the saving in the cost of the defendant’s counsel will cover the cost of the mediator.

It is therefore surprising that in the field of personal injury claims, largely funded by insurers who pay not just the claimant’s damages but also the claimant’s costs and the fees of their own solicitors, insurers are not more pro-active in driving mediation. As Lord Justice Ward said in *Egan v Motor Services (Bath) Ltd*, “Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often”. ●

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