Ministry of Justice

Increasing the use of mediation in the civil justice system

A response by the Association of Personal Injury Lawyers

September 2022

Introduction

APIL welcomes the opportunity to respond to the Ministry of Justice's consultation on mandatory mediation for small claims cases. APIL is supportive of the use of alternative methods of dispute resolution generally, and would welcome a more structured approach to dispute resolution in lower value personal injury claims. However, a "one size fits all" mandatory telephone mediation for every small claims case is not an appropriate approach, and would simply lead to increased costs and delays in the running of these cases. Small claims personal injury cases should be outside of the remit of the proposals. A mandatory hour-long mediation session, particularly with someone who is not an expert in personal injury cases, is unlikely to add any benefit, or help to resolve these cases prior to trial. In relation to road traffic accident claims, the Official Injury Claims (OIC) portal needs to have more time to bed in, and in any event, any alternative dispute resolution should be undertaken prior to issue, not afterwards, in order to offer any benefit.

We have responded only to those questions within our remit.

1. **We propose to introduce automatic referral to mediation for all small claims (generally those valued under £10,000). Do you think any case types should be exempt from the requirement to attend a mediation appointment? If so, which case types and why?**

We believe that all small claims personal injury cases should be outside of the remit of the proposals. In general, this automatic referral is geared towards "standard" small claims i.e. consumer complaints and individuals bringing claims against individuals. It does not cater for cases where there is an individual against an insurer. There is an unlevel playing field for claimants in personal injury cases, and an automatic referral to mediation undertaken by someone who is not specialist in personal injury cases, will not adjust this uneven playing field. We are concerned that litigants in person will be pressured into accepting unsuitable offers instead of being permitted to take their case to trial if attempts to settle the case have been unsuccessful. A mandatory mediation would simply be a further hurdle that a litigant in person would need to clear before being permitted to have their case heard by a judge. The types of dispute that arise that lead to these sorts of cases being issued, e.g. quantum disputes relating to special damages, are unlikely to be resolved by mediation, either.

For road traffic cases up to £5,000 which now proceed through Official Injury Claims (OIC), it is hard to see what value a one-hour mediation post-issue would add. If a case within the OIC reaches the stage of proceedings being issued, all of the necessary work has been done and the case is "oven ready" for trial. There would simply be duplication of effort and time, and therefore increased costs, if cases under the OIC were required to have a referral to mediation as standard at this stage. If there was value to be had via some form of alternative dispute resolution, this should be done prior to issue. Pre-issue ADR was explored when the OIC was being developed, but ultimately abandoned by the Government prior to implementation, as "no practicable solution which gave sufficient coverage of ADR

for claims could be found"[1]. We do not believe this new suggestion of post-issue mediation would be such a solution. Firms who are operating in this sector are finding their own ADR solutions which they are building into their internal processes, and we believe this is a far preferable approach to an ill-suited one-size fits all provision for small claims mediation.

We would also suggest that the OIC must be allowed more time to bed in, to determine how the system is working and specifically the nature of disputes which are tending not to be resolved pre-issue before any further amendments are made to the process for road traffic claims in the small claims system.

Ultimately, as we have said in previous responses, personal injury lawyers are skilled at pre-action work, and most of these cases already settle outside of court. A PI lawyer's goal is to resolve their client's case on the best possible terms, in the best possible manner. In the vast majority of cases, a PI lawyer will aim to resolve a case without the need to go to trial, with the additional stresses and costs that this inevitably incurs. That alternatives to the court are already well utilised by PI practitioners is evident in the available statistics which indicate the great extent to which most cases are settled before they are even issued in the court. On average, between 2016 and 2021, only 16 per cent of PI claims were issued in the courts in England, Wales and Scotland. This maps on to the data from the Compensation Recovery Unit ("CRU") from the period 1 April 2019 to 31 March 2021, which shows that of the 811,752 PI cases registered, only 113,756 were issued (14%). To put this in perspective, in the same period the CRU recorded 854,948 PI settlements. Often parties issue PI claims to ensure that the 3-year limitation period is adhered to, in the knowledge that the case is likely to extend beyond 3 years by virtue of the recovery time necessary to adequately assess the extent of a claim, but all the while conscious of the fact that settlement is the preferred and likely outcome. After a claim is issued, the incentives on both parties to settle a claim only increases. 48% of the cases issued in the CRU data were resolved prior to the claim being allocated to a track. Of the fast-track claims that were allocated, 77% of those were resolved prior to trial. Of the multi-track claims that were allocated, 90% of those were resolved prior to trial. Overall, the CRU data suggests that approximately only 1.5% of PI cases are not resolved prior to trial.

We believe that there is room in lower value cases for a more structured approach to dispute resolution, and anything that narrows the issues in a case is welcomed (provided that any additional work generated by the ADR is factored in to any fixed costs awarded). We do not think a "one size fits all" hour long telephone mediation would be the right approach, especially if such a mediation were not conducted by someone with expertise in personal injury law.

Aside from the unsuitability of personal injury cases to the proposals, we are also unsure how a mandatory mediation would sit with the current pilot of paper determinations of small claims, and the ongoing work on the pre-action protocols by the Civil Justice Council.

4. The proposed consequences where parties are non-compliant with the requirement to mediate without a valid exemption are an adverse costs order (being required to pay part or all of the other party's litigation costs) or the striking out of a claim or defence. Do you consider these proposed sanctions proportionate and why?

[1] Implementation of the Whiplash Reform Programme: Written statement - HCWS133 27 February 2020

We believe that strike out would be a disproportionate response. We query how engagement with the process would be policed – if a party turned up to a call but then the mediation failed, would the party be accused of not engaging properly with the process? The right to an open, transparent, public court hearing before a judge should not be restricted, removed or diluted by an excessive emphasis on compulsory mediation. This is especially so when the way in which this mediation will be delivered, and by whom, remains very far from clear.

11.Does there need to be stronger accreditation, or new regulation, of the civil mediation sector? If so what – if any – should be the role of government? Increasing the use of mediation in the civil justice system

While we do not agree that a "one size fits all" mandatory mediation is the right approach, we do believe that mediation, as one type of alternative dispute resolution, does have its place in helping to resolve personal injury cases, where appropriate for the case at hand. It is important that mediators are subject to continuing professional development, and this should be standardised, monitored and regulated. It is also important that mediators come from a variety of different legal backgrounds. There will be reluctance to engage in mediation from parties if there are no mediators available who have an understanding of the area of law in which the mediation will take place. We believe that there is an appetite for specialist PI mediators, as members report that it is difficult to obtain a mediator who has the knowledge and experience of PI law. We believe that if mediators wish to operate in the PI forum, they should have to prove their knowledge and experience of this ever changing and often complex area.

Any queries relating to this response should, in the first instance, be directed to:

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