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Issue 48, Autumn 2026

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As we enter a new season, we have a new political administration but the same issues remain. For civil justice, the length of time for a court hearing continues to be a significant problem and so can ADR be the solution? This edition focusses on current experiences of ADR across the sector and what practitioners need to be aware of in the new era of ADR and mediation.

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In October 2024 the CRP was amended to provide the Courts greater power to ensure that ADR is taken seriously. Chris Skynner, Legal Advisor at Carpenters Group, reviews the Rules and significant case law and explains how both claimants and defendants should no longer ignore or avoid consideration of ADR.

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ADR in its many forms has been available within the Civil Litigation process for many years, and especially in higher value and more complex cases. Now that mediation is becoming more prominent and in some areas, mandatory, Nicola Critchley and William Balfry of DWF Law, provide a defendants viewpoint of what is needed for it to become more widely used and meaningful, especially in lower value claims.

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In our regular feature of life north of the border, Laura McGee, partner at Jones Whyte Solicitors, provides a fascinating insight into their right to have a PI claim valued by a jury – when to ask for one and the benefits it provides. Something that colleagues 'south of the border' cannot offer.

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EDITORIAL

After a long hot summer, autumn is approaching fast along with it the inevitable change in temperature and autumn colours. With that seasonal change comes yet another new Prime Minister and ministerial team and a Lord Chancellor with no legal background. Whether that is good, bad or indifferent, remains to be seen but for Civil justice and the PI sector, there is at least a degree of continuity at present, with Sarah Sackman remaining in position.

The most recent Civil County Court Statistics have just been released for the April-June 2026 quarter, and at first reading it could be seen as positive. Personal Injury (PI) damages claims were down 4% compared to the same period in 2025. In-fact PI claims have showed a general decrease since Q4 of 2022.

Equally interesting is the number of trials that are down by 10% compared to the same period in 2025 and of those small claims trials were down by 11% and fast, intermediate and multi track trials (combined) were also down (by 5%). However, it is the median time of those trials that is perhaps worth noting, with small claims taking slightly longer to get to trial of 41 weeks (0.7 weeks longer) and fast, intermediate and multi tracks claims taking 55.9 weeks to reach trial (6.1 weeks faster than in the previous year).

On the face of it – these figures look positive with a degree, albeit fairly small, decrease in the number of PI claims and the time taken to reach trial. However, multiple questions remain and concern that it is still taking around a year for cases to have a court hearing. There is still much to do to improve efficiency and access to justice.

One way to reduce the number of claims going to court, that is gathering momentum, is a more robust

judicial approach towards the consideration and use of alternative dispute resolution (ADR). ADR in its various guises has long been in existence and for many has had a strong place within the claims process but there has perhaps been an overall reluctance to engage, for whatever reason.

As always there are pro's and con's and of course it is not necessarily appropriate for all types of claims but the mood is shifting. Consequently, this edition is taking a look at the current status and approach of the use of ADR and mediation, from the perspective of a claimant, defendant and costs lawyer, and a barrister mediator. With the varying types of ADR and of course differing approaches to this alternative method of settlement, one overriding message is clear – ADR can and should no longer be ignored. The Rules have been updated, the courts are taking a more robust approach and mediation is being fully integrated into the civil small claims process up to £10,000.

There can be no doubt that the current position cannot remain. Waiting a year for a court hearing is unacceptable and places considerable strain and cost to all involved, but most importantly the accident victim. ADR and mediation provides a viable alternative for the right case and circumstances and can benefit all. But the principle of English law and the fundamental right to a fair trial must be upheld. So when looking to increase the use of ADR, (be it through a carrot or stick), for all its benefits, what is best for the accident victim must remain central.

Continuing the theme of mediation, this will be discussed at the MASS Conference in Manchester on 1st October, amongst many other important topics and excellent speakers. Make sure you book your place quickly and we look forward to seeing you there.



ADR: Updated Rules and a new Judicial Approach.

Chris Skyner *Legal Advisor, Carpenters Group*

As you will be aware, due to the changes to the Civil Procedure Rules (CPR) on the 1st October 2024, there's a marked shift towards Alternative Dispute Resolution (ADR) and Mediation.

The changes reflect the judiciary's commitment to promote a cost effective, accessible and deemed to be a more effect way of dealing with claims.

Giving the courts a greater power to require parties to undertake this way of dealing with claims, they were also given the power to impose cost sanction on parties for non-compliance.

The aim of the changes appears to be to alleviate a back log of cases within the system, reduce legal expenses and encourage an early settlement.

The amendments to the CPR are as follows:

CPR Part 1.1 (2) (f) 1.4(2) (e) 3.1 (2) (o) Part 28. 7 (1) (d) Fast Track & Part 28.14 (1) (f) Intermediate Track. Also, the court should consider CPR Part 29 1 (1A) Multi Track, with regards to the costs consequences; CPR Part 44 should be considered.

1. CPR 1.1 (Overriding Objective) the overriding objective explicitly includes the promotion of ADR where appropriate, reinforcing that just dispute resolution involves exploring alternatives than going to trial.

2. CPR 1.4(2) (Court's Duty to Manage Cases): Courts are tasked with actively encouraging and facilitating ADR at an early stage, marking a shift from passive suggestion to proactive enforcement.

3. CPR 3.1(2) (Court's General Powers of Management): This provision empowers courts to mandate mediation in specific cases, reflecting a move beyond voluntary participation.

4. Parts 28 (Fast/Intermediate tracks) and 29 (Multi Track): - to confirm that the matters the court should consider when making case management directions include "whether to order or encourage the parties to engage in ADR"

5. Part 44 (Costs): Adverse costs orders can now be imposed on parties unreasonably refusing mediation, reinforcing compliance with ADR initiatives.

In the matter of *James Churchill v Mertyr Tydfill County Borough Council* (2023) EWHC 2334 (QB) the Court of Appeal considered whether the court could lawfully order parties to engage in a non-court-based dispute resolution, and if so, under what circumstance it should so.

The case arose after Mr. Churchill sued the Council, claiming Japanese knotweed had encroached from its land onto his property, causing damage and loss of value. The Council argued that he should have first used its Corporate Complaints Procedure and applied for a stay of proceedings.

When the matter came before Deputy District Judge Kempton Rees at the County Court Mertyr Tydfill, the Judge refused to grant the stay and found that compelling an unwilling party to mediation would obstruct their right of access to the courts. The Learned Judge based their decision on the case of *Halsey v Milton Keynes General NHS Trust* (2002). However, the Court of Appeal ruled the Judge had misinterpreted the decision and the passages relied upon were not binding.

It was also held the courts can lawfully order or stay the proceedings for ADR, providing this does not undermine the claimants fundamental right to a judicial hearing and is proportionate in achieving a cost-effective and fair outcome.

The decision by the Court of Appeal clarified the courts have a discretion to require the parties to participate in ADR in appropriate cases. Therefore, signalling a shift towards the

judicial support for non-court-based outcomes.

The Court of Appeal later affirmed in the case of *Northamber PLC v Genee World Ltd & Ors* (2024) EWCA Civ 428 that failing to respond to a mediation proposal was inherently unreasonable, even without an explicit refusal.

In the decisions *PGF v OMFS* (2013), the courts may impose cost penalties on parties who disregard mediation. The case involved a commercial litigation dispute over a breach of exclusivity agreements. The claimant proposed mediation, highlighting significant legal costs (£450,000 compared to a £300,000 budget), but the defendants failed to provide a substantive response or justify their refusal, despite a court order requiring an explanation. The trial court found the claimant's mediation offer half-hearted and declined to impose cost penalties.

The Court of Appeal found that failing to respond to an offer to mediate was unreasonable and a failure to engage in ADR.

The Appeal Court also confirmed ignoring a court order requiring an explanation for rejecting mediation undermines the effectiveness of such a directive. The Appeal Court also found it was not for the claimant to follow-up on the request, the burden then shifts on the recipient.

With regards to the cost's penalties, the court found it should not be automatic, they should be assessed considering all relevant factors. In this case, the defendants were penalised in costs which were increased by the Court of Appeal.

Therefore, the Judgment in the above case gives a clear warning that disregarding an invitation to mediate

can lead to a financial consequence. Litigants should, therefore, never ignore a request to mediate, even if it considers mediation unsuitable.

Even if a Party is successful at trial, it can still be penalised in costs if the party refused to mediate and can be heavily criticised and the court will assess the unreasonableness to mediate pursuant to CPR Part 44. The rulings make it clear - mediation should be proactively considered, as a refusal can have financial consequences.

The key factors the courts should consider when making an award for costs in a refusal to mediate are set out below:

The nature of the Dispute: Cases which require a legal ruling, may be considered unsuitable for mediation.

Merits of the Case: A Party with a strong legal position may justifiably refuse mediation.

Attempts at settlement: If a party has made an offer to settle which have been rejected, this may demonstrate a willingness to settle.

Costs of Mediation: If the costs of mediation are disproportionately higher compared to the actual trial costs, refusal may be justified.

Delay: If mediation is offered too close to trial and would cause unnecessary delay, refusal may be reasonable.

Reasonable prospects of success: The burden is on the unsuccessful party to prove refusal to mediate was unreasonable.

Advantages and Disadvantages of Mediation Under the October 2024 Civil Procedure Rules:

Advantages of Mediation Under the New Rules

Cost Savings:

Mediation can significantly reduce legal expenses compared to prolonged litigation, where parties must bear court fees, legal representation costs, and other incidental expenditures.

The cost-effectiveness in lower-value claims, where litigation costs may otherwise outweigh potential recoveries.

Time Efficiency:

On average, mediations conclude within three months, offering a resolution far more quickly than court proceedings, which can take years due to backlogs.

Timely dispute resolution helps

businesses and individuals avoid prolonged uncertainty and financial strain.

Accessibility and Convenience:

The integration of virtual mediation allows parties to participate from different locations, removing logistical and financial barriers.

Particularly beneficial for tech-related and international disputes, where parties may be based in different jurisdictions.

Enhanced Access to Justice:

The amendments emphasise proactive ADR integration, reducing costs and delays that often hinder access to justice.

This is particularly advantageous for individuals and small businesses with limited financial resources.

Judicial Efficiency:

Mediation may enable courts to focus on cases requiring formal adjudication, reducing caseload pressures and improving overall judicial efficiency.

This shift allows courts to allocate resources more effectively to complex legal disputes that demand formal legal determinations.

Cultural Shift Toward Collaboration:

The amendments promote a culture of cooperative dispute resolution, encouraging parties to engage constructively rather than adopt adversarial positions.

This shift fosters better long-term relationships, particularly in disputes involving ongoing contractual or familial relationships.

Disadvantages of Mediation Under the New Rules

Potential Coercion and Loss of Voluntariness:

The mandatory mediation provisions may undermine traditional voluntary nature of mediation, possibly reducing parties' willingness to genuinely engage in the process.

Some parties may see mediation as an additional procedural hurdle rather than a viable resolution mechanism.

Resource Constraints for Smaller Firms:

High-quality mediation services require experienced mediators, which may not be readily available to smaller law firms and individual litigants.

The disparity in access to skilled mediators could lead to inequities in

outcomes, particularly where one party has greater financial and legal resources.

Enforcement Challenges:

Unlike court judgments, mediated settlements do not automatically have legal enforceability unless formalised into a binding agreement.

In cases of non-compliance, parties may still need to resort to litigation to enforce mediated settlements, negating the time and cost savings.

Judicial Use of Enhanced Powers Under the October 2024 Rules

Case Types for Mandatory Mediation:

Courts are expected to mandate ADR, particularly in low to medium complexity civil cases, such as landlord-tenant disputes, consumer claims, and contractual disagreements.

Disputes involving ongoing relationships, such as business partnerships and family matters, will also be prioritised for early mediation.

The courts are considering using mediation in personal injury cases

Cost Sanctions for Non-Compliance:

Courts will increasingly use adverse cost orders against parties who unreasonably refuse to engage in mediation or fail to comply with ADR obligations.

This approach incentivises serious participation in mediation, reducing instances where parties exploit litigation delays for strategic advantage.

The October 2024 amendments to the CPR represent a landmark shift in the UK's civil justice system, reinforcing mediation as a cornerstone of dispute resolution. By granting courts the authority to mandate mediation and imposing cost sanctions for non-compliance, these changes seek to enhance access to justice, reduce litigation costs, and alleviate court backlogs. The judicial decisions in Churchill, Northamber, and other key cases signal an increasing expectation for parties to engage meaningfully with ADR, reinforcing a broader cultural shift toward collaborative dispute resolution.

The success of these reforms depends on their practical implementation and the judiciary's approach to balancing mandatory mediation with the fundamental right to a fair trial.

Mandatory Mediation: *Creating the conditions for meaningful settlement.*



Nicola Critchley
Partner, DWF Law



William Balfry
Senior Associate, DWF Law

Mediation is now firmly embedded within our civil justice system. Judicial encouragement, procedural reform and the growing focus on alternative dispute resolution mean that mediation is increasingly viewed not as an alternative to litigation, but as part of the dispute resolution process itself.

Few would argue against that development in principle. From a defendant and insurer perspective, mediation can be a highly effective means of resolving disputes. It provides parties with an opportunity to test their assumptions, narrow the issues in dispute and achieve a commercial outcome without incurring the cost, delay and uncertainty associated with trial.

In higher-value and more complex personal injury litigation, dispute resolution in its various forms is already an established and successful part of the landscape.

The challenge is in lower-value claims.

As mediation becomes a more prominent feature of the civil justice process, the emphasis should not simply be on the number of mediations taking place but on whether parties are being given a genuine opportunity to settle when they attend.

Creating the Conditions for Settlement

Successful mediation requires more than the allocation of a mediation appointment.

For parties to negotiate

meaningfully, they must have access to sufficient information to understand the case they are being asked to resolve. That means having sight of the documents and evidence to help form a view on liability, causation and quantum.

In the absence of these key pieces of evidence, the prospects of meaningful settlement become significantly reduced.

In lower-value claims, mediation may take place before key documents have been disclosed. Defendants cannot assess a case to ascertain whether it is capable of settlement if not supported by evidence. Equally, claimants may not have a sufficiently clear understanding of the defendant's position or evidence underpinning it.

In those circumstances, mediation is unlikely to be successful. A mediator can assist parties in overcoming entrenched positions and exploring settlement options but cannot compensate for the absence of the information required to make informed decisions.

The issue is therefore not whether mediation is desirable, but whether it takes place at a stage when it has a realistic prospect of success.

The Importance of Pre-Action Engagement

The more significant opportunity lies in improving the way parties engage before proceedings are issued.

The Civil Justice Council's work on pre-action protocols recognised that effective dispute resolution is built on meaningful early engagement. Its proposals contemplated greater pre-action disclosure, a proportionate approach to ADR and a structured stocktake process before proceedings are commenced, supported by sanctions for non-compliance.

Those proposals remain highly relevant.

Whilst much of the current debate has focused on mandatory mediation, the reality is that mediation is only one component of effective dispute resolution. The quality of any mediation will inevitably be shaped by the quality of the information available to the parties when they attend.

A stronger pre-action framework would assist both claimants and defendants by ensuring that the key evidence is exchanged at an earlier stage, enabling informed discussions about liability, causation and value before the costs of litigation begin

In higher-value and more complex personal injury litigation, dispute resolution in its various forms is already an established and successful part of the landscape.

The challenge is in lower-value claims.

to escalate, and giving the parties the best chance of settling claims pre-issue. To be effective, that framework must be supported by appropriate sanctions to encourage compliance.

Better Mediation, Not Simply More Mediation

The policy objective of reducing pressure on the courts is entirely understandable but a mediation that takes place before the parties have the information necessary to evaluate the claim may satisfy a procedural requirement without materially advancing the dispute. By contrast, a mediation supported by meaningful disclosure and informed engagement can often result in settlement.

The objective should therefore be to create the conditions in which mediation has the best chance to succeed.

That requires more than mandating attendance at an

appointment. It requires a process that mandates evidence exchange and meaningful engagement. The feedback on HMCTS engaged telephone mediators has been mixed, with some saying they are too passive to encourage settlement. The pros and cons of court-appointed versus party-appointed mediators are relevant, but largely academic in the context of the current pilot. Operating in the small claims arena, where costs are generally unrecoverable, parties will not want to absorb the extra cost of a privately appointed mediator.

Mediation is here to stay and rightly so. When conducted at the appropriate stage and in the appropriate cases, it can deliver significant benefits for claimants, defendants and the wider justice system. With the MoJ currently looking at small claims proceeding on paper, without the parties consent,

mediation may be the only chance that the parties have to be heard directly and it may influence the decision of the court whether to proceed on paper or not.

However, mediation should complement an effective pre-action process rather than act as a substitute for one. If the objective is to increase settlement, reduce delay and control litigation costs, the conversation should not be limited to whether mediation should be mandatory. It should also focus on whether parties have been given the information necessary to make mediation worthwhile.

Meaningful disclosure is not an obstacle to dispute resolution. It is one of the foundations upon which successful dispute resolution depends.

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The Right Tool for The Right Job: ADR in High-Value Injury Litigation

Ben Handy Barrister, mediator, and Crown Court Recorder at St John's Chambers, Bristol

In my short-lived career as a labourer, when I wasn't being sent to look for a left-handed hammer or stripy paint, I was always being told that the key to a good finish is choosing the right tool.

I carried that message with me through my 20s and most of my 30s while I repeatedly messed up simple DIY tasks with the cheap toolkit Dad had given me when I left home (thanks Dad, love you).

I can still remember the feeling of relief and *enlightenment* when I drilled my first hole with a proper hammer-drill and a decent drill bit. So effortless! So neat! So non-destructive! And I've never looked back (note: I have looked back. I'm 41 and I'm *terrible* at DIY).

I like to think I'm a better barrister/mediator/sometime-judge than I am a craftsman, or storyteller for that matter. But I often find myself thinking about that message at work – the *right tool for the right job* – whether it's about choice of expert, case manager, court centre, wondering why an opponent has chosen a particular firm or barrister, or wondering how to get around barriers to settlement.

Because of course our job as lawyers *isn't* to win in court. If you find yourself at trial then *somebody's* made a bad bet, and you have to hope it isn't

you. Our job is really to *find workable solutions* (and, failing that, to win *big* in court).

The system encourages settlement of course. Historically, by way of costs penalties for failing to accept 'good' offers. But now, too, for failing to engage honestly and thoughtfully in Alternative Dispute Resolution *even if you win at trial*. The process, the *effort*, has value in- and of-itself.

In high-value cases, there is usually money in the pot for whatever form of ADR you choose. Advice and exchange of offers, Way-Forward Meetings, Joint Settlement Meetings, Mediation in whatever form – all have their place. It is not one or the other. The beauty of all forms of ADR is that they are '*Without Prejudice*' – a safe space to test your arguments and make concessions, safe in the knowledge they won't be revealed to the trial judge if negotiations fail.

Until recently, JSMs were (and probably remain) the standard. You would exchange evidence and position statements, meet your opponent at an

agreed venue, take a room each, with a third 'neutral' room for negotiations, and lawyers would shuttle between rooms exchanging arguments and offers in the hope of finding common ground. You might have teams of lawyers, experts, deputies, financial advisors in each room or on the end of a phone, but there is no higher authority and it is entirely up to the parties to sense-check their own positions.

Contrast that with mediation, where a referee (a 'mediator'), oversees the discussions. Mediation is becoming more and more common in injury litigation as the market responds to growing evidence and experience of success, senior litigators with a proven track record offer their services as mediators, and the *forms* of mediation become more sophisticated.

Mediators routinely dealing with high-value injury cases are comfortable with both **facilitative** and **evaluative** approaches, and will shift from one to the other and anything in between, having carefully sought agreement from the parties beforehand:

Facilitative: greasing the wheels of negotiation and keeping discussions moving while religiously avoiding offering a view on either side's prospects,

Evaluative: stepping into the ring, testing positions, revealing strengths and weaknesses, *telling* parties they are strengths and weaknesses, and perhaps even acting as a (non-binding) arbiter.

I am *asked* to give my personal view as to the most effective means of ADR, and I will do that, tempting as it is to fudge, but you'll have to forgive me the caveat that *it really does depend*: on what remains in issue, how complex those issues are, whether it is those

issues or relationship dynamics that are blocking settlement.

A straightforward case might settle by simple exchange of offers by email, but the same case could need the input of a mediator if there's an awkward or unhelpful dynamic between opposing legal teams. A mediator might also help opponents with a *good* working relationship get past a genuine but intractable difference of opinion.

That said, and for what it's worth, my own view is this:

The most *effective* form of ADR is **evaluative** mediation via an experienced PI specialist that both parties rate, who will test positions and offer their view on the relative strengths, weaknesses, and likely outcome at trial. It introduces an independent and credible reality-testing mechanism into the negotiations, and I have not personally come across a case in which the parties have *failed* to settle having had their prospects made clear to them by a *credible* neutral referee. But the key therefore is the *choice* of mediator, the *timing* and the available *evidence*. The output is only as strong as the available inputs. The real strength of this method over, say, JSM, is that it is a means of challenging underlying *assumptions* when those would otherwise remain unshaken. It is quite something to be told by a grown-up that a sure-thing is, well, not.

It is shortly followed by JSM – more common, slightly cheaper, slightly less exposing of the weaknesses in a case, but *slightly* less effective for that same reason. It is still the case that JSMs *usually* work, either on the day or shortly afterwards, and all being equal JSM would remain my go-to starting point because I don't necessarily *want* my weak points being dragged into the sunlight before I've had a chance to negotiate.

The most effective form of ADR is evaluative mediation via an experienced PI specialist that both parties rate, who will test positions and offer their view on the relative strengths, weaknesses, and likely outcome at trial

The exception would be where I am *convinced* I am *right* – funnily enough I don't mind a mediator telling the other side that. But remember what I said about *assumptions*.

A mediator would rightly say (and I am one) '*but facilitative mediation would achieve the same aim while increasing the chance of settlement by keeping everyone at the table*', but I would not often go for a purely facilitative mediation and you are therefore exposed to the risk that a more robust evaluative approach will be taken, or (almost as bad) threatened. If a shift to evaluation is suggested and you resist, you have shown your hand.

I would only opt for *purely* facilitative mediation where I am convinced that the issue is one of relationship dynamics, or I really want to talk and that is the only option acceptable to the other side. Don't get me wrong: I am a firm believer in mediation. I know it's effective. A skilled mediator will keep parties talking long after they really want to pack up and go home – as long as they are talking the negotiation is moving forward. But in relative terms, and in high value cases in particular, the parties are (relatively) well-resourced, loaded with experienced lawyers and experts, they know what they want and they know what their options are. Provided you have a reasonable working relationship, I want

a mediator who will engage with the merits, or else I would opt for JSM.

I would usually hope that JSM would break the back of the case, leaving one or two intractable points that either a period of reflection, facilitative mediation, or evaluative mediation, or some combination of the above, would resolve. But I can certainly think of one case where our first stop was evaluative mediation and, while it didn't immediately settle the whole case, it did unlock much-needed funding for appropriate accommodation much sooner than the parties would have achieved themselves.

Ultimately, the best ADR process is the one that *works*, and the one that addresses the *reason* that settlement has not already been possible. Above all: the *process* is valuable.

Parties willing to talk *usually* get somewhere. Goodwill trumps all other considerations. A well-timed discussion, following reasonable disclosure and exchange of expert evidence, but early enough to save the costs of trial preparation, will usually work, might save you a costs order, and will at the very least tell you something about your case. There *is* no 'wrong' tool. In stark contrast to my dad's toolbox (sorry Dad, love you).

Mediation is becoming more and more common in injury litigation as the market responds to growing evidence and experience of success, senior litigators with a proven track record offer their services as mediators, and the forms of mediation become more sophisticated.

In high-value cases, there is usually money in the pot for whatever form of ADR you choose. Advice and exchange of offers, Way-Forward Meetings, Joint Settlement Meetings, Mediation in whatever form – all have their place. It is not one or the other. The beauty of all forms of ADR is that they are 'Without Prejudice' – a safe space to test your arguments and make concessions, safe in the knowledge they won't be revealed to the trial judge if negotiations fail.

**Anthony Neild***Costs Lawyer, FCILEx Litigator (Civil) and Personal Injury Costs Manager at JMW Solicitors LLP*

ADR in Focus; Why it Matters?

It is of little mystique that a refusal to engage in ADR can often, but not necessarily always, put a litigant on the receiving end of a punitive costs order. The Court retains the discretion to order parties to actively explore all forms of ADR and engage in settlement discussions insofar as practicably possible. The Courts discretion as to costs on this point can be found in CPR 44.2(5)(e) and the consideration of the extent to which a party has (or has not) complied with an Order to engage in ADR is a variable that will inevitably be taken into account when determining the basis upon which costs are to be assessed, to what extent they are to be paid, and by whom. This position can be aptly juxtaposed with the case of *Painting V University of Oxford* [2005] EWCA Civ 161 wherein at Para 27 wherein Longmore LJ held that:

Negotiation is supposed to be a two-way street, and a claimant who makes no attempt to negotiate can expect, and should expect, the courts to take that into account when making the appropriate order as to costs

Refusal to Engage- Salutory Warnings

In *BXB V Watchtower & Bible Tract Society of Pennsylvania & Anor* [2020] Costs LR341, the parties were ordered to consider ADR (including mediation). The matter proceeded to Trial, and the Claimant beat their Part 36 offer of £25,000.00, with judgment in the sum of £69,500.00. Consequently, the Claimant was entitled to the usual full Part 36 benefits conferred within CPR 36.17, including costs from the expiry of the Relevant Period to be assessed on the indemnity basis, uplift and indemnity interest. However, Chamberlain J saw the Defendant's refusal to engage in ADR as a serious aggravating factor (despite the over pleading of the Claimant's case) and went a significant step further than that in ordering the Defendant to pay the Claimant's costs on the indemnity basis **from the date they refused to engage**.

Laporte and Another v The Commissioner of Police of the Metropolis [2015] 3 Costs LR 471 provides another illustration of the Court's discretion as to costs when a party is found to have unreasonably refused to engage in ADR. In this matter, the Defendant succeeded on all allegations raised against it. However, it was found that they had not only refused to engage in ADR unreasonably, but that doing so would have had a reasonable prospect of success. The Defendant's legal costs were limited to two thirds of those that would have been recovered.

Equally in *Halsey V Milton Keynes General NHS Trust* [2004] EWCA Civ 576, the Court of Appeal awarded costs on the indemnity basis because of an unreasonable refusal to engage in mediation.

When is refusal to engage in ADR likely to be considered acceptable?

Despite the outcome in *Halsey*, the judiciary provided useful clarity as to the factors that would be taken into account in determining whether a refusal to engage in mediation was reasonable;

- i) The facts of the case; clearly not all cases will be suitable for ADR depending on the crux of the dispute and what is reasonably required to resolve the dispute either way.
- ii) Any previous efforts to engage in ADR; the Court will be slow to criticise a party who has already made a concerted effort to narrow the issues and achieve a negotiated settlement. Going back to point 1, there will of course be many cases that simply need to be brought to a head with Trial.
- iii) The likely costs of preparing for and attending a mediation; if the costs are disproportionately higher than the 'sums in issue' then mediation would clearly not be appropriate. This can be especially

Mediation can help resolve cases of a particularly sensitive nature at an earlier stage whilst circumnavigating the lengthy Court backlogs, avoid the stress of trial preparation and cross examination whilst helping parties achieve closure and bringing a sense of justice to those directly affected

In the context of personal injury claims, it is important to bear in mind that the costs position in mediations can potentially differ to that of say, for example, a Joint Settlement Meeting in that participants will usually be expected to bear their own proportion of the costs of and occasioned by the mediation; for example the selection, agreement and instruction of the mediator, mediator's fee and the costs of preparing for and attending it.

said for matters which are subject to Fixed Recoverable Costs in either the Fast or Intermediate Track.

iv) Whether ADR is likely to result in a successful outcome. Any form of mediation should not be, proposed, agreed to, or participated on a token basis, particularly if significant costs are likely to be incurred in preparing and attending a mediation.

Genuine Efforts to Engage in ADR:

ADR in any form must be meaningful, reflect a commitment to compromise within reason and show a willingness to settle. In the case of *EAXB V University Hospital of Leicester NHS Trust*, the Court ordered the Defendant to pay the Claimant's costs on the indemnity basis for failing to make any offers during the Joint Settlement Meeting, despite them being the party who instigated it in the first place. Should you or your client find themselves in this situation, steps should be taken to put your opponent on notice of your intention to invite the Court to make the appropriate costs order at the relevant juncture.

Good Practice from Day One;

A commitment to narrowing issues doesn't have a start or endpoint, nor does it need to be at a final mediation. The *Serious Injury Guide* sets out comprehensive steps that help parties achieve tangible outcomes at an early stage, which are underpinned by the guiding principles of collaboration, resolving liability issues as timeously as possible, providing for access to rehabilitation for seriously injured Claimants and mitigating the costs

of litigation wherever possible. These outcomes can be achieved through early claim notification, a commitment to investigating liability within reasonable time frames and a pro-active approach to rehabilitation. Making good use of NHS treating practitioners as a precursor to medico-legal evidence can also play a substantial part in keeping the costs of litigation down.

What Cases are Suitable for Mediation?

Mediation is typically suitable for cases where there are substantial issues of fact or law in dispute, allowing parties to get to the centre of the issues in dispute. Mediation can help resolve cases of a particularly sensitive nature at an earlier stage whilst circumnavigating the lengthy Court backlogs, avoid the stress of trial preparation and cross examination whilst helping parties achieve closure and bringing a sense of justice to those directly affected. There is also an element of flexibility to mediation that traditional litigation and compliance with Practice Directions cannot offer, in addition to more bespoke solutions that can be incorporated into any final settlement agreement. Confidentiality is another factor for consideration. Mediation can also be helpful in coordinating a negotiated settlement in cases involving multiple Claimant or Defendant parties.

Mediating Personal Injury Claims:

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say, for example, a Joint Settlement Meeting in that participants will usually be expected to bear their own proportion of the costs of and occasioned by the mediation; for example the selection, agreement and instruction of the mediator, mediator's fee and the costs of preparing for and attending it. If a mediation is proposed, and agreed to in principle, it would be sensible to seek an agreement that such costs are to be treated essentially as 'costs in the case.' This will prevent any later submissions from your opponent in relation to the recoverability of such costs in principle should the claim later settle on favourable terms for your client. It is also worthy of note that mediations are conducted strictly on a without prejudice basis and any matters discussed are therefore not admissible before the Court should the mediation fail and matters ultimately culminate in Trial.

Conclusively, the Court's increasing focus upon engagement in all forms of ADR, will likely become far more relevant to practitioners in view of the current pressures imposed upon the Courts by the current backlogs. Even in matters relating to costs management and budgeting, the judiciary are gravitating towards making orders to compel parties to engage in ADR, as per *Hadley v. Przybylo* [2024] EWCA Civ 250.

With the right approach, ADR can speed up access to justice for injured Claimants, reduce locked in profit with WIP that cannot be realised due to settlement delays and allow Claimant parties to move forward with their lives.



MASS Commentary A new political season, but familiar questions for civil justice.

Susan Brown *MASS Chair*

Westminster has returned from the summer recess to a very different political landscape. Andy Burnham entered Downing Street on 20 July, succeeding Keir Starmer, and one of his first appointments was Alex Norris as Lord Chancellor and Secretary of State for Justice. Sarah Sackman KC remains Minister of State for Courts and Legal Services, retaining responsibility for civil justice. Norris is the first non-legally qualified Lord Chancellor for nearly 10 years, having had a career spanning local government, the trade union movement before entering Parliament in 2017.

For those of us working in personal injury, the personnel may have changed at the top, but many of the questions waiting on ministers' desks will be extremely familiar.

Most obviously, we are still waiting for the Post-Implementation Review of the Whiplash Reform Programme. The Ministry of Justice launched its call for evidence last October, examining Part 1 of the Civil Liability Act 2018, the increase in the RTA small claims limit and the operation of the Official Injury Claim portal. At the time, ministers said the completed review would be published in spring 2026. Spring came and went, followed by summer, without publication.

That delay matters. Five years after implementation, there are fundamental questions about whether the reforms achieved their stated objectives and, critically, what their impact has been on accident victims and access to justice. The latest full OIC quarterly report, covering April–June 2026, records 56,812 new claims, compared with 63,367 in January–March 2026. On a rough annualised basis, claims are around 22% below the 2022 level. In Q2 2026 only 12.6% brought by unrepresented claimants. Just 11,000 claims were issued in the County Court between April and June 2026,

4% fewer than during the equivalent period last year.

The new ministerial team therefore has an early opportunity to make some progress to an area of policy which has been left unresolved for too long.

There are other reasons to believe the autumn could be significant. Fixed Recoverable Costs also remain under scrutiny. An interim CPRC and Ministry of Justice stocktake closed in January, with the Government confirming in July that the evidence gathered will inform an upcoming Post-Implementation Review of the extended FRC regime. For practitioners dealing with cases in the fast and intermediate tracks, the question will be whether that exercise results in meaningful changes or simply another prolonged review process.

There may also finally be movement on an issue sitting slightly outside traditional civil justice policy but with potentially significant consequences for personal injury and motor insurance - e-scooters and other micromobility vehicles.

After years of regulatory drift, however, there are finally indications of movement. In January the Government reiterated its commitment to legislative reform for micromobility vehicles and ministers

have acknowledged that the present position is unsustainable and indicated that regulations for private e-scooters are being considered. Despite micromobility legislation being absent from the latest King's Speech, by June the Government had gone further, committing to the creation of a new Low-speed Zero Emission Vehicles category and confirming that it plans to consult on e-scooter regulations over the coming year.

As we argued in a recent long piece in Insurance Post, the case for continuing regulatory ambiguity is increasingly difficult to sustain with rising numbers of killed and seriously injured and compensation costs exceeding £100 million. It is time to stop dithering and to act on the key issues about compulsory insurance, registration, identification and liability.

So, as Autumn begins, civil justice has a new Prime Minister and Lord Chancellor but a decidedly familiar in-tray. The immediate challenge is not necessarily another round of wholesale reform. It is completing the work already promised, publishing the evidence already gathered and providing some long-overdue certainty.

After a summer of political change, the sector will be watching closely to see whether that change reaches civil justice too.



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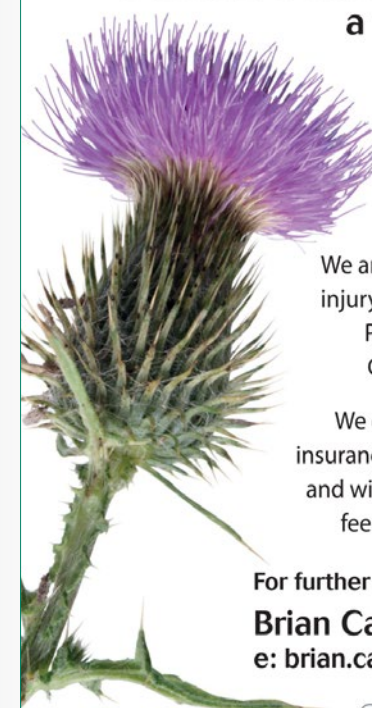
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Case Watch



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Costs Consequences of Maintaining Serious Allegations Without Evidential Support

Over the past couple of years, it has been difficult to avoid news about the case brought by Prince Harry and other high-profile celebrities against Associated Newspapers Limited (‘ANL’). In case you had managed to miss it, the claim alleged a wholesale pattern of deceitful and illegal practices, including phone hacking and bugging of homes, that were alleged to have been undertaken in order to procure information for various articles which were published regarding the claimants’ private lives.

Judgment was ultimately handed down on 7th July 2026 in favour of ANL, dismissing the claimants’ claims. To resolve ancillary issues and costs, the matter then proceeded to a further hearing at the end of July, and it is this judgment that has some incredibly useful practice relevance to anyone dealing with litigation.

It was not disputed in principle that, having been successful, ANL were entitled to their costs of the claim. However, the parties contested both the basis of assessment and the amount of any payment on account of costs. The key question was whether the claimants’ conduct of the litigation was sufficiently bad so as to attract a costs order on an indemnity basis. The judgment provides excellent analysis of the relevant legal principles for this issue.

Mr Justice Nicklin set out the many relevant points to consider. As a core principle, the court must stand back and evaluate the matter as a whole, it was not enough to simply identify isolated criticisms of conduct; there must be conduct as a whole which is outside of the ordinary and reasonable conduct of proceedings. This was further elaborated on with the judgment setting out that in some cases, the cumulative effect of various instances of poor conduct could establish an overall position which was outside of the norm even if individually the procedural failures might not attract such a sanction on their own.

When determining whether conduct was poor, the seriousness of the issues involved and the impact those issues have on the parties involved, such as

reputational consequences, matter. However, a failed serious allegation alone would not automatically attract indemnity costs if there was sufficient basis for it having been brought. It was also confirmed that the poor conduct need not be directly by a party personally, but of anyone upon whom they rely, including their lawyers, experts or witnesses.

Ultimately though, perhaps the most important theme was that parties must undertake reassessment of the merits of the points they are taking. As litigation progresses, parties should be aiming to narrow the issues. A key purpose of the court timetable, for example disclosure and witness evidence, is to enable the parties to make informed decisions about the future of the claim before reaching trial. The judgment clearly set out that if there is a failure to reassess pleaded issues at each stage, particularly where evidence suggests it should have resulted in a change of stance or withdrawal of an issue, that is likely to draw criticism. It was cautioned that this analysis should be considered moving forward through a claim and based on the information available at any given time, rather than working backwards from a failed issue and applying hindsight.

When applying these principles to the claim, Nicklin was firstly critical of the fact that the claims were exceptionally broad. They did not plead specific behaviour by specific individuals linked to the relevant articles that were the subject of the claim. Instead, the claimants made wide ranging allegations of unlawful behaviour over many years and against many individuals. The suspicion behind these allegations was arguably reasonably held. There was evidence of widespread use of third-party investigators by the media for exactly the purposes the claimants were alleging. It followed that in principle the claimants’ claims were ones which could reasonably motivate investigations to be undertaken. However, the allegations remained at this broad level throughout, and the investigations uncovered insufficient evidence prove

the allegations in relation to the specific articles. In essence, the matter was pursued to trial based largely on the initial inference with insufficient support from evidence obtained throughout the claim. This was considered unreasonable.

It also resulted in specific conduct that Mr Justice Nicklin described as “unreasonable to a high degree”. One such point was that the claimants had listed eight journalists whom they intended to cross-examine at trial, but at trial, simply advised that it was no longer required. Given the seriousness of the allegations and the consequences for those involved, leaving these issues hanging over them was unacceptable, and if the allegations no longer had sufficient evidential basis, they should have been formally withdrawn earlier when that became known. There was no evidence presented or demonstrated through the conduct of the litigation that the requirement to cross-examine was re-considered prior to trial. Another specific failing was that the claimants relied on evidence from a witness which, through the course of the litigation had become objectively unreliable. That evidence had initially underpinned some of the most serious allegations and pleadings. Despite it becoming compromised, the claimants continued to rely on it throughout.

Other points also contributed to the overall position. This included the claimants’ publicity around the allegations given the impact on those involved and the high evidential burden to be met. In addition, various allegations and accusations were made at trial which had not previously been properly pleaded. There were even suggestions of dishonesty relating to separate public inquiries which shifted the consequences well beyond the specific issues of this claim. As a result, ANL was awarded costs on an indemnity basis. In addition, a payment on account of costs was ordered reflecting 90% of the budgeted sum and 60% of the costs incurred pre-budget, totalling £9,544,355.

While the circumstances of this litigation were exceptional when compared to most litigation, the principles apply to any claim brought and should be borne in mind by any legal practitioner.

In the context of motor litigation, perhaps the most common situation where these considerations will be

relevant arise in claims with allegations of fundamental dishonesty. Honesty is an extremely important issue and understandably there is often legitimate suspicion as to the authenticity of some claims being brought. The financial benefit of reducing or defeating fundamentally dishonest claims is significant, avoiding payment of damages and disapplying Qualified One-Way Costs Shifting to recover costs incurred. However, the impact is potentially serious for the claimants subject to those allegations. This judgment, along with others we have previously discussed here (*Thakkar & Ors v Mican & Anor* [2024] EWCA Civ 552) demonstrate that courts will not tolerate allegations of this nature being maintained without proper evidential basis.

As claims progress through disclosure and evidence, any party raising serious allegations should be mindful of the need to reassess those allegations and, where necessary, withdraw them. Where they are maintained, parties and their legal representatives should be prepared to produce supporting evidence. Maintaining failed issues to trial, without having reassessed them or evidencing reassessment, seriously risks sanction. Conversely, in circumstances where allegations are made against you or your client, you should consider openly seeking withdrawal of the allegations throughout the claim and highlighting opportunities for reassessment to take place following evidence. That will ultimately support any later argument for indemnity costs to be ordered and may lead to a more collaborative approach to dispute resolution, with less costs incurred by all parties.

While the circumstances of this litigation were exceptional when compared to most litigation, the principles apply to any claim brought and should be borne in mind by any legal practitioner.



Twelve Strangers in a Box.

Laura McGee *Partner, Jones Whyte Law Limited*

The civil jury in Scottish personal injury actions, and why it is still worth asking for one

Every so often a decision comes along that reminds you how differently things are done in Scotland. In January this year the First Division refused a reclaiming motion in a mesothelioma case and, in doing so, preserved something no practitioner in England and Wales can offer a client: the right to have a personal injury claim valued by twelve members of the public.

In **MacVicar or Butt and Others v Nimmo** [2026] CSIH 6 the deceased was exposed to asbestos as a joiner in the late 1970s and died of mesothelioma in 2021, aged 68. His widow and family sought a jury trial and the Lord Ordinary allowed it. The defender appealed, arguing not special cause in the traditional sense but that section 22(4) of the Prescription and Limitation (Scotland) Act 1973, which bars a jury where the limitation period has been extended, applied because the deceased would have needed that extension had he sued in his lifetime. The court was not persuaded: these relatives had raised their action timeously and sought no relaxation of

any time limit, so there was nothing for the subsection to bite on. Delivering the opinion of the court, the Lord President observed that, whatever the fluctuations in popularity over the years, jury trial remains today “an important feature of our civil procedure in personal injury cases” (paragraph 2).

The default nobody expects

Under section 11 of the Court of Session Act 1988 an action of damages for personal injuries, once remitted to probation, shall be tried by jury. Section 9 allows a proof instead only where the parties consent or special cause is shown. A jury is the default. A defender who wants the case to be heard by a judge needs either the agreement of the pursuer or to show special cause. Following section 63 of the Courts Reform (Scotland) Act 2014 the same is true, on the same test and with a jury of twelve, in the All-Scotland Sheriff Personal Injury Court (ASPIC), which takes personal injury claims above £5,000 and is where most Scottish road traffic litigation now happens. Juries are not reserved for

catastrophic claims raised in the Court of Session.

This means the practical question on any substantial Scottish file is not whether a jury is available — it is whether it survives contact with the pleadings.

Special cause usually comes down to the pleadings

Defenders rarely persuade a court that a case is simply too difficult for a jury. What they succeed with is arguing that the pursuer’s pleadings are not up to scratch. In **Sandison v Graham Begg Ltd** 2001 SC 821 the medical issues would have suited a jury perfectly well had they been properly focused in the pursuer’s pleadings. They were not and a jury was refused. Vague averments hand the defender the argument that the questions cannot sensibly be put to a jury.

MacVicar v Nimmo makes the same point, albeit from the other side. Having adhered to the allowance of issues, the court refused probation to the averments in the defences which followed the general denial, since a jury trial can only proceed once every question of legal relevancy has been resolved. The procedure disciplines both parties, which is one of its underrated virtues. If you want a jury, plead a case that can be reduced to questions.

What a jury does to the figure

We refer to the Judicial College Guidelines north of the border, but they are not binding, were not compiled with Scottish awards in view, and have no tariff behind them. The argument is often not about which JC bracket applies, but about how far above it a jury should be invited to go. For years juries awarded far larger sums than judges did — by some accounts up to four times larger — which Lord President Rodger, in **McLeod v British Railways Board** 2001 SC 534, said left the legal system lacking the “consistency which is one of the hallmarks of a mature system”.

That was addressed in the joint appeals in **Hamilton v Ferguson Transport (Spean Bridge) Ltd; Thomson v Dennis Thomson Builders Ltd** 2012 SC 486. A five-judge bench held that awards of £120,000 to a teenage daughter following a fatal road accident, and £90,000 to the father of a man killed at work, were excessive, and ordered new trials. Its remedy cut both ways. Judges were to have regard to jury awards as well as judicial ones, the appeal court could intervene on grounds of comparative justice, and the trial judge would in future give the jury an advisory, non-binding range of awards.

The impact of this decision to introduce a recommended range of awards can be seen in **Bridges v Alpha Insurance A/S** [2016] CSOH 114. The pursuer was struck by a car while crossing Leith Walk to flag down a taxi. The trial ran for four days. Every other head of claim had been agreed by joint minute, so solatium was the only figure left for the jury.

At the close of evidence, out with the jury’s presence, counsel addressed

The decision is tactical, not sentimental. A jury suits a case where the human element is strong and the medical evidence is simple: a sympathetic pursuer, a clear mechanism of injury, an obvious effect on a life. It suits fatal claims especially well, which is why the leading jury awards are loss of society cases.

Lord Tyre on the range he should suggest. The pursuer invited him to top out at £120,000, roughly double the highest relevant Judicial College bracket; the defender argued for £15,000 to £20,000, conceding £28,000 was arguable. Lord Tyre charged the jury at a range of £25,000 to £40,000. The pursuer asked to be told in advance what range the judge had in mind; he declined and refused to certify a Note of Exception when the pursuer subsequently complained the figure was too low. Four days of evidence, and the case turned on an argument the jury never heard.

When to ask for one

The decision is tactical, not sentimental. A jury suits a case where the human element is strong and the medical evidence is simple: a sympathetic pursuer, a clear mechanism of injury, an obvious effect on a life. It suits fatal claims especially well, which is why the leading jury awards are loss of society cases.

Everything attractive about a jury is also what makes it dangerous, and nowhere more so than in relation to contributory negligence. In the first civil jury trial held in ASPIC, before Sheriff Kathrine Mackie, damages were agreed at £15,000 on a full liability basis for a

child injured in his primary school playground. The jury found for the pursuer and then assessed contributory negligence at 96.5 per cent. No reasons were given, making it difficult to appeal. Apply that to the road traffic cases we all recognise — the passenger without a seatbelt, the passenger who knew the driver had been drinking, the pedestrian who stepped out — and you can see the clear risk.

Unpredictability is not a one-way risk. It presses at least as hard on the motor insurer, and that is the real argument for asking for a jury even in a case you never expect to reach a verdict: what your client actually receives is usually decided by a tender, not by twelve people in a box.

The one thing I would change

The system lets us down in one respect. A verdict produces no written opinion and unless a firm or chambers publishes a note, the award simply disappears. The figures that most influence the settlement value of serious Scottish claims are therefore the very ones none of us can put before a court or insurer. Assessing each case on its own facts is right; having no shared record of the outcomes is not. However, it strikes me as exactly the sort of gap a membership organisation is well placed to fill.

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