

The **MASS** Insight Magazine

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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Barrister Ben Handy at St Johns Chambers takes us through why ADR is a useful tool, especially in high value cases. Touching on the many forms of ADR, Ben comments on their relative merits and concludes with his preference of the most effective means of ADR, which ultimately has to be what is right for the specific case.

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There can be no doubt that the Judiciary are taking much more interest in parties willingness to engage in ADR. Anthony Nield costs lawyer at JMW Solicitors, highlights some interesting case law showing the approach being taken by the Courts and the costs implications of why taking a serious approach to ADR is advantageous to all.

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With a new season comes a new political landscape. Susan Brown, Chair of MASS comments on the 'in-tray' the Minister and the team at the MoJ have, some of which have been sat on their desk for many months, others like the increasing problem of E-Scooters and E-Bikes, that cannot be ignored any longer.

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Richard Forbes, senior manager at Meruit Costs comments on the high profile case involving Prince Harry and others and the Courts analysis of the relevant legal principles and conduct of litigation. There are some interesting points of principle that are worth all practitioners taking note of.

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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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