ADR and Arbitration: The Alternative to Civil Litigation for Personal Injury and Clinical Negligence Claims

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Abstract

Using civil litigation to resolve personal injury and clinical negligence claims is nowadays the equivalent of masochism—submitting to a system which is painful, expensive, slow, cumbersome, authoritarian and no longer funded by the taxpayer. Using ADR (alternative dispute resolution) specifically arbitration, provides insurers and injured members of the public with systems which are cheaper, faster, more efficient and less painful.

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Personal injury

Causing personal injury is a very bad thing for society and individuals for so many reasons. The injured person will suffer pain and disability; will be unable to enjoy life to the full; may not be able to work and contribute to the family; will lose productivity, income or business, and the State will lose taxes and GDP. In serious cases, the injured person will have to claim State benefits.

Recognising the need to avoid these bad outcomes States pass laws to avoid or reduce them. The criminal law and the criminal courts deal with intentional and reckless acts causing injury or loss. The civil law and the civil courts deal with reckless and negligent acts causing injury or loss.

The State discourages negligence by imposing statutory duties on the populous and the common law discourages negligence by imposing the common law duty of care on all of us.

Some regard these duties as springing from the religious principle to "love thy neighbour". Others regard these duties as no more than common sense. But whatever their genesis, these duties bind society together, protect society and its members and delineate "good" behaviour from "bad" behaviour.

The criminal process is funded almost entirely by the State. The result of which is acquittal or conviction and punishment which is seen either as a deterrent or as a penance or both.

The civil process in the personal injury field is now funded entirely by insurance companies, the NHSLA and local authorities who lose cases. Its product is either dismissal of the claim or an order for compensation to be paid to the injured person.

The purpose of compensation is not to punish the wrong doer but to put the injured member of the public back into the position which would have occurred but for the injuries.

So how widespread is breach of duty causing personal injury in England and Wales at the moment?

* The views expressed here are my own.

The size of the English and Welsh market in personal injury and clinical negligence claims: CRU data

The Compensation Recovery Unit ("CRU") provides accurate figures on personal injury and clinical negligence claims in England and Wales because all such claims must be registered.

Year	Clinical negligence	Employer	Motor	Other	Public	Liability not known	Total
2016/17	17,894	73,355	780,324	20,047	85,504	1,692	*978,816*
2015/16	17,895	86,495	770,791	11,388	92,709	2,046	*981,324*
2014/15	18,258	103,401	761,878	12,972	100,072	1,778	*998,359*
2013/14	18,499	105,291	772,843	14,467	103,578	2,123	*1,016,801*
2012/13	16,006	91,115	818,334	17,695	102,984	2,175	*1,048,309*
2011/12	13,517	87,350	828,489	4,435	104,863	2,496	*1,041,150*
2010/11	13,022	81,470	790,999	3,855	94,872	3,163	*987,381*

The CRU cases settled in each year were as follows:

Year	Clinical negligence	Employer	Motor	Other	Public	Liability not known	Total
2016/17	18,449	133,934	755,366	13,194	92,042	505	*1,013,490*
2015/16	19,620	99,329	732,788	11,625	100,085	324	*963,771*
2014/15	17,299	97,097	751,437	12,996	111,555	436	*990,820*
2013/14	15,052	96,320	808,016	14,141	115,044	444	*1,049,017*
2012/13	12,955	90,189	786,587	9,584	109,906	496	*1,009,717*
2011/12	12,409	89,888	754,159	4,122	100,715	624	*961,917*
2010/11	10,813	98,586	659,671	3,463	93,220	727	*866,480*

From these figures we can safely state that there are about *1 million claims per annum* in England and Wales. Standing back, that means that a lot of negligent actions causing injury are occurring every day: *2,740* in fact. We should all be more careful.

How does the civil process work?

Currently nearly all of personal injury cases are dealt with by civil litigation. In simple terms the pre-action protocols and Civil Procedure Rules ("CPR") govern the process and most cases are settled either before or after being issued through the civil courts. The pre-action protocols front load and specify the legal work expected, requiring focus on the issues arising from breach of duty, causation and damages and require early disclosure of documentation.

CPR, in force since 2000, also require front loading of the legal work and likewise require focussed pleading on the issues arising from breach of duty, causation and damages; early disclosure of documentation; early service of written witness statements and then disclosure of expert evidence.

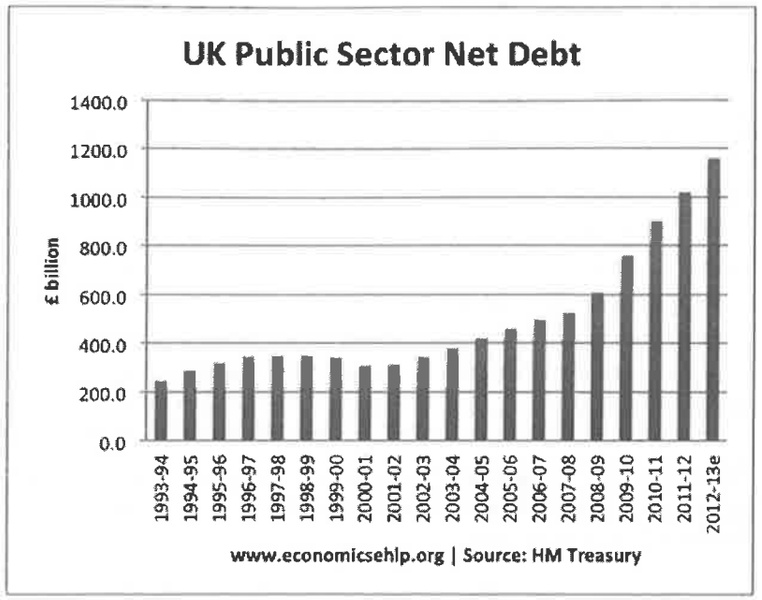
Furthermore, CPR requires the courts actively to manage personal injury cases, which means requiring the parties to come before the courts on multiple occasions to explain what they are doing and why they are doing it and to request permission for every step which they are taking. No step can be taken without

permission. The parties do not have control over the process, the courts jealously retain control and strike parties out for breaches of court orders.

The problems with the current civil court process

Despite the very high quality and independence of our High Court and County Court judges the Civil Court process is now expensive, poor, slow and restrictive. "Active Case Management" clearly seemed like a good idea to Woolf LJ when he invented it in 1999. He was intent on tackling the problem of delay caused by slow lawyers. On the claimant side, these lawyers were running cases, funded at the public expense on Legal Aid or by unions under before the event insurance, who were paid win or lose and the longer the case went on the more they were paid. On the defence side, the lawyers were also paid win or lose and the longer the case went on the more they were paid.

So, the CPR, in 1999, gave power to the courts to manage cases and to push them along with time limits for doing everything. Remember in those *Tony Blair* years the State was far less burdened by debt and the courts were well staffed and funded.



Wind forwards 17 years to today. HM Court Service's funding has been massively reduced; scores of courts are being closed; hundreds staff have been laid off; the county courts no longer provide a front desk service or a telephone service; in Central London County Court, files are lost regularly and parties bring extra copies for the judges; the High Court is struggling to recruit High Court judges due to the reductions in pay and pensions; delays in getting hearings are far too long not just for costs budgeting hearings but also for trials and interim payments:

> "The *Ministry of Justice* will see a *15% cut* by 2019–20, with its *administrative budget falling by 50% over the same period.* Other savings will come from efficiencies within the prisons and courts systems."[1]

Despite this reduction in the service, more cases were struck out per annum after 2013 as a result of the vicious rule changes introduced by Jackson LJ and the decisions made in *Mitchell* and *Denton* than prior to 2013. Parties to civil litigation still have to ask permission and extensions of time for everything.

Parties pay more and get less

> "Over the last year, HM Courts and Tribunal Service (HMCTS) has generated fee income of nearly *£800m*, £186m from family justice fees and more than *£602m from civil justice fees*, surpassing its own spend by £102m, while cuts to the service continue."[2]

The civil courts are now funded by civil litigants not the taxpayer. Yet perversely the courts still consider that "the convenience of the courts" should be part of the overriding objective. I respectfully disagree.

It was a huge error for Woolf LJ to alter the overriding objective in 1999 away from the interests of justice alone and instead towards the convenience of the courts (see the changes to CPR r.1). The prodigy of that error are:

- arrogant interlocutory decisions restricting evidence;
- excessive interlocutory control over parties' activities;
- excessive tendency to strike out;
- inflexibility; and
- delay and high cost.

The civil courts should stick to their core business

In this era, we are all suffering the sequalae of the banking crisis, enormous Government debt, austerity and reduced funding. To cope with these challenges sensible service providers are focussing their activities on their *core business*.

The core business of the civil courts is to determine the issues brought before them by the parties at trials and interlocutory hearings, nothing more. "Active case management", or inactive case delay depending on your experience of the courts, is not a *core business*. It is peripheral. The parties bring the issues to court, the courts decide upon them. If the civil courts restricted their activities to their core business they would need far fewer interlocutory hearings and would need fewer staff. They could work within their reduced budgets and be more efficient.

Changes to the civil process

Disappointingly, at every stage those in charge of changing the civil process have made the same mistakes and have failed to stick to their core business. They ignore that fact that the parties now fund the system. The pretend that they run a system funded by the taxpayer and they act accordingly.

They impose stricter and stricter procedural rules on the parties and require more and more front loading of legal work under the threat of strike out.

They impose budgeting or fixed costs on the parties to reduce recoverable legal costs from the wrongdoer, whilst themselves charging higher and high court fees for a worse and slower service.

[1] 2015 Civil Service World at *https://www.civilserviceworld.com/articles/news/spending-review-2015-departmental-settlements* [accessed 20 October 2017].

[2] *Law Society Gazette*, 20 July 2017.

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They impose greater and greater control over evidence and restrict the parties' rights to call the evidence which they wish to call.

As a result, the civil courts find themselves dealing with far too many interlocutory hearings, facing more dissatisfied litigants and tackling more litigants in person who cannot get lawyers to represent them, who block up the courts with unfocussed ramblings and who waste enormous amounts of court time.

Online e-filing and e-service

The nirvana for the civil courts is online e-filing and e-service so that HM Courts can reduce staff further and save money by abolishing paper court files. This has been achieved in many court systems in the US.

Even under Briggs LJ's plans there is no money or scope for online court filing system to be introduced in the next five years in personal injury or clinical negligence litigation. The parties pay more than the system costs but the profits go to the Government not the system.

Only the criminal courts and some commercial courts have electronic court filing in some form or other.

Jackson LJ's proposed changes

So we must now turn to Jackson LJ's recent suggested changes to civil process. Tasked with reducing costs in personal injury claims and other topics he published his recommendations in July 2017. I deal here only with those relating to personal injury and clinical negligence claims.

The first matter to note is that he has not cut the court process back to its core business. Quite the opposite.

The second matter to note is that he has not suggested the courts should become more efficient by providing e-filing. He has ignored it.

The third matter to note is that he praises his own creation: costs budgeting and then abolishes it for cases under £100,000. Did someone mention hubris?

Jackson LJ has recommended a new intermediate track for claims between £25,000 and £100,000. He produced a matrix of fixed fees payable by reference to the band of the claim (determined by amount of damages) and the stage at which the claim settles or ends.

In addition, he recommended a bunch of fetters on the evidence which the parties can call and more fetters on the civil process including:

- Pleadings cannot be longer than 10 pages;
- No witness statement may be more than 30 pages long;
- No witness can give his own story in his own words at trial, his written evidence shall be read instead;
- Cross examination will be the first time any witness may speak;
- No trial may last longer than three days;
- No party may call more than two experts to give oral evidence; and
- No party may recover in costs from the loser, more than the sum on the matrix.

However clever the architect of the changes and his assessors may be, however well-intentioned they may be, these fetters are arbitrary and restrict the parties' rights to a fair trial. So the customer is paying more for less.

It is not difficult to see why the fetters are unfair. Let us assume that we are involved in an employer's liability claim relating to a defective machine which caused an amputation of three of the claimant's fingers and depression. The claimant wishes to call three experts: the engineer, the hand surgeon and the consultant psychiatrist. The defendants have three too and they do not agree on key issues. Which expert will arbitrarily be prevented from giving live evidence?

Jackson LJ's approach is wholly commensurate with the HM Court Service's policy identified above. Which might be described by an ex *Sun* Newspaper reporter as follows:

> "We believe (mistakenly) that we are a service provided at the taxpayers' expense. We will do what we like with Civil process because we are very busy and important. You personal injury litigants (injured and insurers alike) are bloody lucky to be able to use us at all considering how odious you all are and how overpaid your lawyers are. So take it or leave it."

Below I set out the way to *leave it*.

Alternative Dispute Resolution: The old ways

In my early days of personal injury litigation, experienced insurance company claims managers would come to experienced union solicitors firms' offices with a briefcase full of files and would sit and negotiate them to settlement. Then more often than not they would go to the pub for a pint. That was ADR. Quick, fair and inexpensive.

More recently, in the early 2000s, we adopted mediation. The parties in multi-track cases met with their lawyers and a mediator and most such cases settled.

But the costs of mediation were stripped out of personal injury practice when the practice of joint settlement meetings really took over. Nowadays and for the last 10 years, most cases are settled either by JSMs or by solicitors on the phone or by Pt 36 offers. JSMs are efficient—nearly all are done in a day or less—satisfactory and less expensive than trials. That is ADR in a nutshell. So why do we still issue cases and use the courts at all?

Arbitration

Arbitration is widely used by insurers and litigants in commerce. A Price Waterhouse Coopers International Arbitration Survey carried out in 2013 and called "Corporate choices in International Arbitration" identified that *52% of respondents preferred arbitration* over other means of dispute resolution. Broken down by sector, this corresponded to: Construction: 68%; Energy: 56%.

The clinical negligence and personal injury pre-action protocols expressly require parties to consider arbitration and state that "Litigation is the last resort".

In reality, there is only one alternative to binding civil litigation and that is binding arbitration. Mediation is useful in some cases where one party or one set of lawyers is not seeing the issues clearly, but mediation is not binding and so does not offer an equivalent alternative service to binding civil litigation. Only arbitration offers a binding alternative.

Enforceability

Arbitration is well known to and used by commercial and shipping practitioners, building law and government lawyers. But it grew up in the provinces. The history of arbitration in England and Wales stretches further back than most would guess. The first Arbitration Act was passed in 1698 by William III. It was drafted so as to make the awards of local arbitrators in local commercial disputes enforceable through the courts. The same principle remains at the core of the current Arbitration Act 1996. A specialist arbitrator resolves a dispute between two parties and the award is made enforceable through the courts by a simple CPR Pt 61.18 application.

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The parties have control over the procedure in arbitrations

The basic tenet of the Arbitration Act 1996 is the giving back of control over procedure to the parties. So s.1 of the Act states:

> **"General Principles:**
>
> S.1 The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

Note how the convenience of the courts is nowhere to be seen. See how justice between the parties is paramount. Revel in the freedom to determine your own procedures and evidence. Free yourself from the fetters imposed on your right to gather and call evidence by the civil courts.

Arbitration agreements

Historically, there has been quite a lot of criticism of arbitration in the commercial field because of arguments over jurisdiction which can be long and expensive. However, arbitration arising from a pre-event contract which contains an arbitration clause is the cause of those complaints.

In personal injury and clinical negligence claims, the arbitration agreement is signed after the event and specifically covers the issues to be arbitrated. It may cover all of them: breach, causation and quantum, or only the outstanding one. So the costs of arguing over the scope of the arbitration clause and whether the particular contractual dispute is covered by it do not arise.

Standard form arbitration agreements have been drafted by arbitration institutions such as PIcArbs and are available on the internet.[3]

Once the parties have signed an agreement to arbitrate neither one can issue court proceedings and if they do the courts will stay the proceedings and enforce the agreement to arbitrate.

e-filing and e-service

It would not make sense to arbitrate any personal injury claim without the advantages of e-filing and e-service. So systems like PIcArbs provide a dedicated e-filing system through which all pleadings and evidence are filed, served and stored online providing access 24 hours per day 7 days per week.

This service reduces costs enormously because printing, copying, posting and stamping are time consuming and expensive. The online file is accessible by the parties' lawyers, barristers, the arbitrator and the insurers. It is used for hearings which are paperless (unless old fashioned barristers wish to print out some of the papers) and it saves time and money.

Commencing the arbitration

Under most domestic personal injury arbitration agreements the arbitration does not start until one party or the other issues the claim form via the online platform. Once this is done the parties can either plead out the case or stay it by agreement and simply use the e-filing to swop evidence and settle the case.

[3] See *www.picarbs.co.uk/index_files/downloads.htm* [Accessed 20 October 2017].

Pleadings

The pleadings in arbitration are exactly the same as in civil litigation.

Directions

The claimant in any multi-track case should be represented by an experienced solicitor and insurers always are. Such lawyers take advantage of the flexibility of arbitration and agree directions without the need for permission from a grumpy overworked district judge for every witness statement or expert report.

If a party gathers too many witness statements or expert reports then at the JSM or final hearing the costs of the irrelevant evidence can be disallowed. The beauty of taking back control over the evidence from the courts is that multiple permission applications and case management hearings are wholly unnecessary and are avoided. The costs savings by avoiding permission applications makes arbitration much more efficient than civil litigation.

Of course, if one of the few objectionable lawyers in the world is instructed in an arbitration against you and fails to agree anything then either party can invite the arbitrator to determine any directions on the phone, by email or by face to face hearings. This flexibility allows the speed of throughput for cases to increase dramatically.

Unless orders

So long as the rules of the arbitration institution make provision for the power, the arbitrator can impose unless orders on errant parties and can strike out parts of claims or defences. Usually the power to strike out is tied to the old approach: a party who has broken an unless order and has no reasonable excuse for doing so and of course the interest of justice between the parties, not the convenience of the courts.

Interim payment applications and disclosure

The arbitrator has the same power as a judge to order interim payments.

One power which the arbitrator does not have is to order disclosure against a 3rd party. Disclosure between the parties can be ordered but a court order is needed for 3rd party disclosure. In personal injury litigation, with the powers granted in the Data Protection Act for access to medical records and other records, 3rd party disclosure orders are rare.

Limitation Act issues

There is no difference between and arbitrator's power in relation to limitation issues and that of a judge.

Part 36 offers

Good arbitration institutions build into their rules the Pt 36 provisions or their equivalent so practitioners carry on as usual making such offers in arbitration.

Costs penalties for refusing to arbitrate

Refusing an arbitration proposal is financially dangerous. The courts have begun to add teeth to the ADR requirement in the pre-action protocols. Refusal to agree to an arbitration (and in law silence is taken refusal) will probably result in costs sanctions win or lose. Per Master O'Hare in *Reid*:

> "If the party unwilling to (mediate) is the losing party, the normal sanction is an order to pay the winner's *costs on the indemnity basis,* … This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this defendant's conduct …"

The case law has developed since *Halsey*[4] in which the Court of Appeal gave guidance on when costs penalties for refusal to engage in ADR should be applied. In *PFG*, the Court of Appeal approved a costs penalty imposed on a *winning defendant* for refusing to mediate. In *Garritt-Critchley*,[5] the winning claimant was granted indemnity costs because the defendant refused ADR. In *Laporte*,[6] the winning defendant was deprived of 1/3rd of its costs due to his failure to engage in ADR. In *Reid*, the defendant refused to mediate. Master O'Hare awarded indemnity costs to the winning party due to the losing party's refusal to mediate. In *Bourn* ,[7] the winning defendant was deprived of 50% of his costs due to his refusal to engage in mediation.

These cases have all focussed so far on refusal to mediate but the first national arbitration service: PIcARBS was opened for business in June 2015 so is only two years old. Arbitration was not available for personal injury and clinical negligence claims before 2015.

Conclusions

In our modern age, when the parties not the taxpayer are paying for the civil court service, it is remarkable that insurers and lawyers still put up with the poor service and poor procedures provided by the civil courts for personal injury litigants. Arbitration has been used extensively in commerce for over 300 years to avoid the delays and frustrations of the civil courts process. It is now being used in more and more personal injury and clinical negligence claims and with good reason. We should get what we pay for, not just accept what we are given.

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[4] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
[5] *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch).
[6] *Laporte v Commissioner of the Police of the Metropolis* [2015] EWHC 371 (QB).
[7] *Glimovitch v Bourne Leisure Ltd* [2016] EWHC 3228 (QB).

Limitation (Childhood Abuse) (Scotland) Act

Kim Leslie

Child abuse; Emotional harm; Historical offences; Personal injury; Scotland

Background

For many years, Scottish victims of childhood abuse who attempted to bring civil compensation claims have been met with the defence that their claims were time-barred as they had not raised proceedings within three years of reaching majority.

At present the time limit for a claim of this nature is three years from the date the child becomes an adult, which in Scotland is now 16. So, survivors of childhood abuse are expected to have the wherewithal to seek advice and raise or settle a claim all before their 19th birthday.

Studies have confirmed that, on average, in childhood abuse cases, it takes a woman 18 years to come forward and speak out about the abuse. For men the average is 25 years.

Therefore, current time limits have operated as an *almost universal bar to survivors of childhood abuse bringing forward civil claims in Scotland.* As Lord McEwan observed in *A v N*:[1]

> "I have an uneasy feeling that the legislation and the strict way the Courts have interpreted it has failed a generation of children who have been abused and where attempts to seek a fair remedy have become mired in the legal system."

The Scottish Government pledged to remove time limits in childhood abuse cases through the Limitation (Childhood Abuse) (Scotland) Bill, which passed its stage 3 debate in the Scottish Parliament in June 2017 and received Royal Assent on 28 July 2017.

The grant of Royal Assent does not bring the provisions of the Act into force. The Scottish Ministers will require to do this through a Commencement Order. It is anticipated that this will be done by Autumn 2017.

This landmark decision has come about due to the recognition that the present time-bar regime has completely failed successive generations of historical childhood abuse victims.

Legislation

The legislation has been brought into force will herald a new dawn for historical childhood abuse cases in Scotland.

What is covered by the Act?

The Act defines abuse as *including* sexual abuse, physical abuse, neglect and emotional abuse.

The word "includes" permits a broad interpretation of what constitutes abuse.

There may be some uncertainty as to what might constitute emotional abuse. In some cases, there will be little doubt that the conduct amounted to emotional abuse, whereas other more borderline cases may present difficulties in interpretation.

Emotional abuse is not defined in the Act. The Scottish Government is proposing to introduce a Bill criminalising emotional abuse.

PROCEDURE

[1] *A v N* [2008] CSOH 165.