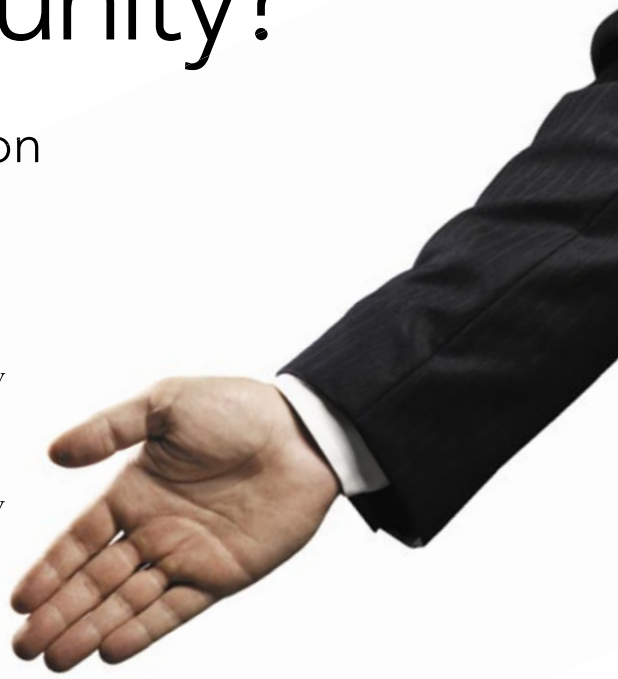
A missed opportunity?

Tony Allen & **Dr Karl Mackie** question why Jackson LJ has shied away from formally endorsing mediation



So what should the mediation world make of the monumental report by Sir Rupert Jackson, apart from marvelling at its clarity and timeliness? Clearly it has most to do with litigation funding, especially conditional fee agreements (CFAs), after the event (ATE) litigation insurance and recoverability of ATE premiums and success fees under CFAs from (usually) defendants.

His general solution is to wind the clock back to 1995–1999 and to require any success fees (capped at 25%) to be deducted from claimant damages rather than being recoverable from defendants, with ATE premiums similarly being payable (if taken out) by claimants but no longer recoverable from defendants in the event of a win. The price which he asks defendants to bear is a 10% increase in general damages in personal injury (PI) and clinical negligence cases, and "qualified" one way costs transfer. This would mean that claimants will get standard or indemnity costs if they win, but not be liable for the defendants' costs if they lose unless they have behaved unreasonably or can afford it, rather like the protection given to claimants with Legal Aid. He wants to encourage funding of litigation by before the event (BTE) insurance, often bolted on to household and motor policies, and firmly proposes that referral fees abolished.

Incentivising settlement?

Such measures would certainly cool the super-heated PI economy, awash with success fees, ATE premiums and referral fees for placement of cases and medical reports, all handled by intermediaries seeking to make a living. But will this approach incentivise settlement, whether by mediation or other means, as intended by Sir Rupert? So far as we know, little effort was made by BTE or ATE insurers to press their panel solicitors to mediate cases before 1999 (nor after), so these proposals may turn out to be settlement-neutral. Arguments for mediation such as improved cash-flow and happy clients with early damages have not made much impact hitherto on PI lawyers. Permitting contingency fees and fixing fees for fast-track work may perhaps encourage early settlement, maximising earnings for minimum work. By contrast with the PI sector, Sir Rupert has suggested little change to current practice in the commercial field, where mediation is comfortably settled, apart from endorsing practitioner calls to withdraw the Pre-action Conduct Practice Direction.

Jackson & ADR

So what of the chapters dealing specifically with alternative dispute resolution (ADR) and mediation? Sir Rupert has said comparatively little about the place of settlement as a means of reducing pressure and cost on civil justice. To be fair, his terms of reference asked him to review the rules and principles governing the cost of civil litigation and to recommend improvements to access to justice at proportionate cost. But ADR, with mediation rightly emphasised, has a chapter of its own, even if his actual recommendations are rather limited in scope. Citing a wide range of submissions, he comments that ADR is a tool which can be used to reduce costs, and identifies the need to structure the costs regime to encourage use of ADR, avoiding late settlement attempts when costs are out of control.

> **"Sir Rupert is right to suggest that financial incentives to mediate will probably be needed to encourage the legal profession"**

Mediating PI claims

Sir Rupert recognises that the widespread belief that mediation is unsuitable for personal injury cases is incorrect, frankly commenting in a footnote that he shared this view himself until persuaded otherwise by submissions to his review. He shies from compulsion to mediate—and indeed no submission received by him sought it. He sees a place for educating the judiciary and for judicial encouragement of ADR, with penalties where it is unreasonably refused, plus a national awareness-raising campaign.

While Sir Rupert has clearly undergone a striking modification of view about the useful role of mediation, he still refers back to the caution expressed in his Preliminary Report when quoting Professor Genn's now much-criticised caricature of a "culture which seeks to drive all litigants away from the courts and into mediation, regardless of their wishes and regardless of the circumstances of individual cases," a picture at complete odds with what the submissions to Jackson on mediation actually said. He does express disagreement with two of CEDR's submissions: over imposing sanctions, especially where both parties avoided ADR; and on "compelling" procedural judges to require ADR. CEDR's full submission can be read on its website,

but we emphasise that we were referring to requiring compliance with **existing** pre-action protocol requirements, currently under-observed by parties and under-enforced by procedural judges.

Protocol enforcement

As Sir Rupert's findings make clear, many claims which might have been settled pre-issue are only settled later, with consequent delay and expense. The improved settlement prospects intended by front-loading are still not being properly captured, to the detriment of parties. We entirely agree with Sir Rupert when he says (in Chapter 39.6.1) "there are serious problems of non-compliance with pre-action protocols", and that "courts at all levels have become too tolerant of delays and non-compliance with orders". CEDR suggested that:

- Both parties may agree not to use ADR when it is actually in their clients' interest to use it (as happened in *McMillen William v Range,* for example): then the court must intervene of its own motion;
- While we suggested "a degree of oversight and if need be compulsion" on procedural judges in observing what the protocols require of parties over ADR, they are already "compelled" to ensure that such obligations are taken seriously by litigants, since the CPR's overriding objective requires active case management by judges, including "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure".

So the policy and "compulsion" already exist: it is a matter of implementation, not principle. Sir Rupert's welcome remedy for this is to propose pre-issue applications by either side to enforce protocol obligations, presumably including ADR. We hope the courts will firmly intervene if they discover post-issue that no pre-issue ADR was attempted without good reason. *Halsey* firmly established that ADR Orders in Commercial Court form are perfectly proper and of general availability, having the status of "robust recommendation" to mediate, similar to the recommendation made by the judge in *Dunnett v Railtrack* (still good law).

To leave encouragement to mediate simply to the fear of costs sanctions at the end of a trial which will only take place in less than 10% of all issued cases rather ducks the case management responsibility required by the overriding objective. Sanctions lurk as a disincentive to being unreasonable. Ignoring judicial recommendation is likely to be seen as such, and they also lurk if an inter-party offer to mediate is ignored, as *Halsey* makes plain. There is no evidence that pressure to participate in any way undermines the possibility of settlement. But once commenced, mediation is a confidential process which is entirely voluntary, with no external pressure to settle or sanctions for unreasonableness or failure to settle. As so many cases settle, it is only right that the courts should generate settlements as soon and as inexpensively as possible, to leave the courts clear for cases which cannot be settled. As Sir Rupert rightly observes, case management indulgence with litigants before the court in one case may well have a detrimental effect on others. After all, the overriding objective requires attention to allotting only an appropriate share of the court's resources to any one case.

"Culture change, not rule change"?

ADR has grown most in England & Wales when encouraged by the judiciary, and Sir Rupert's general recognition of the value of ADR, and that it "is currently under-used, especially in personal injury and clinical negligence cases", adds to that body of judicial approval. CEDR has never argued that mediation should be compulsory in all cases, despite its being so in the vast majority of common law jurisdictions. But its benefits for parties both in terms of time and costs savings and of a good settlement process are still underrated. Mediation operates under the shadow of the law, with settlements moderated against proper assessments of litigation risk. It has been policed by the courts when the parties have chosen to invite judicial scrutiny, and providers have contributed to thinking by intervening and arguing significant issues before the courts. Surely after 25 years it has earned a more established place in the civil justice system than a call for better education?

Mediation may not be a universal panacea, but it has generated enormously favourable feedback and with over 90% of issued cases settling, it belongs in the mainstream of civil justice activity. So we agree entirely with Sir Rupert that use of mediation should not be universally mandated, but assert that there should be an expectation of its earlier use by procedural and trial judges unless good reason to the contrary is shown. We also agree that no new rules are currently required. What is needed is proper observance and enforcement of the obligations which currently exist. Sir Rupert suggests that what is needed is a culture change, not a rule change. That is certainly right in principle, yet cultural revolution in litigation attitudes generated by the Woolf reforms was delivered not just by education, but by rules which we all expected to be enforced rather more robustly than has actually happened. History suggests that education without external pressure, whether by financial incentive or threat of sanction, will not be enough to produce change. NLJ

Tony Allen, solicitor, mediator and a director of CEDR & **Dr Karl Mackie** barrister, mediator and chief executive, CEDR

Educating mediators post-Jackson

- Sir Rupert's core recommendation on ADR is about more education of the profession, the public and the judiciary. However, as directors of a not-for-profit organisation dedicated for 20 years to providing such education, alongside ADR Group, and now the Civil Mediation Council and others, CEDR fear that this may not be enough.
- The problem is that there is so much to train judges for in relation to the work they do, that there is little time to accommodate training in a process which is not under their direct responsibility and of which many of them still have had no experience in practice before judicial appointment. CPD providers report the frequent cancellation of courses on ADR through lack of take-up.
- There is still reluctance among lawyers to undertake training to equip themselves to be effective in what does require new skills for litigators. Sir Rupert is right to suggest that financial incentives to mediate will probably be needed to encourage the legal profession. Despite holding this view, his report does not really explain whether he thinks that his proposals will deliver such incentives. CEDR fear that they will not do so on their own.