Consultation on a proposed Mediation (Scotland) Bill

A response by the Association of Personal Injury Lawyers – August 2019

Introduction

APIL has an ongoing commitment to ensure solicitors are aware of all forms of alternative dispute resolution (ADR) and how they may be used to benefit injured people. Under no circumstances, however, should any form of ADR, including mediation, be forced upon unwilling parties.

As a not-for-profit organisation which campaigns on behalf of people injured through no fault of their own, we have restricted our comments to mediation in the field of personal injury. For the reasons set out in this response, all personal injury claims should be excluded from the proposals for a Mediation (Scotland) Bill.

Unnecessary reform

We question the need for reform to promote mediation in personal injury claims, when there is already a great deal of work undertaken by solicitors to ensure that claims do not go to court unnecessarily. The compulsory personal injury pre-action protocol has been successful in promoting early and fair settlements without litigation. By way of example, through a Freedom of Information request, APIL found that while there were 37,640 successful road traffic accident claims in Scotland in 2017/18, only 5,492 were initiated in the Scottish courts.

There is no sense in upheaving the way in which these cases are run by forcing parties to attend a mediation information session, setting a barrier which must be crossed by injured people should they wish to bring a claim in court, if there is already a successful way of keeping most personal injury claims outside of the court. Even in personal injury cases which are initiated in court, it is estimated that 98 per cent settle before proof[1], and before they take up further time, costs and resources of the court.

[1] https://www.parliament.scot/S4_Bills/Courts%20Reform%20(Scotland)%20Bill/b46s4-introd-pm.pdf

The proposal for a Mediation (Scotland) Bill follows a period of substantial reform to the civil justice system in Scotland. These reforms include the establishment of the All-Scotland Sheriff Personal Injury Court, which Lord Carloway, the Lord President, says has already brought efficiencies[2]. The proposals also come at a time when work is being undertaken to develop new compulsory pre-action protocols for disease and clinical negligence cases[3], and which follow the introduction of a compulsory personal injury pre-action protocol in November 2016. With these reforms already implemented, and other work ongoing, there will be no benefit from further overhaul and disruption of the personal injury claims process as proposed by the Mediation (Scotland) Bill.

Potential for pressure

The proposed Bill would create a statutory obligation on parties to attend a mediation information session to discuss the self-test questionnaire outcomes, acquire information on the benefits of mediation, and determine the suitability of the case for mediation. What is not clear from the consultation document is if separate sessions will be held for the pursuer and the defender, or if both parties will attend the same session.

It is vital that any decision to mediate is discussed and agreed by the pursuer and his solicitor alone. An injured person, who may be at his most vulnerable, should never be placed in a situation where there is the potential for pressure to partake in mediation.

Potential for more cost and delay

In 2017/18, 9,443 personal injury cases were initiated in court[4]. The Mediation (Scotland) Bill would have required a mandatory mediation information session in every single one of these cases, and the involvement of almost 19,000 parties. There are no details in the consultation paper on how soon the mediation information session must take place after a questionnaire has been completed, how long the session will last, where the session will be held, and what will be funded by the Scottish Government. Based on the proposals in the consultation paper, we are concerned that the Mediation (Scotland) Bill will increase costs for injured people, and cause delays.

[2] Scottish Civil Justice Council, Annual Report 2018/2019 and Annual Programme 2019/2020, page 1
[3] Scottish Civil Justice Council, Annual Report 2018/2019 and Annual Programme 2019/2020, page 8
[4] https://www.gov.scot/publications/civil-justice-statistics-scotland-2017-18/pages/6/#Table_13

Under the proposals, the initial mediation information session would be funded by the Scottish Government. There is a lack of detail, however, on whether travel and accommodation expenses incurred by pursuer will be funded by the Scottish Government, or whether the funding will pay for the pursuer's solicitor to provide support and advice in preparation for, and during the session.

A pursuer may have to travel considerable distance to attend a mediation information session, which for many people may not be physically or financially possible. For example, a pursuer may live in Inverness, and his solicitor wishes to obtain the benefits of procedure at the All-Scotland Personal Injury Court in Edinburgh. A requirement to attend a mediation information session in Edinburgh would involve a journey by car which could take up to four and a half hours, or a rail journey of around three and a half hours, and which could cost up to £82.20 for a return ticket.

It may not be possible for a return journey to be completed in one day, depending on the time and duration of the mediation information session. A hotel room may then also be needed. Latest figures reveal the average cost of a hotel room in Edinburgh in 2018 was £103.72[5]. This would equate to nearly £200 for the pursuer just to attend a mediation information session, and this is before the solicitor's costs are taken into account.

The pursuer may not have the ability or the confidence to travel alone, and the costs of attendance at the session could build up to be hundreds of pounds if he was accompanied by family, friends, or carers. For someone this could be unaffordable, especially if he is on minimum wage, or unable to work because of the nature of the injury or disease. We are also concerned at the lack of details in the proposals to support someone with an injury or disease which would make it difficult, or in some cases impossible, for him to attend a mediation information session. Modern technology, such as video-conferencing, may help some people who are unable to travel, but there will be people who will not have access to, or feel comfortable using those facilities.

The proposals do not specify how soon the mediation information session must take place after the questionnaire have been submitted. A requirement to hold almost 9,500 sessions a year for personal injury cases alone could lead to substantial delay and backlog within the court service.

[5] https://www.heraldscotland.com/business_hq/17526355.revealed-surge-in-price-of-a-hotel-room-in-glasgow-and-edinburgh-most-expensive-outside-london/

The wrong focus

Success of a legal claim, either through mediation or through trial, should always be measured on the outcome. We are disappointed, therefore, that the focus of the proposals is on speed and costs, rather than a procedure which secures the right outcome. The consultation paper refers to a belief that a Mediation (Scotland) Bill will speed up settlements. A quick settlement does not necessarily mean it is the right settlement.

In a review of ADR in England and Wales for the Yale Journal of Law & the Humanities, Hazel Genn, a professor of Socio-Legal Studies at University College London found that "success in mediation is defined in the mediation literature and by mediators themselves as a settlement that the parties "can live with". The outcome of mediation, therefore, is not about *just* settlement it is *just about settlement"*[6].

We know from statistics that almost all cases settle before trial. Under the present system, a settlement meeting does not take place until there has been full disclosure. In these situations, the settlement will bear at least some relation to the strength of the case. An advantage of mediation might be early settlement, but this could be outweighed by the disadvantages with regard to the appropriate level of settlement. If early settlement was to be the sole litmus test, existing rules could bring forward the pre-trial meeting between parties.

It is worrying that the consultation paper implies that a pursuer's solicitor may not be involved in the mediation process established by the Mediation (Scotland) Bill. In the section on the potential impact for solicitors and advocates, the paper says, "…there is also the potential for solicitors to have a role in the process, such as by encouraging their clients to mediate and possibly assisting their clients both prior to, and during, mediation"[7]. We are concerned that without access to independent legal advice, a pursuer may be – perhaps unknowingly – forced to agree to a settlement which does not meet his needs. An injured person, who may be at his most vulnerable, should be able to rely on the advice and support of his solicitor through every step of his legal claim.

[6] What is Civil Justice For? Reform, ADR, and Access to Justice, Yale Journal of Law & the Humanities, Volume 24, Issue 1, page 411
[7] Proposals for a Mediation (Scotland) Bill, consultation paper, May 2019, page 17

Cost of mediation

We question the assumption in the consultation paper that mediation will result in reduced costs for all involved. Mediation may appear by some to be cost-effective, but we're aware from our members of recent quotes from Core Solutions, major provider of mediation, of £1,850 plus VAT per party, and £2,750 plus VAT per party, dependent on the individual mediator.

We are concerned that any forced move to mediation rather than trial would appear to be shifting certain costs onto parties, and disproportionately to the pursuer. Unlike court fees, the costs of mediation or a pursuer's own solicitor are not recoverable from the defendant in a successful case. Privatisation of dispute resolution, moving cases away from the court and into mediation, would likely have an effect on the level of income received by the Scottish Courts and Tribunals Service, and will divert money away which ordinarily would have gone into the public purse for the running of the courts.

Mediation is not a panacea

APIL is not opposed to mediation, but we are concerned that proposals for a Mediation (Scotland) Bill could lead to mandatory mediation in the civil justice system. Pursuers and their solicitors should have the freedom to explore all options for dispute resolution, but at no point should they be forced into anything which is not appropriate for their case, or with which they are not comfortable.

The use of ADR, including mediation, in the civil justice system has been the subject of many reviews and discussions over recent years, including a recent report for the Scottish Government published in June 2019 - *An International Evidence Review of Mediation in Civil Justice*[8]. This report concluded that "mediation should not be seen a panacea, but used where appropriate. It should be part of giving users access to a range of dispute resolution processes, including trial" [9]. We agree with this.

[8] https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/
[9] An International Evidence Review of Mediation in Civil Justice, Scottish Government, page 5

Reform should always be evidence based, but there is no evidence which supports any move to mandatory mediation in personal injury cases. The consultation document refers to a belief that the proposals will speed up settlements and reduce costs. *An International Evidence Review of Mediation in Civil Justice*, which was the result of a review of literature and evidence on mediation in the civil justice systems in several jurisdictions, found this is not always the case. The report states that "there is potential for both cost and time savings for users and the civil justice system by making use of mediation, but the evidence shows this cannot be guaranteed"[10].

Conclusion

Access to justice is the cornerstone of our society, and we do not support proposals which will create barriers, increase costs and delays for injured people, and in some cases, could lead to settlement agreements which are not appropriate. APIL supports mediation where appropriate, but it will not be suitable in every case. Mediation will only work effectively if both parties have entered into it freely, and in those situations, parties should remain free to explore mediation on their own. There should be no mandatory requirement for injured people to attend mediation information sessions.

Under no circumstances should mediation become compulsory. Access to the courts is a fundamental part of access to justice, but as Hazel Genn said in her article on ADR, "mediation does not contribute to access to the courts because it is specifically non-court based"[11]. The importance of access to the courts was addressed by Lord Reed in R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)[12]. In his judgment, Lord Reed said, "courts exist in order to ensure that laws made by Parliament, and the common law created by the courts themselves, are applied and enforced" and "in order for the courts to perform that role, people must in principle have unimpeded access to them".

[10] An International Evidence Review of Mediation in Civil Justice, Scottish Government, page 2
[11] What is Civil Justice For? Reform, ADR, and Access to Justice, Yale Journal of Law & the Humanities, Volume 24, Issue 1, page 411
[12] [2017] UKSC 51

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for almost 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,200 members, 219 of whom are in Scotland, who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises solicitors, advocates, legal executives and academics whose interest in personal injury work is predominantly on behalf of pursuers.