

Dealing with Disputed Claims: Is Jackson the Answer, or a Reminder of the Need for a New Approach?

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Centre for Justice

Summary

- There is a need for a less adversarial and more efficient and cost effective approach to settling claims disputes, and the author suggests adjudication as an alternative dispute resolution process. He highlights some of the issues with the current litigation system, and argues that the Jackson reforms will only obliquely resolve some of the matters.
- Currently litigation is the preferred approach to settling disputes, but its adversarial nature lies at the heart of the cost, time and risk issues. It is a process that often amounts simply to a contest with an umpire basing the final decision on his perception of the most convincing performance.
- Arbitration is now considered by many to be even slower and more expensive, and has become as formal, proceduralised and adversarial as litigation. Mediation is considered less adversarial, but suffers from the parties not having faith in the willingness of the other party to agree any solution. So all in all the options for settling disputes efficiently are not ideal.
- The Jackson reforms are unlikely to address some of these issues. Litigation driven by Conditional Fee Agreements will probably drop, and it is likely that the individual and SMEs will find it even more difficult than previously to find a solicitor. The real difficulty is that these reforms are mere tinkering with a system which is no longer fit for purpose in a twenty-first century world.
- Adjudication of the sort offered by the Centre for Justice provides a viable and efficient alternative to the other routes. It takes away the need for complex and expensive legal counsel, focusing on an expert adjudicator to interview the parties and develop a solution. It still offers an avenue for the mediation option if the parties desire.
- The benefits to the insurer of this approach in terms of cost and time savings, risk management, and savings in staff time, are considerable. In addition it offers the ability to challenge a larger number of questionable claims, with greater certainty of the right outcome, and for less money.

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CII Introduction: The implementation of the Jackson review have attracted considerable commentary from all sides, especially over whether the reforms will be sufficient to provide the public with a trustworthy, efficient and affordable legal recourse process. At the moment, many point out that the preferred course of dispute resolution: litigation, does none of these things. However the alternatives such as mediation and arbitration have attracted their own concerns over time, effectiveness and legal impact. In this article, Anthony Hurndall describes what the Centre for Justice has been doing to offer the public an alternative model that avoids the aggressive adversarial approach of litigation whilst actually bringing about results. At a time when insurers are looking for cost effective and proportionate approaches to settling claims disputes in the light of the Jackson Review, adjudication may be a possible contender.

When faced with a claim that is invalid, or overstated, an insurer should be able to decline this safely, in the knowledge it can have any dispute with the insured resolved quickly, inexpensively and without the risk the decision will be overturned in court, leaving the insurer to pay the claim regardless, and the legal bills of both parties into the bargain.

It is inconceivable in modern times that there is no truly effective forum to resolve disputes between insurer and the insured.

Equally, for the insured whose insurer wrongly rejects a claim, it should be possible for the insured to insist on recovery under the policy, without the cost, delay, stress and risk of going to court. For many claimants even this option may not be available, if they do not have the funds to pursue the claim and cannot persuade a solicitor to take it on under a conditional fee agreement.

It is inconceivable in modern times that there is no effective forum to resolve disputes between insurer and insured. However, until now this has remained the case. We clearly need to take an entirely fresh look at the problem and to set up such a forum. This is the task which Centre for Justice has set itself.

Whether it has found the answer the insurance industry and time will decide.

Present alternatives

It is probably helpful to describe the main avenues presently open to those in dispute.

A. Litigation

Why do so many lawyers advise “Avoid litigation at all costs?”

It is universally accepted that going to court is slow—a final decision in court or on appeal can take several years.

Litigation is enormously expensive. This is because it is labour intensive and those doing the work are highly paid. Those who have seen the time that goes into a case will know how and why the time and cost mounts up so fast. One just has to look at the time spent on the various stages of the process.

This work involves a large team: solicitors (probably a partner and assistant at the least), one or more barristers, experts and support staff. This team and all the work is duplicated on the other side. Come the final decision, the loser is going to have to pay two sets of bills of frightening proportions, enough in the case of many individuals and SMEs to bankrupt them.

The hidden cost for insurers and businesses is the cost of staff time. Then there is the stress and anxiety, the business disruption and damage caused to the lives and health of the individuals involved. SMEs and individuals are most vulnerable but no business, even the insurer, is immune to the disruption and reputational damage a court case can cause.

The procedural issues alone are a minefield and even the most skilled lawyers can find themselves wrong-footed. The interpretation of these rules, of the law and the facts, is in the end subjective, down to the view of the judge.

Finally of course there is the risk. A sound case can founder for a whole range of reasons, having nothing to do with the merits. The procedural issues alone are a minefield and even the most skilled lawyers can find themselves wrong-footed. The interpretation of these rules, of the law and the facts, is in the end subjective, down to the view of the judge. Different judges on different days can take very different views. The

outcome will depend largely on the skills and resources of the parties and their lawyers and on their performance on the day. The result is unpredictable to the last.

B. Arbitration

Arbitration was introduced as a less formal process to overcome the problems of litigation, and it certainly has some advantages. Unfortunately, it is now considered by many to be even slower and more expensive. It has become as formal, proceduralised and adversarial as litigation, but the parties have in addition to agree and pay for their arbitrators, often a panel of three, and a venue; they will also have to agree and pay for an arbitration body to supervise the arbitration, or they will have to agree a set of rules or procedures and get their arbitrator to apply these. This is all a tall order for parties in dispute and it tends to protract and make the process very costly.

C. Mediation

Mediation enables parties to agree their own solution, guided by a skilled neutral, outside the narrow issues a court can decide. The underlying problems can be addressed and creative solutions found. When it works, it can work very well.

Parties in mediation often accept very much less, or pay very much more, than is due, convinced to do so by the threat of how dreadful the alternative of litigation will be.

Mediation though suffers from a number of perceived failings. The parties do not want to spend time and cost on a mediation, when they have no faith in the willingness of the other party to agree any solution. The success figures are not altogether convincing, successful mediators claiming rates of 80% or more, but many schemes only showing success rates of 40–65%. Mediations can take months to set up and costs can run into tens of thousands of pounds

Mediation is often stated to be about compromise, not about what is fair. Parties often accept very much less, or pay very much more, than is due, convinced to do so by the threat of how dreadful the alternative of litigation will be. They are even less happy if they come away with nothing, knowing the other party was only going

through the motions, either to delay the outcome or test their position.

The Jackson reforms: nowhere near enough

Following the work of Sir Rupert Jackson, a number of reforms are being put in place, some currently going through Parliament. It is intended to:

- do away with the recovery of success fees and after the event insurance (ATE) premiums from unsuccessful defendants in conditional fee funded litigation;
- allow limited recovery of success fees from the damages a claimant recovers;
- increase general damages by 10% to make up for this; and
- introduce further incentives to accept Part 36 offers (the formal offers to settle a case on terms which penalise the other party if the offer is beaten in court).

There are conflicting views on the likely effect on claimants and on the insurance sector. It is unlikely that overall the sector will pay out a great deal less post-Jackson, though litigation driven by conditional fee agreements (CFAs) will probably drop, and it is likely that the individual and SMEs will find it even more difficult than previously to find a solicitor to take a case on a CFA basis. With the reduction in civil legal aid, access to justice has not been improved by these reforms, though the often monstrous burden on unsuccessful defendants of having to meet the inflated costs of CFA claimants, will thankfully be removed.

Litigation is sometimes said to be best suited to defendants who wish to avoid meeting a liability, i.e. to be used as a barrier to a fair outcome.

The real difficulty here is that these reforms are mere tinkering with a system which is no longer fit for purpose in a twenty-first century world, with serious flaws for the majority of litigants. Indeed litigation is sometimes said to be best suited to defendants who wish to avoid meeting a liability, i.e. to be used as a barrier to a fair outcome.

All in all, the Jackson reforms go nowhere near far enough in addressing these issues. We need to explore

with an open mind, if we wish to provide the public with a process of legal recourse that is trustworthy, efficient and proportionate.

The need for an entirely new approach

In the absence of an effective forum, that can serve the insurance and wider communities as they need, a group of London lawyers has developed a dispute resolution model which is intended to overcome current problems and provide an effective solution for the future. This they have set up to be run by Centre for Justice.

Litigation often amounts simply to a contest with an umpire basing the final decision on his perception of the most convincing performance.

1. Non-adversarial approach

In our view, the principal flaw in litigation is its adversarial nature. This lies at the heart of the cost, time and risk issues associated with litigation, which often amounts simply to a contest with an umpire basing the final decision on his perception of the most convincing performance. All the parties' resources go into the contest, the sole aim being to win, with every tactic and ruse adopted to out-manoeuvre and defeat the other party.

On analysis, this adversarial approach gives rise to between 75–90% of the cost incurred, when all that is needed is a proper investigation of the issues, which is far simpler. The issues and the correct finding are often the casualty of the contest. Combat of this sort often encourages the parties to put extreme opposing positions; when the answer is *grey*, one party will argue *black* and the other *white*, leaving the judge to decide between the two and unable to make the right decision, which may never have been put to him.

Adjudication involves a direct and personal investigation into the issues by the adjudicator. It does not involve him listening to two cases put to him by skilled teams of lawyers, and deciding between them.

We consider the best way to establish the facts and rights of the parties is by a thorough examination of the evidence by a skilled adjudicator, usually an experienced lawyer. This adjudicator, or assessor as we

describe him, will be a specialist in the field, who will know the relevant law and practice better than a judge from a non-specialist background. The adjudicator will fully investigate the claim, deal direct with the parties, the issues and the evidence, and make the correct award.

There is no need for the parties to be separately represented, for complex procedural rules to govern the contest, or for a long series of protracted formal hearings. This is what differentiates it from conventional adversarial arbitration. It involves a direct and personal investigation into the issues by the adjudicator. It does not involve him listening to two cases put to him by skilled teams of lawyers, and deciding between them. The adjudicator is not distracted by arguments about procedural and peripheral issues, or by having to discern the truth from the clever and entirely contradictory reconstructions put forward by skilled advocates who have years of experience of putting matters in the best possible light and obscuring the weaknesses in a case.

2. Time and cost savings

This common sense approach has the benefit that it removes the waste of the contest. The parties only have to pay for work that is necessary for the adjudicator to establish the issues and facts. When this cost is itself shared between the parties, it is easy to see that savings of over 90% in costs can, and are, being achieved.

Equally the result is achieved in a matter of weeks, or at most three to four months, a similar saving in time.

3. Disruption

Court proceedings take a great deal of staff time. This is the hidden cost, which can easily exceed the external cost. For the insured, litigation can be very distracting and disruptive to their personal lives and businesses. It is not just the actual time taken, but the way the anxieties of a worrying court case can take away the focus and energies of those involved, disabling them in ways which are never obvious, until the case is over and the damage can be seen.

4. A more reliable outcome

An adjudicator with the time to investigate and discuss the evidence with the parties and experts over several conversations, returning to matters that trouble him, and allowing parties to return with further comment and clarification after an interview, is far more likely to establish the facts correctly. The high pressure, time limited and formal environment of a court hearing is not the best place and method to interview witnesses, most of whom are nervous and unlikely to give clear and coherent evidence in a court environment, leaving the likely winners in a court case as the parties who are the most confident, articulate and best performers.

Mediation is also available at any time and the assessor will know if the parties are open to discussion and can encourage them to mediate.

In court there is no opportunity to explain and clarify an issue after allowing proper time for reflection, or for witnesses to refer back to files or evidence to refresh their memories and give the right answer to a question. If time is allowed, the position can be established every time very much more accurately and reliably. It will have evolved and developed in the mind of the assessor through an ongoing and constructive discussion with the parties, enabling him to build the correct view of matters, over perhaps a number of days.

5. Mediation included

If the assessor is a mediator, as with Centre for Justice (CFJ)'s panel, the parties can be encouraged to mediate, either at the outset or at any time during the investigation, or to return to mediation, right up to the making of the award. Mediation is available at any time and the assessor will know if the parties are open to discussion and can encourage them to mediate. In this way the real issues and concerns of the parties and the possibility of solutions outside the very narrow points a court can decide can be explored for the benefit of all.

This overcomes the concerns and objections of the mediation sceptics. If nothing is agreed, the assessor will go on quickly to decide the principal issues. There will be certainty and an end to the dispute. For the same reason, the parties do not need to accept unsatisfactory compromises. Mediation cannot be used as a tactical ploy.

6. Risk

With litigation risk at 30%, and the barristers representing the parties often unable to say which way the case has gone even after sitting through the case, insurers and insured crave early certainty. Each will have usually been advised their case is sound, otherwise they will generally not have embarked on the daunting litigation journey. Similarly, few litigants know what a case will cost them in terms of their own legal fees, let alone whether they will have to pay the other side's, and how much these will be.

With this new model the costs and time are predictable, and the parties are given binding cost and time estimates at an early stage. Cfj itself can give a provisional view before a case is referred. There is no risk of having to pay the other side's costs. With the costs at less than 10% of the alternative, if the parties go to court, insurers and insured have substantially limited their costs risk and exposure.

Even more importantly they can manage, if not eliminate, the risk of an adverse outcome very much more effectively. The process is very much more reliable and the process risk is largely removed.

Similarly, few litigants know what a case will cost them in terms of their own legal fees, let alone whether they will have to pay the other side's, and how much these will be.

In addition the parties can ask the assessor for a preliminary view at any time. This puts the parties in the position that they know, from the neutral who is going to make the final decision, what the likely outcome will be. This is of great value and enables the parties to settle the case before the costs have mounted beyond control.

This combination of features puts the parties very firmly in control of risk and outcome.

7. Lower settlements

It is clearly established that in the positive environment of a mediation, hostilities can be set aside, and a willingness to explore ways of getting outcomes attractive to all parties can be explored. The parties are more conciliatory. This leads to far lower settlements than those extracted in the confrontational atmosphere of the courtroom.

8. Faster settlement rates and shorter life cycles

With a process such as this, staff can shorten the time taken to settle claims and can handle more claims. Significantly it means they can afford to challenge more doubtful claims for less outlay, making sure insurers pay only when they should and only pay the amount they should.

9. Improving relationships and reputations

Litigation quickly alienates the parties and is very damaging to relationships, which can be important, for example, where an insurer carries group cover for a company over a range of lines, and cannot afford to jeopardise the relationship. Using this approach allows both parties to have the benefit of informal neutral advice and guidance on the issues, and be assisted to settle them on terms acceptable to both, leaving the underlying relationship unharmed.

Offering this service to policy holders also speaks volumes about the way an insurer views policyholders and its relationship with them. It says that the company wants to improve the claims experience; make any dispute easy to resolve; ensure their customers get fair treatment; and enable any valid claim to be met quickly and without avoidable expense. It is an absolute winner for the marketers.

Benefits and Conclusion

The benefits to the insurer of this approach in terms of cost and time savings, risk management, and savings in

staff time, are considerable. In addition, the ability to challenge a larger number of questionable claims, with greater certainty of the right outcome, and for less money, makes the case for such an approach overwhelming.

The Centre for Justice is calling on Government, as part of its drive to encourage litigants to explore avenues other than court action to resolve their disputes, to make adjudication more readily accessible to users.

From the point of view of the insured, the knowledge that any dispute over a claim can be resolved quickly and affordably is going to make an enormous difference, above all to the individual policy holder and the SME.

The service is new and the result of painstaking research into what those in dispute actually want and need. It combines all that we have learnt from the strengths and weaknesses of the models that went before. We are finding there is a real appetite and appreciation for what the service has to offer. In the meantime, Cj is calling on Government, and the Ministry of Justice, to make it more readily accessible to users of the courts as part of Government's drive to encourage litigants to explore avenues other than court action to resolve their disputes. The market will decide how quickly the service is taken up.

If you have any questions or comments about this Thinkpiece, and/or would like to be added to a mailing list to receive new articles by email, please contact us: thinkpiece@cii.co.uk or by telephone: +44 (0)20 7417 4783.



Anthony Hurdall is Chief Executive of the Centre for Justice. He qualified as a solicitor in 1976 after studying at Oxford, and was a partner at leading London firms including Ashurst and SRT (now Stephenson Harwood). He then set up his own practice to pursue his interest in European property, publishing the authoritative work on the subject with Butterworths. Anthony's concern with the way the legal system fails those in dispute led him to develop a new dispute resolution model as a modern and effective alternative to the courts, and in 2008 he set up Centre for Justice.

The Centre for Justice was set up by leading London lawyers to meet the need for the public, business and government to resolve their disputes quickly, reliably and cost efficiently. Working with representatives of the judiciary, government, commerce, industry and the third sector, it has developed an entirely novel approach to dispute resolution, which dramatically reduces the stress, cost and delay involved. Its staff and directors come from commerce, industry, government and the law, and the Centre has no stake holders and is an independent, impartial and not for profit organisation. www.centreforjustice.org

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