

**COURT-FREE CATASTROPHIC
CLAIMS
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- PERSONAL INJURY LAWYER OF THE YEAR 2010 AND 2012
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NEUTRAL FACILITATION

- the parties to agree at the outset
- or during the course of the claim
- to appoint a neutral and knowledgeable person as a facilitator
- to help the parties to manage the claim
- and to resolve issues
- preferably before they dominate the relationship.

- The object would be to avoid reference to the courts
- on the basis that lawyers and insurers are now more likely to be highly specialist than judges.

- The range of the neutral facilitator's powers could be wide
- but not just to settle a claim
- a wider remit to help to manage issues of all sorts.

SOME AREAS OF FACILITATION

GETTING HOME FROM HOSPITAL

- Insurers could become directly involved in helping to devise a plan to get the claimant home from hospital
- It's not always necessary or desirable to buy a house or bungalow straight away
- discussion can produce a plan which is genuinely agreeable to both sides.

- That may have a beneficial effect on the long term housing solution
- insurers may have access to housing which has already been adapted
- or access to good property searchers.

- An inventive facilitator might be able to encourage the parties to discuss other solutions, either short or long term, such as different forms of ownership.

REHABILITATION

- There is a potential tension here
- claimants and their lawyers can be sceptical if the insurer is involved in the choice of unit or personnel
- defendants worry about money being spent without clear goals and targets.

- Also, the situation is complicated by the Immediate Needs Assessment
- some of the organisations which carry out these INAs may have close links to insurers
- creating a perceived conflict of interest.

- Selection of the type of rehabilitation is important for the family
- and also for the insurer.
- Good choices will achieve real results at sensible cost
- the alternative is to pour money down a bottomless pit.

- Several choices
- rehab unit or home-based
- in-patient or not
- choice of unit is highly specialised
- needs good clinical input.

- A genuine insurer could have real input on this topic
- but allowing that to influence the injured family and the claimant legal team might require facilitation.

- Before the claimant enters rehabilitation, both sides might want to discuss what the realistic objectives are
- Monitoring the progress of rehabilitation is essential
- insurers may have a genuine interest in being involved in the process.

CASE MANAGER

- selection and management of the case manager can be another area of real mistrust
- both sides can either pull together or fall out
- public funding
- claimant who pursues privately funded treatment or purchases, when the equivalent is as readily available through public funding, should expect to incur the insurer's displeasure

- If there is no dialogue, that may set the scene for the entire claim
- a facilitator should be able to achieve a compromise between public funding and private spending
- *Peters v East Midlands Strategic Health Authority [2009] EWCA Civ 145*
- co-operation in securing whatever public funding is available; must be done in a way that will not prejudice the claimant's long-term rights.

EXPERTS

- The facilitator might have worthwhile input on the selection and use of experts
- this is an area where disputes are often created, sometimes unintentionally, which can dominate the claim.
- It would be possible to discuss selection of experts with the other side, but it is difficult. A facilitator might be able to manage this in a way which reduced conflict.

TREATMENT AND LITIGATION

- Common for claimants' lawyers to treat the claimant, including rehabilitation
- and to let litigation follow behind
- which might well suit insurers, in the sense of producing a better outcome
- but claimants and their legal teams can be wary of defence intervention in clinical management.

COSTS

- It might be possible to include costs in the facilitator's role
- not easy, but a challenge for a facilitator
- it might be possible to include costs as part of the ongoing management of the claim, with interim payments of costs if and when appropriate.

FINALISATION

- When finalisation of the case approaches, the facilitator could be involved in the process of identifying and resolving issues
- and making sure that the parties bring realism to the negotiating table
- maybe not just simple mediation
- could be more involved and, if the parties agreed (see below), more wide-ranging.

THE POWERS OF THE FACILITATOR

- Would depend on what the parties agreed
- either at the outset
- or during the course of the case.

- The parties might identify the facilitator, and might not feel it necessary to describe or limit his or her powers at that stage
- If a problem approached, the parties could agree how they would like the facilitator to help them to manage it
- Eg a conference call
- or problems and suggested solutions in writing
- or arrange a consultation with the facilitator.

- If they couldn't agree what method of management was preferable, they could ask the facilitator to decide
- If he or she felt that an alternative method of management might work better, that could be suggested.

- If the parties wanted, the facilitator could give an evaluation of the merits of the problem
- As a last resort, the parties could agree to ask the facilitator to decide the issue; this could be agreed to be a final resolution of that issue, or it could be subject to court decision.

TYPES OF ADR

- **ADJUDICATIVE**
- **NON-ADJUDICATIVE**

ADJUDICATIVE

- EXPERT DETERMINATION
- ARBITRATION (INCLUDING BASEBALL ARBITRATION!!)
- ADJUDICATION

NON ADJUDICATIVE

- EARLY NEUTRAL EVALUATION
- EARLY EXPERT EVALUATION
- MEDIATION
- NEGOTIATION
- MINI TRIAL

EARLY NEUTRAL EVALUATION

- ENE is when a neutral third party is asked to evaluate a dispute, without themselves becoming involved in the negotiations between the parties
- But the neutral facilitator would combine roles
- Endless variations

- Oral or in writing
- If oral, either on the phone or in person
- With or without advocates
- Time limits
- Paper limits
- Cost limits

- If in writing, limits
- simultaneous or sequential exchange

- Evaluation not binding
- But query what if one side ignores the evaluation?