COMPENSATION CULTURE CRASHES by CHSpurin

Amidst a wave of euphoria the UK embraced contingency fee justice, a wonderful new legal product that reached the parts that other forms of justice could not reach. Previously, justice at a price was available to those that could afford and to those entitled to assistance from the ever-shrinking Legal Aid pot. Now anyone with a valid claim could pursue it – no one was left out. Then came the call-centre phenomena. Aggressive TV marketing campaigns encouraged the public to pursue their rights to compensation, free of charge. US style ambulance chasing arrived with a vengeance in the UK. Local authorities and business paid the price as claims flooded in. The cost of insurance cover went through the roof. Then doubts about the benefits to claimants were expressed. Whilst the contingency percentage is capped at a low level, the hidden costs of pursuing the claim deprived many successful litigants of a large proportion of their awards. Now it appears the entire edifice is tumbling down.

First there was the demise of Claims Direct in 2002. In June 2003 the mighty Aventis and its subsidiary The Accident Group (TAG) ceased trading. Whilst the claims on its books will still be pursued by the solicitor firms already engaged, working directly with the clients rather than through TAG, it appears that the bottom has fallen out of the claim chasing market at last. What impact, if any at all will this have on ADR?

The initial successes of the movement were significant. Many claimants who might previously have gone directly to solicitors were attracted by the promise of free representation, without realising that this was available from many high street solicitor's firms in any case. Perhaps therefore the inability of law firms to adapt to the legislation quickly enough contributed to the success.

Submitting a claim over the phone gave the impression that claimants could get access to justice without having to face the daunting task of going to a solicitor. Informality and user-friendliness appeared to be on offer. Perhaps however one of the most significant factors has been the way tortuous liability has been extended by the courts as one after the other many of the litigation flood-gates has been lowered in recent years, with no doubt a little help from the Human Rights Act 1998. The Claims Centres initially capitalised upon this, benefiting many claimants. Defendants, rather than risk losing in court were prepared to make a settlement offer. However, the sheer cost of manning these centres required a massive case-load to make them viable. Ultimately the centres pursued too many weak cases in an attempt to maintain the case-load and the movement imploded.

There are lessons to be learnt from this for ADR. Firstly, there is a continuing need for access to justice which no longer being fulfilled by these call centres. Whilst the passing of the excesses of the movement is to be applauded, they did nonetheless fill an important gap in the claims market. Secondly, a new way of filling that gap is needed. There is a role here for ADR .

Mediation and arbitration are not limited to contract disputes. Both processes lend themselves equally well to the settlement of tort claims. The problem is that tort disputes rely overwhelmingly on ad-hoc submissions, which require the consent of both parties. Court recommended mediation under the CPR 1998 can help but its value at present is limited. What is needed is a mechanism to encourage the use of ADR in tort claims.

It is possible that ADR service providers can work with the insurance industry to create such a mechanism. Firstly, the insurance industry often picks up the tab at the end of the day when compensation is awarded. Secondly, increasingly many members of the public have insurance accident cover so the claimant is in fact an insurance company, claiming in subrogation. Thirdly, legal insurance is increasingly popular today, so that the cost of litigation is covered by the insurance industry. Litigation costs are a major problem for the insurance industry and ADR by providing cost effective, timely dispute settlement processes has a lot to offer the industry.

The ADR industry alone cannot fill the gap left by the demise of the legal call centres, but by working with the insurance industry the needs of society can be met. The insurance industry and ADR have successfully worked in partnership in the US for over ten years now providing a model of what can be achieved, relying essentially on mediation. The P&I clubs have also started to make use of mediation.

However, as yet little has been done to develop arbitral and adjudicative services in this area. The CIArb has successfully pioneered timely fast track arbitration for travel/holiday and sport disputes. However, these schemes rely on prior contractual relationships. Ensuring a role for arbitration and adjudication in the settlement of tort claims will not be so straightforward but it is a worthwhile and achievable goal. The key to success is to build bridges between ADR service providers and the insurance industry, educating carriers about the nature of the services we have to offer and their benefits for the settlement of tort claims.