

UNSUNG HEROES?

Darren Snow, a Barrister at 4 King's Bench Walk, Temple and a consultant with the Concordia Consultancy, asks is the loss adjusting profession the unsung hero of dispute resolution?

In the recent case of *Halsey v Milton Keynes NHS Trust (2004)* the Court of Appeal had to answer the question – when should the court impose a costs sanction against a successful litigant where he has refused to take part in an alternative dispute resolution?

The Court of Appeal recognised that in certain circumstances a court could penalise the successful party in a civil dispute on its recoverable legal costs, where they had unreasonably refused invitations by the unsuccessful party to mediate. Once again, Alternative Dispute Resolution has been endorsed by the Courts.

In the insurance claims industry we already know the ADR reality; many contentious claims end up getting negotiated on grounds of economics, evidential weaknesses and because the risks of litigation are often too high to justify the expense of trial. Since April 1999 and the *Woolf Reforms* insurers, loss adjusters and claims professionals have all been sensitive to the overriding objectives of the Civil Procedure Rules.

The *Pre Action Protocols* are steered towards encouraging negotiated settlements but this is nothing new for insurers and loss adjusters. We need to speak up for the claims adjusting profession for a moment and recognise that the reality is that every day claims handlers and loss adjusters are *negotiating* many settlements on complex and high value claims – we all do so very competently and without fanfare. *Negotiation* is ADR so in many ways, all of us involved in claims work have for a long time been advocates of ADR, even if we have not really promoted this skill or even realised it.

ADR is not a science or a technique best learnt in the class room. Loss adjusters get their education on their feet handling claims – negotiating is entwined in the role of loss adjuster, so much so that we take the skill almost for granted. With our experience I really believe that the loss adjusting industry now has the opportunity to really embrace the growing role of ADR/mediation and begin to really promote it. When was the last time someone in your firm reported to a client “*we recommend that insurers now consider mediation as an alternative to litigation*”?

Loss adjusters should not be afraid to make these kinds of recommendations. Mediation is not the preserve of lawyers; in fact, by its nature, mediation is a process open to everyone and the process works because the parties want to make it work. There is absolutely nothing to prevent loss adjusters representing a client at mediation.

Mediation has, perhaps, been over analysed and over studied in recent years, but strip mediation back to what it really is – just another way to *negotiate*. I've yet to see anyone better at negotiating than a good loss adjuster. The loss adjusting industry should stop hiding its talents and living in the shadow of the lawyers. In mediation the power to actually achieve the agreement rests with the parties. Who better to achieve that agreement for an Insurer than the loss adjuster?

We see all too often a perception by insurers that lawyers are needed to take over cases when disputes arise, which still inevitably end up in negotiated settlements. In my view, loss adjusters still have the best qualification going when it comes to dispute resolution – practical experience negotiating in the commercial world. We have a rather too modest view of this profession's abilities and potential. As more and more law firms move towards loss adjusting and claims management so perhaps the loss adjusting profession should move towards promoting its dispute resolution skills.

It's time the loss adjusting industry raised its voice and reminded its insurer clients that it's already an expert in ADR – it's just, well, we call it *loss adjusting*.

Darren Snow was legal counsel & an international loss adjuster with CTC Services Non Marine before his move back to the Bar. He continues to work as a specialist loss adjuster as a consultant with the Concordia Consultancy.