Alternative Remedies

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Introduction:

1. The right to valid remedies as a general principle of European Law has been reinforced by Article 47 of the Charter of Fundamental Rights of the European Union. It is worthy of note that a European Commission consultation paper in 2009 noted:

   "In promoting access to justice, a modern civil justice system should offer a variety of approaches and options to dispute resolution. Citizens should be empowered to find a satisfactory solution to their problem which includes the option of a court-based litigation but as part of a wide menu of choices"

2. Justice may sometimes require a decision from a High Court or County Court Judge who has heard and considered evidence and legal argument after a hearing and the court system remains central to our civil justice system.

3. However, in some cases justice might mean an apology and / or a change of administrative or practical process in response to a particular problem. In some cases alternative dispute resolution (ADR) can provide resolutions and individualised justice for parties which a court cannot. It should be recognised that a court-based process is not able to provide an optimal solution for all conflicts of society.

Your menu of choices:

4. The forms of alternative dispute resolution (ADR) covered in this talk:

   (a) Mediation,
   (b) Round table meetings (JSM),
   (c) Arbitration,

(d) Neutral evaluation.

5. Probably the most significant and attention worthy of all of the above is mediation. There will be others I will mention along the way.

Why is an alternative way important?

6. Naturally, Alternative Dispute Resolution (ADR) is encouraged in the pre-action protocol (PAP) for clinical negligence disputes. The emphasis is on litigation being a last resort. The form of ADR does not matter: be it discussion and negotiation (with or without formal Part 36 offers), mediation, arbitration, early neutral evaluation and/or Ombudsman schemes. What matters is that there are potential sanctions against the party who either refuses to enter into ADR or who is silent on the issue.

7. There is however a degree of inconsistency in the way in which the PAPs are framed. For example in the Practice direction:
'If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional costs'

The corresponding provision in both the PI and Clinical negligence PAPs:
'If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. ***It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR*** *but a party's silence in response to an invitation to participate might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs'*

8. Attempts at ADR must be genuine. A 'drop hands' offer or using a mediation or JSM to listen to the Claimant set out and explain why they have a case is unlikely to be considered genuine.

9. It is within every court order in a clinical negligence claim that ADR will be 'considered'. The model directions from the Queen's Bench Masters contain the following provision:

'At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including round table conferences, early neutral evaluation, mediation and arbitration); any party not engaging in any such means proposed by another is to serve a witness statement giving reasons within 21 days of receipt of that proposal. That witness statement must not be shown to the trial judge until questions of costs arise.'

10. In addition we need to recognise that there are going to be changes in this area.

11. In January 2016 the Civil Justice Council resolved at its meeting for a Working Group to review the ways in which ADR is at present encouraged and positioned within the civil justice system in England and Wales. In October 2017 the 'CJC ADR Working Group' published their Interim Report on 'ADR and Civil Justice'. Stretching to 98 pages and taking over 18 months to come to fruition the report makes a number of interim recommendations and requested written submissions on the findings and recommendations of the report by December 2017. These submissions are being collated and discussed with view to a final report being prepared and submitted to the Government. It is not known when a final report will be presented.

12. The background to this interim report and the need to set up the working Group was:
    (a) Relatively low levels of awareness found during a 2015 MOJ users survey.
    (b) A perception that there are significant numbers of civil disputes in which ADR techniques are not sufficiently used, in particular those above the small claims bracket whose value is insufficient perhaps to make the cost of mediation proportionate and appropriate.
    (c) Whether lessons could be learned from other jurisdictions and in particular family and employment disputes as well as the use of ADR in other countries.

13. Plainly underlying this also were the proposals of Lord Briggs in his Civil Court Structure Review (CCSR). Of importance in the interim and / or final reports (final report published 27.7.16):
    (a) The present position at the time of the Briggs report:
        - The small claims mediation service was effective and useful but not satisfying its potential demand.

- A form of early neutral evaluation modelled on the financial dispute resolution (FDR) system operated in the family courts was bring successfully conducted in certain County Court centres.
- In higher value civil cases mediation was being steadily used and such cases were mostly towards and above £250,000 in value. Mediation was insufficiently used in a substantial proportion of modest claims. Notably in **personal injury and clinical negligence there was too little use of ADR.**
- Provisions for pre-issue ADR were weak.

(b) The proposals:

- There should be promotion of pre-issue ADR.
- In the new on-line court there should be encouragement to parties to settle before going to court.
- Access to small claims mediation will be improved.
- Tier 1 of the on-line court will make early ADR possible. At tier 2 case officers will make judgments as to whether to conduct some form of ADR (small claims style mediation) or arrange for one to be conducted or refer the matter to some form of early neutral evaluation. The idea being at Tier 2 for some form of human intervention into the process.
- Re-introduce after hours court based mediation systems given their past successful operation.
- On-line dispute resolution to be used more greatly.
- Potential costs provision for advice on the uptake of ADR at an early stage.
- The modern emphasis should be upon pre-issue ADR.
- On compulsion to use ADR the interim report but not the final report stated: *"The relationship between the civil courts and the providers of ADR has undergone fundamental development during the last thirty years but, save in certain respects…it has now reached a relatively steady state. I would describe it as semi-detached. … (M)ost judges will, at the case management stage, provide a short stay of proceedings to give the parties space to engage in ADR. The courts penalise with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years, to make any form of ADR compulsory. …This is, in many ways, both understandable and as it should be … ". [Interim report 2.86-7]*

"Stage 2 of the OC process is plainly directed to making conciliation a culturally normal part of the Civil Court process rather than, as it is at present, a purely optional and extraneous process, encapsulated in the "alternative" part of the acronym ADR. By that I do not mean it should be made compulsory. Rather it would build upon the current Small Claims Mediation Service by inviting the parties to engage in an appropriate form of conciliation, albeit respecting the refusal of one of more of them to do so." [Interim report .6.13]

This issue was not revisited in the Final Report.

14. The CJC Working Group stated in October 2017 that they wished to support the Briggs recommendations except that they wished to open up the issue of compulsion for further discussion.

15. In summary then the importance of understanding and considering all types of ADR is perhaps becoming more important than ever and compulsion to some degree may be a realistic possibility. A little more on the recommendations of the report once we have gone through the main types of ADR.

ADR:

16. In general ADR is the all encompassing term to cover all types of alternative remedy. There may be different timings for ADR:
    - Pre-action ADR
    - Pre-action ADR at commencement of proceedings
    - Concurrent ADR.

17. Pre-action ADR – at the very outset of the dispute and at the time a complaint is first made. Best example is consumer conciliation scheme which handles a grievance as soon as the complaint is made. This happens within the NHS complaints process. Typically lawyers are not involved.

18. Pre-action ADR at the commencement of proceedings:
    - This is prompted or required when proceedings are about to be issued. An example would be pre-action mediation that a litigant would be directed to

when filing their claim. Examples are MIAM (mediation, information and assessment meeting) in family cases and ACAS early conciliation in employment cases.

- Within the civil court system there is the portal and pre-action protocols.

19. Concurrent ADR:

    - This tends to be the situation in the civil courts in that any ADR or mediation occurs concurrently within the proceedings and often because of judicial encouragement at case management stages.

Consumer conciliation and ombudsmen:

20. Not hugely of relevance in personal injury and clinical negligence. Typical and largest body here is the financial ombudsman service.

21. NHS complaints in 2015 stood at 207,000. According to NHS Digital the number in 2016 – 2017 were:

    - Written complaints 208,415. This is the equivalent to 4,008 written complaints a week or 571 complaints per day.

    - The total number of all secondary care written complaints was 117,836 in 2016-17. This is an increase of 1,656 (1.4 per cent) from the previous year (116,180).

    - The total number of all reported Primary Care (GP and Dental) written complaints has increased by 8,020 (9.7 per cent) from 82,559 in 2015-16 to 90,579 in 2016-17

22. It is considered that this is a likely under- estimate. Of these numbers the PHOS (Parliamentary Health Service Ombudsman) deals with a tiny number of these – around 1500 per year.

23. This is not therefore a particularly viable method of ADR in the clinical context.

Neutral evaluation:

24. Early neutral evaluation is a preliminary assessment of facts, evidence or legal merits. This process is designed to serve as a basis for further and fuller negotiations, or, at the very least, help parties avoid further unnecessary stages in litigation.

25. This is often referred to as ENE.

26. The parties appoint an independent person who expresses an opinion on the merits of the issues specified by them. The opinion is non-binding but provides an unbiased evaluation on relative positions and guidance as to the likely outcome should the case be heard in Court. The parties must agree the nature and extent of the material to be provided to the evaluator and whether there are to be oral submissions.

27. The process can be flexible and beneficial, and it can go way beyond someone simply hearing the facts of a case then deciding a figure for damages or outcome. It may therefore be able to provide some form of redress beyond financial compensation.

28. The process of using ENE has been provided for in the CPR and various court guides since the Woolf Reforms. It has been rarely used and the CJC Working Group has found that the number of private ENE's is vanishingly small.

29. Certain County Courts are using robust ENE hearings conducted by judges in small claims lists. In these cases attendance is compulsory in that the sanction for non attendance is strike out. The judge conducts an informal ENE and in the event that the case does not settle then the Judge is in a good position to make appropriate directions for the remainder of the proceedings. That judge would then be precluded from dealing with the matter substantively in court at a later stage.

30. This is rarely used in general for personal injury or clinical negligence claims save for the circuit of courts on the South (Bournemouth, Southampton and occasionally Swindon etc.) where the District Judges have for around 20 years approximately held a 'conciliation appointment' in claims. The specific orders require attendance at these

appointments by the Claimant and attendance by or access to a representative for the Defendant who can give settlement instructions at the hearing. The inability to comply with the order for attending these hearings carries sanction. My experience is that these are used to varying degrees of effectiveness depending largely on the availability of judges.

On-line dispute resolution (ODR):

31. The first formal implementation of ODR in the civil procedure is the RTA Portal which now relates to the handling of personal injury claims worth up to £25,000 arising from motor, EL and PL claims. This deals with cases in which liability has been admitted. The parties have access to the courts but only if the case becomes defended or quantum cannot be agreed. Fixed costs are awarded.

32. Whether such a process would be applicable to clinical negligence claims is debatable. A much higher proportion of clinical claims are rejected or defended than in any other injury sector. The CJC have considered that there may be a certain number of lower value indefensible claims that a portal could resolve. However, the CJC defer to the NHSR and the medical defence organisations to lead on this and consider whether there is data and evidence to suggest that there would be enough qualifying claims to make this a worthwhile and workable system.

Arbitration:

33. Used considerably in commercial litigation. Much less so in personal injury and clinical negligence. Governed by the Arbitration Act 1996.

34. Arbitration is an alternative to litigation as a means of resolving disputes. It is based on the parties' agreement: all parties must agree to submit the dispute in question to arbitration. Like a judgment, the decision of an arbitral tribunal is final and binding. Arbitration differs fundamentally from litigation, however, in several respects:

    - Apart from statutory arbitration the basis of arbitration is contractual. The rights and obligations of the parties to arbitrate their dispute arise from the arbitration agreement they have concluded.

    - The parties usually choose where the arbitration is to take place (the seat).

- The parties can also choose rules to govern the procedure of the arbitration.
- The parties may have some choice in the arbitral tribunal (appointment of arbitrators)
- Arbitration proceedings are usually confidential.
- The arbitral tribunal's powers derive from the arbitration agreement, as supplemented by any applicable legislative provisions
- Decisions on the merits of the dispute by an arbitral tribunal are usually final and not subject to appeal, although the award may in exceptional circumstances be set aside by a court at the seat of arbitration.
- Decisions of an arbitral tribunal are widely enforceable abroad by virtue of several conventions, in particular the New York Convention

35. An arbitration agreement or clause is a contract for the resolution of disputes between the parties by arbitration rather than by court proceedings. The parties thereby agree to refer disputes between them for a binding decision by one or more persons chosen by the parties (or through a mechanism provided by the parties) after a private hearing process. For advice on drafting arbitration agreements,

36. An arbitration agreement will not completely preclude court proceedings, which may arise in a number of different ways. For example, the English court has a supportive jurisdiction which enables it to intervene to assist in the appointments procedure.

37. Parties will normally agree to arbitrate for one or more of the following reasons:

- Privacy and confidentiality of arbitration proceedings: unlike court proceedings, the parties to arbitration are subject to duties of confidentiality.
- Flexibility in procedure: the tribunal must tailor the procedure to the particular dispute, and the parties also have power to agree procedures which are efficient and speedy.
- Choice in selection of the tribunal: the parties have the ability to choose a tribunal with expertise relevant to the particular dispute.
- Neutrality of law, procedure, language and place of arbitration: as opposed to opting for one of the parties' national courts.

- Binding nature of the award: the options for challenging the award are very limited.

38. Where a panel of three arbitrators is appointed, one will usually be appointed Chairman with power to make procedural rulings and to cast the final vote. In the absence of agreement, the view of the Chairman will prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority.

39. There are no legal requirements to become an arbitrator. The arbitration agreement may require the arbitrator(s) to have special qualifications (for example, a solicitor, or other professional).

40. The arbitration agreement or the rules incorporated into it will usually contain a procedure for appointing arbitrators. If parties fail to agree on the tribunal, the arbitration agreement usually provides for powers of appointment to be exercised by a third party, for example, the President of the Law Society. Referring to a third party is quicker and cheaper than applying to the court. An appointing authority may be a specialist professional institution, a trade association or arbitration institution. They normally charge a fee. Parties may make submissions on the identity, qualifications and characteristics of appointees.

41. Fees will be payable to the tribunal, usually upon appointment. Also, an additional administration charge may be payable if an arbitral institution is involved. There may also be expenses for the place where the hearings take place and of any appointing authority.

42. The level of fees varies considerably. Two common methods of calculating fees are:

- Charges according to the time spent (a method used in, for example, LCIA and ad hoc arbitrations).

- Charges based in part on a percentage of the amount in dispute, including a consideration of the complexity and other relevant circumstances (a method used in, for example, ICC arbitration).

- Another possible method is agreeing a lump sum with provision for increase. All sums should be fixed at the start of the arbitration. Expenses, such as travel and hotel bills, will usually be extra.

43. The tribunal derives its power to determine disputes from the parties' agreement. It follows that the tribunal has no power to determine disputes that fall outside the scope of the arbitration agreement. Nor, in such a situation, are the parties obliged to refer such disputes to the tribunal, or to take part in the arbitration at all. Any "award" issued by the tribunal in respect of disputes falling outside the arbitration agreement will be of no effect.

44. Following the appointment of the tribunal, there will often be a preliminary meeting, at which the tribunal will set down the procedural timetable for all or part of the arbitration after hearing the party's submissions. The parties should seek to agree the procedure in advance. None of the court restrictions on advocacy or form apply. It is currently still more common for a solicitor to present oral submissions in an arbitral hearing than a court hearing. Arbitration proceedings are subject to duties of confidentiality. Unless there is an agreement otherwise, hearings may be attended only by the tribunal, the parties, and their representatives. The requirements of confidentiality also restrict the disclosure of documents produced during or for the purposes of arbitration. However, there are exceptions to this general rule, in particular relating to the confidentiality of the award.

45. An award is equivalent to a judgment in litigation. It is "final and binding" in that it provides a final determination of the dispute, subject only to closely defined statutory rights of challenge. The tribunal may make either one award dealing with all of the issues in dispute (a final award) or a series of awards, each dealing with a separate issue in dispute (a partial award) - in which case the last award dealing with all outstanding issues is called the "final award". Where the parties have reached a settlement, and agreed terms, these terms may be incorporated into an award to facilitate enforcement - an "agreed award" or an "award by consent".

46. The role of the court in arbitration is limited. Prior to the appointment of the arbitral tribunal, the parties can apply to the court for assistance in the resolution of issues such as the following:

- Staying court proceedings that have been brought in breach of an arbitration agreement (see section 9, the Act).
- Appointing arbitrators (where the parties cannot agree on the arbitral tribunal and/or there is no default mechanism for appointment).

- Extending time limits for commencing arbitral proceedings.

47. Court's powers when the arbitration is pending:

    - The parties may require the assistance of the courts as regards applications against third parties to the arbitration. For example, the courts can issue a witness summons, or order the production of documents or the preservation of evidence.

    - In addition, the court has statutory powers that it is entitled to exercise for the purposes of supporting (rather than supervising) the arbitration. This is beyond the scope of this talk.

48. Arbitration for personal injury and clinical negligence law cases was launched in England and Wales in May 2015 by the Personal Injury claims Arbitration Service (PIcARBS), a not-for-profit organisation, created by Andrew Ritchie QC.

49. PIcARBS arbitration is a private dispute resolution system in which the parties appoint a fair, neutral and impartial arbitrator to resolve a personal injury or clinical negligence dispute.

50. Arbitration is an ideal approach for people who want to resolve a personal injury or medical negligence dispute without the delay and expense of the court process. It allows parties to engage in a flexible process, with complete confidentiality and the knowledge that a binding final decision will be made:

    - For PI and clinical negligence disputes over £25,000.

    - Injured claimants are helped by their lawyers, solicitors and barristers to use the arbitration process and 95% of PIcARBS arbitrations settle by agreement.

    - In cases where you cannot reach a settlement the PIcARBS arbitrator will produce a decision after hearing from each of the parties and their witnesses.

    - PIcARBS arbitration applies the law of England and Wales.

    - It is different from other forms of non-court dispute resolution such as mediation and non binding discussions because you are guaranteed a binding decision if you cannot reach agreement with the other side.

51. Some of the benefits of Arbitration are perceived to be:

- No court fees
- Faster start to end times, due to system efficiency and cooperation
- Likely reduced legal costs
- Control over the procedure and evidence
- No costs budgeting
- e-filing, e-service, online files and paperless hearings
- Specialised, experienced, independent personal injury & clinical negligence arbitrators

52. In terms of developments in arbitration in this area:

- Clyde & Co/PlcArbs pilot started 27 November 2017: AXA and 12 claimant firms.
- Sabre Insurance: "We are putting a cohort of cases over £200,000 through".
- NHS Resolve: "We are open to arbitration…".

Round table meetings / JSM:

53. Still one of the most common forms of ADR in personal injury and clinical negligence.

54. This involves the parties choosing a time and place where parties will meet with their lawyers to explore settlement of a case.

55. This should be a procedure undertaken in good faith and not an opportunity for Defendants to seek to warn Claimants off. It should be used for genuine discussion and resolution.

56. All parties should ensure that they are in can be in receipt of adequate instructions to negotiate. Usually without prejudice discussions and will take place in a third neutral room between Barristers and / or Solicitors.

57. In the main:

- Will occur at same stage after proceedings have commenced and more often closer to trial. This means that considerable expense has already been expended.
- Usually for claims of a value that make it proportionate to have a JSM which may not resolve matters and therefore would be a proportionate tool in addition to the possibility of a trial.

58. They can be very effective indeed.

59. Increasing use of early JSMs pre-action.

60. The main advantage of the process is flexibility. Whilst often schedules or a less formal position statement might be exchanged before or at the JSM there is not obligation to do so.

61. There is no obligation on a party to provide a breakdown of the individual awards that make up an offer. This avoids potential disadvantages of providing a breakdown which may reveal a significant amount about your position.

62. If the JSM fails to resolve the case then it should be used to gain the best understanding of how the case against your client will be put. Based on observations made during the meeting, it is worth taking stock before the meeting ends to identify any further evidence or steps that are needed to strengthen the case and meet the points made against you. If the meeting ends without conclusion then it is usually sensible to follow up with written offers. If the motivation to settle is genuine, it is suggested that it will usually be appropriate for both parties to make final offers that are slightly more generous than the Part 36 Offer they intend to make.

Mediation in clinical negligence disputes:

63. *"A flexible process conducted confidentially in which a neutral person (a mediator) actively assists the parties in working towards a negotiated settlement of a dispute or difference with the parties in ultimate control of the decision to settle and the terms of resolution"* (Modern definition of mediation (CEDR))

64. Mediation is now well established in England and Wales and in many jurisdictions internationally. The view of the CJC and Lord Briggs is that this is significantly underused in the civil justice system.

65. The uptake has been low in Personal Injury and Clinical negligence. Statistics are hard to come by because of the confidential nature of mediations. However, in the CJC Working Group a senior group of experienced mediators indicated that only 1% of their conducted mediations were PI and Clinical Negligence.

66. Quite apart from the general advantages of mediation, clinical negligence claims are ideally suited to mediation:

- They involve injured people who are seeking redress and don't want to wait for years to obtain compensation through the stressful, formal Court system.
- Public money is being spent defending claims which could better be spent on clinical care.

67. NHSR set up a mediation process in December 2016 but the uptake has been low. A recent report from the public accounts committee suggests that this is not in fact down to Claimant lawyers shying away from mediation, and the answer is more complex. It is more likely that NHSR is resistant to settling and that Claimant lawyers are reluctant to use NHSR's own panel of mediators. There were 94 mediations in 2017. Settlement rate was 75%.

68. The Public Accounts Committee says it has identified a 'prevailing attitude of defensiveness' from NHS trusts which has helped to quadruple clinical negligence costs from £400m in 2006/07 to £1.6bn in 2016/17.

69. MPs on the committee said the government needs to be bolder to address issues within the health service which cause negligence in the first place. NHS trusts were accused of adding to the cost of claims through under-investment and a reluctance to admit mistakes when they are made.

70. Committee chair Meg Hillier said:

- ‘I am concerned that funding available for NHS services and the costs of clinical negligence are locked in a vicious spiral – one that without urgent action will spin out of control.
- ‘Of course it is important that patients who suffer because of clinical negligence are compensated. But government has been far too slow to understand and get a grip on the increase in negligence costs.
- ‘The NHS must move more quickly to share best practice in the handling of harmful incidents and complaints. This should be a fundamental part of what remains a disappointingly slow-moving shift towards openness and transparency.’

71. The committee demanded that the Ministry of Justice and NHS Resolution clarify why claims take so long to resolve, and report back by September 2018.

72. MPs asked whether mediation should be mandated for certain types of claims, noting that just 71 cases were settled through a new voluntary mediation service in its first 10 months.

73. The focus of the interim report of the CJC is to look at compulsion of ADR but with the idea that Mediation should be the main form of ADR.

74. The key for this part of the talk is to enable you to be thinking ‘mediate not litigate’.

What is mediation?:

75.

- A form of ADR
- In use in commercial and family disputes since around 1988.
- More recent use in PI and clinical negligence disputes.
- Formal meeting to seek to reach a settlement of a dispute between the parties.
- Confidential process consisting of meetings between parties and mediator either jointly or individually.
- All discussions are entirely confidential and without prejudice – so if the claim does not settle then evidence cannot later be given of what was said or done at the mediation, nor are any documents prepared for the mediation admissible.

- Normally takes a day but not limited to a standard court day and often go into the late hours.
- The mediation process is non binding and no binding outcome is guaranteed in advance. The process only produces a binding outcome once satisfactory terms have been reached and embodied in either a written agreement or consent order which become contractually binding.
- The process is contractual and exists entirely outside of the CPR and any statutory confines. It is governed by a mediation agreement in which the mediator defines the procedure and what the participants and mediator can and cannot do during the process.
- The process is itself voluntary and a party can leave at any time if they wish however parties should enter a mediation in good faith.
- Potential satisfactory outcomes are not limited to the remedies that a court may have at its disposal and parties can negotiate non-monetary outcomes and terms in relation to future relations and interests.
- It can take place at any time up to trial or even between trial and appeal.
- If mediation fails then this has no impact on the litigation process.
- There are two potential types of mediation; evaluative and facilitative.
- Evaluative – less commonly used but often preferred – mediator forms and expresses an opinion on the merits and potential settlement terms. The mediator must be contracted to perform an evaluative mediation and the parties must agree to this. The mediation agreement must reflect this and how the evaluation will be provided (written / oral / timing etc. / joint sessions or not). Often considered that the risks here can outweigh the advantages.
- Facilitative – most mediators trained in this form – no evaluation or determination of the merits of the case – mediator is a facilitator to assist the parties to resolve the dispute – helps parties explore and identify outcomes. The mediator's role is not to convince parties of a particular solution. Techniques will be used to focus on interests underlying their positions. The process is objective, explores a variety of options from both sides. Person lead.
- It can be agreed that if a facilitative mediation does not provide a solution then the process may turn to an evaluative one. This must be set out in the mediation agreement.
- Fees may be daily fixed or hourly rates plus administration, travel costs etc. Fees may also be determined on value of the claim. E.g. National mediation publish fixed fees e.g. £1500 if under £50,000 plus venue costs etc. Should always ensure the full costs

are available before instructing a mediator including travel, accommodation, unsociable hours charge etc.

- Often best held at a neutral venue at the satisfaction of the parties- hospital may be convenient but consider if it is appropriate?
- Parties may share the cost or an outcome based cost approach.

What is mediation not?:

76.

- Unless specifically requiring an evaluative mediation then it is not an opportunity to hear the mediator's analysis of risks or the merits or what a judge may or may not do.
- An arbitration.
- A process that requires parties to necessarily compromise.
- A time when a solution will be imposed.
- A waste of time or money – Formal success cannot be readily publicised because of the issue confidentiality but many say around 85-90% of mediations result in a resolution either at the mediation or shortly afterwards.
- The chosen meal of the hungry litigator…….why not?

Why not mediate instead of litigate – what are you afraid of?

77.

- Make mediation services a central part of what you offer to clients.
- NHSR claim a 60% success rate for claims taken to trial and the number of cases they consider were resolved without paying any damages reached a high of 4935 (based on data released July 2016).
- The principles I have underlined in the CEDR modern definition of mediation are key.
- The process of mediation has significant benefits to a clinical negligence claimant:
    - A trial in clin neg often leads to a win / lose situation and even in a win situation the outcome may not provide satisfaction or closure to the victim.
    - It is focussed on the individuals concerned – victims / clinicians and allows an opportunity for discussions face to face which may not have happened and might never happen.
    - It allows the potential victim / loved ones to be heard outside the confines of a witness statement and the witness box which necessarily limits the evidence to relevant fact and avoids emotion.

- It is a process which recognises the emotion which runs high in clinical negligence claims on both sides.
- It allows Claimants to tell the Defendant what they feel happened and any wishes they may have about the future. The Defendant can explain directly and freely what happened, why decisions were made, go through records etc. All of this is off the record and without prejudice.
- Although not in a formal court room it comes close to allowing the Claimant their often desired 'day in court'. A mediation guarantees an opportunity for the right individuals to get together and exchange information / express views. Given most cases settle, the opportunity for this face to face exchange in litigation is limited.
- The process is accessible and informal by comparison to the court room. It is flexible and appropriate to the parties needs.
- Avoids the ordeal of giving evidence in court and the potential for the Claimant feeling side-lined by the formalities, technicalities and legal procedure.
- The process can happen at any time and can be quick (sometimes within days of a referral) – this is particularly important where there may be life expectancy issues.
- Reality checking of your own case before the judge does it for you.
- An avoidance of the harsh but inevitable concerns about funding, financial pressures etc.
- The process is likely to draw a more favourable and less defensive response from the clinicians – some of whom may be facing the worst moments in their professional career and this may impact on the way the handle the matter.
- The outcomes of the mediation process are beneficial to Claimants.
- Risk analysis and testing can be carried out.
- The litigation risk is removed.
- It may help unravel difficult issues of identifying correct defendants.
- Far more imaginative outcomes than financial compensation can be considered and provided including options for future changes. For example – apologies, fuller explanations, non defensive explanations. This is more than the complaints procedure and litigation procedure can offer.

- Avoidance of adverse publicity.

78. Some further examples of the mediation providing an 'out the box' but very beneficial solution to a Claimant:
    - IVF / fertility treatment where ability to conceive possibly effected.
    - Scar revision surgery.
    - Involvement / feedback on changes to systems, protocols, risk assessment.
    - Restoration of the patient / clinician relationship – particularly crucial if on-going treatment needs.
    - A chance to see / appreciate that changes have or will be made even if the actions taken by the clinician may not have been negligent.
    - A memorial.

79. Mediation can provide a far better means of closure. The Mulcahy report in 1999 (Mediating Medical Negligence Claims: An option for the future?) found that there was a high dissatisfaction level with the litigation process. Amongst those surveyed, 70% (including those in receipt of an award) were dissatisfied. Has that dissatisfaction level likely increased since this time given Jackson, funding issues, focus on proportionality and court orders above all else?
80. The case law shows that the courts do not look too kindly on the party who refused to mediate even if they were ultimately successful. Should this end the ambivalence about mediating a clinical negligence claim?
    (a) *Dunnett v Railtrack plc [2002]* "All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."
    (b) *Leicester Circuits Limited -v- Coates Brothers PLC [2003] EWCA Civ 333* Coates pulled out of mediation two days beforehand after having agreed to mediate. Coates' argued that mediation was just another form of negotiation. Moreover, they argued that in this instance such steps had merely come to nothing and that in any event there had been no real prospect of a successful resolution of the issues. These arguments found little favour with the court of appeal. LJ Judge commented: 'the whole point of having mediation, and once you have agreed to it, proceeding with it, is that the most difficult problems can sometimes, indeed often are resolved.....having agreed to mediation it hardly lies in the mouths of those who

agree to it to assert that there is no realistic prospects of success'. The court went on to penalise Coates in costs.

(c) *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576* A clinical negligence case. The claimant, a widow (C), sued D for causing the death of her husband but failed in her claim. Consequently, she asked the court to be punitive towards the health authority in respect of costs because it had repeatedly refused to mediate. The court declined this request holding that the health authority was justified in refusing to mediate because it reasonably believed it would win. Held:

i. The court did not have jurisdiction to order parties to mediate against their will as this would be an unacceptable violation of their right of access to the court under Article 6 of the European Convention on Human Rights. The court's role was to robustly encourage ADR.

ii. The burden was on the unsuccessful party to show why there should be a departure from the general rule that the unsuccessful party pays the costs of the successful party. Therefore it must be shown that the successful party acted unreasonably in refusing to agree to ADR.

iii. There was no presumption in favour of mediation and regard must be had to all the circumstances of the case. The factors relevant to the question whether a party had unreasonably refused ADR included:

- The nature of the dispute – most, but not all, cases were suitable for ADR;
- The merits of the case;
- Whether other settlement methods have been attempted;
- Whether the costs of the mediation would be disproportionate;
- Any delay; and
- Whether the mediation had a reasonable prospect of success.

iv. If the court has encouraged ADR, this is another factor to take into account. The stronger the encouragement the easier it will be for the unsuccessful party to show the successful party's refusal was unreasonable.

v. An order for the parties to consider ADR and justify why the case was not suitable for ADR should be routinely made in general personal injury litigation.

(d) *ADS Aerospace Ltd v EMS Global Tracking LTD [2012] EWHC 2904 TCC* D had not acted unreasonably in refusing mediation. Akenhead J made reference to the case of Halsey and held that the claimant had failed to demonstrate that the defendant had acted unreasonably in refusing to mediate on the following grounds:

i. There had been no willingness on the part of the claimant to engage even in without prejudice discussions until late in the litigation process notwithstanding various attempts by the defendants to initiate discussions early on

ii. The claimant held and gave the appearance that it was entitled to substantial compensation and was not interested in offers which fell short of that.

iii. The defendant indicated a willingness to engage in without prejudice discussions and there appeared little or no good reason why that approach should not have been tried early on

iv. Within the trial programme the lateness of the claimant's suggestion to mediate was a material factor. Without prejudice discussions would have been quicker and less intrusive into trial preparation

v. The defendant did not act unreasonably in believing that it had a very strong case on liability, causation and quantum. The damages claim was demonstrably overstated - worth about $400,00.00 rather than the 16m claimed. Akenhead J was of the opinion that a good mediator would have been able to 'work on' the claimant to accept what would in effect be a nominal offer. However, he also felt that without prejudice discussions would at least have got to the same stage as mediation. In deciding whether to deprive a successful party of some or all of its costs on grounds that it has refused to agree ADR, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The question will be determined having regard to all the particular circumstances of the case.

(e) *PGF II SA v. OMFS CO 1 Ltd [2013] EWCA Civ 1288* Silence in the face of an invitation to participate in ADR was in itself unreasonable, regardless of whether there was a good reason for a refusal to engage. Silence could be seen as nothing else but a refusal. The conduct was sufficient to warrant a costs sanction. Part 36 offers were not necessarily everyone's bottom line and a gap could be bridged with mediation.

(f) *Crawford v Newcastle Upon Tyne University [2014] EWHC 1197* When C invited D to mediation they were already engaging in adjudication and this was a form of ADR. Without any indication from C as to what further mediation would achieve that was not already being dealt with then D was not unreasonable to refuse to invitation to mediate also.

(g) *LaPorte v Commissioner of Police for Metropolis [2015] EWHC 371* Despite successfully defending proceedings, on the basis of *Halsey* D was found to have failed, without adequate justification, to have engaged in mediation and that was to be reflected in the costs order made. Costs reduced by 1/3.

(h) *Reid v Buckinghamshire Healthcare NHS Trust [2015] SCCO*. D unreasonably refused to mediate in detailed assessment proceedings of a clinical negligence dispute. The court awarded the successful claimant indemnity costs (and interest) of the assessment from the date the NHS received the offer to mediate. The court wanted to show its disapproval of their conduct.

(i) *CIP Properties v Galliford Try Infrastructure Ltd and others [2014] EWHC 3546* from a procedural view point. Coulson J stated that a sensible timetable for trial that allowed parties to engage in ADR was good case management.

(j) *Bristow v Princess Alexandra Hospital NHS Trust and Ors [2015] SCCO* There should be a sanction if a party unreasonably failed to enter into mediation to determine costs. C was awarded her costs on an indemnity basis to reflect the refusal by D to engage in mediation.

(k) *Gore v Naheed [2017] EWCA Civ 369* Patton LJ refused to disturb the first instance findings of HHJ Harris who indicated that ' I have some difficulty in accepting that the desire of a party to have his rights determined b a court f law in preference to mediation can be said to be unreasonable in conduct particularly when, as here those rights were vindicated'. Briggs LJ – 'Failure to engage even if unreasonable does not automatically result in a costs penalty. It is simply a factor to be taken into account by the Judge when exercising costs discretion'.

Is mediation inappropriate for clinical negligence disputes:

81. In light of *Halsey* and most of the case law above it appears that in general most cases are likely to be suitable for mediation rather than litigation. Using *Halsey* factors:

- The nature of the dispute – I doubt that many clinical negligence disputes would not be considered suitable for mediation. The human and tactical aspects of mediation would weigh strongly in such claims.
- Where a party feels it has a very strong case then that might make refusal of mediation reasonable but it would have to be very clearly a strong case. Many such cases are much more borderline and therefore refusal is much more a risk.
- Other ADR has been tried and has failed. Often the JSM is favoured. However, what is lost here is the third party input and the courts have noted that mediation often succeeds where other methods have failed.

- The cost of mediation is high? Arguably, the later one gets in litigation, especially in a modest claim then the costs may not be proportionate but generally it is cheaper and increased providers mean more competition. Also competition with Arbitration costs.
- Delay may be argued – unlikely given how swiftly a mediation can be arranged.
- The chances of success of the mediation – the burden lay with the unsuccessful party who proposed mediation and not with the successful party who refuse. The test is a reasonable prospect that mediation would have succeeded.

When to mediate?

82. There is no set time and ideally this should be when both sides are likely to have enough information available (including what may come out at the mediation) to form a sound view as to whether resolution is appropriate. Consideration of the various stages:
    - After PAP concludes – this has the advantage of saving expense, especially in a lower value claim and medical records will be available, some indication of expert opinion and the accounts of the patient and clinicians involved. It is certainly a good idea to consider this before issue if time allows.
    - If there has been a period of offers being made but there is a gap that is not being bridged.
    - At the time of the first CMC / CCMC.
    - At the time of Part 35 expert meetings.
    - Subsequent CMC / PTR.
    - To make it likely to legitimately save trial expense then 3 months before trial with statements and expert reports.
    - Whenever negotiations have seriously broken down – whatever the reason may be.

Starting the mediation process:

83. This will usually be at the suggestion of one of the parties or indeed the court. Mediation providers can also help with attempting to get agreement to mediate. If one side or another refuses to mediate then be aware:
    - A Claimant could write directly to NHSR particularly given that they are encouraging the use of mediation. It is sensible to set out what you think can be achieved by mediation.
    - If a Claimant refuses mediation then D can write to LSC or a funding insurer to draw the refusal to their attention.

- If the request is refused before proceedings are issued then you can threaten an application for a stay to allow time for ADR and / or ask the court to consider the issue of mediation at the first CMC.
- After issue you can bring the issue to the court's attention and the costs sanctions of refusal.

Preparation for the mediation:

84. There are a number of administrative steps to be taken but above all remember that this is not a trial or a mini trial. Some key points:
    - Agree a suitable mediator – what skills are needed? Technical skills, practice area, people driven, personality…etc. Also ensure a conflict check.
    - Case summary and core bundle but not necessarily all documents. Include statements of Claimant and clinicians and other key witnesses, pleadings, expert reports, schedules and any offers. Sensible to bring all documents in case a document not in the bundle is needed.
    - Conduct a risk analysis and explain to client the process and prepare the client for seeing an alternative view and being flexible. As the advocate think about what you would do in your opponent's shoes. Be prepared for the reality check / mirror testing of your case.
    - Experts will not usually attend but if this is really the heart of the debate then it may be sensible.
    - Be aware of the duty of good faith and the code of conduct and the mediation agreement.
    - Be aware of costs to date and further costs moving forward and the timescales concerned.
    - Explain process including that the client will be central and may in fact be the main advocator at the mediation.
    - You may wish to prepare a written document or mediation statement which will be for the mediator only and can be candid and open about wishes, intentions, desires etc.
    - Be prepared to be flexible and fluid and ensure your client is too.
    - Advise your client and indeed be prepared yourself that the mediation may go into the late hours.
    - Ask the mediator how the day will be run.
    - Have any relevant resource with you. F&F, JCGs, Kemp, laptop etc.

- Think about and discuss any non monetary requirements of your client, especially in a case where your claim may be weak.
- There is no set method to a mediation but most will start with the mediator coming to meet you all and getting to know you. Then if all are content there may be a joint session and indeed this may be the only one. This is often an opportunity for each side to say what their interests are. How the rest of the day evolves can vary and is flexible and determined largely by the clients and in particular the Claimant is central to the process.

Compulsion to engage in ADR?

85. So we come full circle to the interim recommendations of the CJC in their October 2017. The focus on the review is whether there should be compulsory ADR in civil claims and this would include potentially clinical negligence and personal injury.
86. The recommendations / questions for consultation:
    - Making ADR culturally normal.
    - Encourage ADR at source and before contemplation of legal proceedings.
    - Encourage or requiring ADR when proceedings are in contemplation.
    - Encouraging ADR during the course of proceedings.
    - Potential use of costs sanctions
    - Recognition of ADR within middle bracket value cases.
    - Use of ADR for low value cases and litigants without means.
    - Greater use of on-line solution, conciliation, ombudsman.
    - Potential growth of Judicial ENE.
    - Possible regulation of mediation.

87. As ever in a talk about a vast and developing area of law…..watch this space but in the very near future I would say!

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