



# Reform of Private Hospital Regulation: A universal assurance of standards?

The Government has been aware of the need to ensure regulation of the private health sector, akin to the NHS regime of regulation, since the late 1990s. At last, following a number of steps in this direction, the Healthcare Commission announced, in December 2005, that it is putting steps in place to reach a level playing field between the private and public sectors by 2008. The Healthcare Commission's goal is "to phase in change at a manageable pace [moving] towards truly equivalent standards and assessments by 2008." Louise Jones summarises the current position.

The fact that it has taken this long to get to a position of equivalence between the public and private sectors is, on one level, astonishing. Without formal inspections and systematic regulation, there has been no formal mechanism by which a consistent standard of care could be maintained. A history of tragic cases, such as Laura Touche, the mother who died at the Portland Hospital following a Caesarean section, may be recalled. In 2002, a Coroner's jury returned a verdict of death by natural causes contributed to by neglect. The inquest found that the catastrophic error in Ms Touche's case had been the midwife's failure to carry out routine, but vital, post-operative monitoring. Although hospital protocol recommended checks every 15 minutes, the patient was not checked for some two and a half hours, an omission that ultimately led to her fatal brain haemorrhage and death. Sadly, Laura Touche's case is just one of the better-known examples of instances in private hospitals in recent years where a clear breach of duty, which may have been avoided by a more rigorous system of inspection, has had tragic consequences. Stories of inadequate staffing, misleading adverts and consultations with non-medically qualified 'consultants' in plastic surgery have provided numerous examples of concerning practices in private hospitals that may well have been eliminated with more scrupulous checks.

The very inception in 2004 of the Healthcare Commission, a body created by the Health and Social Care (Community Health and Standards) Act 2003, has been an important stage in the aligning of inspection of the public and private sectors.

<sup>1</sup> See Press Release of Healthcare Commission, dated 5.12.05

## In this Issue

March 2006

<b>Reform of private Hospital Regulation: A universal assurance of standards?</b>	<b>1</b>
Louise Jones	
<b>The control of vibration at work regulation 2005</b>	<b>2</b>
Trevor Davies	
<b>Family law reform - opportunities take, wasted and yet to be seized</b>	<b>4</b>
Poonam Bhari	
<b>Corporate manslaughter</b>	<b>5</b>
Eleanor Mawrey	
<b>The need for mediate</b>	<b>8</b>
Giles Eyre	
<b>9 Gough Civil team strengthened</b>	<b>8</b>

The work of several bodies has been subsumed into the remit of the Healthcare Commission – it has replaced the work of the Commission for Health Improvement, taken over the private and voluntary healthcare functions of the National Care Standards Commission as well as those elements of the Audit Commission's work which relate to efficiency, effectiveness and economy of healthcare. With a wide brief – to promote and drive improvement in the quality of healthcare and public health – and a wide range of responsibilities, the Healthcare Commission is well-placed to set about taking the final steps to bring inspection and the consequent raising of standards in the private sector. The bodies whose work the Healthcare Commission took over had gone some way to bringing full-scale inspection to the private sector, but it is only now that a formal timescale for ultimate equivalence has been set down.

In its current assessment of NHS hospitals, the Healthcare Commission has primary regard for seven 'core elements', namely safety, clinical and cost effectiveness, governance, patient focus, accessible and responsive care, the care environment and amenities and public health.

The specific proposals of the Commission to reach an equivalence between the sectors by 2008 are:  
(1) to ensure that the Commission's assessments

...Continued from page 1

- offer patients and users of services the same assurance on the same core aspects of healthcare, no matter where they are provided;
- (2) in partnership with the Government, to modernise the regulatory framework of standards and guidance so that the requirements for the quality of care in the independent sector are aligned with those for the NHS;
  - (3) to develop an approach driven by better information and a stronger focus on the outcomes of care;
  - (4) to establish a new system of regulatory fees that creates incentives for improvement by being proportionate to the actual costs of regulation.

Further, the Commission will seek to ensure that assessments of private hospitals cover the whole year rather than focussing on a snapshot point in time, and visits will be based on risk assessment, rather than an automatic annual basis. Revisiting of all healthcare providers will take place where necessary.

The hoped-for equivalence between the public and private sectors is clearly desirable so that standards of care do not break down as in the past. There is also, of course, a desirability for these changes that comes from the increasingly important role that the private sector plays in the nation's healthcare. It is estimated that by 2008, one in seven non-emergency NHS patients may be treated in hospitals and clinics run by the independent sector. Already, more than 80% of mental health patients cared for in their independent sector are funded by their local NHS.

For the first four months of 2006, there will be a consultation period while the Commission gathers responses to its proposals from those affected by the forthcoming changes, including members of the public and healthcare professionals. It is then hoped that all services can be assessed in the same way, to result in a consistent, unambiguous assurance on the core standards of care applicable to both the public and private sectors.

Although these reforms aim to bring the private sector up to the standards of the NHS, that must be seen as a beginning of the process of improvement rather than the end.

More details can be found at [www.healthcommission.org.uk](http://www.healthcommission.org.uk).

Louise Jones is a junior tenant at 9 Gough Square and undertakes a variety of work including personal injury, crime, employment, landlord and tenant, family; and all aspects of common law work.

## THE CONTROL OF VIBRATION AT WORK REGULATIONS 2005

**T**revor Davies drills into the new Regulations and outlines their implications for both employers and claimants who have suffered from whole body vibration while at work.

Until recently, in order to bring a successful claim for hand-arm vibration syndrome,



Claimants have had to rely on a variety of Regulations, including the Provision and Use of Work Equipment Regulations 1998 and the Personal Protective Equipment Regulations 1992. Not any longer! The Control of Vibration at Work Regulations 2005 came into force on 6th July 2005

The Regulations apply to employees who have regular and frequent use of hand-held power tools or hand guided power equipment, or who hold materials being processed by machines such as pedestal grinders. They also apply to employees who are subjected to high levels of whole body vibration, such as operators of off-road mobile machines (such as straddle carriers at ports, or construction vehicles) agricultural vehicles and industrial trucks.

### **What kind of tools and equipment can cause ill-health from vibration?**

Some of the most common ones are;

- Chainsaws
- Concrete breakers/ road breakers
- Hammer drills
- Hand held grinders
- Impact wrenches
- Jigsaws
- Needle scalers
- Pedestal grinders
- Polishers
- Power hammers and chisels
- Powered lawnmowers
- Powered sanders
- Strimmers/ brush cutters

### **What do the regulations require employers to do?**

#### 1. Risk assessment

Where an employer carries out work "which is liable to expose any of his employees to risk from vibration" he must make a suitable and sufficient assessment of the risk created by the work, this assessment shall identify the measures that need to be taken to meet the requirements of these Regulations" (see regulation 5)

...Continued from page 2

2. Duty to eliminate or control exposure to vibration

"The employer shall ensure that risks from the exposure of his employees to vibration is either eliminated at source, or where this is not reasonably practicable, reduced to as low a level as is reasonably practicable" (regulation 6)

Examples are given of measures that shall be considered including:

- (i) Appropriate maintenance programmes for the work equipment
- (ii) Providing suitable and sufficient information and training for employees, such that work equipment may be used correctly and safely
- (iii) Limitation of the duration and magnitude of exposure to vibration
- (iv) Appropriate work schedules with adequate rest periods

This provision will provide a fertile ground for requests for disclosure of the relevant documentation, as well as providing potential allegations breach of statutory duty.

Regulation 6 (4) is particularly onerous for employers and is worth setting out in full "6 (4) subject to regulation 3 (2) and (3) and paragraph (5), the employer shall:

- (a) ensure that his employees are not exposed to vibration above an exposure limit value; or
- (b) if an exposure limit value is exceeded, he shall forthwith:
  - (i) reduce exposure to vibration to below the limit value;
  - (ii) identify the reason for that limit being exceeded; and
  - (iii) modify the measures taken in accordance with paragraphs (1) and (2) to prevent it being exceeded again"

(see also regulation 6 (5))

Please note that this particular regulation does not apply until 6th July 2010, where work equipment is used which was first provided to employees prior to 6th July 2007 by an employer. Further, this particular regulation shall not apply to agriculture and forestry sectors in relation to whole body vibration until 6th July 2014. Furthermore the following may apply to be exempted from regulation 6 (4) namely;

- ◆ The emergency services (regulation 9)
- ◆ Air transport (regulation 10)
- ◆ The Ministry of Defence (regulation 11)
- ◆ The relevant exposure limit values and action values are set out in regulation 4

The Daily exposure limit value (ELV) is the maximum amount of vibration an employee may be exposed to on any single day.

Values are given for hand-arm vibration (see also schedule 1) and whole body vibration (see also schedule 2). The Daily exposure action value (EAV) is a daily amount of vibration exposure above which employers are required to take action to control exposure. Again different values are given for hand arm vibration and whole body vibration. The Health and Safety Executive have provided guidance for employers in a publication entitled "Control the Risks from Hand Arm Vibration.

*"Advice for employers on the Control of Vibration at Work Regulations 2005"*

This publication suggests that employees who regularly operate hammer action tools for more than about one hour per day, or some rotary and other action tools for more than about two hours per day are likely to be above the ELV. However, the publication goes on to say "The limit value could be exceeded in a much shorter time, where the tools are not the most suitable for the job". A useful source of information about the vibration levels will be the equipment hand book or manufacturer's information.

3. Health surveillance

If the risk assessment obtained in accordance with regulation 5 identifies a risk to the health of the employees, who are, or are liable to be, exposed to vibration or, if the employees are likely to be exposed to vibration at or above an exposure action value then the employer is under an obligation to place such employees under "suitable health surveillance" (regulation 7).

A health record must be kept. Where an employee is found to have an identifiable disease or adverse health effect as a result of exposure to vibration, the employee

is to be informed accordingly (regulation 7 (5)(a)).

4. Information, instruction and training

If the risk assessment obtained in accordance with regulation 5 identifies a risk to the health of the employees, who are, or are liable to be, exposed to vibration or, if the employees are likely to be exposed to vibration at or above an exposure action value then the employer is under an obligation to provide those employees with "suitable and sufficient information, instruction and training" (regulation 8).

**Conclusion**

The main provisions of these Regulations are in force for exposure to vibration on or after 6th July 2005. They provide useful ammunition to the Claimant, particularly in cases involving whole body vibration. The provisions of regulation 6 (4) will be particularly useful when they come into force on 6th July 2010. However, the reference to daily exposure limit values of vibration is likely to require the use of expert engineering evidence in order to prove the breach, just as acoustic engineers are required in deafness claims.

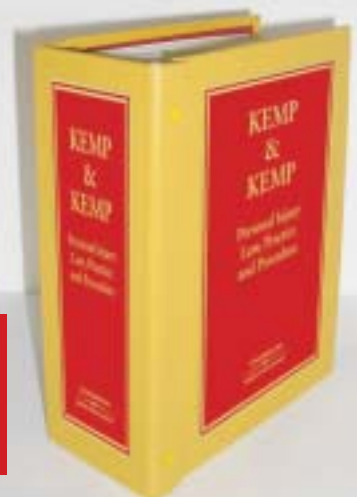
Trevor Davies is a specialist personal injury practitioner. He regularly represents Claimants from the large trade unions in industrial accident, industrial disease, work related upper limb disorders (WRULD), stress and road traffic cases.

*Look out for  
Kemp & Kemp:  
Personal Injury Law,  
Practice & Procedure*

*General Editor:  
Andrew Ritchie*

*Contributing Editor:  
Grahame Aldous*

*Publication: Nov 05*



[www.sweetandmaxwell.thomson.com](http://www.sweetandmaxwell.thomson.com)

**P**oonam Bhari summarises the personal views expressed by the Right Honourable Dame Elizabeth Butler-Sloss GBE at the Law Reform Committee Lecture on 5 December 2005 at The Hall, Inner Temple.

The Chairman introduced Dame Elizabeth as someone who 'though retired is not retiring' and who expresses her views on this subject 'in a forthright manner'. Dame Elizabeth described the last 50 years in Family Law as 'more revolution than evolution'.

### DIVORCE

Starting with Divorce reform in 1970 to 1973 culminating with the Matrimonial Causes Act of 1973 (MCA). Previous approaches were hotly contested divorces, collusion was consigned to history and mediation was in; statements disappeared as did the 'inquiry'. Irretrievable breakdown of marriage was now the only ground and although more controversial, two and five year separation were also introduced. Baroness Hale was the architect of the 1996 Divorce Reform, which was a brave attempt to modernise Divorce. Sadly this was a wasted opportunity to move forward.



### FINANCE

Until the 1960's wives only received maintenance pending suite and periodical payments after divorce. Section 25 MCA 1973 introduced equality into the arena. The Court would now 'have regard to all the circumstances of the case' with the 'first consideration being given to the welfare while a minor of any child of the family'. Conduct was no longer relevant unless it would be inequitable to disregard it. There have been few statutory amendments to the legislation but judicial creativity in interpretation, i.e. 'White' and 'Lambert', recognised the non-financial contribution of the Applicant, usually the wife. Where children will live is the deciding factor in less affluent cases as to where the income goes.

### DOMESTIC VIOLENCE

Until recently the abusive behaviour of one party in

# "Family Law Reform – opportunities taken, wasted and yet to be seized"

a marriage/relationship, to another was considered a private matter.

More recently the Court of Appeal considered the impact of domestic violence on children, including considering the report of two child psychiatrists. A change of approach was encouraged by a change in legislation with Part IV of the Domestic Violence Act, which included prosecution, in the case of Domestic Violence, even where the victim refused to co-operate. A new approach to domestic violence has been adopted in New York in the form of Domestic Violence Courts dealing in the same court with criminal and family aspects to a case. Dame Elizabeth considered it a good idea that one court can deal with criminal and family matters. It is a good thing, in Dame Elizabeth's view, that domestic violence is acknowledged but avoiding duplicating legal aid expenditure and court time could save valuable costs. Dame Elizabeth emphasised that we cannot be complacent about domestic violence, it has not been sufficiently defeated and it is often difficult for those from minority communities to come forward.

### MARRIAGE

Dame Elizabeth moved on to consider marriage. In her view marriage is now under threat. There are economic and social advantages to marriage both for the couple and the state. Divorce is not a private matter as it affects the community and state both in terms of the emotional fall-out on relatives and the work place but also, as shown by research, on the serious effect it has on children. Studies show that marriage remains the most stable relationship between men and women. There are financial and other long lasting benefits for the family and wider community within marriage. The Civil Partnership Act deliberately does not apply to cohabiters in order to encourage marriage. Dame Elizabeth doubts that said Act will encourage marriage resulting in many cohabiters having no idea about the consequences of separating or dying without have made appropriate plans

### CHILDREN

Dame Elizabeth began by looking at Children and the Care system. There have been changes regarding the removal of children by the state and how children at risk are dealt with. In the 1970's following incidents of physical injuries to children, Jasmine Beckford and Tara Henry, there was the call for the removal of children from their parents, and 121 children were removed in Cleveland. This led to The Cleveland Inquiry and the work that followed led to the Children Act 1989 (CA 1989). The CA 1989 is not perfect but it is the firm basis for family law in the UK. The welfare of the child is the paramount consideration (S.1 CA 1989) and all levels of court apply this criterion.

The case of Victoria Climbié highlights the need to remain vigilant but problems remain in terms of lack of resources in social services departments. Social workers are underpaid and under appreciated and there are recruitment problems across the UK. After a Care Order is made there is no push for the court to remain overseeing the situation. In some cases after a Care Order is made children are moved a number of times and there is no continuity of social worker. Children in care do not do as well as children with parents; that is a sad fact and a cause for concern. Dame Elizabeth was also concerned about the 'watering down of the Children's Guardian and the Solicitor for Children' as the vulnerable person, the child, may be facing permanent removal from the family.



# Corporate Manslaughter

**E**leanor Mawrey outlines recent developments following the Law Commission's proposals for major changes to the law of corporate manslaughter and asks "Will it make a difference?"

## Background

Last year, yet again the difficulty in securing a conviction under the existing law of corporate manslaughter was made clear as the prosecutions brought in relation to both the Hatfield and the Potters Bar rail disasters collapsed. Since 1992 out of 34 prosecutions only 6 small organisations have been convicted. The flaws with the current system have been apparent for a very long time, and indeed the Law Commission reported as far back as 1996 suggesting major changes. The last three Labour Party manifestoes have promised to deal with the issue and a consultation process was begun in 2000. However it was not until March 2005 that the long awaited draft bill was finally presented to Parliament.

## PROBLEMS WITH THE EXISTING LAW

At present, corporate manslaughter is a common law offence which depends very largely on the so called "identification process". This requires "a controlling/directing mind", namely an individual at the very top of the company, to be themselves guilty of manslaughter before the company can be convicted. This principle ignores the reality of the modern corporate world, where companies often have numerous tiers of management delegating much of the decision making process from those at the very top. Directors, executives and board members have been able to escape conviction and thereby their companies as well, by being too far removed from the act of gross negligence that caused the death. This position is clearly unsatisfactory and has left the relatives of those killed angered by the lack of proper legal redress for their loss.

## PROPOSED NEW LAW

The draft bill addresses the difficulties created by the management structure of corporations by examining the behaviour of "senior managers" within the organisation. A "senior manager" is defined in section 2 of the bill as someone who: "plays a significant role in:

- a) the making of decisions about how the whole or substantial part of its activities are to be managed or organised, or
- b) the actual managing or organising of the whole or substantial part of those activities."

The act does not define what a "substantial part" will mean in practice, but it is aimed to catch those such as area managers but probably not those at branch or office level. It is however the organisation that will be prosecuted not the senior managers themselves. The report released by the Home Affairs and Works and Pensions Committee in December was particularly critical of the proposed "Senior Manager" test, seeing it as a likely obstacle in future prosecutions. It urges the adoption of the Law Commission's more general approach of "management failure". Whether the government reconsiders this section in light of the report will remain to be seen.

The bill maintains the requirement that the negligence in question must be "gross", which is set out in s.3(1) as being when "the failure in question constitutes conduct falling far below what can reasonably be expected of the organisation in the

circumstances". It must be made clear that the proposed law does not create any new health and safety responsibilities on companies. Compliance with the existing legislation relating to the work place will however be the first port of call when examining the behaviour of the "senior managers" and nothing in the new proposals will affect the liability of companies to also be prosecuted for separate health and safety offences. The jury will be asked to consider, "whether the evidence shows that the organisation failed to comply with any relevant health and safety legislation or guidance, and if so -

- a) how serious was the failure to comply;
- b) whether the senior managers of the organisation -
  - (i) knew or ought to have known, the organisation was failing to comply with that legislation or guidance;
  - (ii) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;
  - (iii) sought to cause an organisation to profit from that failure."

## ITS SCOPE

For the law to bite in the first place, the Prosecution will have to prove that the organisation owed a duty of care to the deceased. This will be a matter of law to be decided by the judge. A significant and welcome change to the existing law is that the Crown will now also be liable for prosecution if its "conduct falls far below what is to be expected." A list of particular Crown bodies covered is contained in a schedule to the bill.

However there are numerous exceptions. Firstly the bill does not cover unincorporated organisations. Secondly public authorities will not owe a duty of care in relation to matters of public policy. The third exemption is those carrying out an exclusively public function which is defined as:

"a function which falls within the prerogative of the Crown or is exercisable only with authority conferred -

- a) by the exercise of that prerogative or
- b) by or under an enactment,"

This removes incidents such as deaths in custody outside the remit of the bill. Fourthly the activities of the Armed Forces in relation to combat operations are not covered. Finally, the law will only apply to deaths within the jurisdiction. Fatalities caused by companies registered here but that happen abroad will not be covered.

The Centre for Corporate Accountability [CCA], a charity advising those bereaved from work-related deaths, whilst broadly supporting the general thrust of the proposals, has real concerns over the extent of these exemptions. Together with Inquest, a charity to assist those going through the inquest procedure, they commissioned an advice from Tim Owen QC and Henrietta Hill to assist in preparing their response documents to the draft bill. That advice states that the exemptions are "potentially so

...Continued from page 4

There was delight at the appointment of a Children's Commissioner for England but disappointment that the role does not carry as many powers as it does, for example, in Northern Ireland.

Child criminal legislation has improved, with Youth Courts considering the welfare of the child and the introduction of YOTs (what is this). In the criminal arena some children may be reacting to problems at home and whilst 'mollycoddling' was not being suggested, 'some children do need to be brought up short'; a different approach is required for some children up to the age of 12 years, for moderate offences, where family factors should be looked at and Dame Elizabeth would support the use of Section 7 CA 1989 welfare reports in the Youth court, whereby if a welfare issue is highlighted then the matter is transferred to the Family jurisdiction.

We underestimate the effect on children of divorce; it changes their lives and the arrangements agreed to by parents are not always in the children's interests. Section 41 MCA 1973, dealing with Statement of arrangements for children 'lacked teeth'. Part II of the 1996 Divorce legislation, which is not in force, had more consideration for children. Conciliation initiatives to settle children disputes have met with a degree of success. The DFES, DCA, CAFCASS and HMCS are trying to extend conciliation across the UK, thereby reducing private law children cases.

In conclusion Dame Elizabeth noted that there have been huge changes over 50 years but there is more to be done to protect children in relation to the circumstances they are born or fall into. More social workers are required as well as therapeutic intervention but this all costs money, but **'children have rights and to help our children is to provide for the future'**. We need to do more otherwise we are **'condemning our successors to the failures of our generation. This causes more problems for the future.'**



Poonam Bhari joined 9 Gough Square in November 2005 and her practice covers all aspects of family law.

...Continued from page 5

widespread as to introduce a substantial species of Crown immunity 'through the back door'...and we believe that such a limited an arbitrary availability of the new offence would be incompatible with the European Convention on Human Rights and the Human Rights Act." It is clear that these sections of the Bill are likely to be the most controversial, and may well have to be substantially altered following the consultation process.

### PROSECUTION AND PENALTIES

The task of prosecuting the offence will remain with the CPS, though undoubtedly they will be liaising very closely with the Health and Safety Executive. The consent of the DPP will also still be required before a Prosecution begins. Organisations that are convicted will face the prospect of unlimited fines. The Court can also require the corporation to take specific steps to remedy the breaches in their duty of care which must take place within a specific time frame. As it is the organisation itself that is being prosecuted rather than the individuals involved, imprisonment is no longer available as a penalty.

### WILL IT MAKE A DIFFERENCE?

It is clear that the proposals address many of the difficulties inherent in the current law. However that does not mean that those companies that have been acquitted in the past would necessarily have been convicted if the draft bill had been in force. The Zeebrugge disaster was caused by the leaving open of the bow doors, a practice that was widely followed at the time, and therefore that act was unlikely to have constituted gross negligence. By adding no further burdens on organisation, its bite lies in creating an added incentive for corporations to comply with their duties.

As the ultimate sanction constitutes a fine, one has to question whether this really goes further than the HSE offences that already exist. Network Rail and Balfour Beatty were recently fined a total of £13.5 million for Health and Safety offences as a result of the Hatfield disaster. Had they been successfully convicted under this proposed bill, (and that is not to say a Prosecution would necessarily have been successful), would the overall fine have been any higher? Furthermore, especially in the case of public authorities, is fining really appropriate when the money might be better employed elsewhere or used to ensure that the same breaches do not happen again? It is no doubt hoped that a conviction under the proposed law will carry a significant "shame factor", but again one has to question whether the public would really have viewed Network Rail and Balfour Beatty any worse than they already did following the extensive press coverage of their behaviour, had they been convicted?

In a MORI poll for the Transport and General Worker's Union in 2003, 65% of the people agreed with the statement: "Workplace safety will only improve if company directors can be prosecuted for a serious criminal offence like manslaughter." This bill by concentrating on the organisation as opposed to the individual, means company directors will continue, in the eyes of many, to go unpunished. Following the collapse of the manslaughter charges in relation to the Potters Bar rail disaster, Perdita Kark, who father was killed in the crash stated: "I don't want to see the chap who wielded a spanner take all the blame. There was a complete breakdown in the entire structure, enough to put away the men in suits and make them suffer." . The Home Affairs and Works and Pensions Committee who examined the Bill wants individuals to be liable for something more serious than Health and Safety offences and believes that secondary liability should be addressed in the legislation.

It is a natural human instinct to wish to see those punished for the harm they do and future victims may find that this proposed legislation as it stands does not address that need. One can only hope that the rest of the bill provides a sufficient enough deterrent for organisations not cut corners in the future for us never to find out.

Eleanor Mawrey is instructed in a variety of criminal work, both for the Prosecution and Defence. She has worked with the Revenue and Customs Prosecution Office and has considerable knowledge of drugs cases, trials involving the use of informants. and ASBO trials. Her involvement with Fair Trials Abroad includes acting as an international observer of trials.

# THE NEED TO MEDIATE

by Giles Eyre

## The Court of Appeal's attitude to mediation

Mediation has the stamp of approval of the Court of Appeal as an adjunct to the civil justice system.

"Not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate." Ward LJ in **Burchell v Bullard** (2005) EWCA Civ 358

In **Vahidi v Fairstead House School Trust Ltd** (2005) EWCA Civ 765 in relation to stress claims Longmore LJ said:-

"One shudders to think of the costs of this appeal and of the trial which apparently took as long as 9 days. As the courts have settled many of the principles in stress at work cases, litigants really should mediate cases such as the present. Of course, mediation before trial is infinitely preferable to mediation before appeal. But it is a great pity that neither form of mediation has taken place in this case, or if it has, that it has not produced a result."

## Unreasonable refusal to mediate

The court will expect ADR, which includes but is not limited to mediation, to be considered and a party may be penalised in costs for failing to use ADR – see **Halsey v Milton Keynes General NHS Trust and Steel v Joy and Halliday** [2004] EWCA Civ 576. The court does not have the power to order reluctant litigants to mediate (because of Article 6 ECHR) and it is the court's role to encourage parties to enter into mediation rather than compel them, although "the form of encouragement may be robust". If a party refuses to mediate, then at a subsequent trial the court can displace the normal costs rules and order that party to pay the costs despite winning at trial but an adverse costs order will only be made if the unsuccessful party in the litigation establishes that the other party was acting unreasonably in refusing ADR. The burden of proving that unreasonable behaviour will be on the unsuccessful party wishing for the normal costs rule to be displaced.

Where the court itself has recommended that the parties should mediate then it may be easier to establish that a refusal to mediate was unreasonable as for example in **McMillan Williams v Range** [2004] EWCA Civ 294 where on granting permission to appeal the appeal judge stated "ADR is strongly recommended" and the parties having failed to follow that advice the Court of Appeal ordered each side to pay its costs of the appeal.

Any decision to refuse an offer to mediate, whether from the court or the other party, is likely to be scrutinised on the issue of costs at the end of any trial. In **Yorkshire Bank plc and Clydesdale Bank Asset Finance Ltd v RDM Asset Finance and J. B. Coach Sales** in exercising his discretion on costs the trial judge, having awarded C only half his costs on the merits of the claim, awarded a further 15% to reflect D's refusal to agree to mediation, D having refused on the basis that it was an "all or nothing" case and no benefit could be seen in mediation. The judge emphasised the invaluable service the mediator can offer in privately testing out weaknesses in each case before it gets to trial.

In contrast in **Daniels v Commissioner of Police for the Metropolis** [2005] EWCA Civ 1312 C's claim failed. Because D had rejected C's attempts to negotiate, C sought to avoid paying all of D's costs. However it was held that a public body routinely facing such claims from employees was entitled to take a stand and contest them and that the courts should be slow to characterise such conduct as unreasonable even if the costs were disproportionate to the value of the claim.

Where mediation has failed and if one of the party's acted unreasonably or reprehensibly in the mediation (perhaps not daring to refuse mediation for fear of a costs sanction) what can the judge considering the costs of the subsequent trial be told? In **Wethered** the judge was clear that he could not speculate about what lay behind

the veil of confidentiality of the mediation and he could not receive evidence about it, unless the parties all unequivocally waived that confidentiality in relation to the whole of the mediation to permit such evidence to be admitted.

In contrast in **Hurst v Leeming** (2002) EWHC 1051 Lightman J was prepared to form a view as to the party's intransigence as having affected the outcome of the mediation (in a case where a barrister was held to be justified in refusing to proceed to mediation in a professional negligence case because the attitude and character of the claimant made it very unlikely that mediation would succeed).

## Timing of mediation

The earlier that a case is mediated the greater the saving in costs, time and energy but the later it is mediated the more that the issues will be clearly defined.

In **The Wethered Estate Ltd v Davis** (2005) EWHC 1903 in a dispute over land use C refused D's suggestion of early mediation unless and until they ceased part of the disputed use (parking a van on C's land). C did however agree to mediation once the issues were clear and suggested the issuing of proceedings, and a defence and part 20 proceedings (subsequently abandoned) followed. Mediation subsequently took place but was unsuccessful and C was largely successful at trial. The judge declined a costs sanction against C for the delay in agreeing to mediate, identifying in this case "very peculiar circumstances" which justified the refusal to mediate unless the van was removed. The case involved questions of construction of an agreement against a disputed factual matrix. Where the action of the other party is regarded by the court as unreasonable in itself then it is unlikely to obtain what is effectively equitable relief in the form of the favourable costs order. However an unwarrantable delay in agreement to mediate, and not just a refusal to mediate, could result in a costs sanction.

◆ Giles Eyre

### WHY MEDIATE - A REMINDER

Mediation does offer something that a traditional round table meeting does not. A trusted and independent third party with no interest in the outcome is able to assist the parties, by –

1. facilitating discussions in such combinations as appear appropriate during the different phases of negotiation and without anyone feeling that they might be displaying weakness by entering into such discussion
2. helping the parties identify the core issues
3. ensuring that parties continue to carry out appropriate risk assessment and privately testing each side's position
4. asking in private the 'awkward questions' about the claim,
5. speeding up the process of concessions and offers, particularly where there are more than 2 parties to a dispute
6. looking for solutions outside the litigation framework
7. letting the parties themselves have their say, which can then allow movement towards settlement

### HOW TO START MEDIATION

Contact a body providing mediation services, such as CEDR or 9 Gough Square's mediation team (of Andrew Baillie QC, Giles Eyre, Grahame Aldous and Christopher Wilson).

Over the Christmas break things were busy behind the scenes at 9 Gough Square as space was found for 5 new and established practitioners from 199 Strand to join Chambers. As subsequent "reconfiguration" has yielded a further clutch of desks to be made available for continuing Chambers growth over the next few years as barristers with the right experience continue to apply to join our busy and successful Chambers.

Jeremy Ford (1996): A broad range of commercial and insurance litigation including property damage, contractual disputes and accident claims. Litigation cost recovery and underground damage claims.



Stuart McKechnie (1997): Personal injury including road traffic accidents, employers liability claims, consumer protection law, occupational diseases, holiday claims, occupiers liability and sporting accidents. Coroner's court and inquests. Clinical Negligence experience includes gynaecological and urological, dental and ophthalmic cases together with general surgical and nursing errors.



Simon Brindle (1998): Personal injury work, including employers liability claims, road traffic accident claims, consumer protection claims, holiday claims, highway claims and occupiers liability claims. He undertakes work in the coroner's court and has successfully defended health and safety prosecutions. His quantum experience includes quantification of head injury claims, involving multiple experts, as well as fatal accident claims. His clinical negligence work is growing and ranges from negligent treatment to delayed diagnosis.



## 9 Gough Square Civil Team strengthened by 5 new Practitioners

Adam Dawson (2000): Personal Injury: fast track and lower value multi track work involving RTAs, workplace accidents; health and safety claims and trips and slips generally. Clinical negligence, transport and crime plus general contract and commercial work.



Linda Nelson (2000): Personal injury: road traffic accidents; employers' liability; public liability; aviation/carriage by air; animals and holiday claims. Also does clinical negligence, coroner's inquests and CICB/CICAP work. Property and general common law work includes commercial & business disputes and employment law.



## Expert employment law group on equality

An expert employment law group has been strengthened by a barrister from 9 Gough Square's Employment Team. Susan Belgrave was invited to attend a select, focus group by the Fawcett Society to identify the next steps necessary for gender equality law reform. The seminar looked at how legal issues and problem could be overcome in the following areas:

- ◆ Equal pay;
- ◆ Pregnancy discrimination;
- ◆ Part-time work;
- ◆ Use of the concept of "reasonable adjustments" outside disability discrimination;
- ◆ Enforcement;
- ◆ Remedies;
- ◆ Equality monitoring;
- ◆ Statutory grievance procedure;

It also looked at the role and possible powers of the new Commission for Equality and Human Rights and will report to the Governments Discrimination Law Review.

Susan's practice covers advocacy and advisory work on behalf of applicants and employers including CRE, EOC, trade union firms and a number of London local authorities. Her specialist areas of work include: sex, race and disability discrimination claims including equal pay claims and pregnancy rights, unfair dismissal, redundancy, health and safety, trade union rights and transfer of undertakings.

Editor: John Kerr, Chief Executive  
The Chambers of John Foy QC  
9 Gough Square  
London EC4A 3DG

t 020 7832 0500  
f 020 7355 1344  
dx LDE 439  
clerks@9goughsquare.co.uk  
www.9goughsquare.co.uk

