ADR NEWS

Volume 4 Issue No 3 October 2004

For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

Contents

EDITORIAL :

The summer has well and truly come and gone and thoughts turn to the December festivities to see us all through the shortening days and lengthening nights of Autumn. This is the season of seminars and conferences and the ADR industry is active with many serious short update programs being run around the country.

Following in this spirit, at Christmas the Welsh Association of Mediators, in co-operation with Cardiff Law School and the University of Glamorgan Law School plans a seasonal diversion with a demonstration Father Christmas tort claim mediation. Please lend generous support. All comers welcomed. Hope to see you there.

A substantial part of this and the next edition are given over to an in-depth analysis by Rachel Miles of the professionalisation or otherwise of mediation practice. Comments to the editor on this thought provoking seminal work invited.

G.R.Thomas : Editor

EVENT

THE ASSOCIATION OF WELSH MEDIATORS PRESENTS

Booking : To reserve your place at this charitable event ple
Dr Mair Coombes Davies, Secretary, *Association of Welsh*
Barristers Chambers, 30 Park Place, Cardiff, CF10 3BS
Tel: 02920 398421. Fax: 02920 398725. DX 50756. Cardiff 2
E-mail: m@coombesdavies.co.uk

Association of Welsh Mediators
Cymdeithas Cyfryngwyr Cymreig

A CHRISTMAS ENTERTAINMENT

The Law School, University of Wales, College Cardiff
Thursday 2nd December 2004 5:45 - 8:45
Mulled Wine and Minced Pies : Carolling - Seasonal Entertainment
Principal Event 6:30 – 7:30 : A court ordered mediation in the case of
Father Christmas v (1) The City of Llandaff Health Trust and (2), ACME Builders plc.

Donations invited to Ty Hafan Children's Hospice

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Mediation: A Fledgling Profession or A Pot Puri of Good Intentions?

Rachel A Miles

Introduction. What is mediation? A Snapshot.

A possible definition. *Mediation is a decision making process, in which the parties are assisted by a third party, the mediator, who attempts to improve the process of decision- making and assists the parties reach an outcome, to which each of them can assent.* (Boulle 2001:3)

A Historical Perspective.

"Mediation is both as old as human interaction and as new as the recent 'reinvention' of this old form has made it, in its modern use of courts, private disputes, public policy formation and governance. Mediation is both a legal process and more than a legal process used for thousands of years by all sorts of communities." (Menkel Meadow 2001: X11)

Moore (1996) considers mediation to be the intervention in a negotiation or conflict of an acceptable third party who has limited or no authoritative decision –making power; but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. Historians have identified that third parties have intervened in disputes since time immemorial. Traditional mediation is believed to have its routes in Confucianism. The peaceful organisation of society, according to Confucious starts from proper enquiry and understanding. He believed the latter lead to compassion and empathy, the core of Confucianism. Linked concepts are harmony and a conflict free, group based, system of social interaction. Boulle (2001:223) considers that "*concepts of enquiry, understanding, empathy and forging harmonious relationships are the essence of mediation"*. There is in part a religious linkage to mediation, where in Christian culture in the Middle-Ages clergy were called upon to act as mediators in disputes between families, as well as diplomatic disputes. Equally the Islamic culture has a strong tradition of mediation. Both Confucian and Buddhist traditions value dispute resolution through mediation rather than litigation, which is perceived as *'loss of face'*.

Menkel Meadow (2001) notes that despite its wide usage there is no cultural uniformity to the form the practice of mediation takes. It is the principle, which has prevailed and will remain interest based, reflecting the flexibility of its nature. Equally important was the idea that the intervention of a wise leader, or the airing of grievances, might reduce the perceived need for individual revenge or violent vengeance. It was a process aimed at the common good as well as individual consideration.

In secular society, the mediating role of village elders, tribal councils and the like can be traced across all major continents. Arguably local councils continue to fulfil an important role as mediators in local disputes. However it was not until the twentieth century that mediation came to be institutionalised in our secular society and began to gain recognition as an emerging profession.

Boulle (2001) states that within more modern times in Western society, mediation has its roots in America, when in 1913 a small claims mediation scheme was introduced in the Municipal Court in Cleveland Ohio. By the late 1960's mediation was considered a means of increasing access to justice in the United States, and by the late 1970's had increased in usage considerably, having developed to its existing levels by the 1990's.

In the UK in the early 1970's the Final Report recommended mediation for the resolution of family disputes. However there was a failure to implement the report, and by the late 1970's independent family mediation services had been set up, and were endorsed by the Booth Committee in 1995. Community mediation was established in the mid 1980's, while growth in commercial mediation began in the early 1990's (Boulle 2001).

With the publication of the Woolf Report it became clear that mediation was about to blossom in England and Wales. The recommendations of this report were entirely endorsed by the U.K. government, and resulted in the new Civil Procedures Rules, which were enacted in April 1999. The latter half of the 1990's have demonstrated a steady growth in the use of A.D.R. and with it came the growing awareness by the more enlightened, that mediation was destined to become an extremely significant dispute resolution tool, providing a real alternative to the adversarial legal system.

Wilson (2002) considers that apart from the motive of avoiding the potential costs of litigation, the growth of mediation in the Western world has evolved from the need for people enmeshed in conflict, to find a mechanism whereby they are enabled to address multifaceted, complex issues complicated by widespread democratic and demographic societal changes. Life has become very complicated. Mediation with its inherent capacity to

evolve with its cultural roots, has attempted to meet the changing needs of society.

The difficulties of defining mediation.

Menkel Meadow (2001 XXVII) considers that "because mediation is seen as an ideology (of peace-seeking, transformative conflict- restoring, human problem solving) and practice (of task- orientated, communication enhancing dispute settlement), there are many controversies about appropriate definitions, forms, and boundaries," Boulle (2001) likewise sees difficulty in its definition, given its flexibility as a process, and open interpretation of terms such as *'voluntary'* and '*neutrality*', which causes problems of certainty consequent to their unclear boundaries and the subjective nature of the activities undertaken. The other difficulty of definition being that mediation as yet has not accrued a coherent theoretical base, which would clearly distinguish it from other non-adversarial processes, being a fledgling profession in comparison to more traditional professions, such as law and medicine. Aligned to the previous comment, a third difficulty lay in the diversity of its uses, interpretations and understanding. Mediation is used for different purposes by different people, who practice in a variety of different social and legal contexts. Equally mediators have roots in a range of backgrounds, often with extensive differences in qualifications, training, levels of skill and mode of operational style. Hence mediation presents as a patchwork of diversity, linked by themes of commonality, to include the core principles of neutrality/ impartiality, fairness, and mutual agreement, grounded within an ethical framework.

Davis (1998:65) however "*doubts it is safe to assume any characteristic of mediation, simply because the label is applied, for some forms of mediation are self- consciously evaluative and directive; while others claim to be purely facilitative, but have coercive elements"*. Despite these problems the attempt to achieve uniformity continues. Boulle (2001:4) considers that a conceptualist definition would not necessarily reflect the reality of practice, while enjoying wide acceptance as a definition consequent to its idealistic content. He cites Folberg & Taylor (1994) in their definition of mediation as *"The process by which the participants, together with the assistance of a neutral person, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs."*

Arguably the reality of the situation may be that the process involves no more than incremental bargaining towards a compromise situation, and has scant regard for 'needs'.

Equally some conceptualist definitions identify empowerment and an aspiration to improve relations between the disputing parties, a concept considered quite unrealistic and positively "*misleading*" by (Boulle 2001:5) . A reality or descriptive definition of mediation however demonstrates more accurately the practice of mediation. Boulle cites Roberts (1992) in describing mediation as "*a process of dispute resolution in which the disputants meet with the mediator to talk over and then attempt to settle differences*." The disadvantage within such a value free definition being that it omits the ideal of an underlying philosophy. Boulle (2001:6) sees definitions as "*idealistically and politically significant*", given the current climate of take- over of mediation by a variety of competing professionals. Davis (1998:66) sees it in far more pragmatic terms, asserting that irrespective of definition "*It is rather a matter of what works tolerably well, for how many, at what cost".*

The Process of Mediation.

Dingwall & Greatbatch (2001) identify that solo mediation is becoming more common, although co-mediation is the preferred method in some places. Some providers have preliminary fact- finding meetings with each party; others do not. Some of the latter use caucuses where they speak to each party separately; others do not. Some have clear rules about who gets to speak about what and when, others seem to improvise. In their research on quality for the Legal Services Commission they found that the client experience varied greatly, although most individual mediators were explicit about how they would manage the session.

Richards (1999:174) considers the first task of the mediator to be that of providing structure for the negotiation, with a view to converting the dispute into *"conversation"*. Pou (2002) places structure on the process by identifying key elements of the process.

- Information gathering.
- Facilitation of communication.
- Communicating information.
- Analysing information.
- Facilitating agreement.
- Managing cases.
- Documenting agreement.

The process should begin by gathering all information relative to the dispute in question. The approach should be a measured, unhurried, methodical form of negotiating, which sometimes calls for tenacity, and always for absolute impartiality. The clients must be supported to remain focused on solutions, and where necessary impartial advice is provided by some mediators. Regular review of views and progress is made, continually questioning understanding of issues and summarising responses in solution- focussed language. Questioning should be respectful, demonstrating neutral, but genuine interest, while summarising should be impartially constructive, care being taken not to undervalue the difficulties within the dispute. Active listening must be practiced, by the mediator who needs to ensure that the clients are actively involved with the process by checking understanding. It is also important that the parties involved in the dispute listen to and take on board each others perspective. Encouraging the client's confidence in their capacity to find their own solutions to their particular problems, can also be helpful. Roberts (1999:174) believes that *" It is important to maintain the belief that all human beings have the capacity to run their own lives; that they usually accept fairness as the criterion for resolving disputes, and that what they decide……. is their right."*

Boulle (2001) reminds us that after identifying areas of agreement, which are ascertained in consultation with the clients, the situation is moved to areas in dispute. The disputed areas can then be prioritised for negotiation. The process adds structure, aids clarity and tends to focus minds, providing an agenda upon which to focus negotiation, the negotiation providing the core element of the process.

The purposes of mediation.

The purpose of the processes of negotiation is described by Boulle (2001:133), as "*involving the parties in constructive negotiation for the purposes of quality decision making;*" identifying and exploring in detail major elements of the dispute, as well as encouraging direct communication between the parties, enabling them to express their position and feelings. There needs to be a positive effort by the mediator to promote mutual understanding while moving forward in the process of identifying needs and interests. There should be an exchange of information and views; developing and exploring options being necessary. Evaluating positions and considering consequences, while moving through the problem solving negotiation, can prove stimulating and challenging.

Spurin (2002:2) identifies that the intention of the mediation is to bring the dispute to an end by consensual means, *"involving the disputing parties directly in shaping the terms of the resolution ……. However depending upon the model of assisted negotiation …….. what the parties retain control over varies considerably."* Within the arena of Family Law, mediators are required to ensure that clients are clearly informed at the outset, about the nature and purpose of mediation; to include its differences from marriage counselling or legal advice representation. However Dingwell & Greatbatch (2001) found in their exploratory research for the Legal Services Commission, into the quality of mediation being provided, that it was questionable whether clients were being made aware of the purposes of the intervention of mediation.

Clearly and perhaps unsurprisingly standards are not uniform, but as Dingwall & Greatbatch (2001:381) assert *"parties should be able to rely on greater uniformity"*, so that clients can expect consistency and reliability in the provision of a predictable, quality service.

Outcomes. Binding and Non Binding Agreements.

Given that one of the prime intentions of mediation is to achieve a consensual agreement from disputing parties, focus on aspects of the agreement which are less contentious, would appear to be a significant position to start, moving progressively to more difficult issues. The agreement within mediation can be two fold, the only difference being in the enforceability or otherwise of the negotiated settlement.

Binding.

Spurin (2002:2) reminds us that "*the parties cannot be forced to actively participate in the process and are free to withdraw at any time.*" Clearly withdrawal equals breakdown and causes settlement by means of mediation to be impossible. However once the parties have agreed and signed a 'binding agreement' it is enforceable, and produces closure on the dispute. If the settlement is of an enforceable nature it is treated by the courts as a 'simple contract'.

Non Binding.

Spurin (2002:3) again reminds us that *"a non binding agreement is binding in honour only, and thus cannot be*

enforced by the courts," and only indicates approval of the terms of the agreement, but do not have enforceability.

The common factors within these agreements is their consentuality. The agreement is subject to some legal constraints in that where a new agreement has an element of reciprocal bargain it might be unenforceable in the absence of a device to give it the force of law. The agreement may be made under seal to ensure its enforceability, or lodged as a settlement if the parties had commenced legal action. The enforceability of the agreement can only be challenged on the basis of misrepresentation, which is very difficult to prove. Practice which emanates from an ethically established base, would hopefully protect the mediator (in conjunction with insurance).

Distinction Between Mediation & Conciliation

The terms *'neutral'*, *'voluntary'* and *'interventionist'*, are subjective and can equally be applied to mediation or conciliation. Evaluative mediation can be difficult to differentiate from conciliation, but there are differences. Principally conciliators have a more 'interventionist' role, recommending solutions, otherwise influencing the parties, and affecting the outcome. Conciliation is less neutral has a statutory context, and does not have mediations *'alternative character'*. However evaluative mediation can just as interventionist. There lurks the danger of undue coercion where an interventionist model of mediation is practised. Arguably an action for undue coercion might lie here in appropriate circumstances.

Conclusion.

There is clearly much to know about the process and product of mediation, and a great awareness that what has been overviewed within this chapter, does not begin to scratch the surface of available knowledge. The intention was to give a flavour of mediation, as an introduction to concerns and considerations about standards and quality issues, which currently prevail within the arena of mediation.

Professionalism and Mediation

The Professional Status of Mediators.

The professionalisation (defined as the status of a designated body of people) of mediators, seems to preoccupy the minds of a number of writers to include Boulle (2001) and Morris (1997) who cites Pirie (1994) in suggesting that the professionalisation of mediation may be more about power, market forces and control, prestige, elitism and patriarchy than it is about specialised bodies of knowledge, commitment to service and meeting the broader interests of society.

However arguably in an overarching sense there are benefits to be gained by the profession of mediation from a generally recognised professional status; not least by the implicit commitment to produce a generally recognised standard or quality of workmanship, deemed appropriate to their professional status. Characteristic determinants of professional status have traditionally been identified by a sound academic knowledge base, autonomy and self regulation, accountability, affiliation to and membership of, an appropriate professional organisation, which is bound by an agreed code of ethics/ practice and conduct. Linked to these are social prestige, status and eventually at least, financial reward, with the expectation of identifiable, ongoing professional development (knowledge and skills), being an essential component of today's professional persona.

Black- Branch (1998) identify intellect, a substantial body of cognitive knowledge developed over a protracted period, accompanied by practical experience, used in problem solving complex and important issues, as essential to professionalism (defined as a code of behaviour). The passing on of this specialised body of knowledge, skills and techniques by effective teaching to selected others, self regulated by an organisation which guides the further education of its members and places the highest value on altruism and a desire to serve the community, are identified by Friedson (2001) as essential components of a true profession. Hence professionalism provides the foundation stones for daily practice, while simultaneously improving the ethos of the organisation which is geared for the benefit and support of society.

Professionalism is clearly not that purist and there are a multiplicity of alternative agenda operating simultaneously. However the principle is idealistic and arguably should apply to mediators. Black-Branch (1998) views the professional status of mediators with concern seeing it to be a sadly neglected area, requiring focus and attention, given its increased promotion by academics, lawyers and care professionals. It is seen as a more humane means of settling disputes; in cases of divorce, child contact and property distribution. This principle

can equally apply across other fields of mediation. His anxieties lay in his perception that minimal 'gate keeping' appears to exist, consequently allowing access to potentially unsuitable practitioners; unlike law medicine and accounting, for example, who's self governing body presents compulsory training schemes. In these cases the central regulating body governs the profession, identifies a central role of members, sets standards, applies discipline (to its members) and identifies issues of ethical concern and accountability. The centrality of this situation does not present in the arena of mediation, which remains largely unregulated. No central compulsory training exists, no central regulatory body exists, no central register of members, no central regulatory body governs the profession. Consequently no central body sets uniform standards.

Issues of accountability and ethical standards equally do not possess a central identity. Clark & Mays (1996) in their study conducted in Scotland between January and March 1996 involving sixty-seven field interviews and forty questionnaires, found in their responses a great diversity of opinion in the regulating of Alternative Dispute Resolution (ADR) activities, with attitudes ranging from complete laissez fair, to the imposition of tight regulatory and supervisory controls. Scotland in common with the rest of the U.K. is subject to very little regulation of mediation, beyond the service providing organisations. Clark & Mays (2003) identify the suggestion that mediation would benefit from the establishment of a national umbrella organisation, who's remit would be to co-ordinate education and training, provide regulation and accountability for practitioners, and act as a monitor on the quality of service being provided. They acknowledge the difficulties inherent within the imposition of a national body aiming to regulate all mediation, considering it to be a situation burdened with deep difficulties. Such problems however despite their difficulties are not insurmountable, if there were a majority view to pursue such a course. Such consensus would not appear to currently exist, if the Scottish experience is accepted as a national guide.

In an attempt to address issues of standards and adequate training the Law Society introduced rules on mediation which are contained in Chapter 22 of their Guide to Professional Conduct of Solicitors. Equally a range of alternative organisations eg. The U.K. College of Family Mediators, the British association of Lawyer Mediators, Mediation U.K., The Academy of Experts and others, have established codes of practice and guidelines. However Clark & May (2003) remind us that there is opportunity for criticism because there is no universally accepted code, with little means to monitor adherence to approved 'best practice'. Some of the difficulty with attempting to establish a benchmark of acceptable mediation practice within the diverse range of organisations which exist, emanates from a lack of cohesiveness and a conflict of interests and opinions; which is arguably not helpful to a sense of belonging, a universality of standards or a solid power base upon which to build professional status.

A plethora of mediation organisations taking the initiative for attempting to set standards and present a professional façade demonstrates initiative and self interest; but arguably a non compulsory policy of registration is unhelpful to uniformity of standards and the process of monitoring. There is limited hope of consistency of standards outside a central system, given Boulle's (2001) comments on mediators basic training considerations. *"At present there is little agreement in the U.K. on what the mediation training content and methodology should be."*

Arguably this lack of central regulation prompts concern relative to standards of service and commitment to a central ethos of professionalism.

Black-Branch (1998) cites Hoy & Miskell in identifying a professional orientation as characterised by technical competence acquired through long training, adherence to a set of professional norms to include a service ideal, objectivity, impersonality, impartiality, a colleague orientated reference group, autonomy in professional decision making, and self imposed control based on knowledge, standards and peer review.

Within Family mediation, Glenn's study of the Central London County Court Mediation Pilot, cited by Boulle (2001:424) highlighted that *"currently there is no formal requirement in the U.K. for training or qualifications, and any person can hold themselves out to be a mediator."* It is consequently not surprising that Black- Branch (1998:40) identifies that the degree of professionalism amongst mediators is perceived as being very ad hoc. It would appear that three categories of mediators currently practice in U.K. There are those individuals that are affiliated to the

Law Society and the U.K. College of Family Mediators, who are striving to achieve professional status against an academic back-drop, while setting high standards of training and simultaneously moving towards a self regulated profession, subscribing to an organised body which governs its membership and binds individuals by a code of professional conduct and ethics. Secondly there exist the alternatively qualified professionals (who are professionals in their own right), who have migrated to mediation, demonstrate a professional approach and may be skilled mediators. They do not however subscribe to an organised body bound by a code of professional ethics, with disciplinary power over its members. Thirdly there exists the quasi-professionals who are not responsible to any of the existing regulating bodies presently established in the U.K., may not be well trained, and are not well placed to competently perform effectively as a mediator, but function in that capacity; with no effective control being exerted to influence their standards of professionalism – which in reality do not exist. This scenario identified by Black- Branch (1998) is not helpful in the promotion of mediations professional status. However this focus is related to family law mediation and does not include the expertise, training and professionalism provided by a cluster of organisations, such as the Chartered Institute of Arbitrators, ACAS, the Nationwide Academy of Dispute Resolution, the Centre for Dispute Resolution and numerous others.

Arguably where there exists a prior knowledge base accompanied by practical experience in people management, extended periods of training may well be inappropriate and unnecessary. *'Bolt-on'* sessions of appropriate material accompanied by designated periods of professional development, would probably prove more appropriate. Spurin (2003:14-15 July) identifies the broad range of training available to help promote mediator expertise, noting that *"competence examinations provide perhaps the best measure of quality assurance"*, and that professional communicators are likely to need less training given that their pre existing persuasive skills are already highly developed. He also considers that mediators highly skilled in interpersonal skills maybe able to handle any dispute irrespective of subject matter. However that is not the case in evaluative or pseudo-judicial mediation, which requires a firm grasp of the law and the industry context of the dispute. Hence quality of the individual influenced by training and experience will ultimately reflect in the quality of the body of the organisation and the profession.

Features of group solidarity, *'closing ranks'* when problems emerge, and *'gate-keeping'* entrance to the profession, also tend to be features of professions. Also the existence of a subculture, which comprises explicit or implicit codes of behaviour has been noted by Moloney (1986). Arguably this level of cohesion is not present within mediating, consequent to the diverse nature of its collective body and lack of central control. Affiliation to many organisations does not lend itself to professional cohesiveness. The commonality of traditional professional characteristics and ethical values set certain groups apart (eg. law and medicine), from other occupational participants. Arguably the reasons for acceptance of certain occupations as professions is their value to society, esteem for the prolonged training, knowledge and skills that are required to conduct this work and respect for those engaged within those spheres, given the societal expectation of dedication to a service ideal. However public scrutiny facilitated by media coverage has somewhat displaced automatic respect for professionals, within our current social climate.

Boulle (2001:530) cites Morgan in considering that *"professionalism in itself is undergoing considerable change, and some would say decline"*. He asserts that in its current stage of development, mediation is only able to claim some exclusive technical competence, which does not meet the calibre of the traditional professions.

Arguably mediators do not fit into this category of professionalism, given the invisibility of their status to the public at large. There would appear to be little awareness of their role, function, and potential for facilitating the solving of disputes, effectively, flexibly and without the involvement of an expensive, laborious, adversarial, confrontational legal system.

Clearly there are a diversity of opinions on what it means to be a professional, and what constitutes professionalism. However it is generally accepted that a profession should have the trust of the public and a very high set of ideals and ethical standards with which to underpin practice. Arguably individual trust will emanate from personal interface with an individual professional group or individual professional person. A more public trust

is likely to emerge from a reputation gained from a more collective experience and possibly affected by media coverage, and provision of information in conjunction with culturally accepted *'norms'*.

Black- Branch (1998) considers that, while it may not always be possible to attain perfection, mediators must strive for excellence through the acquisition of technical competence, acquired through rigorous training, adherence to professional norms, objectivity, impartiality, a colleague orientated reference group, professional autonomy and self imposed control based on knowledge, high standards and peer review. Black- Branch (1998:40) identifies practitioners as being *"characterised by a strong service motivation and a lifetime commitment to competence"*. He also notes that the practitioner has relative freedom from supervision and direct public evaluation (hence the increased need for peer evaluation); and accepts responsibility in the name of the profession, being accountable through his profession to society.

Arguably belief in the profession of mediation and the quality of its practice must include governance by a professionally accepted code of ethics. However Boulle (2001), Mc Farlane (1997), Black- Branch (1998), identify the existing lack of a mandatory centralised authority to regulate the profession leaves *'loop holes'* within the system, and allow for untrained persons to enter the mediation profession, with the potential to damage its reputation by inadequate practice. If mediation is to continue to gain strength as an increasing alternative to the traditional legal adversarial system, rigorous surveillance of its professionalism, as evidenced by its standards; which reflect from its ideals, ethics and training are arguably essential. The critics who consider regulation to be stifling, constraining and in contradiction to the ethos of flexibility and imaginative free thinking, may need to consider the consequences for its status as a sub-profession.

Grossman (2003 July) considers that the *"face of professionalism is changing and that more practitioners, including those in established professions are working in managed, or multi-disciplinary environments, where the trend is towards higher specialism. Within this arena greater emphasis is placed on working in partnership with people rather than 'doing things for' clients."* He considers that the older traditional view of professionals meeting a set of characteristics against which occupation of a profession can be assessed is seductive; but dangerous, because it ignores the changing conditions of society and changes in how occupations operate.

Evolvement of professional status, and changes within the structures of the working relationships of many professionals, may call for reassessment of how the current state of professionalisation provides a secure base for reflecting professional identity as well as a qualifying association. Arguably given the diversity within the range and practice of mediation, a single institutionalised body might prove unwieldy and inappropriate. However the desire by some for allegiance to a recognised body and the need for training remains. An array of mediation agencies already exist, and many like for example CEDR already have an accreditation function, principally dealing with commercial and civil matters. However standards and circumstances are not equal across the fields of mediation e.g much of community mediation, it would appear, is undertaken by volunteers with minimal training. Arguably they require a different level of training and support, given their status and the nature of their very different field of mediation. Hence central regulation could prove very difficult, and standardisation of training equally difficult, given the highly variable context of the mediation.

Equally *" it is difficult if not impossible to instil through training, personal characteristics that pre-figure competence in mediation. Mediators very much use their own personalities as an instrument of mediation, through which their skills are transmitted"* (Grossman 2003 July). Duration and depth of training must fit need and situation if it is to be effective as a means of improving knowledge, outcome, and professional status. Experts are required to move the *'fledging'* profession of mediation forward, and such people are clearly in evidence; judgement being made from the evidence of secondary research. However the cohesiveness of the body of expertise is arguably not readily identified in places beyond the *'inner circle of experts'*. To the public at large, mediation is largely invisible and local community mediators struggle to enlighten not only the public, but the involved professionals e.g police and housing departments, to recognise and use their services (Ms B interview 2003)

The European Union are desirous of uniformity in standards to reflect appropriate uniform levels of professionalism, in an effort to *'harmonise'* cross-border working relationships. Grossman (2003 July) identifies that recently the Legal Affairs Committee

of the European Parliament debated the draft directive on the recognition of professional qualifications, to enable the free movement of professionals within the European Union. The Committee however, was unable to reach a consensus on the definition of a profession, and whether the directive should be limited to the established professions, or include other occupations. Arguably qualifications and standards must leave sufficient scope in the regulatory mechanism to allow for different and emerging types of professional practice.

The European Union are equally concerned about regulation of mediation, and assurances have been provided by the commission that it does not intend to regulate to remove the flexibility of ADR . There was desire to produce regulation to ensure harmonisation between systems, on such matters as understanding the effect of ADR processes on statutes of limitation. (Mackie 2003 Sept). Concern has also been expressed by CEDR that the implementation of regulation by the European Commission, creating minimal standards of accepted practice, rather than those set out by the leaders in the field, could produce the reverse effect. This would have the effect of reducing rather than improving standards which will reflect in levels of professionalism. As an example, which will have implications for other fields of mediation, Mackie (2003 Sept) sees that commercial mediation is only know beginning to deal with questions and concerns regarding professionalisation, and practitioner ethics. This extends beyond regulatory measures and codes. He sees it as an urgent priority that the European Commission and its member governments promote the social environment and actions necessary to enable the growth of ADR referrals, rather than regulation of mediation practice, or mediations professional status. The message from the European Parliament to the European Union Commission has been clear. Policy towards ADR is to be focussed on research, promotion of best practice, with legislative activity directed at simplification rather than direct regulation (CEDR 2003)

Mackie (2003 Sept) considers that it would be inappropriate to start from a presumption that there can be a simple of single set of regulation or ethical guidelines for mediation. He asserts structure and management of mediation must be specific to the needs of individual situations and contexts.

There exists a section of mediators who clearly feel that implementation of a tight regulatory framework could lead to *"unnecessary professionalisation of mediation activity, which could detract from the long – term goals of grass-roots mediation"* (Clark & Mays 2003:5). The obvious concern being the exclusion of lay persons, some of whom possess excellent mediation skills, and may well find themselves excluded by the introduction of further regulation. Others see central mandatory regulation as closing options and monitoring the process as difficult in the extreme. Arguably a desirable process, to provide real accountability for practicing mediators and protection for mediating parties, but identified by some and cited by Clark & Mays (2003:5) as *"no more than a theoretical fancy, a practical impossibility in a world awash in a sea of conflicting interests and combating agenda."*

Mediation's professional status.

Has mediation achieved true professional status? Some would argue definitively yes, albeit as a young profession. However if the comparison is being made with traditional professions like law, and medicine, and the same criteria are applied, mediation clearly does not reach that benchmark. Others it would appear have no desire to move down the professional road with its perceived restrictions and constraints. Central control and registration produces howls of pain from many, while others see it as a 'natural' progression. Multiple considerations require agreement. Clearly the path to resolution on this issue is long and tortuous. 'The jury is still out'.

The Role of The Mediator.

Boulle (2001:155) uses the term role to refer to "the overall aims and objectives of mediators. Thus the roles of the mediators can be represented as being to create the optimal conditions for the parties to make effective decisions and to assist the parties to negotiate an agreement." She considers that "role operates at a high level of generality, and does not clearly identify what mediators actually do." The nature of the mediator's functions will be dependant upon the type of dispute, the characteristics of the parties involved, the agency providing the service, the terms of the agreement and the individual guidelines that describe the role and functions of the mediator. The model of mediation being used will affect the process as will the individual style of the mediator.

Spurin (2002:1) defines mediation as *"the process whereby an independent third party acts as a facilitator to bring about an agreement between the disputing parties, as to the terms of a settlement of the dispute. The parties negotiate the terms of a settlement agreed between themselves, with the assistance and guidance of the mediator"*

Hence the mediator as the independent third party has a specific role to play within the particular process of mediation. The three concepts of roles, functions and skills overlap significantly, and arguably the distinctions are somewhat arbitrary. There would appear to be agreement amongst multiple authors of mediation that the function of a mediator should be neutral and impartial, with fairness and 'even handedness' being critical, key elements. The role is one that respects the concept of confidentiality, and the ultimate aim is to obtain settlement of the dispute between the parties in question. How that process is expressed however will be variable and susceptible to individual interpretation, variability of context and the pressures of circumstances.

The possession and use of excellent communication skills are the clear requirement of a good mediator. Active listening is essential, demonstrating that what has been said is understood. It is not necessary to agree with someone to register that understanding, in a non- judgemental manner, has occurred. It requires one hundred per cent attention and concerted concentration in an effort to, not only communicate, but to catalogue facts and information. Main (1989) reminds us that becoming involved with another person and becoming the significant *'other'* is not achieved by following rules or rehearsing set patterns of behaviour. He sees listening as a dynamic activity, the dynamism of such interaction always having the potential for uncertainty. However the potential for change and movement towards resolution is unlikely to be achieved without this essential element. Benjamin (2001) admitted to regularly feeling 'confused' producing levels of uncertainty, with the constant effort required to feel his way through new situations.

Rodgers (1973) an eminent psychologist, considered that the quality of the interpersonal encounter provided the most significant element in determining the effectiveness of the result. The mediator must also be aware that prior to making a significant statement he/she should have some insight into the effects of that act of communication, and ensure that the language used is clear and unambiguous. The capacity to inspire the clients to pursue long -range goals, and the tenacity to persist where such goals are perceived, with effort to be achievable, could be regarded as complimenting the role. Burns (1990) considers it to be a particular capacity that human beings posses. Arguably without communication there is no mediation, hence the quality of the former must be of the highest standard.

Neutral and mediator are words that are often used interchangeably. There is an expectation and a need for the mediator to be indifferent (Collins definition of neutral). Such indifference would not of course indicate lack of interest, but lack of bias as to the outcome. Richards (1997:51) considers that the mediator has a responsibility to remain sincerely neutral as to the outcome, while remaining strongly committed to a process of negotiation; what he refers to as *"managing other peoples negotiating from a neutral position"*. Neutrality is a totally critical and a central element of the mediator's role.

Arguably it is impossible or at least unlikely that any human being does not have an opinion or biases, and is truly neutral. However it is also arguable that if the mediator is sufficiently self-aware and is a reflective practitioner, attuned to his/her reactions and able to articulate intuitive feelings and actions; the possibility of bias negatively affecting interventions is reduced. Cohen (2003: 2) suggests that *"The reflective practitioner goes further by thinking carefully through a range of options, while contemplating interventions to make in mediation …. The mediator makes conscious choices based on cognisance of core values and biases, as well as using conflict and mediation theory, techniques, and experiences, that combine to form a skill base"*.

She identifies that the mediator's role requires more than a basic set of techniques, giving high priority to reflective practice in which opportunity is made to reflect upon and analyse the interventions of particular cases. The dynamism of the conflict at multiple levels are reflected upon, recognising mistakes and articulating intuitive feelings; as well as understanding personal values and biases. Essential to the exercise, is the value of learning from experience.

A sound theoretical and researched based approach, informed by practice and experience are essential. Cohen (2003) considers that professional

development conducted through reflective practice of day -to -day mediation encounters, are a powerful resource for mediators seeking a disciplined and introspective way of thinking about client interventions. However the mediator also needs to accept what Walker (1989) identifies in his studies upon reflection. He asserts that success cannot always be guaranteed even with excellent facilitation and the specialised help of a mediator. However lasting binding agreements are a real possibility. Spurin (1999) identifies an average success rate as 83%. Walker (1989) considers that reflecting upon situations and events, acknowledging feelings, both positive and negative aid learning and enlighten the evaluation process; thereby improving the prospect of a more informed decision making process.

Arguably the mediator must be a critical thinker with the capacity to make explicit what is implicit within a given situation (Brookfield 1993), and be very aware that understanding cultural difference and variability in the language meaning, can often prove crucial to understanding and acceptance of ideas. Fisher & Ury (1991) point to the Middle Eastern interpretation of the word mediator as *'someone who meddles'*, a negative connotation, not appreciated in the West. Such awareness is necessary in the application of successful communication. Brookfield (1993) considers the ability to be critically analytical concerning the assumptions underlying our own actions are an essential component of professional practice. Updike cited by Friedson (2001) stated that his four years at Harvard had left him with a lot to learn, but had give him the liberating notion that now he could think for himself. Arguably one cannot reach that state of liberation until one has learned the art of critical analysis. Brookfield (1993:X) considers that critical analysis is essential to self- development and self- determination. He defines it as "reflecting on the assumptions underlying the ideas and actions of others, as well as self, and contemplating alternative ways of thinking"; this should constitute a critical element in the role and practice of mediators.

The capacity to think critically is clearly vital not only to academic analysis, but to the evaluatory process of daily living and could be considered one of the most significant activities of the adult mind. The nature of the activity explodes the myth of single answers to problems, and invites alternative analysis, action and behaviour. Brookfield (1987) considers the characteristics of critical thinkers to be competence, ability and humility (the converse of know it all arrogance), and a capacity to be insightful and perceptive. Arguably the mediator's role in encouraging clients to critically analyse their conflict with view to resolution, supports their efforts to solve their problems; or approach questions and issues from new perspectives, which should encourage their capacity for logical reasoning. Richards (1998a) considers that emotions need to be attended to prior to that point, but that does not distract from the importance of the mediators need to apply critical analysis. Change or a changed state of perception may be the end product of critical analysis, and within many contexts change may be unrealistic or difficult to achieve, for *"most people live within structures and circumstances that are extremely hard to change"* (Brookfield 1987:248), hence clients may find the process of adjusting to a new/ altered position within mediation difficult and painful, with the danger of disconnection. The mediator will be required to be vigilant and patient. However taking the risk to think critically can prove innovative and prove empowering for the clients. If there is to be movement of positions by the clients and some level of resolution, change is inevitable. Hence the importance of this skill to the professionalism of the mediator.

The essential element within this process has to be that the neutral mediator "provides structure for the negotiating, in order to transform the client's dispute into a conversation" (Richards 1999:174). There is a clear need for the mediator to have a very thorough knowledge and understanding of the process and procedure of mediating, (the detail of which has received attention in an alternative section of the dissertation). The mediator has to manage conflict by responding neutrally and impartially, maintaining a different role from that of a judge or advice giver, being careful not to fall into the role of counsellor or arbitrator. Richards (1999) considers it is important to maintain the belief that all human beings have the capacity to run their own lives. Given that guiding principle, the mediator will facilitate the process to ensure that any agreement is client led in outcome. Richards (1999) believes that helping clients deal with their disputes in a manner which is mutually satisfactory to them, in their own time and in their own way, ultimately helps them

manage future conflict with self- respect and greater fairness.

Mediators are people and hence do not live within a vacuum. The mediator brings to the role transferable skills gained from life experience, professional experience, and training, hopefully. Richards (1998:633) considers that mediators who are also professionals in an alternative capacity *"tend to resort to values and methods of their major profession"*, which he sees as problematic. Arguably such professionals should leave their profession at the door, and take in with them their professionalism. It is not the role of the mediator to inject judgements and advice into mediation sessions. Spurin (2001:1) identifies that *"the role of the mediator does not differ in any significant manner, simply because the mediator is an expert; though that may depend on whether or not the mediator is an expert on the issue in dispute"*. However he considers it *"essential for all mediators to possess high degrees of mediating expertise"*.

The mediator will be aware that the motivating source for settlement will vary with context, but what is common to all situations, is that it is arguably in the best interests of both parties to settle the dispute as promptly as possible. Spurin (2003 July) reminds us that the interest based mediator invites the parties to consider the long- term benefits that could occur from looking beyond the immediate disputed issues. Settlement of the dispute would allow the disputing parties to *'move on'* in their lives, and relationships, and short term sacrifices may well produce long term gains. It is necessary for both parties to cooperate, finding common ground on which to move forward. The cost of litigation, and the stress and disruption of a trial, the loss of privacy over commercial trade secrets, the welfare of a child; the list of wider interests is endless, all provide motivating reasons for settlement. Spurin (2003:11July) considers that "the majority of disputants are not unreasonable" and that early intervention by the mediator is preferable, before attitudes harden and the parties become too entrenched into their own positions. The incentive to settle Spurin (2003:11July) considers can be highly dependant upon the personality of the parties. However mediation aims to *"separate the personalities from the issues, and adopt an objective view, thereby facilitating a reasonable pragmatic settlement of the dispute."*

Richards (1998b) considers that the mediator should provide a stimulating environment, which will enable the conflict to be reconstructed in a format acceptable to the clients, for he pragmatically sees ending the conflict as an impossible task. The clients must eventually come to their own resolution, and Spurin (2001) identifies that the outcome must be entirely consensual. He also warns of the need for a potentially higher standard being placed upon the mediator to ensure equality of bargaining information for clients who are not professionally represented, especially where the issues at stake concern significant legal interests, rights and duties.

Hence if the clients are to be the experts within their own situation, why is it so important for the mediator to hold such expertise in mediating? There in lay the art and practice of the mediator, in guiding their clients to their own personal solutions.

Conclusion.

"The test of a first rate intelligence is the ability to hold two opposed ideas in mind at the same time and still retain ability to function". (Fitzgerald 1965 cited by Peters & Waterman 1995). Arguably the mediator will require not only a first rate level of intelligence, but be prepared to demonstrate the quick mind, strong nerve, persuasive manner, resilient nature, and sensitivity that Atkinsons identifies (cited by Spurin 1999). Equally he/she is required to demonstrate professionalism, to incorporate appropriate levels of confidentiality; while acting as a facilitator and sometimes a guide (while not being directive). Meanwhile there will remain the need for neutrality and impartiality, while negotiating a compromise that is acceptable to the parties involved. The mediator will use strategies, tactics and well-developed skills to enable a settlement, which results in a contract devised by the parties and facilitated by the mediator.

High Standards: :Acquisition & Maintenance.

How shall we know it? How shall we measure it?

Simon (2002:1) identifies the standards of mediation in the U.S.A. as *"a crazy quilt of rules, regulations, standards, and legislation."* Arguably that concept is transferable to the U.K. Here there exists no universally applied set of standards, and those that do exist, emanate from a diverse selection of service providers. Hence different interpretations are applied by different groups and individuals, who function within very variable context and present with highly variable backgrounds. This arguably results in a fairly meaningless array of mediator standards. It is obviously possible to measure the

competency of an individual against a defined set of criteria. Selection of criteria and consideration of the validity and reliability of the assessment process, present yet another area of debate. It is usually possible to gauge the competence of a profession by the structures it has in place for selection, training, assessment, supervision / monitoring and disciplinary processes, directed at its members; in conjunction with its aims and ethical standards. As no agreed set of standards exist, for use as a reference point, potential clients are left with no universal 'benchmark' upon which to gauge quality. It is argued by some that neutrals offering services such as early neutral evaluation and expert determination are usually either qualified lawyers or are qualified in some other profession. They are consequently subjected to alternative professional standards and codes of conduct so do not require the further constraint of yet more 'rules' to underpin an existing professional base.

Equally others argue that mediation is about bringing people together to formulate an agreement, where it is possible. Also there must be a willingness to cooperate, within a situation where good communication skills and a sound understanding of the specific skills of a neutral, to include appropriate process, are the requirements. Bingham (2003) would argue that context *'rules'* are an unwanted intrusion. Others argue that it does not take years of formal education and 'paper qualifications' to become a highly competent mediator, who's origins might be as diverse as a coal miner, or a university professor. Simon (2002:2) indicates that regulation and accreditation to this group signals a closed profession dominated by those possessing the finances and education to acquire the necessary qualifications; removing mediation from its *"grass-roots solutions"* and transplanting it into a, " privileged licensed practice", thereby betraying its origins.

However there does exist a concern amongst many practicing mediators about the quality and standards being offered by the mediation service in the U.K., Wilson (2002), Simon (2002), Honeyman (1999), and Black –Branch (1998), to name but a few authors, identify the quality as inconsistent and patchy. Consequent to this concern amongst practitioners and some academics, consideration has been applied to the most appropriate means of evaluating the process and measuring its standards. Wilson (2002:64) considers that mediation *"one of the most scrutinised of the newer professions"*, has spanned the spectrum of the evaluatory methods through evaluating taped mediation conversations, looking at caseloads, percentages of cases settled, post mediation litigation, sustainability of outcomes, cost/ benefits, client satisfaction and mediator process skills. However she considers that much of the research has been hampered by *"linear thinking"* involving the principle of application of a pre-established *"correct process"* using prescribed pre-identified formula, with increased possibility of uniformity of result. Such quality assurance she sees as inappropriate to the uncertainties associated with the dynamics of mediation. Dingwall & Greatbatch (2001) would seem to agree that there exists a degree of variation in practice that cannot be addressed by the imposition of external codes and standards for they are highly reliant upon the dynamics of the interaction, the quality of the mediator's skills, and the capacity of the mediator to work with uncertainty within a flexible framework. Arguably the personal qualities of the mediator will undoubtedly influence the quality and outcome of the process. This has been described by Benjamin (2000) as confused, voyeuristic, compulsive and marginal. This use of adjectives and perspective are unconventional, and challenging to a more traditional perspective of mediation. However it is arguable, that a talented mediator will possess intrinsic personal qualities and knowledge that informs their practice, and is not easily measured by psychological testing.

Wilson (2002) considers that most mediators and academics interested in the issues accept the premise that mediation requires evaluation and that mediators should demonstrate accountability, working from an ethical position of tried and tested 'best practice' principles and strategies. Most are in agreement that there is a need and requirement for ongoing professional development, incorporating updating of skills and theoretical knowledge. Updating should include refreshment of standard practice, evaluation of new research and its effect on, and position within, a working environment. Maybe new approaches could be applied to jaded practice. It is therefore generally accepted that the measurement of mediation (either qualitative or quantitative) is necessary and desirable, though it may not be readily achieved.

Dingwall & Greatbatch (2001:381) identify that currently aspiring mediators, intending to practice family mediation, are examined (by their organisation) on their knowledge of what they ought to be doing, rather than demonstrating their capacity to undertake the role effectively. They consider this approach to be limiting and ineffectual, a *"secret garden ……with no direct quality assuring, other than by assuming compliance with the organisational requirements".*

Honeyman (1999) considers that any strategy devised for the qualification and scrutiny of mediators must have as its foundation the consideration and well being of clients and the public at large, whom he considered ill served by an existing system of inaction, He identifies a system which failed to provide a performance-based mechanism, whereby skilled mediators could demonstrate the key elements of effective performance, which he considered socially valuable as well as professionally significant. Dispute settlement, as an indicator of mediator competence he considered neither valid nor a reflection of mediator competence. Equally he dismissed substantive knowledge as an important criteria of mediator skill. More than a basic and mediation-specific knowledge of law was seen as important only for relatively few types of situations.

Spurin (2003:15 July) believes that from the interests based perspective, it may well be true that *"the mediator only needs to be a highly skilled inter-personal guru, who can handle any dispute irrespective of subject matter".* However this does not apply equally to the evaluative mediator, who needs to have a firm grasp of both the law and the industry context of the dispute.

Simon (2002:2) cites research by Rogers & Sander (1997) which identifies the difficulty of writing meaningful criteria for evaluating mediator effectiveness. *"Their study examined 650 cases mediated by volunteer attorneys, and its conclusions identified that the amount of training had no significant affect on settlement rates or client satisfaction or perceptions of fairness. Equally expertise in the subject matter of the dispute did not affect settlement rates".* If neither education nor subject expertise can serve as the criteria, what can be used? Experience seemed to be the only aspect of qualification that was related to increased settlement. The obvious conclusion being that the greater the experience, the more well refined the mediator's skills.

Experience is a quality well respected by Benjamin (2001:1) who identified prior work experience which encouraged a need for *"the quick development of street sense for survival and sanity",* as critical in his acquisition of the core skills and confidence so essential to his work as a mediator. Transferability of skills with intelligent adaption clearly is an advantage and a bonus, given that there is understanding of the differences which may exist in values and function within an alternative profession. Benjamin (2001:1) considers that effective mediators frequently have prior experience of people management; albeit not gained via the professional practice of mediation. He also considers that formal professional education cannot offer the kinds of experience critical for the training of effective mediators and that over intellectualised individuals divorced from his/her *"intuitive sensibilities ….relying on rules and formulas"* is no substitute for practical experience.

However assessment is a critical factor in daily living. It commences at the moment of birth and proceeds with us through life; for the assessment spectrum ranges through from the very formal stylised examination system, through to the informal and the casual. Rowntree (1987:Xii) identifies it well *"Assessment will remain with us from the cradle to beyond the grave. Scarcely have we taken our first breath before we have a label fastened to our wrists …and our first file has been opened. From then on the assessments come thick and fast …from practically everyone we have dealings with".*

Consequently how can mediators believe they can escape the process that the remainder of society are subjected to on a daily basis. Given acceptance of the need, the more difficult issue of establishment of criteria by which to judge mediator competency requires attention. As Rowntree (1987) cover page notes *"how shall we know them?"*

Pou (2002) considers that mediator skills and inherent personal attributes can be vital to a quality outcome within a mediation encounter. Influencing the process will be the mediator's training and experience as well as the variable context within which the mediation takes place. Pou sees the nature and diversity of roles that mediators play as presenting complications for setting standards, and accepts that strong differences of opinion exist within the dispute resolution community as to what constitutes quality results, how best to define quality practice by neutrals, and how to assess whether

practitioners have the required skills. *"Competence is the term often used to describe the ability to use dispute resolution skills and knowledge effectively, to assist disputants in prevention, management or resolution of their disputes in a particular setting"* (Pou 2002:4). Hence the need for a clear understanding of the term competence, described by Collins English Dictionary (1992) as " being capable or able"; a highly subjective definition, requiring subjective criteria to itemise the considered essential elements of mediation efficacy. Freidson (2001:69) considers *"It is difficult if not impossible to establish truly objective criteria by which to characterise the knowledge and skill required to perform work; for all criteria seem to be contestable as either indefensibly evaluative or relative".*

There would appear to be no clear consensus on the knowledge, skills, abilities and extra attributes needed to conduct a high quality mediation. However Pou (2002:4) identified the results of the project 'A Performance Based Assessment. A Methodology for use in Selecting, Training and Evaluating Mediations , which he considered offered a methodology for making performance based assessment of mediations a workable opportunity. Pou outlines the generally accepted descriptions of a mediator's task, identified below:

Mediator Tasks. [1]

- Gathering background information.
- Facilitating communication.
- Communicating information to others.
- Analysing information.
- Facilitating agreement.
- Managing cases.
- Helping document any agreement by the parties

Mediator Criteria.

- Investigation

Effectiveness in identifying and seeking out pertinent information.

- Empathy

Conspicuous awareness and consideration of the needs of others.

- Impartiality

Effectiveness in maintaining a neutral stance between parties; plus avoiding undisclosed conflicts of interest or bias.

- Generating opinions

Pursuit of collaborative solutions and generation of ideas. Proposals consistent with case facts and workable for the opposing parties.

- Generating agreements

Effectiveness in moving parties towards finality and a closing agreement.

- Managing the interaction

Effectiveness in developing strategy, managing the process and coping with conflicts between clients and representatives.

- Substantive knowledge

Adequate competence in the issues and type of dispute to facilitate communication. Help parties develop options alert parties to relevant legal information.

He identifies that endorsement has come from many mediators, relevant to the use of the above criteria, and an accompanying assessment scale. Equally some mediators have criticised the structure as one that is deal-seeking and not sufficiently reflective of diverse needs and party goals (Pou 2002)

What does seem obvious is that such a programme could provide structure to a mediation. For it to be used in an evaluative capacity it would require monitoring, possibly by both supervision (direct and taped) and by self -assessment consequent to reflective practice. Some would argue that an element of client satisfaction would also be necessary. Essential to this process is a high level of self -awareness. Cohen (2003) reminds us that we must have a well grounded self understanding of internalised biases, and that mediators who believe they can enter mediation as 'blank slates', being totally objective with no prejudices need to re-evaluate their position. Arguably no one is ever truly neutral, consequently understanding and taking account of our biases will produce a higher quality mediation experience. Cohen (2002:2) reminds us of the importance of being mindful of "our core values and world view as well as our own mediation and life experience. In the best circumstances we also filter what we hear through a screen of conflict theory and mediation ethics". Hence the need for ongoing self -awareness and self-assessment. This process is complimented by supervision which provides an essential element of the quality process, whereby high standards are maintained.

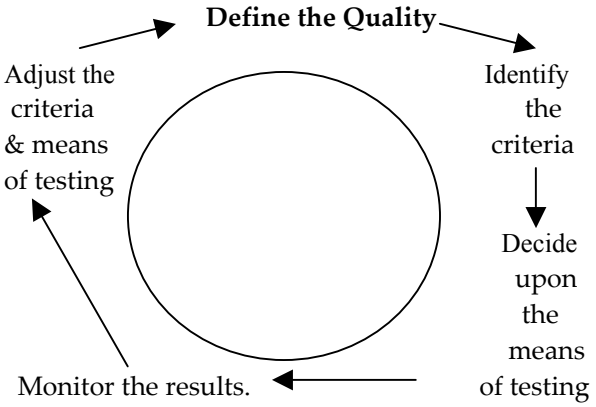
[1] Cited by Pou 2002 and extrapolated from the Hewlett NIDR Test Design Project.

Self awareness needs to extend to cover core values to include for example ideas of fairness, honesty, religious beliefs, civil liberties and personal responsibility. Beyond that we require insight into our biases about what as an individual we perceive to be abusive, obnoxious, or manipulative behaviour, which is likely to be coloured by life experience. Superimposed upon that situation is the personality, the self determinism and the training, which results in mediator competency and the ethics of confidentiality.

There will always be a degree of variation in practice that cannot be addressed by good intentions or Codes of Practice. It is the human element within an encounter. Arguably the most helpful means of maintaining standards lay in monitoring by supervision; whereby a range of means are used ie. The supervisory presence of a colleague, taped mediation sessions (with permission), post mediation evaluatory sessions in conjunction with a colleague and self- assessment are possibilities; all using an agreed set of identified criteria as a benchmark.

However this does have the potential to increase costs, which arguably could be self-defeating, as one of the benefits of mediation is its lower financial impact. It also raises the problem inherent within assessment itself of validity, reliability, bias in selection of criteria for assessment, as well as a generalised dislike of assessment by those exposed to its rigours. Despite such reservations however there exists within the profession a desire by some for more uniform standards, which might begin with a quality circle.

A Quality Circle.



While such a process begins to feel constraining, and inhibiting of flair and imagination, consideration needs to revert to the criteria, to allow sufficient *'space'* for the inherent flexibility of mediation to prevail. If standards are to be identified, there has to be a means of measurement. What to measure and who will measure arguably results in more questions than answers, other than maintenance of the prevailing belief in high quality, and the need to measure it in an effort to demonstrate high standards of practice. Arguably it must not only be done, but be seen to be done, for purposes of transparency. All mediators would not agree its necessity, seeing post qualification testing as an expensive waste of time, only necessary where there are investigations ongoing in situations of asserted malpractice.

Codes of Practice and regulation go some way to contributing to that effort to develop, set and maintain standards. Pou (2002:2) talks about defining mediation quality in terms of *"addressing programme goals"* and considers that *"efforts to define and measure quality mediation must first recognise and address these variations"*. He considers that a variety of individuals and bodies are currently involved to include judges, courts, interested official entities and multiple mediator associations. He considers the possibility of having a central entity setting policy guidance, while allowing separate standards for different programmes, or different kinds of mediation activity. Arguably that is not too far removed from the existing situation, for the range extends through qualified professionals eg. Lawyers who practice as mediators, who have undertaken *'bolt on'* courses; frequently associated with family law disputes. Academics who hold Alternative Dispute Resolution / Mediation qualifications, some to a very advanced level, through to alternative professionals such as counsellors, social workers and health professionals. The list also includes unqualified *'ordinary'* volunteers who practice with very minimal training. A very diverse group, spanning a wide spectrum.

Who will be allowed access reflects back to the issue of credentials. Simon (2002) tells us that qualifications, substantive knowledge and training are what is valid for entry, described by Pou (2002) as the initial 'hurdle', which is ironical given the research findings by Rogers & Saunders (1997) cited by Pou (2002) which identify the only significant factor affecting positive mediation outcome was the experience of the mediator. It does however give value to the situation found in volunteer mediating, where no entry qualifications and minimal training are the order of the day. Given sufficient experience

it has to be assumed such low cost/ no cost investment might ultimately be the most useful formula, from a cost benefit perspective; assuming such unpaid persons can be persuaded to continue to give of their time. There are arguably multiple paths to competence, and quality mediators come from a diversity of backgrounds, having developed skills in ways other than standard training. Potential within an individual and experience, should never be overlooked in favour of exemplary *'paper qualifications'*, desirable though they may be. Being a mediator is about far more than an affiliation to paper.

Quality once established by thorough training, supervision and experience, requires maintenance and should include ongoing professional development. Pou (2002) identifies the importance of ongoing training, mentoring and continuing education; which arguably should also include regular supervision, providing the check for quality. How such supervision is undertaken will be variable to the organisation but could include peer consultation, supervisor consultation, group supervision of appropriate individuals, as well as self -evaluation through reflective practice, reports, and the process should include client evaluation.

Relative to competence Pou (2000) considers that:

Context: The context of the mediation should identify what should be determined as competent practice – being specific to the situation.

The responsibility for ensuring competence: This lay with a range of interested parties, all who have differing roles and responsibilities for assuring quality, to include mediator organisations, the practitioners as well as the consumers, who's views should be sought.

Competency: Essential is the acquisition and demonstration of the core skills adapted for the needs of the context.

The acquisition of competency: Competency could be acquired via multiple paths, to include academic and practice based approaches. There should also exist some combination of natural aptitude/people skills, an appropriate knowledge base, in addition to other attributes developed through training and experience.

Assessment of competence: Variable methods should be applied, not relying upon one method of assessment to the detriment of others. Assessing competence should be a shared responsibility between the interested parties.

The assessment tools for quality assurance: Quality assurance tools should be used to support the aims of mediation, and be consistent with the practice context. The more formal the accreditation process the greater the number of considerations that should accompany the implementation. Programmes should assure competence through training, supervision, monitoring and the use of assessment tools.

Pou's (2002) suggestions sound nicely ideal and rather imprecise, which no doubt will increase its level of acceptance by many practitioners, but it 's interpretation of necessity has to be a very subjective exercise. Hence we are left with possibly more questions than answers, with the realisation that much work needs to be done in an effort to ensure and maintain high standards within mediation.

Conclusion.

If the use of mediation as a form of A.D.R. is to continue to develop and evolve, it has to be argued that standards related to selection and competence of mediators must be addressed, to protect both consumers and the integrity of the profession. Academic skills alone, however desirable, are insufficient unto themselves in the measurement of competence. There is the need for the development of principles and policies, resulting in qualifications and competencies which are measurable and acceptable to the profession and public, as considerations of policy.

Simon (2002:4) admits that compilation and introduction of a credible form of accrediting mediation knowledge and skills will prove a difficult and onerous task. However he sees it as desirable and achievable. Further he sees that "if mediation is ever to become a credible profession, it will be partially built on a foundation of quality assurance, only attained in Western Society through accreditation. He sees that "accreditation is coming, it is our future. We must not let it slip through our fingers". Beyond accreditation The Joint Mediation Forum U.K. considers there is an overriding need for the accreditation to be centrally managed. The forum includes representatives from CEDDR. ADR Group, The Academy of Experts, Mediation U.K., and others, including mediators specialising in family disputes, who are all working towards establishing a new over-arching body for the whole

profession. The intention- to set ethical and training standards, for community, commercial, and family mediators across the country. Such developments on both the private and voluntary sectors towards common standards, would appear to render action by Government unnecessary . However not for the first time, it may be that Government, private and voluntary sectors can work together to achieve effective procedures and standards, for the assurance of good quality mediators and clients alike.

Wilson (2002) considers that mediation is not a mechanical, replicable process, but a dynamic interaction with many intangibles and unknowns, arising from unique sets of circumstances. Consequently quantifiable measurements of quality and standards continues to pose an ongoing challenge, for those concerned with trying to ensure the business of mediation continues to aspire to the highest standards of best practice and professionalism. Diversity with core values appear to be the passwords.

Some thoughts on Ethics as an essential element of standards.

Menkel-Meadow (2001:430) sees it as *"deeply ironic"* that as a proponent of alternative dispute resolution with its promise of flexibility, adaptability and creativity, she now sees the need for ethics, standards of practice and rules (all so potentially limiting) as necessary, to *"insure its legitimacy against theoretical and practical challenges"*. She acknowledges the variety and complexity of the present situation, acknowledging mediations pursuit of different goals, intentions and behaviours, many of which being inconsistent with the original aims of mediation. Arguably mediation has been hijacked, the rules of behaviour having become less clear and hence more important. Mediation is not an adversarial situation, hence it requires the application of a different set of underlying values that inform and are responsive to its practice. *"Rules premised on adversarial and advocacy systems … do not respond to process which are intended to be conducted differently and produce different outcomes"(* Menkel - Meadow 2001:432). However, that ethical rules are in position is important, given a changing scene where mediators function as both facilitators and evaluators, and lawyers function as both litigators and neutrals. Changing *'hats'* is not impossible, but the process requires consideration. Considerations of ethically appropriate behaviour by the mediator within a mediation session, are ultimately a facet of standards and quality. Also issues of advice giving and conflict of interests, pose obvious mediation ethical dilemmas.

Menkel- Meadow (2001:441/2) sees that the *"flexible, adaptive and creative processes of alternatives to litigation and court have produced their own abuses"* and there has developed a need to reconsider "rules, norms and standards of conduct" and denies movement towards a more codified structure is associated with "new professions attempts at legitimacy through the promulgation of ethical codes and rules", in an effort to more effectively control itself. She poses the pertinent dilemma "at what level of generality or particularity should we address our standards? Should we aim for enforceable rules or aspirational, ethical, considerations"? Arguably concern for quality and good practice reflect professional self- interest. However the flexibility and variety of neutral roles make reliance on currently existing ethical standards problematic. Arguably mediation is always facilitative, hence there is the potential to provide neutral information that is not advice or prediction. However there is the potential to move along a continuum of mediation activity ranging from information giving, to advice, prediction and eventually evaluation, suggestion or decisions (usually non-binding in evaluative mediation). The authors of the *'Joint Standards'* however take the view that mediation should refrain from providing professional advice.

Third party neutrals (including mediators) who serve the courts are granted quasi-judicial immunity, thus rendering information given by them, irrespective of quality, immune from scrutiny. Hence no mechanism for quality control or accountability. A.D.R. to include mediation, acquires its foundational principles from a problem solving perspective of joint gain, and future, rather than past orientation. Trust, confidentiality, creativity and openness identify a particular wholesome set of ethical precepts and standards. Considerations of accountability and legitimacy still prevail, but the openness places greater emphasis upon transparency and a more democratic process. Confidentiality, neutrality and impartiality, are three of the most significant ethical issues faced by practitioners of mediation.

Neutrality / Impartiality.
Neutrality according to Boulle (2001) reflects the mediator's background, and his/her relationship with the parties and the dispute. It includes issues such as prior knowledge of the dispute, the degree of mediator interest in the substantive outcome, or in the way the mediation is conducted; to include the extent of mediator expertise in the subject matter in dispute. He considers that while neutrality is obviously a desirable quality it is a less absolute requirement and could be put aside, without necessarily prejudicing the integrity of the mediation process. Boulle (2001) sees the existence of neutrality as a question of degree, rather than an absolute entity. Arguably with sufficiently high levels of self-awareness and integrity, it is possible for the mediator not to be personally neutral about the dispute, but to conduct the process in a fair and unprejudiced manner.

Impartiality it is argued refers to an 'even-handedness', objectivity and fairness towards the parties during the mediation process and includes issues of time allocation, facilitation, avoidance of favouritism, bias or adversarial conduct and indicates an inclusive communication process. Its absence would fundamentally flaw the nature of the process, and must present as a constant feature.

Menkel -Meadow (2001) identifies the diversity in practice that arises within the flexible framework of mediation. She presents the argument for the distanced, unbiased, impartial and neutral stance of the mediator, to ensure that process and outcomes, are freely chosen by the disputing parties. This should allow for self-determination, with an absence of coercion. Arguably mediators with expert subject knowledge might be tempted to influence the decision making process, consequent to their expert knowledge base. However Spurin (2002:1) identifies a clear and particular place for the subject mediator, noting that within mediating what is required is *"the acquisition of mediator skills"*. The mediator does not require subject expertise to conduct mediation. Mediating skills effectively learned and practiced, should inhibit crossing the boundaries of professional practice. However some parties seek substantive expertise, which at times will cause ethical difficulties relative to neutrality. Brand (2003) argues that a mediator with particular subject expertise, brings to the mediation an intellectual framework of understanding, which may help the parties develop a creative solution that works. Hidden within that framework is always the agenda of mediator bias, which requires consideration. Ultimately it must be the parties who formulate the agreement.

The mediator also has to contend with issues of power balancing with view to reducing inequalities within the mediation process, Menkel –Meadow (2001:446) identifies that "momentarily neutrality may be exchanged for fairness". Arguably good third-party neutrals vary their practice flexibly to deal with the contexts of the disputes, giving consideration to the underlying values which inform the practice differences, bearing in mind it is not only the parties' interests, but the integrity of the process which is at issue.

Confidentiality.
Confidentiality within professional domains, is not about absolute secrecy as suggested by Collins English Dictionary (1992), who define confidentiality as 'secret'. It has a somewhat broader meaning and works principally on a need to know basis. The system by which confidentiality works between professionals also varies somewhat. Within professional counselling, confidentiality means sharing with a supervisor, who will in turn share with his/her supervisor. This acts to check and balance the quality of service as well as producing support for the individual. However the privileged information is 'ring fenced'. Confidentiality within mediation also has its own pattern, and arguably has become increasingly complex and controversial with the passage of time.

In general terms there must be an intention to protect party interests, as well as third party neutral and process interests. Ascertaining exactly what is to be protected however can be more difficult. By definition anything said in mediation would not be confidential, because at least in joint sessions, adverse parties are revealing information freely and in the presence of a neutral, and are consequently outside the protected zone of a lawyer –client confidentiality. Hence mediation has had to provide its own confidentiality rules, so that parties can share settlement facts with each other without fear of that information being used outside of mediation.

Some disclosures however by-pass confidentiality provision and require disclosure eg. Child abuse or domestic abuse, or intentions to commit crime, or admissions of serious crime eg. murder. Ethical rules and guidelines, in addition to private contracts

and agreements for confidentiality are subject to 'the law of the land', raising significant issues about the need for 'Miranda' warnings, that clients may need in mediation in determining just how candid to be in their revelations. Mediators promise confidentiality in contracts, agreements and dealings, and are invariably concerned to protect personal integrity and personal reputation. Menkel-Meadow (2001:464) identifies that while ethical standards attempt to deal broadly with issues of confidentiality "the reality is that case law and common law development will be required to deal with the myriad of factually specific conflicts that exist between competing policies". Confidentiality in the context of mediation is complex, especially given the variability of practice demonstrated through the profession. The mediator is required always to be thoughtfully reflective in conversation, careful not to violate confidentiality, and maintain intact his/her personal integrity. Awareness of the foundation stones upon which one's personal value system is built, and adherence to a personal framework of integrity and honesty, will invariably support ethical considerations of confidentiality.

Upholding Standards.

Arguably at this point in the evolution of mediation, ethics 'best practice' format may better serve the needs of the parties in making informed choices about process, than a rigid set of ethical rules or standards. There is an extensive list of issues which require ethical consideration which are outside the scope of this dissertation, but which affect standards. These include, though the list is not exhaustive, competence, scope of representation, diligence, fees, disabilities, truthfulness, dealing with unrepresented parties, advertising, contracts with prospective clients, communications about fields of practice, reporting professional misconduct and misconduct.

The dealings with all such matters requires a foundation of ethical principles, advised by a code of conduct broadly acceptable to the profession; for such consideration protects not only clients, but the integrity of the profession. Menkel - Meadow (2001:469) identifies that regulating practice by ethical standards "begs the question of the appropriate unit of analysis". Equally the profession will have to "confront the issues implicated in provider accountability, internal ethics and responsibility". She also considers that issues affecting 'public interest' be treated differently from purely private disputes. Menkel –Meadows (2001:473) feels that the profession is not yet quite ready for clear rules and standards on many issues, but could consider some "discretionary aspirational standards which commit to providing alternative justice …. based on adherence to ethical moral and 'good' non-adversary principles.

Conclusion.

Mediation requires its own set of ethical underpinning, which must reflect from foundational principles. It is not an adversarial system, so legal ethics do not fit comfortably with a problem solving, joint gain concept. The ethics of mediation must reflect the trust, confidentiality, creativity, and openness of its process. At that point it will meet the appropriate standard. It has to be remembered that not everyone accepts the joint gain concept. The Risk Evaluator in looking for a settlement that gets as close to legal liability / responsibility as possible, moderated by a Cost Risk opportunity figure.

This paper is continued in the next edition

MEDIATION CASE CORNER

by C.H.Spurin

Instance v Denny Bros Printing [2001] EWCA Civ 913

Without prejudice communications related to settlement negotiations and mediation may not be used, subject to eight exceptions set out in **Unilever v Proctor v Gamble**, in subsequent litigation against a party, by either the other party or third party litigants in unrelated actions. Instance settled a dispute without prejudice, with Denny. Instance bought Moss, a company in the US which owned a franchise to use a Fix a Form program, which had featured in the dispute with Denny and Denny's US suppliers, the program owners. Fix-a-Form commenced action in the US to prevent Moss and thus Instance from using its own program in competition with it. Evershed, Denny's solicitors, supplied Fix-a-form with copies of the without prejudice communications to assist its US action. Instance applied for and got an injunction preventing use of the material.

The court stated that the protection of without prejudice, confidential material firstly arises out of the terms of the contract to negotiate and secondly is based on public policy, to encourage disputants to negotiate without fear of subsequent compromise from disclosure to the courts of any admissions of liability or other facts, whether the attempt to use such information was by the other party or third parties. Protection extends to all civil litigation, not just to related cases and issues. Whilst there is no need to expressly state that a document or conversation is without prejudice, where it relates to a dispute settlement process, which is by implication automatically confidential, the scope of the protection may benefit from express words.

Rush & Tomkins v Greater London Council [1988] 3 All ER 737

A builder engaged sub-contractors to carry out preparatory ground works on a large housing development site. There was considerable delay and disruption which the builder sought to recover from the GLC as employers. The action was settled out of court. Subsequently the sub-contractors sought discovery of the confidential without prejudice correspondence between the main contractor and the employer to substantiate his claims for loss and expense. The first instance judge rejected the application, the CA allowed it but the House of Lords endorsed the ruling of the court at first instance, confirming the confidentiality of without prejudice correspondence.

Smith Group plc v Weiss (2002) Ch.D

The Smith Group bought PneuPac Inc. Subsequently Smiths commenced proceedings for damages for breach of warranties and misrepresentation. The parties attempted mediation. Experts interviewed present and former employees on a without prejudice basis, which made the interview records privileged. Weiss referred to the interview documents in a list provided to the court. Smith then sought to use the interview material disclosed during mediation at a subsequent trail, arguing that Weiss had waived the privilege.

Mr Kaye QC held, on the authority of **Somatra v Sinclair**, that the correct test for admissibility of such material was *"whether in all the circumstances it was fair and just to allow a party to rely on it"*. The court, should be slow, both because of the mediation agreement and public policy, to hold that the without prejudice status of material was lost, except in clear and unequivocal circumstances. The fact that informal assurances of privilege were given to the interviewees underlined the confidential and without prejudice nature of the interviews. Merely including such documents in a list did not in itself breach the mediation agreement. On the other hand the court would, upon receipt of an objection, rule such material to be inadmissible.

Somatra Ltd v Sinclair Roche & Temperley [2002] EWHC 1627 (Comm) (2000) 1 WLR 2453

A vessel owned by Somatra sank. Sinclair represented Somatra in an insurance claim, recovering 66% of the value of the hull. Somatra assert that Sinclair was negligent and should have recovered 85% of the value representing a difference of $10M. Somatra entered into "without prejudice" negotiations with Sinclair, conducted partly in Jeddah. Somatra covertly tape recorded telephone conversations and the meetings themselves. Sinclair introduced correspondence referring to the meetings in an application for a Mareva Injunction related to the recovery of unpaid fees. Somatra then sought to introduce transcripts of the meetings as evidence in support of their claim for damages. The trial judge held the transcripts were subject to without prejudice privilege and inadmissible, but granted leave to appeal.

The CA considered the application of without prejudice privilege and the rules on waiver to the case. The court confirmed that in the usual course of things the negotiations were without prejudice and thus inadmissible. Sinclair denied waiver, stating that the letters were included simply to discharge their duty of full and frank disclosure. The court disagreed, finding that Sinclair relied partly on them to show that they had not admitted to having discharged their duties negligently and that they were therefore entitled to their fees and thus a mareva injunction to secure monies to ensure funds available to pay said fees. That being the case, could Somatra use the letters and the conversations they referred to in a full trial on a different matter. Sinclair asserted that the use of the letters would at most be limited to the mareva injunction hearing. The court again disagreed. Whilst in limited circumstances without prejudice correspondence may be deployed merely to show that a party had intimated that an action was still alive and not subject to being struck off for delay and lack of prosecution and nothing more, this was not the case here. Somatra could therefore use all the material. Where privileged material is introduced and relied upon, the test is as to waiver. Where without prejudice material is relied upon the test is partly based on waiver of agreement, but most significantly upon public policy, namely, if material is disclosed by and for the benefit of a party justice requires that the other party also be permitted to make whatever use they can of that material.

South Shropshire District Council v Amos [1985] S3275 25.07.1986 CA

Following a discontinuance notice, Amos the occupier commenced negotiations with the council for Compensation. He sent two sets of claims and particulars to the council, marked without prejudice. The council made no offers and Amos proceeded to a Land Tribunal. The Council sought to bring the letters in evidence. Amos resisted on the basis of privilege. The council asserted that without privilege only results in confidentiality if the correspondence relates to a dispute. Since there was no dispute the documents were not privileged. The CA disagreed. There was a dispute and Amos was trying to negotiate a settlement. Whether his letters were offers, opening gambits or counter offers someway through the negotiation process makes no difference. All correspondence in negotiations is privileged. It is a two-way consensual matter and privilege attaches to both parties. It is also a matter of public policy to encourage negotiation and to avoid litigation. However, if there is no dispute to negotiate over, the words without prejudice are meaningless.

Tomlin v Standard Telephones & Cables [1969] 3 All ER 201

The claimant sought recovery for back strain whilst working on an anchor. The employers at first denied liability but subsequently made an offer, plus a reference to only accepting to pay out on a 5-/50 basis if liability was established, all subject to a without prejudice heading. The claimant's solicitor responded that the client had authorised a 50/50 basis for settlement. The final offer was for something in the region of £1,3000 / 2 plus solicitor's fees. The client rejected the offer and the matter went to court on quantum. The court then had to decide whether there was an agreement arising out of the without prejudice correspondence and whether details of the correspondence could be admitted in evidence, since it was headed *"without prejudice."* The court confirmed that in the ordinary course of things without prejudice correspondence is confidential and non-admissible, but where an agreement results from the without prejudice correspondence, that correspondence can be admitted as evidence of the terms of the agreement. In this case, the correspondence established that there had been a 50/50 agreement, so only 50% of the courts award on quantum became due to the claimant. Case gave rise to the so-called Tomlin Order.

Unilever plc v Proctor & Gamble [2000] FSR 344

Unilever produced Persil Action Tablets. P&G considered that the tablets infringed their copyright. Patent right negotiations took place between the various Unilever and P&G organisations in the UK, France and Germany. A peculiar aspect of Patent Law is that it is forbidden to make threats to sue for breach of patent rights without promptly asserting those rights in the court, mainly to prevent threatened actions hanging over a tradesman's head whilst depriving him of an opportunity to test before the court whether or not there is a breach with the consequence that it might put the trader off and create an unfair but unjustified monopoly and hold back fair trade and commercial enterprise. The nub of the case is as to whether threats made during private negotiations, as opposed to unsolicited letters unrelated to court proceedings, constitute an actionable statutory tort where the negotiation results in a settlement, thereby pre-empting the litigation which would legitimise the threat, and secondly whether or not the threat made in such circumstances is "*without predjudice"* and *"privileged"* and thus whether or not it can be used as evidence in a

statutory tort action. The Court of Appeal, upholding the first instance trial judgement, ruled such threats are privileged, since it would be impossible to engage in negotiations based on an asserted infringement of a patent right without giving an indication that litigation might, in the absence of a settlement, be pursued.

CONSTRUCTION CASE CORNER by C.H.Spurin

Alstom v Jarvis (No1) [2004] EWHC 1232

The parties agreed to a "Pain and Gain" provision under an IChemE Sub-contract Contract for the design and installation of signalling equipment as part of a main railway line development contract. The main contract also contained a P&G provision. The mechanism for determining the exact proportion of P&G between the Main and Sub Contractor was not finalised, but the court was made the final determinator. The court held that the criteria would be a *"fair and reasonable"* apportionment. The court held that this was not a May v Butcher / Walford v Miles agreement to agree, since the parties were committed to the sharing and had provided a method of determining the rate, which whilst not expressly stated, would impliedly operate in the absence of agreement between the parties. Whilst there were, potentially, a range of fair and reasonable outcomes, the parties had undertaken the risk in respect of which outcome the court opted for and would have to live with whichever outcome the court went for.

Alstom v Jarvis (No2) [2004] EWHC 1285

Jarvis sought and obtained an adjudicator's decision to enforce payment of an application for payment on the grounds that no withholding notice had been issued. The court held that the sum due was the amount certified not the amount applied for and that in the circumstances it was not necessary to issue a withholding notice against the application. Accordingly, it was finally settled that no sum was due under the application. There was no need to refuse to enforce the adjudicator's decision since it ceased to be operative. The adjudicator should have decided afresh how much was due by opening up and examining the certificate but had failed to do so and this is what needed to happen next to determine how much if any at all was in fact due to Jarvis. The court analysed the application of the payment provisions of the Scheme in relation to the IChemE Sub-Contract and the Special Gain and Pain provisions adopted by the parties.

Bath and North East Somerset District Council v Mowlem Plc . [2004] EWCA Civ 115

This concerned a JCT LAQ 1998 contract for the refurbishment of the Roman Spa at Bath with a target for completion in 2002. By 2003 problems with the sealing paints in the pools became evident, due either to design faults/inappropriate materials or defective workmanship. The architect issued instruction for removal of paint coatings to open up the works for inspection. Mowlem refused. The Council instructed Warings to do the work. Mowlem refused Warings access to the site. Mowlem offered to do the work *"without prejudice"* whilst referring the validity of the instruction to adjudication. The court applied for a mandatory interlocutory injunction for access to be afforded to Waring. The judge considered Mowlem's proposal to be potential prejudicial to the Council. Mowlem claimed the instruction was used as a device to avoid ordering rectification. Mowlem wished to have the injunction removed, claiming the balance of convenience was with them. Waring would destroy the evidence by removing the paint. The judge at first instance held that if the evidence was destroyed Mowlem would not suffer because the Council's case against Mowlem would also be destroyed. There was a need for work to progress and not for the project to be placed in limbo. The agreed liquidated damages under the contract was set at £12K which the Council asserted was well below their actual daily losses, so that an action in damages would not provide an adequate remedy, thus justifying the granting of an injunction. The court agreed with the Council and confirmed the injunction. Whilst an adjudication may have produced an answer, the adjudicator could not grant an injunction. Stay of injunction pending adjudication denied.

Branlow Ltd v Dem-Master Demolition Ltd. [2004] A904/03 Lothian

Following oral discussions and exchange of a 15 page fax and an exchange of letters, the parties by common consent entered into a contract. The scope of the contract was ill defined in these two brief documents. A dispute in respect of the impact of subsequent instructions and the valuation of variations arose which was referred to adjudication, The enforceability of the adjudicator's decision was challenged on the basis that in

the absence of a construction contract in accordance with s107 HGCRA the adjudicator had no jurisdiction, In particular the lack of specification usual in standard form contracts such as the JCT demonstrated that whilst it was common ground that there was a contract, that contract was oral and not limited to the information in the documents. The court rejected this argument and held that there was a written construction contract. The two letters, albeit lacking detail, contained the essence of the contract, sufficient to amount to a construction contract for HGCRA adjudication.

Buxton Building Contractors Limited v Governors of Durand Primary School . [2004] EWHC 733

This concerned the construction of a residential block for a school under JCT IFC 98 Form. Interim, practical completion and expiry of making good defects certificates had been issued. All that remained was final certification and release of 2nd tranch of retention monies. There was a longstanding dispute about door handles, toilet flushes and low water pressure. Buxton failed to deal with the complaints. Outsiders were brought in and amongst other works the drain set out was altered. The school sought to recover the costs of remedying the defects. The school issued a notice of withholding against the 2nd retention sum to recover £16K. An Interim certificate was then issued. The certificate was non compliant with JCT IFC 98 which only allowed for the issue of a final certificate. Buxton commenced adjudication to release of retentions on the basis of the Interim Certificate. The adjudicator dealt with the matter on a paper only basis and concluded that the Interim Certificate was for sums due and in the absence of a valid withholding notice, decided that the sum was due. It is clear that the adjudicator was wrong to treat the sum as monies earned. It was clearly retention money. Buxton asserted that even if wrong the decision was enforceable. However since the adjudicator had failed to address the whole dispute, only addressing Buxton's claim whilst ignoring the set-off claim against retention, the decision was unenforceable. Trial not set down pending negotiations / ADR.

IDE v R.J.Carter. [2004] HT 03 454

Wishing to submit a dispute to adjudication, a party approached the named adjudicator in the contract, only to find that he was not available and promptly approached an ANB for a nomination. The nominated adjudicator went ahead and delivered a decision in due course. The other party sought, successfully to resist enforcement on the basis of no jurisdiction. The court held that where the contract names an adjudicator, all parties must be informed of his unavailability before an ANB can be approached to make a nomination.

Ritchie Brothers (PWC) Ltd v David Philp. [2004] ScotCS 94

This involved a construction adjudication under the Scheme. Due to delivery problems with the referral document the adjudicator started late. Later the adjudicator requested an extension which was potentially outside the 28 day period. Enforcement was resisted on the grounds that an extension could not be granted if requested outside the 28 day period and so the adjudicator was by analogy with arbitration law, functus officio. The court held that the 28 day period commences when the referral document is sent to the adjudicator, not when the adjudicator receives it. Under the Scheme, the relevant date of the decision is when it is finalised, not when it is delivered to the parties. Unlike arbitration, the adjudicator does not automatically become functus officio after 28 days in the absence of an extension, but rather if and when either party terminates the adjudication for delay and appoints a replacement adjudicator. This had not happened and so the decision was enforceable.

Specialist Ceiling Contractors v. ZVI Construction [2004] 4T-0006 1 Leeds 00.03.2004

The claimant disclosed the existence of, but not details of, a rejected without prejudice offer. The defendant resisted enforcement of the adjudicator's decision alleging that knowledge of the existence of settlement negotiations prejudiced the mind of the adjudicator and influenced his decision. The adjudicator had made it clear that he had paid no attention to the matter and that he assumed that settlement negotiations are par the course in most adjudications but that no inference in respect of admissions of liability could be drawn from the fact that they had taken place. The court approved the approach of the adjudicator and held that in this instance there had been no bias and the decision should be enforced. However, as a decision based on its facts, a similar revelation could result in a decision being set aside if the adjudicator does not similarly spell out how he has dealt with the disclosure.

NADR UK Ltd Company Number 4734831
Published by NADR UK Ltd. and NMA UK Ltd. Registered Office, Stockland Cottage, 11 James St, Treforest, Pontypridd, CF37 1BU
Tel : 0044 (0)1443 486122 : Fax : 0044 (0)1443 404171 : e-mail : The Editor@nadr.co.uk. Web-site : www.nadr.co.uk