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KEYNOTE ADDRESS OF MR JUSTICE FOSKETT

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Introduction

May I begin by thanking the Association for inviting me to give this Keynote Address? Since I was born in Stratford-on-Avon, it is very agreeable for me personally to be joining you in this lovely setting near to Stratford.

It is not always clear why a particular person is invited to give the Keynote Address at the beginning of the Annual Conference of any organisation.

Getting on for two years ago, it was my privilege to be invited to give such an address to the 'The Disciplinary Conference' 2013, a conference for lawyers and others principally involved in disciplinary issues.

I began my address[1] by suggesting that the Chairman of the Conference must have wanted a judicial figure whose interests, talents and achievements went far beyond merely trying cases and that an Internet search had obviously demonstrated to him what a truly interesting person I was. If you searched my name at that time you could have found that I was an author whose works included "The Law and Practice of Compromise", which I can claim as substantially my own work, and then a succession of cookery books including "Food Preparation and Cooking", "Advanced Practical Cookery", "Kitchen and Larderwork" and "Patisserie and Confectionery". However, I was also credited on this particular website with "War and Peace".

I have revisited that website recently and have discovered that "War and Peace" has for some inexplicable reason been deleted from the list, though the rest remain.

Another current Internet search for the name David Foskett immediately comes up with my details, including the accurate date of my birth and the university where I took my degree, but accompanied by a photograph of someone who is not me. If you follow the links from that website you will find that my most successful book is "Practical Cookery".

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1 *www.judiciary.gov.uk/.../in-the-**public-interest**-justice-**foskett**-speech-08022013.pdf*

I am looking forward one day to comparing notes with Professor David Foskett MBE, Professor and Head of the London School of Hospitality and Tourism, to see whether he has from time to time been wrongly identified on the Internet as a High Court Judge. Maybe he and I will have to do some equitable accounting in relation to royalties mistakenly attributed to each of us.

However, as with those at the Disciplinary Conference, any of you expecting some revealing insight into the Mossiman-style approach to *Cuisine Naturelle* are going to be sorely disappointed.

The truth behind the invitation is, I fear, rather more prosaic. I met your President during the year and it was that meeting that ultimately led to the invitation. I suspect that it was because I was Chair of the Costs Committee of the Civil Justice Council that your President thought I would be a name of topical interest. Let me begin by saying a word or two about the work of that committee although I recognise that it is only of tangential relevance to your discussions later today.

Guideline hourly rates ('GHR')

That committee, as you will know, was charged with the task of making evidence-based recommendations to the Master of the Rolls on the thorny issue of Guideline Hourly Rates.

The hourly rates had not moved since 2010 and there had been concerns that, not merely were they out-of-date, but that, despite the best efforts of those who had previously grappled with the issue, the evidence to support them was less than persuasive. The appointment of a committee comprising substantially of those with expertise and experience in the area of litigation costs to put forward evidence-based recommendations was plainly a worthwhile initiative.

However, apart from the quite outstanding *pro bono* assistance the committee received from Professors Paul Fenn and Neil Rickman of Nottingham and Surrey universities respectively, we were given no resources at all with which to fulfil our terms of reference.

Since we were trying to drill down to the base costs of running a litigation practice and to determine what reasonable profit element should be added to the hourly rate or rates thus generated so as to yield a fair recoverable rate, what was needed in order to put forward recommendations that commanded respect and acceptance was evidence from a statistically valid sample of relevant solicitors' practices.

I said in the Foreword to the report of the committee to the Master of the Rolls[2] the following:

> "We have not had the resources to conduct a nationwide randomised survey of a large number of solicitors' practices (to which the respondents were obliged to respond) in order to obtain, for example, a statistically robust assessment of the average cost of running a litigation practice and to identify regional variations. The

[2] http://www.judiciary.gov.uk/publications/master-of-the-rolls-decision-and-committees-report-on-guideline-hourly-rates/

> wherewithal to engage professionals to conduct such a survey has not been available in the current exercise."

What we had to do was to use data from recent surveys that had been carried out by the Law Society and by others and then endeavour to supplement and cross-check that data by reference to the results of a survey of our own. A great deal of time and trouble was spent by the committee, particularly the solicitor members of the committee, in devising a survey that was tolerably easy for solicitors to answer, largely by reference to their most recent accounts and the internal systems at their disposal. A watertight guarantee of confidentiality was given.

Once the terms of our own survey had been finalised, an enormous amount of effort went into publicising its existence and encouraging responses. We were quite satisfied that anyone or any firm interested in the issue of the GHR would have been aware of the existence of the survey and how to respond to it.

We received responses from 148 firms of solicitors. When one bears in mind that there are over 10,000 firms in England and Wales (not all of which are, of course, engaged in non-family civil litigation) it can be seen how difficult it is under existing conditions to obtain a large number of responses to a request for financial information concerning the costs of running a practice. Although the response rate to our own survey was disappointing, we understood that this was not untypical of similar surveys conducted by the Law Society.

Partly coloured by evidence received during our oral evidence sessions in February, when the post-*Mitchell* issues were at their height with fears of massive forthcoming hikes in insurance premiums for small firms, a significant majority of the committee expressed considerable reservations about the reliability of the evidence-base. Equally, we had taken a collective decision not to try to factor in the effect of the Jackson reforms on the GHR in the exercise we undertook because the evidence to support any such influence would, at that stage, be insubstantial. Nonetheless, the unknown effect of those reforms, along with the arrival of alternative business structures in relation to the organisation of solicitors' practices, reinforced concern about the reliability of the evidence-base.

We fulfilled our terms of reference by making "recommendations" based upon the evidence we had, but anyone who has read the report and my covering letter to the Master of the Rolls, will see just how guarded those recommendations were[3]. I prefer the expression "new rates [of GHR] generated by the committee's work" rather than "the committee's recommendations" to describe the figures we put to the Master of the Rolls.

At all events, as everyone will know, the Master of the Rolls did not feel he could accept these new rates, however they might be characterised, because the evidence on which they were based did not afford a sufficiently strong foundation for there to be public confidence in those rates. He announced that he proposed to have urgent discussions with The Law Society and the Government to see what steps could be taken to obtain evidence on which GHRs could reasonably and safely be based[4].

It is, perhaps, not really for me to comment, but it must surely be right that those two institutions should be the first to be invited to consider the position. The existence of the GHR is of benefit to the public in the sense that they can give clients a general feel for

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[3] See footnote 2.

[4] See footnote 2.

whether the rates they are being charged are reasonable for the kind of civil litigation work involved in the geographical area and at the level of expertise involved. But if one poses the question 'for whose benefit do the GHR exist?' the immediate answer must be (a) the judiciary and (b) the solicitors' profession.

As to the judiciary, the existence of the GHR enables judges at the end of an appropriate case to have some "ready-made" hourly rates with which to make an assessment of recoverable costs without having to hear evidence about what a reasonable hourly rate should be. This process shortens proceedings about costs and saves valuable, and increasingly precious, judicial time. The ultimate guarantor of the funding of the judicial system, namely, the Government, has a clear interest in these rates being established.

Equally, solicitors are saved time and expense in preparing for and arguing about these matters at the end of the trial and their existence enables solicitors to put to a client a reasonable pre-estimate of liability for costs or for receipt of costs depending on the outcome. Again, the profession must have an interest in ensuring that there are in existence rates which command confidence.

There is an argument, which was addressed to us during the course of our deliberations, that guideline hourly rates are no longer relevant, or at least will become increasingly irrelevant, because of the impact of cost budgeting and fixed fees. It is, of course, possible that hourly rates will assume a less significant role with the passage of time, but until that time has passed the desirability of the existence of rates which are respected and accepted will remain. At all events, that issue is not strictly one for the committee, but for others.

As to the current state of play, all I can say is that a meeting was held in mid-October between the Master of the Rolls and representatives of the Ministry of Justice and the Law Society, which I, my present Vice Chair of the committee (Senior Costs Judge Andrew Gordon-Saker) and Professor Paul Fenn also attended. The outcome of further consideration of the position is awaited. Doubtless the Master of the Rolls will take the matter forward when he is able to do so.

It will be appreciated that it would be impossible for me to fill my allotted time with reference to the current state of play so far as the GHR are concerned and, in any event, it may not be the most riveting of topics for those here principally interested in substantive legal and practical issues concerning professional negligence cases.

May I therefore move to a couple of areas of particular interest to me which I suspect may also be of interest to everyone here?

I should, perhaps, emphasise at the outset that one advantage of giving an address such as this is that one can raise issues without necessarily answering them. I am inclined to think that I am not alone in believing that there is no easy answer to either of the matters to which I shall refer.

<u>Limitation</u>

I will introduce the first by means of a short quiz. You need not be concerned, I will not be asking for responses to my questions, but it would be interesting to know how many present recognise the quotations I am about to mention and the context in which they were made.

The first question in the quiz is 'who said this and when?' -

> "So what is the present state of the law of England? With three House of Lords' cases to guide us it ought to be possible to give a clear answer to this question, but I regret that I feel unable to do so with any confidence."

The next question is to like effect in respect of this quotation:

> "Our judgments on this appeal will not, I fear, be an ideal source of guidance to lower courts which regularly have to deal with these difficult problems."

And the final quotation is this:

> "The current law … is complicated and incoherent."

The first was Tuckey LJ in *Abbott & Anr. v Will Gannon & Smith Ltd.* in a judgment given on 2 March 2005[5]. He was talking about something which all here will recognise if I describe it as the *Pirelli* issue – in other words, does a cause of action accrue for limitation purposes against a construction professional when the relevant damage occurs or when it is discoverable. Tuckey LJ was talking about the effect, if any, of *Murphy v Brentwood District Council*[6] and *Kettleman v Hansel Properties*[7] on the decision in *Pirelli*.

The second quotation is from the judgment of Lord Walker of Gestingthorpe in *B v Ministry of Defence*[8] – otherwise known as the Atomic Veterans' case.

The third quotation comes from the same case, but from the judgment of Baroness Hale of Richmond.

I have a particular interest in the latter case because I was the judge at first instance[9]. As one of my colleagues said to me recently, it was a case that divided opinion. That undoubtedly is true.

It raised limitation issues in a particularly difficult and unusual situation although the essential question in law of when the asserted cause of action arose had similarities to that arising in the context of defective buildings. It is of interest to note that, whilst it might be said that the Atomic Veterans' case raised issues that arise in purely personal injury, rather than professional negligence, cases, the starting point for the development of the law in both fields was the case of *Cartledge v E. Jopling and Sons Limited*[10]. That was the case where Mr Cartledge died from pneumoconiosis contracted from the inhalation of minute particles of fragmented silica dust more than 6 years before he issued his writ claiming damages. He did not discover, and had no means of knowing, that he had pneumoconiosis before the symptoms emerged and, accordingly, it was impossible for him to issue a writ within 6 years of the first damage occurring to him.

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5 [2005] EWCA Civ 198.
6 [1991] 1 AC 398.
7 [1987] AC 189.
8 [2013] 1 AC 78.
9 [2009] EWHC 1225 (QB).
10 [1963] AC 758.

It would be inappropriate for me to comment on the Atomic Veterans' case, but I think I can safely say this: in the recent case of *Berney v Saul (t/a Thomas Saul & Co)*[11], the issue was the date of accrual of a cause of action in tort in respect of financial loss caused by professional negligence and Gloster LJ said this:

> "… the issue is critically dependent on the circumstances arising in any particular case. Thus, although there appears to be a tension between certain statements made in some cases, when compared to what is said in others, I am not persuaded that it is either necessary, or appropriate, for this Court in this case to reconcile what may be differently nuanced approaches to what, at the end of the day, is essentially a factual question: namely, when did the claimant first suffer actual damage as a result of the professional negligence."

I rather wish that I had had the luxury of such a simple solution in the Atomic Veterans' case. As it was, it was necessary to consider very many previous authorities at both appellate levels which, with respect, hardly spoke with the same voice on many of the crucial issues. Whilst, of course, the majority view in the Supreme Court prevails as a statement of the current law, Lord Walker's observation is to be noted.

Baroness Hale went on to explain why the law was, as she said, complicated and incoherent by saying this:

> "This is, as the Law Commission pointed out in 1998, largely because it "has been subjected to a wide range of ad hoc reforms, following the recommendations of reform bodies charged with recommending reforms of particular pockets of law.""

She was referring to a consultation paper issued in advance of the wide-ranging consideration given by the Law Commission to the question of limitation periods in general that led to its report laid before Parliament in July 2001[12]. The consultation paper ran to some 456 pages and the report itself ran to some 318 pages.

In July 2002 the then Government announced its acceptance, in principle, of its recommendations, subject to further consideration of several issues, and stated that it would legislate when a suitable opportunity arose. In January 2007 the Government announced that it would consult on the detailed content of a draft Bill to implement the recommendations. In February 2008 the Government confirmed that the proposed consultation would take account of a recent House of Lords judgment dealing with the limitation problems thrown up by child abuse cases[13]. However, in November 2009, the same Government announced that reform of the law of limitation of actions would not be taken forward. Referring to the then proposed draft *Civil Law Reform Bill* and indicating that it would not now include provisions to reform the law of limitation of actions, the Minister said:

> "These provisions were based on a Law Commission report of 2001. But a recent consultation with key stakeholders has demonstrated that there are insufficient benefits and potentially large-scale costs associated with the reform. In addition,

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12 Law Com No 270.

13 *A v Iorworth Hoare; C v Middlesbrough Council; X & Anor v Wandsworth LBC; H v Suffolk County Council; Young v Catholic Care (Diocese of Leeds)* [2008] UKHL 6.

> the courts have remedied some of the most significant difficulties with the law that the Law Commission identified, for example, in relation to the limitation aspects of child abuse cases. The limitation reforms will therefore not now be taken forward."

My limited opportunity for research has not led to my identification of the "key stakeholders" or to what were the anticipated "potentially large-scale costs" of implementation. However, whilst it might fairly have been said at the time that the law concerning limitation in child abuse cases had been clarified in a way that led to more acceptable results than hitherto, the Law Commission report had covered a wide range of areas from tort claims (including personal injuries claims) and contract claims to restitutionary claims, claims for breach of trust and claims on a judgment or arbitration award. Other areas were also included.

Subject to certain modifications in some areas (including personal injuries litigation) the Law Commission recommended adoption of a single, core limitation regime, comprising a primary limitation period of three years. That would start from the date on which the claimant knew, or ought reasonably to have known, (a) the facts which gave rise to the cause of action, (b) the identity of the defendant and (c) if the claimant had suffered injury, loss or damage or the defendant had received a benefit, that the injury, loss, damage or benefit was significant. There was to be a long-stop limitation period of 10 years, starting from the date of the accrual of the cause of action or (for those claims in tort where loss was an essential element of the cause of action, or claims for breach of statutory duty) from the date of the act or omission which gave rise to the cause of action.

In personal injuries cases the proposed modification was that court should have a discretion to disapply the primary limitation period and that no long-stop limitation period would apply.

In his illuminating lecture to the Technology & Construction Bar Association and the Society of Construction Law, given on 30 October this year and entitled "Concurrent Liability: Where have things gone wrong?"[14], Lord Justice Jackson suggested that it was time for the Law Commission proposals to be implemented.

His theme, put shortly, was that to overcome difficulties presented by the law of limitation as it presently applies to contract and to tort, the courts have created concurrent liability in contract and tort when such a course was not justified. In characteristically forthright style he said this:

> "The difference between the limitation periods for contractual and tortious claims has been the driving force behind many of the cases asserting concurrent liability. This is unfortunate to say the least. If it is felt that the contractual limitation periods are unsatisfactory, then surely the remedy is to amend the law of limitation, not to mangle the law of tort. The fact that a contractual claim is time-barred is not a good reason to 'invent' a tortious claim."

He went on to say that either we have limitation periods or we do not. He suggested that if the judiciary and Parliament really do not like limitation periods, they could be extended or

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[14] *www.judiciary.gov.uk/wp-content/uploads/2014/10/tecbarpaper.pdf.*

abandoned altogether with the civil law being thus on the same footing as criminal law such that anyone can be sued for anything irrespective of how long ago it happened.

He articulated his own support for the social policy reasons for retaining limitation periods in the following way:

> "For what it is worth, I think that limitation rules serve a valuable social purpose. They mean that people know where they stand and do not have potential claims hanging over them for ever. The more distant an event is in the past, the more difficult it is to prove what actually happened. Witnesses die. People forget what they saw, heard or said. Documents and other evidence are lost. It is a lottery which snippets of contemporaneous evidence survive. Putting it bluntly, as time passes it becomes more and more likely that the court will reach the wrong decision. Furthermore most people insure against their potential liabilities. They and their executors cannot be expected to go on insuring for ever."

I respectfully agree that a wholesale abandonment of limitation periods would probably be undesirable if only on the basis that, as Lord Justice Jackson says, people cannot go on insuring forever. If there were not some relatively clear cut-off point for potential liability, insurance premiums would presumably have to increase to meet the risk of an adverse finding on liability many years after the event. I am unaware of any quantitative analysis of the effects on the insurance industry (and thus upon the payers of premiums) of the abandonment of limitation periods, but it is not difficult to imagine that they may be significant.

That having been said, however, I do wonder whether the passage of time is now quite so significant a factor when it comes to determining whether there can be a fair trial of the issues of fact relating to an incident or state of affairs many years ago as it might have been if the issue of limitation had been debated in a particular case, say, 20 years or so ago.

In *A v Hoare*, Baroness Hale said this:

> "A fair trial can be possible long after the event and sometimes the law has no choice. It is even possible to have a fair trial of criminal charges of historic sex abuse. Much will depend upon the circumstances of the case."

In the Atomic Veterans' case, I concluded that a fair trial would still be possible even now of events taking place in the mid-1950s because the material events would have been, and indeed were, by their very nature, extremely well-documented. This conclusion was accepted by the Court of Appeal and the contrary was not argued in the Supreme Court.

Many involved in clinical negligence litigation will have experience of litigating what may, on any view, be a very stale claim because the claimant is a "protected party". I can remember in practice representing a brain-damaged claimant who, if I recollect correctly, was born in 1970, but whose parents (perfectly respectable, responsible and caring people) had not thought of pursuing any matters concerning the circumstances of his birth until a chance conversation between a solicitor experienced in the sphere and one of them led them into considering a claim which, on proper analysis, had merit. The claim was mounted and eventually settled in 2001, some 30-31 years after the circumstances giving rise to the claim.

This may, of course, be the exception rather than the norm, but bearing in mind that, probably for the last 20 years or so much material has been stored electronically, the result may

be that the picture of the lost file, lost documents or records generally may have become a less familiar one. As the years ahead unfold, with so much being stored (literally) in the "clouds", one wonders whether documents will ever truly be "lost". Whilst, of course, the oral evidence of witnesses remains an important part of the trial process, and the longer after the event such evidence is given the less reliable it is, quite often the documents speak louder than the words of the witnesses. This, as it seems to me, must be a factor to be considered either when formulating any new principle concerning the role of a limitation period or in the exercise of any discretion left the court about whether a case should be allowed to proceed if the limitation period has expired. The existing statutory provisions were formulated, often in the *ad hoc* way to which Baroness Hale referred, long before the emergence of the kind of electronic storage of data with which we are all now familiar.

The words of Tuckey LJ, Jackson LJ and, of course, Lord Walker are all supportive of the proposition that "something ought to be done" in this general area. It is debateable as to the extent to which the courts can now move things much further forward given the recent intervention of the Supreme Court and the question is the extent to which the Law Commission might be invited to re-visit the issue or whether Parliament might be encouraged, as Lord Justice Jackson suggests, by the next Government to legislate along the lines of the existing report. The Law Commission's agenda for the next 3 years is set and it does not include consideration of this issue. However, that might not prevent the Commission from suggesting to the Government that there is in existence a report of considerable weight that is worthy of re-consideration even if the relevant "stakeholders" were not in favour in 2009.

The reason for saying this is not just for the sake of having a tidying up exercise in this whole area, but because people need advice they can understand about these difficult issues when they can afford legal advice. However, the increasing cohort of litigants in person will of itself drive the courts to face issues of limitation without the benefit of informed representation from time to time. Anything that simplifies the law in a way that ensures overall fairness is plainly desirable.

I do not have the time today, nor indeed would it be appropriate in an address of this nature, to try to indicate the precise way in which, in my view, the law ought to develop. Indeed judges are usually expected to steer away from entering this kind of arena in a speech because the very issue upon which he or she expounds a view may form the subject of a case he or she is asked to try the following week. All I think I will say (with, I believe, considerable justification) is that the law that you and I as professional lawyers understand to be embraced within the expression "constructive knowledge" is a very difficult area for us, particularly in the context of its factual evaluation in an individual case. If that is so, quite how well most laypeople would understand the concept, even if explained lucidly by a lawyer, is questionable and the prospect of a court grappling with the issue when presented with arguments fashioned by a litigant in person on the basis of the existing law is not one that many judges would embrace with enthusiasm. It is not fanciful to conceive of cases where a litigant in person will come to the court, many years after he or she has received advice from a surveyor, a solicitor, a financial adviser or any other person with professional expertise, complaining that he or she has only just realised the damaging effect that acceptance of such advice has occasioned. Questions about when he or she ought reasonably to have appreciated this will almost inevitably arise.

The existing law in this area is self-evidently difficult. The Law Commission proposals did not abandon the concept of "constructive knowledge" and indeed it is difficult to conceive of an effective law of limitation without it. However, much as I admire its report, I respectfully question whether the proposed statutory definition will be that much easier to apply than the present law. It was in these terms:

> "The claimant should be considered to have constructive knowledge of the relevant facts when the claimant in his or her circumstances and with his or her abilities ought reasonably to have known of the relevant facts.
>
> Unless the claimant has acted unreasonably in not seeking advice from an expert, the claimant should not be treated as having constructive knowledge of any fact which an expert might have acquired. Where an expert has been consulted, the claimant will not be deemed to have constructive knowledge of any information which the expert either acquired, but failed to communicate to the claimant, or failed to acquire."

I do ask the question: where does subjective knowledge or belief give way to the concept of objective knowledge or belief in this analysis? Is it any clearer than the existing law?

However, the advantage, of the adoption of the formula or indeed of some other formulation, is that it would be possible for the courts to start again with a clean slate and, provided that a self-denying ordinance of not looking to previous authority for guidance was observed, the courts could at least endeavour to fashion conclusions in individual cases that accorded with everyone's sense of justice by contemporary standards.

Almost exactly two years I gave a lecture entitled 'Black Holes in the Legal Cosmos – A Hitchhiker's Guide'[15] in part of which I expressed the view that the legislative system ought to avoid a situation where in a particular area of the civil law everyone recognises that the law needs re-consideration, but no one, least of all the judges, could do anything about it. I wonder whether the law of limitation is just such an area. As I have said, it is not difficult to see that the problem could easily arise in the context of a case involving a litigant in person where the court may not receive the kind of legal submissions it might wish to receive.

I must leave this issue now to move briefly to the other area I wish to mention. It is, however, I believe, an important area that needs addressing.

Mediation

[15] *www.judiciary.gov.uk/.../justice-foskett-kings-college-lecture-15112012.*

I suppose I must recognise that my name is always likely to be associated with the settlement of litigation and if my book continues to survive, it will always be associated with that subject long after I am no longer around to edit it.

Prior to my appointment as a full-time judge I qualified as a mediator and indeed acted as a mediator in a fair number of mediations prior to that appointment. I covered a wide range of areas of dispute, including those arising from alleged professional negligence. As so often is the case, one can remember the first occasion when one does something. My first appearance in a court as an advocate was on 2 April 1973 in Gloucester County Court. I remember it well.

Since I must observe the necessary confidences, I will not say when and where my first mediation took place. However, I can say that it arose out of a situation in which a claimant with a cast-iron case on liability arising from an accident was let down by, if I recall correctly, three separate firms of solicitors, at least one of which missed the limitation period applicable to his claim. The reason that his claims against those firms were so difficult to resolve was that each, in their own way, blamed the others for adding to his problems and costs. Furthermore, my recollection is that the insurance position of each was different with different excesses being payable by the partners in each case and, I believe, different insurers: it was a time when there was more than one insurer in the field. That is, of course, the kind of information that helps a mediator help the parties through their difficulties although it is the kind of information usually denied to a judge trying such a case.

I shall not forget the enthusiasm with which the claimant met me despite his bad experience with the legal profession thus far. I think he saw someone who was wholly independent of what had gone before, who was there simply with the task of trying to secure a mediated settlement, as some kind of friend. The other parties also welcomed the involvement of a new player in the game that had, not very happily, been played out hitherto.

Fortunately, after the usual to-ing and fro-ing, the case was resolved satisfactorily and all parties seemed to walk away in a reasonably happy frame of mind. I had not been wholly confident at the outset that it would end in that way, but I was pleased that a mediation process in which I had played a modest part worked. In cricketing terms, at least I got off the mark.

I was interested to learn recently from your President about how many professional negligence claims are settled through mediation. Speaking from my current vantage point, this is very welcome news. There does not seem to be any let up in the number of cases judges are being asked to try and without settlements being achieved, assisted where necessary by mediation or other ADR process, the court lists would be back to those with which we were familiar in the pre-Woolf days.

For various reasons I have been reading recently a number of articles by those currently involved in the field of mediation about the question of whether there should be a form of "mediation privilege" that would maintain totally the confidentiality of the mediation process with no risks of a mediator being called to give evidence about what occurred during a mediation[16].

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[16] Including contributions on the subject by Michel Kallipetis QC, William Wood QC, Gordon Blanke, David Cornes, James Tumbridge, A.K.C. Koo and Heather Allen.

I have to say that when I was engaged actively in mediation, I did not really think about the difficulties that these articles suggest could arise. Every mediation agreement emphasised the "without prejudice" nature of the discussions, their confidentiality, that no agreement was final until reduced to writing and the invulnerability of the mediator to being required to give evidence in the event of some issue about what occurred at the mediation arising. Perhaps I was lucky that no problems arose in any of the mediations I conducted.

However, we all know that there are techniques of negotiation that some parties employ that can sometimes come close to the threshold of propriety. The borderline between the acceptable and the unacceptable is reflected in this quotation from a then seminal review of the "without prejudice" rule by Professor David Vaver in the University of British Columbia Law Review as long ago as 1974:

> "Compromises are regularly induced by such considerations as the desire to preserve good relations between the parties (especially if they are commercial men), the supposed weaknesses of a party's case, the supposed strength of the opponent's case, the costs and risks of litigation, etc. These are part and parcel of settlements in everyday life. On the other hand, misrepresentations, libels, threats of insolvency or bankruptcy in the event of non-acceptance, blackmail, threats of perjury, suborning or flight from the jurisdiction must all amount to the sort of improper pressure which ought to be admitted in evidence if relevant to some matter in issue–this notwithstanding they occur during 'without prejudice' negotiations."

Another quotation from Lord Walker of Gestingthorpe sums up what happens in any "without prejudice" discussions, whether facilitated by a mediator or otherwise, which he described as consisting of "wide-ranging unscripted discussions during a meeting which may have lasted several hours":

> "At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities."

The observations from those two eminent sources were almost certainly made with the scenario of represented parties taking part in the discussions in mind. There is no reason, of course, why unrepresented parties should not take part in a mediation – indeed I recall conducting one or two where that was so. It is possible, and perhaps likely, that it occurs more frequently now. Encouraging private openness with the mediator, which is part of the whole process and which is assisted by the confidentiality provisions that apply, could easily result in things being said which, if repeated to the other party, would cross the threshold of acceptability.

The situations where something said in private, which if repeated to the other party, might constitute an illegal threat or a deliberate misrepresentation are probably rare. They would undoubtedly call for a reputable mediator to exercise all the influence available (including ultimately withdrawing from the process) to ensure that the process does not become tainted in this way. However, it is possible to conceive of situations where some illegal threat is made which goes unnoticed or unprevented or where something is said which one party wishes

subsequently to characterise as an illegal threat even though it was not. Should it be possible for the mediator to be called as a witness for either party? Arguably, the mediator is the best person to give wholly reliable evidence about the issue.

However, all mediators would, I think, be very concerned to avoid this scenario, not through fear of giving evidence itself, but because it could be seen as undermining the advantages to the whole mediation process of the ability to have entirely confidential conversations with each party to the mediation without the risk of those conversations subsequently being divulged. I believe most mediation agreements are currently very widely drawn to ensure that this scenario does not occur.

The other entirely practical issue is this: my recollection of the mediation process is that, to the extent that the mediator can achieve it, he or she will want to keep the mediation moving forward and will want to keep it as a dynamic process. I recall taking very few notes as the process moved forward, perhaps jotting down precisely the terms of an offer or counter-offer to avoid getting the message to be conveyed wrong, but otherwise moving as quickly as possible between the parties to maintain momentum. There was no time to make detailed notes. Even if I had done so, I have little doubt that if asked to re-create their meaning several months or years after the event I could not have done so. They might well have been well nigh indecipherable to me and they would almost certainly have been indecipherable to anyone else! Nonetheless, even more assiduous and neater note-takers would be hard-pressed to re-create their recollections of what occurred during a mediation involving several parties over many hours and of what they could recall of a particular moment in the process which itself would have to be viewed in the context of the whole period of the mediation.

The issue of whether there should be a "mediation privilege" has not been litigated to the extent that there is an authoritative decision upon it. Perhaps that is indicative of the proposition that the current framework works, lessons as to the drafting of mediation agreements having been learned after the *Farm Assist* case[17]. On the other hand, there are those who argue that, either by way of legislation (perhaps building on the EU Mediation Directive[18] which relates only to mediations of cross-border disputes involving parties from EU countries) or the development of the common law, that a discrete form of mediation privilege should be fashioned[19]. Not everyone in the mediation community shares that view, however.

Again, for obvious reasons, it would be wise for me to refrain from expressing a view on the issue: it would be good, in any event, to hear an informed debate about it before coming to a view. However, I think I am on safe ground if I say that I imagine that any incursion into the generally accepted arena of confidentiality and privacy of the mediation process, whether by virtue of statutory intervention or the development of the common law, would be treated as wholly exceptional and ordinarily very tightly circumscribed. To provide otherwise would undermine the very essence of the mediation process. It is recognised that the courts should not receive evidence of why a mediation failed so that the "integrity and confidentiality of the

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17 *Farm Assist Limited (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No.2)* [2009] EWHC 1102 (TCC) Ramsey J.

18 EU Directive 2008/52.

19 See, e.g., Cornes, 'Mediation Privilege and the EU Directive: An Opportunity', (2008) 74 Arbitration 4, 395; Koo, 'Confidentiality of Mediation Communications' (2011) 30 CJQ 192. See also Briggs, 'Mediation Privilege?' Parts 1 and 2, (2009) 159 NLJ 506 and 550.

process is … respected"[20]. The issues may be different when considering settlements achieved at a mediation are sought subsequently to be undermined, but that "integrity and confidentiality" of the process will undoubtedly be the starting point.

Conclusion

Each area I have touched on this morning could in one sense be said to be an unresolved issue or to constitute unfinished business. I must leave you to judge whether you agree and, if you do, what order of priority you might give to them if you had the power to influence the processes that might lead to their resolution.

I have said, in relation to two of those areas, in particular, that the difficult legal issues that may arise could easily be raised by litigants in person. Their numbers are on the increase. The law needs to be able to handle the issues fairly when they are raised in that way. We ignore that feature of the wider picture at our peril.

I repeat my thanks to the Association for its invitation. You have some very interesting contributions to follow. May I wish the rest of the Conference success?

[20] *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 at para. 14, *per* Dyson LJ, as he then was.