

## Early Neutral Evaluation in Clinical Negligence Cases

Rhiannon Jones QC

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1

- Current pandemic presents an opportunity for us all to assess how we used to practice, how we are currently practising and how we will practice in the future.
- What changes can we make to achieve optimal solutions for our clients in clinical negligence litigation?

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2

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## Motivation to change for good

*“The illiterate of the 21<sup>st</sup> century are not those  
who cannot read and write;  
It is those who cannot learn how to do something,  
then unlearn it, and relearn how to do it much better.”*

Alvin Tofler

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3

## Duty to change for good

*“All members of the legal profession should routinely consider whether their  
clients’ disputes are suitable for ADR.*

*Acting in a client’s best interests includes...advice on resolving disputes by  
all appropriate means of ADR as well as litigation.”*

Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 267 per Dyson LJ

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## Pleas to change for good

*“It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an experienced practitioner ...to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for years.”*

Oliver & Anor v Symons & Anor [2012] EWCA Civ 267

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5

## Early Neutral Evaluation

*“The advantage of an Evaluation process over Mediation is that a person with subject matter expertise evaluates the parties’ cases in a direct way, and provides an authoritative view of the legal issues of the case and an experienced evaluation of the strength of the evidence.”*

Seals & Anor v Williams [2015] EWHC 1829, per Norris J

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## Judicial Early Neutral Evaluation

CPR: 3.1(2): The Court may:

- “(m) take any other step to make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.”

[Lomax v Lomax \(Executor of the Estate of Lomax, deceased\) \[2019\] EWCA 1467](#)

The Court has power pursuant to CPR 3.1(2)(m) to order ENE even though one party has not consented to it; to impose a limitation to the effect that consent of all the parties was necessary would be contrary to the overriding objective.

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7

## Cost penalties for failure to engage

The Courts are increasingly prepared to impose cost penalties for parties not engaging in ADR including ENE.

*“It is well known that personal injury claims by an employee against an employer were often amenable to ADR. An independent person could look at the case dispassionately. The instant case was one where ADR was appropriate. The defendant maintained that the litigation was out of the ordinary as it was a public body at the centre of a police investigation in a prison, at a time when inquiries of abuse against public institutions had led to widespread public concern. However, the court failed to see how that was relevant...The greater public context, if it existed, did not mean that the defendant was exempt from court orders or that it was entitled to disregard the need for proportionality. If a defendant did not want to engage in mediation for public policy reasons it had to be prepared to take the cost consequences.”*

[Marsh v Ministry of Defence \[2017\] EWHC 3185 \(QB\) Thirlwall LJ](#)

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8

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[Laporte and Christian v Commissioner of Police of the Metropolis \[2015\] EWHC 371 \(QB\) Turner J.](#)

Despite successfully defending proceedings, after taking into account the factors listed in **Halsey**, a police commissioner was found to have failed, without adequate justification, to have engaged in the ADR process and that was to be reflected in the costs order made.

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9

## Independent Evaluation Process

- Step 1:** One party suggests referral to Independent Evaluation.  
This can be at any stage from pre-issue to during an appeal.
- Step 2:** An Evaluator with relevant expertise is appointed for the entire duration of the process.  
Contact is established with both parties' representatives.  
Assistance is provided in identifying the legal and factual issues.
- Step 3:** Directions  
Replicating the Court's functions in terms of evidence gathering, Interim Payments, etc.  
Exploring the strengths and weaknesses of positions.  
Guiding the management of expectations.  
Helping the parties make high quality decisions & optimise resolution of the dispute.  
  
Approximately 75% of disputes resolved by the end of or shortly after the Directions phase.
- Step 4:** The Evaluation

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## IE Process (continued)

Step 4: Evaluation: equivalent of a claimant's day in Court.

Less formal than a trial and without cross-examination.

Treated just as seriously as a trial by the parties.

Can be undertaken in person as with a Mediation or a JSM.

More recently have been successfully been undertaken remotely by Teams.

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11

The same Evaluator who handled the claim from outset:

- ✓ listens to the parties;
- ✓ undertakes a guided forensic analysis of the positions;
- ✓ informs the parties of the likely outcome at trial ('evaluation');
- ✓ helps parties achieve mutually optimal settlement ('facilitation');
- ✓ resolves costs on the same day (except for Appeal cases).

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12  
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ENE can provide all the advantages identified as being of value in Mediation and more.

*“Mediation can deliver things which go beyond compensation, which is so important when we look at what our research tells us about why people pursue claims. It provides space and time for everyone to explore and understand what happened in all its complexity, to hear what can be answered and bring the conversation back to what matters to the injured person.”*

Helen Vernon, the NHS Chief Executive in the NHS Resolution Annual Report 2018/2019

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13

## Benefits for patients and families

- ✓ Optimal settlement protecting any therapeutic relationship;
- ✓ Optimal financial damages: usually better than at Court;
  - ✓ Greatly reduced stress and emotional strain;
- ✓ Much quicker resolution: months rather than years;
- ✓ 100 % free for PI & Clinical Negligence claimants;
  - ✓ Claimants costs paid as if part of litigation;
- ✓ Early closure allows claimants to move on with their lives.

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## Health: Need for change for good

Little progress in improving NHS patient safety over the past 20 years.

The top Health Service Watchdog, Prof. T. Baker said:

*“20 years later it is very frustrating how little progress we have made. It’s clear to me that we still have not got the system around patient safety right. ... [and there is] an “insidious” culture of defensiveness and blame. ”*

The Telegraph, 2<sup>nd</sup> October 2019

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15

## Law: Need for change for good

*“The increased procedural steps imposed by Woolf and Jackson’s reforms add no value to the client and adversely affect people’s ability to pursue a claim or insist on their strict legal rights.”*

President, London Solicitors Litigation Association

*“Judges’ fury at Dickensian litigation over ‘toxic’ dispute.”*

*“Judges rue attritional warfare.”*

Law Society Gazette, 16.10.15 and 03.08.16

*“Cases are still resolved with complex procedures, an adversarial climate and costs that sometimes dwarf the value of the contested claim.”*

Ministry of Justice [2015]

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## NHSR recognise the need for change

*“We are excited about this important new mediation service and hope that it be embraced by the NHS, patients and their families as a truly effective way of resolving claims in the NHS.”*

NHSLA Press release: 04.08.14

*“NHSR has called for it to be compulsory for a party to engage in some form of ADR before issuing proceedings. In order to make ADR (of whatever kind) culturally normal, we suggest that there be a requirement to engage in an ADR process prior to issuing proceedings.”*

PI Focus: March 2018

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17

## The CJC and ENE

*“Mandatory Neutral Evaluation is a bold and imaginative proposal favoured by both sides.*

*The ... majority of cases will settle...and if not they would then be referred for MNE.*

*Full details of how this proposal would work still need to be ironed out.”*

CJC Report: October 2019

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## Change for good? Concerns about MNE

MNE was a late arrival in the CJC's thinking.  
CJC seems to have no experience of ENE in Clin Neg or at all.  
Unwilling to run a Pilot Scheme.  
Insistence upon 'Mandatory' Evaluation.  
Inadequate quality assurance: recruitment & evaluations.  
No thought to GDPR compliant document management.  
Fixed costs regime.  
Probable erosion of patients' rights & access to justice.  
A starting point for a 'Portal' scheme in future.

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19

## IE: Claimant's views

*"Settlement was achieved without the pain, both financial and emotional, of a full hearing....Given the availability of this non-binding evaluation, why would any client choose to go to court? I highly recommend Independent Evaluation."*

David Edwards, Partner, Edwards Hoyle

*"This is precisely what practitioners and their clients have been waiting for, and it is particularly needed since all the recent changes. I have no hesitation in recommending IE to all my clients."*

Charles Atha, Atha & Co.

*"Where traditional JSMs have failed in difficult and hotly disputed cases, IE offers an innovative and leftfield approach with their evaluation service. The involvement of an evaluator allows us to navigate round the previous obstacles and concentrate on the elements that facilitated the eventual settlement. The process is cost effective and efficient."*

Tristan Holdam, Specialist Brain Injury Solicitor, Tollers LLP

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