

**Arthur Li Oration at the Conjoint Diploma Conferment Ceremony  
at the College of Surgeons of Hong Kong  
by the Secretary for Justice  
Hon. Mr. Wong Yan Lung, SC, JP  
on 25 September 2010**

**“Mediation and Medical Practice”**

Professor (C K) Yeung, Mr (David) Tolley, Presidents of Distinguished Colleges, Distinguished Guests, Ladies and Gentlemen,

**Introduction**

Good evening. It is indeed a great honour for me to be present at your Conjoint Diploma Conferment Ceremony, and to be invited to deliver this prestigious oration named after my good friend and former colleague Professor Arthur Li. May I first of all extend my warmest congratulations to the new diplomates and the recipients of the various awards for excellence today.

2. Your invitation to me to speak on the subject of “mediation” is, if I may say so, truly insightful and wise. First, mediation is fast becoming the new paradigm for dispute resolution in Hong Kong and elsewhere. Second, had you asked me to speak on anything else, I probably would feel compelled to decline your kind invitation, for having spoken four times already to the medical profession on comparable occasions, I have pretty much exhausted all I can say and all my medical resources and ideas.

3. I would like to set the scene by quoting Father Cormac Burke, a leading Vatican priest and judge from his speech, ‘*Law and Medicine in the Service of the Person and Society*’. where he said,

*“one could say that medicine seeks to heal the body, priesthood to heal the soul, and law to heal the relations between persons. The physician who practices the art of medicine can heal only if he has a true idea of what bodily or physical health is. So it is with the lawyer who practices the art of law: he can only help to resolve and heal the disputes about claims and rights that arise in civil society, if he is inspired by a true idea of justice...”*

4. As a lawyer and an administrator of justice, I am attracted to the concept that the law has healing properties. In that connection, mediation, when used to restore relationships torn asunder by acrimonious disputes, is particularly apposite.

5. Perhaps not everyone here this evening is familiar with mediation. So allow me to begin by speaking on what mediation is and on the development of mediation in Hong Kong. Afterwards, and perhaps of greater interest to you, I would like to show you how mediation is relevant to the medical practitioners and how it may be used to resolve medical disputes.

6. As the Chairman of the Working Group on Mediation, I was privileged to have the opportunity to look into the different developments in mediation in Hong Kong, and to make recommendations on how it can be further strengthened. For those of you who would like to go deeper into the subject, the Report of the Working Group on Mediation ('the Report') was published earlier this year and is available on our website. We have just finished a 3-month public consultation and have received over 80 written submissions. The valuable feedback from the public will help us map out the way forward for mediation in Hong Kong.

### **What is mediation?**

7. One of the first things the Working Group on Mediation had to consider is to define mediation. For many have confused it with some other legal or non-legal processes. In essence, mediation is a voluntary and confidential process in which the parties seek to find practical solutions to their dispute. The parties are guided in their decision-making process by a neutral third party, the mediator, who assists the disputing parties to work through their differences and to find solutions acceptable to them.

8. Mediation can be used for many purposes, including settlement of disputes, management of international conflicts, negotiation of joint venture agreements, policy-making as well as conflict prevention. Depending on the parties and the subject matters to be resolved, the mediator can adopt different mediation techniques as it is a very flexible process.

9. Many people confuse mediation with arbitration. Arbitration is another form of Alternate Dispute Resolution ('ADR'). The main difference is that the arbitrator makes a decision called an award which binds the parties whereas in mediation, the mediator does not make decisions for the parties. Parties make decisions themselves and work towards a negotiated settlement of their dispute. This is what commentators describe as the '**empowerment**' of the parties to deal with their differences and to come to agreement.

10. Mediation has a number of benefits when compared to adjudicatory dispute resolution processes such as litigation and arbitration. Firstly, as settlement agreements are reached voluntarily in mediation, parties do not run the risk of having a judge or an arbitrator deciding against them and losing their case (i.e. 'win-lose' situation). Secondly, as an informal and flexible process, mediation saves time and costs. Mediation can preserve or even improve the relationship between the parties by facilitating communication. Mediation is also highly beneficial as it is confidential and avoids damage in reputation that often results from media coverage or litigation. Finally, as settlements are voluntarily entered into, there are very few cases of parties reneging on the terms of their mediated settlement. Settlement arrangements are binding by virtue of the law of contract.

### **Development of Mediation in Hong Kong**

11. In the Report, the Working Group looked at the development of the use of mediation in various aspects of public life in Hong Kong. In some areas such as in the resolution of construction disputes and family disputes, mediation has been utilised successfully since the 1980s. However, there are many other areas where mediation ought to be considered more seriously or used more widely as a helpful form of dispute resolution process. It is hugely beneficial in the resolving of disputes in the commercial, community, employment and healthcare areas.

12. One of the recommendations of the Working Group on Mediation is for **Pilot Schemes** to be set up to test if it is a viable option for a particular area of conflict resolution. The advantage of Pilot Schemes is the opportunity to put on trial whether it works well or not, very much like drug trials of new medicines.

13. In Hong Kong, the Judiciary has taken a leading role in promoting the use of mediation to resolving disputes. As part of the Civil Justice Reform, mediation is part of efficient case management. Practice Direction 31 ('PD 31') which was put into force by the Judiciary at the beginning of this year requires solicitors to explain mediation to the parties in civil proceedings and to sign the Mediation Notice. Parties have to sign and state whether they are willing to go to mediation. There are potential cost sanctions for any party who chooses not to attempt mediation. Thus a party who wins a litigation case but had unreasonably refused to attempt mediation before the trial may not be able to get the court to order the losing party to pay its legal costs which can be very substantial. We have also seen a greater number of lawyers undertaking mediation advocacy and mediator training since the implementation of that practice direction.

### **How is Mediation relevant to Medical Practice?**

14. In **Lord Woolf's Final Report on Access to Justice**, he identified the problems in 'medical negligence litigation' meaning litigation involving allegations of negligence in the delivery of health care by hospitals, doctors, dentists and other healthcare professionals. It was problematic because of its failure to meet the needs of the litigants on both sides. Lord Woolf identified, among other things, the following:

The costs of bringing a medical negligence case are disproportionate to the damages which might be recovered, especially in smaller cases;

The complexities of the litigation can result in greater delays in getting to trial;

Unmeritorious cases are often pursued and clear cut cases are defended for too long;

The success rate for Plaintiffs is lower than in other personal injury litigation; and

The suspicion between the parties is more intense and the lack of co-operation frequently greater than in many other areas of litigation.

15. Indeed, from the Plaintiff's perspectives, the costs of preparing and gathering evidence and bringing a medical negligence case to trial can be very significant and disproportionate to the damages that may be recovered in cases where injuries are held to be less debilitating or serious. From the defendant medical practitioner or hospital's viewpoint, the costs of defending any such litigation can be equally high if not more. A medical professional who is the defendant in such cases may experience extreme stress, anger and resentment at what may be considered an affront to his or her professional reputation and integrity. Hence, if mediation offers a better way to resolve medical negligence cases, it is obviously of relevance to you as medical practitioners.

16. In a number of jurisdictions, the rise in medical negligence cases and the damages awarded have resulted in huge escalation of professional indemnity subscriptions for medical practitioners. According to the Medical Protection Society,

“Mediation is talked about again as a serious option in Hong Kong after research showed that indemnity subscriptions have tripled for public doctors in the last ten years; for private practitioners it is even higher, with increases ranging from five to thirty times previous amounts. In the high risk categories, subscription costs are in significant excess of the monthly salary of an HA consultant or government director.”

17. If the subscription rates or professional medical indemnity insurance premiums rise to a level where it makes little economic sense to practice as a medical practitioner, one might choose to do something else, in spite of the huge investment and dedication he has invested into his medical training.

18. In other cases medical practitioners may choose to move out of high risk practice areas such as obstetrics and gynecology. This sad state of affairs is already happening in certain places in the United States of America. Some American doctors have resorted to march in the streets and demand legal reforms such as putting a US\$250,000 cap on non-economic damages and a US\$750,000 overall limit per medical negligence claim.

19. Here in Hong Kong, while I do not have the figures on the medical negligence claims, there certainly has been a trend of surging complaints being brought to the Medical Council. The number of complaints rose from 190 to 472 in the 10 years period between 1997 and

2007. With the rise of medical complaints, the corresponding increases in your subscription rates or professional medical indemnity insurance premiums are really inevitable.

20. The making of a complaint or claim is highly disruptive to the doctor-patient relationship. It usually eradicates any meaningful clinical or even personal communication between them while the claim is being made, a process which often lasts several years.

### **How can mediation be used to resolve medical disputes?**

21. Currently there has been very little use of mediation to resolve medical disputes in Hong Kong. But you may have heard that Dr James Chiu, a practicing surgeon and an accredited mediator, has conducted a number of successful mediations in his admirable pioneering endeavours.

22. So we shall have to examine what is happening in other jurisdictions where mediation has been used more extensively to resolve medical disputes.

23. First of all, in the **United Kingdom**, the National Health Service ('NHS') launched a medical negligence mediation pilot scheme way back in April 1995 as a response to the criticisms being made of the way medical negligence claims were managed and concerns about their increasing incidence. The Mulcahy Report on the NHS Mediation Pilot reported that 70% of claimants were totally or very dissatisfied with the tort claims process, even where compensation was awarded. That Report supported the benefits of mediation despite the small sample of 12 cases. All 12 cases were settled; 11 with payments and other non-monetary benefits conferred to claimants. The Mulcahy Report noted the importance of non-monetary benefits such as apology, explanation and reassurance of changes in procedure, together with the opportunity for parties (patients and doctors alike) to be heard informally and privately, are all substantiated, as is the possibility of creative outcomes.

24. The Ministry of Justice in the United Kingdom reported that in 2008/09, alternative dispute resolution ('ADR') has been used in 314 cases involving the government, with 259 leading to settlement, saving costs estimated at £90.2 million. The National Health Service Litigation Authority reported that the majority of claims were of very high value; typically where the claim related to the acquisition of severe neurological damage as a result of alleged negligence in medical care. In most of these

cases mediation took place post proceedings and subject to standard court directions requiring the parties to consider mediation. It was usual for liability issues to have been resolved prior to the settlement meeting and concentration to be on quantum which could be very technical, involving multipliers and multiplicands, indexation and life expectancy. The high settlement rate achieved at mediations indicated that the parties found mediation of great benefit in resolving claims.

25. The British Medical Council issued a policy statement recognising the value of mediation in terms of the benefits conferred on claimants and clinicians by both the process itself and the flexible outcomes which it makes possible. It also supported a campaign to raise awareness of the benefits of mediation across the medical profession and to supporting its use by clinicians and their legal representatives, wherever possible, to resolve clinical negligence and other disputes.

26. Then crossing the Atlantic to the **United States of America**, the American Medical Association ('AMA') has a 'Medical Liability Crisis Map' which maps the states in crisis where multiple factors including the soaring medical malpractice indemnity insurance rates have caused doctors to limit their practice to lower risk medical specialties, leave medical practice, practice medicine without insurance or practice "defensive medicine". Many doctors and insurance companies allege that the single most important factor behind the cause of the crisis is malpractice litigation or the 'medical malpractice tort infrastructure'. A former president of the AMA described the use of litigation to resolve conflict in the medical area as, I am sure some of you will agree, 'a rapidly growing income-transfer system from doctors to lawyers'.

27. A mediation program in the United States of America that is often cited as a successful model is the Chicago Rush Hospital Mediation Model. Since 1995, it has successfully expedited resolution and lowered legal costs associated with medical malpractice cases. In the cases that were mediated, 90% were successfully settled with a 50% reduction in annual defence costs and a 40% to 60% payout savings as compared with comparable cases that was litigated in courts. The model uses highly skilled comediators and usually commences after discovery has ended so that both parties are aware of the facts of the case. Most mediations are conducted within a year of the claim being filed and are concluded within a day. It has been commented that the real cornerstone of the success is the availability of an apology in the mediation process which allows the aggrieved party to forgive.

28. Closer to home, in **Singapore**, disputes ranging from banking disputes to medical negligence claims and personal injuries have been resolved through mediation in court or through the Singapore Mediation Centre. The Supreme Court of Singapore recorded savings of more than S\$21 million and 3,356 court days as at 1 April 2009 as a result of mediation being used to resolve disputes. The Singapore Mediation Centre has been assisting with medical negligence cases since 1998.

29. Lastly, in **Australia**, mediation is used alongside litigation to resolve disputes. For the health sector, there are state legislation covering health complaints and it is recognized that there are many advantages for medical disputes to be resolved by early settlement including the saving of costs and not having the stress of a court battle. Further, the adversarial system is recognized as being particularly stressful for plaintiffs who are sick or dying and are not credible or coherent under cross examination in court and hence mediation may be a better option.

### **Some Benefits of Mediation for the Medical Profession**

30. The survey of mediation in other jurisdictions is encouraging. The Medico-Legal Committee of the British Medical Association supports the mediation process and helps make mediation an attractive process for the medical profession. Some of the benefits identified by that Committee include the following:

- Mediation can be set up speedily, often before legal proceedings are issued;
- Mediation is entirely confidential and without prejudice, and is thus largely risk-free even if the claim is not settled;
- The safe private surroundings in mediation enable the aggrieved party and the doctor to re-establish communication in a direct and positive way, far more akin to doctor-patient than defendant-plaintiff;
- Mediation is informal and managed by a neutral mediator, who takes responsibility and control of the process which enables the parties to craft their own solutions if they so wish, as the mediator makes no judgment;



- Parties have the opportunity of being heard, of venting their feelings and are encouraged to listen and respond respectfully;
- Doctors can explain what they did and why, express regret and offer an apology (if they wish) without any necessary or consequent admission of negligence or causation of injury, and contribute directly to any debate between the parties;
- A 'one-stop' outcome that delivers both monetary and non-monetary settlement is possible;
- Imaginative outcomes which can benefit both parties can be devised; and
- Finally, mediation can lead to the withdrawal of a claim.

### **Way Forward for Mediation in Hong Kong**

31. In order to maximize these benefits and to provide a solid foundation for mediation to take off in Hong Kong, the Working Group believes the enactment of a Mediation Ordinance in Hong Kong is necessary. Comments from the public consultation on the Report showed an overwhelming support for a Mediation Ordinance to be enacted. My Department will embark on the work leading up to the enactment of this piece of legislation. I would encourage the medical profession to participate actively in the process of the enactment of the Mediation Ordinance in due course.

32. There is a need to have a fundamental change in culture and mindset in order to take mediation forward in Hong Kong. I agree with Lord Neuberger, the Master of the Rolls who said at the Civil Mediation Council Conference in May this year the following,

*“If we are to make mediation second nature, if it is to be litigation’s twin, then we need to embed that culture from the very beginning of a lawyer’s training.”*

33. I would take a step further. Mediation needs to be incorporated not just into lawyer’s training but also be introduced into medical training as part of Conflict Management Training for Health Care Professionals.

34. A cultural change has to occur in health care as the system grapples with ways to provide more care with fewer resources and to improve safety through collaboration and better systems. For this change to be successful, health care organisations are going to need a critical mass of professionals with good conflict management skills and a means for integrating collaborative processes into their day-to-day operations. Mediation educators and trainers can meet that need by providing well designed, interactive training programs that enhance the ability of health care organisations to provide safe and effective care and that enable doctors and other health care practitioners to regain hope that complex problems in the medical field can have creative solutions.

## **Conclusion**

35. Ladies and Gentlemen, I hope I am already gathering some converts to mediation from this audience. Well, it really should not be difficult because the concept of mediation, stripped to its core, is not new in Asia.

36. The fundamental element of mediation which is the resolving of disputes with the assistance of a third party has been practiced for centuries in Asia. In rural communities in India, mediation was often conducted by respected elders as mediators. The Confucian ideal of harmony within society and the resolution of disputes in an amicable manner resonates with proverbs such as, ‘*In death avoid hell, in life avoid law courts*’ (「生不入官門，死不入地獄。」).

37. According to Mr. Campbell Bridges, SC, a leading counsel and mediator from Australia, mediation does work in resolving disputes in the medical area. In his speech on ‘Medical Negligence litigation – Issues, Psychology and Why Mediation Offers the Best Solution for all Parties’, he said,

*“The Australian experience of the rise of and effectiveness of mediation in such disputes is instructive. Twenty years ago, Australia was among the most litigious societies in the world. Virtually any dispute, however trivial, was the subject of Court proceedings. The burden, financial and otherwise, on litigants was severe. Our largest medical insurer almost collapsed under the burden. These days the landscape is completely different.*

*A major difference is that the government, the courts and the parties are totally focused on alternative dispute resolution, with mediation not arbitration in the forefront of that push.”*

38. Urbanization, industrialization, economic competition and a focus on legal rights rather than individual's interests have all contributed to an emphasis on litigation. Many people, however, have come to realize that litigation may not be the most effective way to resolve disputes, and that the costs and pain of litigation are quite often counter-productive.

39. Here in Hong Kong, the Courts, the Government, the legal professions are all speaking the same voice in support of mediation as a true alternative. I urge all of you, leading surgeons and medical practitioners in Hong Kong, to pitch in and to embrace the new culture of dispute resolution.

40. Thank you very much.