

## **Essay 2: AQA January 2002**

- a)** There are several differences between a negotiated out of court settlement and a civil action for damages.

When a dispute arises between two groups – the easiest way to resolve it is by negotiation. This involves meetings until an agreement is reached. However the potential claimant (or plaintiff) may decide to begin legal proceedings rather than negotiate, or if an agreement cannot be reached.

Obviously, with the millions of summons served everyday and all the delays that occur during litigation – a final decision can take a long time. Negotiation is often much quicker as the court need not be involved and delays do not occur if both parties want to resolve the dispute with minimum hassle and cost.

Civil action is expensive from the outset, with a claims form itself costing money. Each side must take into account the court fees and of course lawyer's fees they may have to pay if they lose. Negotiation on the other hand does not inevitably cost anything – merely a stamp if the discussions are being done by post, or the price of hiring a room for debates between the two sides to take place.

Another difference between the two is that negotiation is informal and as a result user friendly because no court is involved and thus both sides can use simple, colloquial language. This also speeds up the process.

Sometimes, during legal action negotiation is encouraged aimed at reaching a settlement. This is when both sides finally accept an amount of money as damages and finish the case without incurring pointless court costs and other legal fees. In this case each party might use their solicitor/barrister to write the other side a letter or to help them with negotiating. However such legal aid is not needed – keeping costs down. If civil action was started, one side would probably need to pay for representation, unless they were receiving legal aid from the CDS.

A big difference between the two methods of resolving disputes is that during litigation (with its long, drawn out case and adversarial nature) harmonious relationships between the two parties are often irreversibly destroyed. This is especially because usually in civil cases one side has to pay all the fees for both sides if they lose.

However, with negotiation these relationships are more likely to be better when a resolution is reached. This is because both sides state what they want and then try to work towards a decision that suits both.

Of course litigation means that the judge who decides the verdict during civil cases is an expert in the law. With negotiation this does not usually happen and the outcome tends to be based not on justice but on how good your negotiating skills are.

Also the negotiation 'verdict' is legally binding and once agreed cannot be dismissed by one side or appealed against as you can with civil action.

- b)** Litigation is just one option open to people seeking damages. There are many good reasons for going to court and it is often a last resort when these other options fail.

Often the judge will order that other ways of finding resolutions are tried, this saves the public, and the people involved in the case both time and money.

These other options are known as ADR – Alternative Dispute Resolution. Arbitration is basically a personal judge whose decision both parties agree to accept. It is used most commonly in international law (for example in settling the oil in the North Sea dispute between various European countries).

Its success depends primarily on both party's willingness to accept this independent judge's decision. Basically both sides appoint an autonomous arbitrator, and then both points of view are put to him/her. This seems very much like regular civil cases but the arbitrator has no power to make witnesses give their evidence and no legal aid is available. Also the costs of arbitration are shared between the two sides in proportions they agree. At the end however, like court cases, one side loses and the other wins depending on the arbitrator's verdict and this is legally binding. Another difference between litigation and arbitration is that there are no appeals during the latter except to the High Court if a violation of justice or visible error of law.

Another method of finding justice is through mediation or conciliation. These are widely viewed as the same thing, the only difference being that a conciliator may show his/her own opinion and can suggest how a court would decide if litigation was entered into. Mediation is commonly used to solve family disputes, such as who should have custody of children after divorce. This is because both parties may not agree just to spite each other.

Basically another person acts as the 'middleman' and aids the parties in discussing their differences and eventually reaching a decision. Several meetings with the mediator will occur, some with both parties present, and others separately. Costs are kept low because lawyers are not necessary but are permitted, also legal aid may be available during family disputes. The outcome is decided by the people disagreeing, it is not the mediator's role to decide. This therefore means that if the parties cannot agree other methods must be explored. I feel that even if mediation does fail, it is better than going straight to the courts as it saves money and may allow the people involved a less acrimonious relationship both during and after, this also helps during cases involving children. In fact the Family Law act of 1996 makes it obligatory unless in extreme circumstances, for partners etc to attempt mediation before taking the matter to court.

Another, less popular alternative to litigation is the Press Complaints Commission (PCC), set up recently. It is a non-statutory group, which means it is not legally bound and also does not have anything to do with the government, and is, in effect, the press world's way of self regulation to avoid controls which may be enforced by the government. A person who thinks they have been unfairly treated by the press can complain to the PCC within three months of publication of the slanderous material. (Such as Catherine Zeta – Jones' and Michael Douglas' recent claims against 'Hello!' magazine)

The Commission firstly tries to come to an amicable resolution, trying to persuade the editor to apologise/compensate the individual. Where this is not possible the PCC makes its own investigation and its findings are usually published in the paper involved and the press generally. However as the Commission is not legally bound, the press can and have reprinted articles and images and this can lead to litigation as a last resort.

The fact that the PCC has no powers legally is a flaw in using this as an alternative to litigation and of course it can only be used for disagreements concerning the press. Another failing is that they can only act after the publication and has no powers to halt the printing of any damaging information.

The final alternative to litigation I will discuss is using an Ombudsman. Their function is to look into misadministration in public bodies (such as the NHS) or government departments (such as the Benefits Agency). There are also private sector ombudsmen for complaints to do with the railways, for example. The complainant has no onus of proof, but they must produce some evidence (*prima facie*) to show that their complaint

has some basis. Although technically an ombudsman's findings are not legally enforceable, in practice their recommendations are almost always followed (usually a written apology and/or compensation).