Successful Mediation in Clinical Negligence Cases – Ten Top Tips for Lawyers

written by Imogen Hildred | 24 February 2020

Alternative Dispute Resolution has been around for many years. It is enshrined in the Civil Procedure Rules – CPR 1.4(2)(e) requires the Court to actively manage cases by "*encouraging the parties to use alternative dispute resolution procedure if the Court considers it appropriate and facilitating the use of such procedure*". The standard directions in clinical negligence claims means that it is routine for the Courts to order the parties to consider ADR as part of the directions given at the start of each case. It is also now well established that parties can face cost penalties for failing to engage in ADR – *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

However, mediation – a specific form of ADR – is on the increase in clinical negligence claims. NHS Resolution has publicly stated its position that "*Mediation and alternative dispute resolution (ADR) are fundamentally aligned with NHS Resolution's strategy to deliver fair and cost effective resolution, by getting to the right answer quickly, safely, and reducing the number of claims going into formal litigation by keeping patients and healthcare professionals out of court*" (Julienne Vernon, Head of Dispute Resolution and Quality, NHSR – February 2020).

The stage at which cases are mediated is changing too. NHS Resolution is not only enthusiastic about mediation but also to engage in mediation early – "*Mediation as an intervention can be more effective if carried out at an earlier stage in the lifecycle of the claim*" (Mediation in healthcare claims – an evaluation – NHSR February 2020).

It has always struck me as odd that JSMs in clinical negligence claims are routinely timetabled at the end of the directions, late in the case and often a week or so before trial. This contrasts with other types of claim – for example building disputes – where under the pre action protocol the parties are required to meet before issuing. Wouldn't pre-issue mediation make a lot of sense in clinical negligence claims too?

I have yet to meet a client in a clinical negligence claim who does not wish to seek to settle their case pre-issue rather than waiting another 2 years for a last minute pre-trial JSM. Patients and clinicians alike find these cases dragging out far more stressful than us lawyers imagine.

Of course, the disadvantage of pre-issue mediation is the relative lack of evidence at that stage upon which to base advice. But as experienced lawyers in these types of case, aren't we able to assess and value claims early on without every single piece of the jigsaw which we will have 2 years later? I think we can, with a caution to our clients accordingly. Obtaining the key reports early and agreeing a without prejudice exchange of them for the purposes of the mediation has formed a very satisfactory basis for pre issue settlement at a mediation in my experience – and to everyone's satisfaction.

Mediation is set to become far more common and important as a means in which clinical negligence cases are concluded over the next 5 to 10 years. The use of mediation by NHSR increased by 110% in the year from 2017/18 to 2018/19 alone. We would all be wise to learn more about it.

Not all types of ADR are the same. Having worked now in the role of both advocate and mediator, I have appreciated that a very different approach is required of the lawyers at a mediation to that of a

JSM and that an understanding of these differences can greatly benefit the participants.

So here are my 10 top tips for lawyers approaching mediation.

1. **Think about it early.**

In my view, as experienced specialist lawyers, we are able to give reasonable advice to our clients on merits and quantum before we have every single piece of evidence. Think about mediating pre-issue or early after issue, rather than 2 weeks before trial in accordance with the standard directions. Your clients will thank you for it.

2. **Agree a without prejudice exchange of evidence.**

Basic outline liability and quantum reports are often already in hand or can be obtained quickly. Exchange them on a WP basis for the purposes of the mediation only. They inform your advice and assist with demonstrating strengths and weaknesses to a client, who may have an overconfident view of their case.

3. **Draft a position statement.**

This is a great help to the mediator but also assists the other participant. An outline without prejudice Schedule and Counterschedule are a must for a mediation on quantum.

4. **Ask the Claimant to prepare a statement to read out at the first open session.**

Unlike a JSM, a mediation routinely starts with everyone, including the lay client, attending the first open session with the mediator. This is a very stressful moment for a claimant. They deal with it a lot better if they can simply read out a short statement explaining in brief terms the effect the case has had on them and what they would like to achieve from the mediation.

5. **Involve the clinicians.**

I have seen a departmental head consultant surgeon attend the first open session and speak in such a sensitive manner of how sorry he was in respect of the (admitted) negligence and what he hoped would be achieved for the claimant from the mediation that it significantly helped in a successful conclusion to the day. He didn't stay beyond that. He didn't need to – his input had been short but very beneficial.

6. **Think carefully about the first open session.**

It sets the tone for the rest of the mediation. Your manner is important.

7. **Don't be aggressive.**

I have seen a defence lawyer metaphorically tear into a claimant's case to their face in an open session. His aggressive manner created a major obstacle to the mediation. You can do that at a JSM as the lay client is not usually present in the room. A conciliatory approach facilitates settlement at mediations – you can be firm but don't be aggressive.

8. **Be open with the mediator in closed session.**

Some lawyers have a tendency to treat the mediator as their opponent. If the mediator appears to be asking you to acknowledge the weaknesses in your case, rest assured they are doing exactly the same when they are in closed session with the participant. Whichever participant you act for, the

mediator is your friend. They will not disclose anything you say to the other participant without your express permission. The more open you can be with them, the better they are able to navigate the mediation to a successful conclusion.

9. **Be flexible.**

Mediations offer the possibility to consider a wider range of settlements. Money might not be everything. And avoiding the stress of 2 more years of litigation might be more important than you think to your client.

10. **Think about longer term relationships.**

We work in a small professional world. How you behave at a mediation will be remembered by the other participant lawyers and lay client long after you catch the train home. Someone who is courteous, sensitive and constructive will be viewed in a positive manner the next time your paths cross, encouraging further settlements to be achieved where appropriate.

Dr Simon Fox QC is a medically qualified specialist clinical negligence silk. He has acted as Counsel in a number of mediations over the last 25 years.

Examples include –

- A patient with Spina bifida who developed a spinal abscess. Claim alleged negligence in discharging him from the Emergency Department. He collapsed and died at home in front of his wife who attempted resuscitation, resulting in a fatal and secondary victim claim. Settled at mediation for approximately £300,000.
- A mental health patient who hanged herself when not admitted to a psychiatric unit. Fatal claim brought on behalf of husband and young children. Settled at mediation for approximately £250,000.

Simon has long seen becoming a mediator as a logical extension to both his clinical negligence practice and his work sitting regularly as an Assistant Coroner and qualified as an Accredited Mediator at the London School of Mediation in March 2019. He is a member of the Civil Mediation Council and a panel mediator with Trust Mediation in London. He has been involved in and conducted a number of mediations.

These have included cases of delay in hospital diagnosis, management of Cauda Equina Syndrome by hospital and GPs, neurosurgical practice and cardio thoracic surgery. Participants have ranged from 2 to 5 (multiple defendants including multiple GP’s and hospital trusts) with Claimants aged 30 to 70. All have been medically complicated and required sensitive handling on the part of the mediator. All were full day mediations and concluded successfully at mediation for figures in the region of £150,000 to £500,000.

Simon is passionate about the advantages of mediation and both writes and speaks on the topic and in particular on the different skills needed by lawyers engaging in this process.