# Mediating Clinical Negligence Claims

Posted On: 07/04/2022
Author: Patrick Limb KC

The NHS in England faces paying out £4.3bn in legal fees to settle outstanding claims of clinical negligence: so reported the BBC in January 2020 following a Freedom of Information Request. Estimates published in 2019 put the total cost of outstanding compensation claims at £83bn; NHS England's total budget in 2018-19 was £129bn.

Over the same period, as reported by NHS Resolution, in 2018/2019 264 cases were settled at mediation with damages agreed, out of 390 cases that went through the process i.e. just over two-thirds. A further 21 cases had damages agreed within 28 days. In short, a settlement rate overall approaching three quarters. Other statistics are of course available, but they do coalesce around a 'success rate' approaching 75%. Those figures are found in an *Evaluation of Mediation in Healthcare Claims* published in February 2020.

The Foreword to that paper came from Julienne Vernon, Head of Dispute Resolution and Quality at NHS Resolution (NHSR), formerly the NHS Litigation Authority (NHSLA). She ended with these words:

> "*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.*"

The findings of the paper were positive and digested as follows. First:

> "*Mediation is proven to be an effective forum for claims resolution by providing injured patients and their families with the opportunity to receive face-to-face explanations and apologies. Time can be spent listening and responding to the particular concerns of a patient and their family. The process provides a platform to claimants, patients and their families to articulate concerns that would not ordinarily be addressed in other forms of dispute resolution.*"

And secondly:

> "*Positive and compelling feedback has been received from participants of the process and there is a heightened awareness of the benefits of mediation for claims resolution and demand for its use by members and other stakeholders.*"

Although it would have been surprising if NHSR had concluded otherwise – its own change of name from NHSLA indicating an intended direction of travel – the paper was published on the eve of the pandemic, which (over an extended and enforced period) has precluded or limited access to courts and led to less face-to-face, and more remote, engagements. In this writer's first-hand experience, that has not been an obstacle to mediation but, if anything, something of an encouragement to it.

## To Mediate or Not to Mediate

Numbers of concerns, even suspicions, can abound around proposals to mediate. On the Claimant's side, misgivings about whether the object is delay (as a stay may be proposed to enable the 'breathing space' for mediation) or calculated reconnaissance. On the Defendant's side, that mediation is proposed in order to appear to be behaving in a proportionate and co-operative manner when in fact there is no real intention to settle; or, conversely, when the claim lacks merit, that it is being proposed as a fig-leaf – rather than an olive branch – almost to conceal the lack of a case. Like a lot of suspicions, they can be mutual – that is to say, what has just been attributed to one side of the litigation fence might be perceived as applying to the other.

Turning matters around, in most cases, only a few reasons may exist not to mediate. Is there a remedy sought that mediation cannot secure – an injunction, perhaps, or some form of court-backed declaratory relief? Neither are at all likely to arise in the context of clinical negligence. There may be a point of principle to be served but it would have to be a high one to be worth all of the financial candle that risks being burned in going to court. One of the proponents of

mediation, in my experience, is actually the Court of Appeal which, after all, is the forum where so much precedent is set; yet the default setting is to stipulate that parties are expected to consider mediation. It may be said that a particular reputation needs to be vindicated as justifying the day in Court but, again, such cases are few and far between. In reality, the question of 'why mediate?' may need inverting to 'why not mediate?'.

The other question is why mediate when there is scope for joint settlement meetings (JSMs)? The answer is three-fold. First, in respect of those acting for Claimants in particular, without naivety, what may be looked for is variously acknowledgment, respect for the value of the victim's life, an apology, an involvement in the process of stock-taking over steps for improvement. That is not borne of vindictiveness but more a desire for what they have gone through to be recognised. Getting all that across in a JSM is harder, where the talk (conducted by and through lawyers) may descend to 'huff and puff' about competing litigation risks and money, to the exclusion of other considerations. Few are the Claimants who are determined to have their 'day in court' and, properly advised, they may come to realise they are more 'heard' by a 'day in mediation'.

Secondly, mediation in this context tends to have an evaluative element – it is not that the parties do not know how to talk to each other (as might require facilitative mediation – say a family that has fallen out over a will). Some high-level, broad-brush input from an experienced and independent mediator can be invaluable. In their nature, clinical negligence claim are often complex, with sometimes nuanced interactions between breach and causation, and therefore having a 'third voice' inviting the parties to see the wood for the trees – or the crucial areas of dispute – does assist. Where there are more than two parties in the litigation, the flexibility of mediation can also be of advantage, as different sides will have different perceptions of relative strengths and weakness and pressure-points that are best explored neutrally, which is no more than encouraged by the confidential, and more supple, nature of mediation.

Thirdly, it presents as an opportunity to speak directly to the ultimate decision-makers in ways that conventional JSMs sometimes do not necessarily afford. This is not to say that lawyers get in the way. However, in the context of a well-run mediation, the opportunity might arise for the Claimant's representative to address the paymaster directly – in a strong case, by giving a flavour of what might otherwise be the opening to the trial judge. In this context, demonstrating how even, on the Defendant's evidence, the defence may founder may be particularly effective. Conversely, attentive listening to what the actual Claimant has to say – and particularly how they have to say it – can sometimes move matters forward effectively. As before, what may be true for one side could apply equally to the other, in the appropriate case. The onus should not be seen as resting with one side or another to suggest mediation first.

## Timing of Mediation

If mediation is seen as suitable, that necessarily involves consideration being given to what is the right – or wrong – time to mediate. In principle, if one or other side is quite convinced of the demonstrable merits of its position, inviting mediation sooner rather than later may be entertained, particularly with costs considerations in mind. After all, there is a responsibility to defend unjustified claims to secure NHS resources, but those resources are less likely to be run up by this means. However, holding a mediation too early can prove unhelpful as the failure of it may led to entrenchment that could have been avoided with more patience before embarking on the process.

Two practical considerations are likely to feature when considering timing. First, is there any additional expert evidence required before entertaining the process? Secondly, has there been sufficient disclosure given on both sides? If there has and the documents speak for themselves, then the need in addition for witness statements might diminish. That said, if one is prepared to mediate, then be proactive with proposals as to next steps. If there are indeed any further documents or further information one requires prior to participating in any mediation, request these from the other party without delay.

Of course, one side's assessment of when timing is optimal might not coincide with others, even though an agreement to mediate is almost there. Always respond promptly to an offer to mediate (there may be costs consequences if one does not – see further below). Do not wait until one is facing a costs sanction to justify the decision not to mediate: it will be too late. Never close off the possibility of mediation for all time as your circumstances, and/or the circumstances of the other party (or parties), may change in the future, in which case mediation may be worthwhile at a later date.

There are no hard and fast rules *viz.* timing. Indeed, a hall-mark of successful mediation is that it calls for flexibility and

that is true also of when it takes place. If early mediation is not indicated, one timely juncture can be before – rather than after – joint statements. Divergent views as to how a case should be approached may already be manifest from a 'battle of the draft agendas' over what questions the medical experts ought to be addressing as part of the 'joint statement' process. At that stage, namely before joint statements, each side's perceptions of where the risks in the litigation lie may be most heightened, which can be no bad thing towards encouraging settlement via mediation. Further, having mediation before rather than after – if not sooner rather than later – should mean the costs are somewhat less than waiting to a point where the 'areas of disagreement' point to entrenchment.

## The Position Paper

Almost invariably, whether acting for Claimant or Defendant, one should prepare a Position Paper. My own default setting is to seek instructions for it to be disclosed not only to the mediator but also the other side (or sides). What one should be prepared to say to one should be said to all. That said, there may be cases where exceptionally a side-note, for the mediator's eye only, might additionally be prepared.

The Position Paper should be a concise statement of the client's case, both on facts and (to the – probably limited – extent necessary) the law. Some powder needs to be kept dry for any trial. In plain language, the Position Paper should be directed to the decision-makers on the other side. Though a Position Paper, it should not take up positions e.g. posing any ultimatums or bottom lines. That said, one approach I sometimes consider is weaving into the Position Paper a version of a Notice to Admit Facts, the informing consideration or question being: what are the facts it is considered the other side really needs to concede or be confronted with?

Rare are the cases where, at mediation, the medical experts – or, if acting for the Defendant(s), treating clinicians – will be present. However, as to the former, one would wish to ensure of course that the Position Paper confirms with the 'construct' on events that is to be advanced by the expert(s) to be called at any trial. As to the latter, this may present as their best, last opportunity to say – without artifice or the duress of cross-examination – what they may really want to get across to the other side.

Mediation is not to be seen as an easy, or lesser, option, where some of the work is to be done by the mediator. Just as an effective opening will set a positive course at trial, so also a comprehensive Position Paper may have the same effect, as the mediator ought to bring home the consequences of a weak/weaker case.

## Costs and Refusing to Mediate

The starting point for consideration of the law on this topic remains the case of *Dunnett v Railtrack plc* [2002] 1 WLR 2434, where the Court of Appeal gave guidance as to the potential for costs consequences to be applied to parties who refuse to mediate.

The issue came before the Court of Appeal again in the case of *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, where the court established the following principles at [16]:

> *"The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following:*
>
> *(a) the nature of the dispute;*
>
> *(b) the merits of the case;*
>
> *(c) the extent to which other settlement methods have been attempted;*
>
> *(d) whether the costs of the ADR would be disproportionately high;*
>
> *(e) whether any delay in setting up and attending the ADR would have been prejudicial; and*

*(f) whether the ADR had a reasonable prospect of success.*"

The court gave particular emphasis to the prospect of the mediation succeeding and cited the case of *Hurst v Leeming* [2003] 1 Lloyd's Rep 379, where Lightman J considered at p. 381 that the "*critical factor*" in that case was whether "*objectively viewed*" a mediation had any real prospect of success.

In *PGF II SA v OMFS Co 1 Ltd* [2014] 1 WLR 1386, a serious proposal for mediation had been made with the Claimant inviting the Defendant to take part in an early mediation. The letter assumed that the Defendant would wish to review the Claimant's disclosure, and that a meeting and exchange of information might usefully take place between experts, before a mediation commenced. It was considered to be a "*thorough, carefully thought through and sensible mediation proposal*" (see [10]).

In its judgment at [34]-[35], the court extended the *Halsey* guidelines as follows:

> "*In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. … There are in my view sound practical and policy reasons for this modest extension to the principles and guidelines set out in the Halsey case, which concerned reasoned refusals, provided in prompt response to the request to participate in ADR.*"

In summary, silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds.

In *Garritt-Critchley v Ronnan* [2015] 3 Costs LR 453, it was held that an unreasonable refusal to engage in mediation justified an order for indemnity costs, even where the Claimant recovered very substantially less than originally claimed. One reason provided for this was that "*parties don't know whether in truth they are too far apart unless they sit down and explore settlement*" (see [22]). Costs sanctions were also applied in *Laporte v Commissioner of Police of the Metropolis* [2015] 3 Costs LR 471 against a successful Defendant. The Defendant succeeded at trial but had refused an offer to mediate so was only entitled to recover two-thirds of its costs.

In November 2018, the Civil Justice Council issued its Final Report on ADR. The Working Group put forward a number of recommendations including a revised and considerably narrower list of what might be good reasons for refusing mediation:

1. The parties have already attempted mediation (or possibly ENE or some other form of ADR) without success.
2. The parties are already committed to an ADR process in the nearâ€ÂÂterm.
3. The parties satisfy (or a party satisfies) the court of a need to wait (often until after disclosure) for any meaningful negotiations to take place, but they will commit to using ADR at that stage if the case has not otherwise settled.
4. There has been unreasonable or obsessive conduct by one or other party (of the *Hurst v Leeming* variety).
5. There is a genuine test case in which the court's judgment on an issue of principle is required.

Costs penalties have also been applied in *DSN v Blackpool Football Club Ltd* [2020] Costs LR 359 and *BXB v Watch Tower and Bible Tract Society Of Pennsylvannia* [2020] Costs LR 341. Both cases concerned allegations of sexual abuse.

In the case of *Wales v CBRE Managed Services Ltd* [2020] Costs LR 603, CBRE were deprived of 50% of their costs up until the date they made an offer to compromise. Their costs were reduced by 20% from the date they refused to engage in mediation. In *Gregor Fisken Ltd v Carl* [2021] 4 WLR 91, the Court of Appeal stated that the parties should have engaged the services of a skilled mediator early in the dispute, notwithstanding that the matter did not fall within the Court of Appeal's pilot scheme for mediation. The court invited further submissions as to the consequences which should follow.

## Concluding Thoughts

What can be taken from this line of cases is that a party must respond to an invitation to mediate in a meaningful way. Further, if no invitation is received from the opposing party, consideration should be given to taking the initiative and suggesting mediation (or others forms of ADR). Save for limited circumstances the court is likely to consider most cases as being appropriate for mediation or ADR.

In this last connection, remember paragraph 8 of the Practice Direction – Pre-Action Conduct:

> "*Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.*"

Indeed, the Ministry of Justice last year called for evidence from all interested parties in relation to Dispute Resolution, noting that "*a quarter of a century after the Woolf report, litigation is still far from the last resort and too many cases still go through the court process unnecessarily*".

Rather than being seen as outside the run of the mill, clinical negligence cases should lead the way when it comes to mediation.