

ADR – A viable alternative in Personal Injury and Clinical Negligence disputes?

By Christopher Gardner QC, Head of Lamb Chambers.

Those who practice in these areas will know that on a good day, with a straight start and a Judge who is experienced in such disputes, who is willing to listen and does not appear to be preoccupied with when the case is likely to finish, their case is likely to reach a reasoned and acceptable determination and, perhaps more importantly, will result in both the damaged claimant and the defendant feeling that they have had a comprehensive and fair hearing. This surely should be the aim of any tribunal.

Sadly the experience of many practitioners is that this is now the exception rather than the rule. So often the parties find themselves with a trial window, which creates difficulties when expert witnesses have to be assembled, many months ahead.

The parties and their legal representatives often only find out the identity of their Tribunal the night before the trial, and discover that their High Court case is to be tried by a Deputy, with only temporary High Court status, who is illogically and sometimes quite unreasonably expected to determine complex medical issues of fact, liability, causation and quantum with which (s)he is not familiar. Those practising in County Court multi-track cases often find that other court business has to take precedence, and that insufficient time is available for their case to be completed. Unconscionably long adjournments make it almost impossible for the judge to remember what the case was about at the resumed hearing. Sometimes such a situation may provoke a settlement and thereby save court time, but this is at the expense of dissatisfaction and disillusionment of the parties and does our legal system little credit.

Clients are left feeling that considerations for court procedures and timetables are more important than they are, including at preliminary hearings, where their ability to call evidence in support of their case is constantly questioned. When the trial begins, speed of completion often seems to be of the essence. Counsel are discouraged from elaborating on their skeleton opening, final written submissions or a witness's evidence in chief.

The fact that a claimant or defendant wants, and importantly to them feels the need to hear how the case is put to the judge in open court, as well as wanting to explain their evidence in their own words, is often overlooked or ignored. They should not be left feeling that all such claims should be capable of being settled without a court hearing. Such is patently not the case as, just like in any other area of law, there are cases where disputes as to liability, causation and quantum need to be decided.

In an area of law and practice that has such a high personal and emotional content, if it is perceived that justice cannot properly be obtained through litigation, the search for an alternative method of disposal becomes inevitable.

ADR organisations contend that mediation and arbitration can provide quicker, more cost effective, less traumatising, more user-friendly alternatives, specifically tailored to personal injury and clinical negligence disputes. The seriousness with which they

have been regarded or even countenanced by practitioners in these areas has varied. Sometimes mediations are attended by an assistant solicitor on one side and leading counsel on the other. Many barristers and solicitors have been wary of ADR, fearing an adverse financial effect on their practices, and lack of expertise and bias of the mediators.

As to the former, the stage at which a successful mediation can take place will only be reached when each party has properly assessed the strengths and weaknesses of their case and realistically quantified the claim, that is to say when most of the investigation has been done and conferences with experts have been held. As to the latter, steps have been and are being taken by the ADR institutions to ensure that panels of suitably qualified mediators are available.

The importance of the expertise/calibre of the mediators, and the need for understanding and sensitivity in such disputes, has been recognised by the Clinical Negligence Mediation Project, a working party set up by the NHSLA, AVMA and CEDR, and funded by the LSC. Various persons have been appointed to its advisory group, including Philip Naughton QC on behalf of the Bar sub-committee on ADR, and various ADR bodies have also been consulted. CEDR is to initiate a training and accreditation process for such mediators, and are currently running a pilot scheme for a preliminary process review to help parties to assess whether mediation is suitable or premature in a particular case, or whether further preparation is required. The extent to which a preliminary review would be used is, in my view, questionable. Those representing such clients have to be specialists in this form of litigation, and will know whether their case is suited to and ready for mediation, assuming that they know precisely what mediation involves. To this end seminars are being devised to educate practitioners.

Fears as to the neutrality of mediators will be largely dissipated when it is understood that they only act as facilitators, and will not express any personal views as to the merits of a case.

The aim is to create, from existing specialist mediators and those who will be trained up to be such, a panel of mediators comprising those who know their way around and have a feel for the subject, which patients, medical practitioners, Trusts, the NHSLA and medical defence organisations and their respective lawyers will regard as a trusted resource for addressing disputes. They will act as a confidential go-between, and will encourage the parties in a realistic review of their case. The process in no way resembles robing room or door of the court negotiation or even round table discussions.

Its essence is the ability of each party to be able to talk to the mediator confidentially and privately, matters discussed only being conveyed to the other side by agreement. Nothing agreed is binding until it is written down and signed. Nothing revealed can be used in litigation. Publicity, often unwelcome to both claimant and defendant, is avoided. The whole process is confidential unless agreed between the parties, for example the publication of an apology.

The working party is also considering whether a formal neutral evaluation procedure should be available, although this would be by a third party who would have no communication with the mediator.

It is important that ADR is just that, an alternative to litigation. A court-imposed mediation is unlikely to be embraced by the parties in a way that is essential if it is going to be successful. It must not be used, or be perceived as being used, as a tool in the litigation process, providing a party with an opportunity to gauge the other's top or their bottom line on quantum.

The requirements of an expert tribunal, a timetable and process to suit the parties, as well as the advantages of confidentiality and a friendlier environment, could also be met by arbitration, with the added advantage of finality, the delays and uncertainties of the appeal process being avoided. Concerns regarding the possible bias of the arbitrator should be met by ensuring nomination from a panel of highly trained and specialist arbitrators. Further it should be remembered that even the court process is often made up of full and part time judges who have been or are mainly concerned with either claimant or defendant representation. The Chartered Institute is creating such panels of both arbitrators and mediators from those it has trained. For the larger claims, such as cerebral palsy, a panel of 3 arbitrators will be appointed. Each party appoints an arbitrator, and they subsequently appoint a Chairman. If they are unable to agree on the Chairman, then the President of the Chartered Institute will make an appointment.

A new scheme, which will come into effect in April, has been developed by the Chartered Institute in conjunction with the Association of British Travel Agents (ABTA), relates to claims for personal injury and illness alleged to have been suffered as a result of a failure by the tour operator to ensure safety. Under the rules of the scheme the parties are able to refer their dispute to a mediation procedure specifically developed for personal injury and illness cases. A dedicated panel of experienced personal injury mediators for appointment under this procedure is being created, and a conference will be held to outline the benefits of mediation for personal injury cases, and will include a mock mediation.

Such a scheme has the attraction of providing a quick, cost-effective and private resolution of disputes in the field.

These, then, are examples of two schemes where proactive measures are being taken to provide workable alternatives to health dispute litigation, where they are arguably most needed, and their creation evidences that the use of ADR in such disputes is growing, presumably as a result of more and more practitioners, including barristers, finding out just what ADR involves and what its advantages are.

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