

Mediation matters

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In recognition of the success of its claims mediation service, NHS Resolution has recently been shortlisted for a Mediation Innovation Award at the National Mediation Awards. Reflecting on how NHS Resolution is improving the role of safety and learning in resolving claims, we look back at how mediation has developed its aim of achieving early and fair resolution as well as providing some top tips for mediation attendance.

Delivering fair resolution and learning from harm was the headline for NHS Resolution's 5-year strategic plan published in 2017 and in February this year NHS Resolution published "Mediation in healthcare claims – an evaluation". This report evaluated over 600 mediations which had taken place since the inception of NHS Resolution's claims mediation service in December 2016. The report found that:

- Mediation is an effective forum for claims resolution by providing injured patients and their families the opportunity to receive face-to-face explanations and apologies and a platform to articulate concerns that would not ordinarily be addressed in other forms of dispute resolution.
- 74% of cases mediated were settled either on the day or within 28 days of the mediation date with the largest proportion of cases settled on the day being those where Counsel didn't attend.
- Trust representative attendance increased the prospects of settlement both on the day and within the following 28 days.

During our recent Shared Insights session on The Benefits of Mediation for Trusts, Julienne Vernon, Head of Dispute Resolution and Quality at NHS Resolution, explained that over 1,000 claims have now been mediated under NHS Resolution's claims mediation service, which operates under a fixed costs model, keeping costs in check and preserving valuable resources for frontline patient care.

A key finding of NHS Resolution's report [Behavioural insights into patient motivation to make a claim for clinical negligence](#) published in October 2018 was that patients who bring a clinical negligence claim do not want the same thing to happen to someone else. In recognition of that, Bev Hunt, NHS Resolution's Safety and Learning Lead (Mediation) is currently looking to increase the involvement of safety and learning representation and promote attendance of Trusts at mediations with both legal and clinical representatives to explain what went wrong and why, and to give a meaningful apology.

With this in mind, we set out some 'top tips' for attending mediations from those in the know:

1. As a trained midwife, Bev is well aware of the emotions involved when things go wrong and states "Apologising to patients and their family is very impactful for the patient, the Trust and the NHS Resolution representative".
2. Dr Nav Ahluwalia, Consultant Psychiatrist, and Executive Medical Director at Rotherham Doncaster and South Humber NHS Foundation Trust gave us his perspective:
3. A Trust should pick the right person to attend with the right mindset - someone who has authenticity, who knows the case

and who is prepared to make an emotional connection with the patient and their family.

4. "Never forget humanity in this process, manage each case to build that humanity and trust. In terms of culture change, we need to stop the win/lose mindset. This can arise between clinicians or between patient and clinicians and is damaging. We need a win-win approach - it will do no end of good for patients, staff and carers".
5. Lorraine Purcell, Head of Midwifery at University Hospitals of Derby and Burton NHS Foundation Trust emphasised that empathy and being well-prepared is key. "Knowing the case and being supported by the legal team all made a big difference and made the mediation I attended a very positive experience" and "eight months later the patient returned to the Trust to be involved in Learning and Development by speaking to staff about her experience, which had a positive impact on her and the clinicians involved and helped us to learn from her experience and involve her in that learning".
6. As to the benefits of mediation over other forms of dispute resolution, Paul Balen, mediator at Trust Mediation, a member of NHS Resolution's mediation panel, sets out his view that mediations can help to rebuild trust which can help achieve settlement. "The mediator aims to give the patient a voice" and it is important to remember it is the parties' case, not the lawyers' or the clinicians'.
7. Trust Mediation, who have provided the team at Browne Jacobson with "advanced mediation training", state that whilst they would like to see more Defendant representatives at mediations "The identity of the listeners is important. There is a big difference between a claimant talking to lawyers and a claimant talking to the Trust and NHS Resolution - and receiving a response and or an acknowledgement from them ... our belief and experience is that a claimant is more disposed to settle if they feel that they have been heard".

From our own experience at Browne Jacobson LLP, there needs to be a shift in mindset for mediation to work effectively. Mediations are not a litigious process and the best mediations are those where both parties come away feeling as if they have been listened to, have been treated fairly and are able to move forwards. We have experienced great examples of this including:

1. Mediating with a group of Claimants who had suffered psychiatric and physical injuries. The Trust's Legal Services Manager showed such empathy with the Claimants that in addition to verbal apologies, we also shared hugs and tears. The mediator, Tony Allen, CEDR commented "I cannot remember a more telling set of interventions which influenced the atmosphere so positively, and I am sure, the outcome ...";
2. At a recent emotionally charged mediation following the death of a couple's two children, the Trust's legal team and Deputy Medical Director were in attendance with Bev Hunt and time and effort was put into addressing the family's non-monetary needs so lessons could be learnt and information provided about changes that had occurred since the incident; and
3. Paul Balen mediated a case where the Clinical Director in attendance was the person who saved the Claimant's life after the negligent treatment. Despite her reservations, the Claimant met the clinician without the presence of lawyers for a highly emotional meeting which enabled the parties to settle the claim very quickly afterwards, thus demonstrating the importance of the human relationship and empathy in the mediation process.

Finally, what Covid-19 has taught us is that there's no longer a need for parties to spend hours travelling to sit in solicitors' offices to attend settlement meetings and mediations. Remote mediations by Zoom, Skype, MS Teams and other platforms are the new normal and

should allow Claimants to feel at ease in their own homes and allow attendance from busy professionals and clinicians for just the key part of the session.

Should you have any mediation related queries or if you would like to discuss how we can help you with mediating disputes, please contact [Kelly Buckley](mailto:kelly.buckley@brownejacobson.com).

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