THE CLINICAL DISPUTES FORUM’S
GUIDE TO MEDIATING
CLINICAL NEGLIGENCE CLAIMS

This guide is intended for those involved in clinical negligence claims, both claimants and defendants and their lawyers. It gives an outline of what mediation is and what it is not, why it should be considered, and when it should be considered. It seeks to enable parties to make rational and informed decisions about the best process to use in reaching efficient and satisfying outcomes to clinical disputes for all concerned. It also gives some guidance on what happens at a mediation and how to prepare for it.

1 What is mediation?

1.1 A definition of mediation

Mediation is a private, voluntary, non-binding process in which a neutral third party - the mediator - assists the parties to a dispute to find a mutually satisfactory outcome. Unlike an arbitrator, the mediator will not evaluate or determine the merits of the case. As with the process of conciliation, sometimes used to resolve complaints against GPs and dentists, the mediator is a facilitator, assisting the parties in the resolution of their dispute. It is private, in that only those involved in the dispute and their lawyers, and sometimes witnesses, attend. Anything said at the mediation is also confidential and without prejudice, so that if the claim is not settled, evidence cannot later be given of what anyone said or admitted or offered at the mediation, nor are any documents prepared for the mediation admissible.

Continued participation in a mediation is always voluntary; a party may leave if it is felt that the mediation is achieving nothing, even where the court has stayed proceedings or encouraged the parties to mediate.

Mediations are non-binding, in that the mediator makes no decision for the parties. Thus a binding outcome is not guaranteed in advance. The outcome is dependent on the parties finding acceptable terms. If they cannot, they can revert to conventional litigation for an imposed solution. If they can find agreed terms, these are then made contractually binding, by written agreement or consent order.

The neutral mediator facilitates the exploration and identification of outcomes with the parties, enabling them to find solutions which are acceptable, as compared with what an adjudicated solution might provide. A skilled and experienced mediator will use a variety of techniques in so doing.

Although the model of mediation most commonly applied to resolve clinical negligence claims is designed to be conducted in the ‘shadow’ of litigation, having regard to what remedies could be available at law, satisfactory outcomes are not confined to what a court can order in a given dispute. The parties are free to negotiate non-monetary outcomes and terms governing future relations and interests, instead of simply deciding past rights.

Mediation has been used in the UK since about 1988, to resolve a variety of commercial and family disputes, often involving considerable complexity. In recent years it has also been used to resolve clinical negligence disputes. It has been used widely in most other common law jurisdictions for every kind of dispute for over 20 years.
1.2 Mediation and litigation as alternatives to each other

Use of mediation does not shut off use of mainstream litigation. It is not “alternative” in the sense of excluding the litigation option. On the contrary, litigation and mediation remain complementary to each other throughout any unconcluded dispute. Mediation can and often does take place before court proceedings are started. At that stage, litigation is the alternative to a mediated settlement. Once proceedings have started, mediation can take place at any time up to trial. If proposals emerging from a post-proceedings mediation prove unacceptable, the alternative is to continue with the litigation. Cases can even be successfully mediated between first instance judgment and appeal. In this way mediation and litigation are both symbiotic and alternative to each other.

It may be helpful to think of mediation as a **structured form of assisted negotiation**.

2 Why use mediation at all?

2.1 “The day in court”

Parties often say that they want their “day in court”, but very few cases actually reach trial. Settlement may be advised, particularly if there are problems with funding, even if it deprives parties of the day in court which they may have desired, losing the benefits that a personalised hearing may confer.

Most clinical disputes not concluded through the complaints process are settled by:

- negotiation between claimant lawyers and defendants or their lawyers during a claim, by exchange of letters, telephoned negotiations or meetings
- acceptance of a formal offer to settle under Part 36 of the Civil Procedure Rules (the CPR)
- withdrawal or discontinuance by the claimant
- settlement conferences with lawyers (often both barristers and solicitors) present with the parties
- settlement at the court door

Moreover, trials are no longer encouraged by the civil claims system. It is clear from the Civil Procedure Rules 1999 (the CPR) that trial is to be regarded as a last resort. Those who approach litigation, whether before or after proceedings are issued, in an uncooperative or unreasonable fashion, or in a manner or at a cost disproportionate to the issues involved, may face unpleasant costs sanctions at trial even if they “win”.

Enshrined in the overriding objective of the CPR is the requirement on the court to exercise its active management powers: including encouragement to use alternative or complementary processes such as mediation to settle cases at the earliest suitable time, thus avoiding the frustrations and expense of continuing litigation. In every case, the parties must in effect see if it can be settled without recourse first to proceedings and later to trial.

Furthermore, not all who do get to experience a trial will find it specifically attuned to their basic needs. Although the Judge will try to include the parties, many may feel marginalised by the highly technical and professionalised proceedings, over which they lack any real control. Evidence-giving can be a real ordeal. And, of course, however strong the case, there is always the risk that it will not succeed before the Judge.

Mediation in effect guarantees a day in court for both claimant and clinician, though (as will be seen below) of a private, confidential and informal kind, perhaps more suited to the needs of those involved.
2.2 The parties’ need for proper closure to claims

This is frequently overlooked, as is best evidenced by the high dissatisfaction level with the conventional litigation process among claimants identified by the Mulcahy Report\(^1\). A system which is criticised by 70% of those surveyed, even when they were awarded damages, can hardly be said to command respect. What might claimants want which the conventional processes do not deliver? The Mulcahy report lists a number of these, including admission of responsibility, apology, explanation, reassurance that what happened was not in vain; with the desire for monetary compensation appearing surprisingly low down the list of priorities.

2.3 An analysis of how parties’ needs are (and are not) met in litigation and mediation

Table I studies a number of different needs which parties making a claim might well have, discussing to what extent these are provided by the various ways of bringing claims to a conclusion, including conventional negotiation between lawyers, settlement conferences, court-door settlement, mediation and court trial.

The needs of clinicians for closure of claims and allegations against them must not be forgotten. Many of the needs set out in the table below apply to them as well.

2.4 What differentiates mediation from trial and conventional negotiation?

It will have become clear from the previous section that mediation is very different from a civil trial.

- The objective of a trial is to equip the judge with admissible evidence and argument so as to allow the judge to make a binding decision on the issues which separate the parties. Normally one party will win and the other will lose.
- The objective of the pre-trial litigation process is partly to make a fair trial possible, but is now also to equip each party with the information needed to assess their risks and consider settlement, thus avoiding trial.
- The objective of a mediation is to try to reach outcomes by agreement between the parties, with no imposition of a decision by a third party. This makes it possible for both parties to "win" (in the sense of achieving a mutually acceptable set of outcomes) and for there to be no winner or loser, or at least a negotiated equality in the outcomes achieved and agreed.

With the vast majority of cases settling before trial, what are the key differences between mediation and conventional negotiation? The key differences are:

- The opportunity to have all the key people involved in the claim together.

Conventionally, negotiations are otherwise often conducted at arms’ length lawyer-to-lawyer (or lawyer-to-Trust/NHSLA), usually excluding both the claimant and the clinician under challenge. During a mediation, those whose claim and defence it really is can be fully involved in a thorough exploration and negotiation process to conclude the claim. A good mediator will ensure that all present are fully engaged in the process, especially the claimant and the claimant’s life partner (both are encouraged to attend), who between them have borne the personal burden of what has lead to the claim over many years, and who are usually involved in making a claim for the first time ever. Equally, the mediator will want to ensure that the clinicians who attend the process participate in a full, constructive and creative way for the benefit of both themselves and the claimant, being their (former) patient or a close relative.

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\(^1\) Mediating Medical Negligence Claims: An option for the future? Linda Mulcahy. HMSO 1999
Clinical Disputes Forum

- **A guaranteed “settlement event” for the parties themselves**, which enables them to meet and be heard by each other personally. The claimant can talk to a group of named individuals who come with authority to settle if persuaded that it is right to do so, instead of a faceless NHS Trust. Claimants can express such things as how they feel about what happened, their wishes for the future, in a human and non-technical way. Defendants too (including, where desired, the clinician under challenge) are able to talk directly to the claimant, explaining what happened, how things have changed and express any appropriate regret, though without necessarily having to concede liability or compensation. Clinicians themselves can look for a satisfying lifting of what is often a considerable burden of facing an accusation of professional negligence. All of this takes place in an entirely safe environment - informal, private and off-the-record - a little more formal and inclusive than a negotiation, but quite unlike trial. Such potential benefits are much less readily available within the formalised framework of a trial, and are rarely made available through informal negotiation.

- **The presence of the mediator**, whose role as a neutral facilitator includes taking responsibility for running the mediation process, deciding the order of events, and thus allowing the parties to concentrate on the issues. More importantly, the mediator sees each party privately and can discuss and test out strengths and weaknesses with each side both impartially and entirely confidentially. This equips the mediator to help the parties to find ways forward out of impasse, simply through knowing more than everyone else what are their true positions. This is a much more efficient way to negotiate than the positional techniques of threat and bluff, in which negotiators concede little, and may make exaggerated demands in the hope of securing less. Reality-testing of each party's publicly stated positions and arguments, by an impartial mediator in a private meeting, is much more likely to be taken seriously than when put or repeated by an opponent. The mediation process can help parties to move on towards compromise by reflecting litigation risk in their assessments, yet in a way which minimises the loss of face that so often hinders progress in negotiation.

- **The focus on interests rather than rights**, which most mediators will encourage and develop. Virtually all claimants remain in a clinical relationship with the NHS, and the future needs to be carefully thought through as part of the settlement of claims based on past rights. Mediation still provides a forum for negotiating often very substantial damages, but creative outcomes are also often negotiated through mediation beside monetary remedies. As research has confirmed, these can be perceived by claimants as being of much more value than pecuniary damages. Litigation almost always looks backwards and deals merely with rights and monetary compensation for past breaches of those rights.

2.5 **Other reasons for using mediation**

- **Bringing a dispute to a head**: by setting a mediation date and preparing for it, parties and their lawyers will avoid the risk of drift. They will advance their thinking about a case, compelling consideration of its strengths and weaknesses and the attractiveness or otherwise of settlement. Mediation is often likened to an “artificial court-room door”.

- **Speed**: mediations are often set up within weeks or even days of referral.

- **Cost savings**: mediation costs less than a trial, because counsel are less often used and preparation of bundles much less essential. The earlier mediation takes place in the life of a claim, especially if held before issue of proceedings, the greater the potential savings in legal costs and fees on both sides. However, the costs of the mediation, including the costs of preparation and attendance of lawyers and the mediator’s fee, are not in themselves insignificant. Parties and their lawyers will need to check the costs and likely benefits of mediation, in terms of both the process and possible outcomes, against the costs likely to be incurred otherwise to achieve an outcome, whether by trial or later negotiation.
3 How do I get a case into a mediation?

3.1 Initiating a mediation

The mediation process usually starts in one of the following ways:

- by agreement negotiated directly between the parties
- by agreement negotiated through one of the mediation providers
- on the suggestion of a funder, such as the LSC or the NHSLA
- by the court’s suggestion, sometimes coupled with a stay of proceedings for a fixed period, or sometimes without a stay of the litigation timetable.

A claimant or defendant should be able to look to his/her solicitor for advice on the mediation process, and further advice is available from the mediation providers, who will be able to nominate possible mediators from their databases, recording experience and feedback built up over time. The parties retain an absolute choice over mediator, only ever subject to court order in the event of deadlock, when the court may rarely authorise a mediation provider to appoint a mediator in default of agreement.

Details of some ADR organisations who are associates of the CDF are given at the end of this Guide.

3.2 What if I want to mediate and the other party does not?

Usually the best question to ask first is, what do you have to lose? If a good outcome is likely, with funders paying for mediation, then there is little to lose. The main risk relates to bearing the costs where a mediation does not settle a claim. If a claim is settled by mediation (as usually happens), the costs normally follow the event.

Clearly, it is much better for parties to agree, attend and see through mediation voluntarily. If, however, agreement to mediation is not immediately forthcoming from the opponent, either party’s solicitor may approach a mediation provider to discuss mediation further with them, and to endeavour to persuade them into mediation voluntarily.

The Court of Appeal has now indicated that courts are prepared to impose indemnity costs and penal interest sanctions on any party unreasonably refusing to participate in mediation - see Dyson & Field v Leeds City Council unrep., 22 Nov 1999, in the judgment of Ward LJ, supported by Lord Woolf and Laws LJ. Whilst the courts show no sign of imposing mediation compulsorily, they have been prepared to make orders at case management conferences providing for a stay in proceedings, to encourage mediation. They have clear powers under CPR Part 44.5 and the Practice Direction to the Pre-action Protocol to penalise conduct perceived by them to be unreasonable, on this as any other issue, and whether before or after issue of proceedings.

Both the Legal Services Commission and the NHS Litigation Authority are prepared to encourage the use of mediation. After-the-event insurers are also considering its possible impact. Thus if your opponent has turned down a reasonable request to engage in mediation, as a final way of bringing your opponent into mediation:

- if you are (for) the claimant, write to the NHSLA in case they are controlling the litigation:
- if you are (for) the defendant against an LSC funded claimant, write to the LSC or (if known) the funding insurer:
- if your request is turned down before proceedings are issued, (threaten to) apply for a stay under CPR Part 26.4 at allocation, invite the court to order an allocation hearing to debate mediation and seek indemnity costs, to be summarily assessed:
• if proceedings are already issued, (threaten to) apply for an ADR order either at the next Case Management Conference or Pre-trial review, or on a stand-alone application notice, again seeking indemnity costs, to be summarily assessed on that issue.

3.3 When should mediation be considered?

In each case, a proper review should be undertaken of the client’s real needs, and a proper cost-benefit analysis undertaken to check how the difference between the sides compares with the costs of various processes available to reach an outcome, and the most appropriate settlement process selected accordingly.

Mediation of a case can and should take place as soon as both sides in a claim are likely to have enough information available by the end of the mediation (remembering the opportunity for information and opinion exchange at the mediation itself) to form a sound view as to whether settlement is appropriate. In clinical negligence claims, when there is a huge spectrum of complexity involved, it is hard to be more specific than that.

The following stages of a claim might be regarded as useful trigger-points for considering whether a case is ready to be settled, either by negotiation or mediation. They could be used as the basis for an office or lawyer/client protocol:

• the conclusion of the pre-action protocol process, when there has been disclosure of records, an exchange of views and usually some expert opinion sought. Certainly, it should be seriously considered immediately before proceedings are issued, when the court fees otherwise payable might be saved. Proceedings should only be issued without pursuing a negotiated settlement, or first considering mediation, if there is urgent limitation pressure, or if it is clear that the case cannot safely be settled by then (usually for reasons of prognosis and valuing future loss claims).

• after a failed application for summary judgment under CPR Part 24, if too much acrimony has not been caused. Even if there is acrimony, a mediator may be able to help parties through it, while the case is still relatively fresh in each side’s mind.

• whenever irreconcilable Part 36 offers have been made, the gap between which is worth litigating: by this time each side has shown itself willing to settle in principle, albeit on terms less than claimed.

• at around the time of the first case management conference, when ADR may well be put on the agenda by the procedural judge or the other party.

• whenever a Part 35 expert meeting is to be convened, as it may be better to embody expert discussion into a mediation instead, when the parties can observe and contribute to the debate, and immediate instructions can be taken on its outcome.

• at around the time of any subsequent case management conference or pre-trial review.

• when all witness statements and expert reports have been exchanged: shortly after this point, both sides should really be able to form a final view on their litigation risks.

• (if later than the second or subsequent CMC or the PTR) at say no closer than 12 weeks before trial. The aim should be never to settle at the court door. A mediation within 3 months of trial should be treated as the last chance to see if trial can be avoided. The considerable expense of brief fees and final trial preparation can be saved, and the stress for claimant and clinician of preparing for the rigours of giving evidence minimised.
3.4 Are there cases which are inherently unsuitable for mediation?

Very few cases are inherently unsuitable for mediation at every and all points throughout their life cycle. The right question is not whether a case is suitable for mediation, but is it ready?

Possible exceptions are where a precedent is required or there is a significant good faith disagreement over the issues at stake which can only be resolved by a judge. However, if an unfavourable precedent would be unacceptable, then it is better to try to negotiate an outcome. Mediation often bridges very large gaps between parties, even when they are apparently entrenched a long way apart.

Mediation has now been used to deal successfully with both large and small cases, with issues on liability, causation and quantum; claims involving minors which require court approval; cases referred by the court and referred voluntarily; cases with major differences in expert opinion on the key issues. It has also been used for one party to persuade another party that their claim should be paid in full or that a claim should be dismissed without any payment to the claimant, though even in such cases some non-monetary benefit has usually been generated for the claimant, often of a very real kind. A wider possible range of outcomes is possible than provided for by litigation.

3.5 Is a case unsuitable for mediation because you believe that your case is unanswerable?

Mediation has sometimes been criticised for creating an expectation of compromise. Defendants who believe that a claim is frankly misconceived fear that they will be expected to pay something or else be accused of bad faith. Claimants may feel that there is no good reason why they should offer any discount off their claims at all.

Few cases generate that kind of certainty. If they do, an application for summary judgment under CPR Part 24 might be the first choice. Short of that standard, there is almost always a measurable degree of litigation risk which might give rise to a settlement.

However, provided that it is clearly flagged up in preparing for the mediation, so as to avoid any sense of ambush, there is no reason at all why one party should not come to a mediation saying “We honestly do not believe that you have a case and have come here to persuade you to accept this fact at the earliest possible stage. However, we have also come to listen very carefully to what you say. Please put your case to us as strongly as you can and ask for any further information you need. We undertake to give careful consideration to what you say. If you persuade us to change our minds, we have authority to do so today. You must realise though that unless you persuade us to change our present view, one outcome may be that we will not make any offer.”

Mediated cases have ended both with payment of a claim in full or total withdrawal of a claim. Even where withdrawal has occurred, the value of the opportunity given to the claimant to meet and vent feelings is important, and there may be non-monetary benefits that can be usefully agreed, often of very real value.

4 What does a mediation involve?

4.1 Who attends a mediation?

This is a matter of judgement to be made in relation to each case and the issues at stake, plus considerations of balancing numbers in each team.
The following people might well be considered:

- Obviously **the claimant** and if possible their life partner, parent or a close friend, whoever is most appropriate in each case to give support and perspective at a personal level.

- **A lawyer for each party:** this will normally be a solicitor, as counsel's advocacy skills are not really relevant to the informal presentations typical of mediation meetings. However, counsel may attend in very 'heavy' cases requiring specialist advice, and especially where claimants are children or patients, when any settlement provisionally reached must be justified to the court by counsel for approval.

- **Appropriate representatives of the Defendant NHS Trust, medical defence organisation or private hospital insurer:** these may include the clinician under challenge, who may want to resume contact with the patient claimant and deal with that ruptured relationship. If not, a more senior clinician from the Trust may well be required, plus Risk Manager or other management representative, and NHSLA representative. In private medicine and primary healthcare claims, the insurer and equivalent hospital or GP practice office-holders will be required. **It is important that someone is there with authority to settle up to any possible outcome,** even if the defendants may hope that settlement will be substantially less than that worst case figure. Funders like the NHSLA may not always have a representative present: authority will be delegated to their panel solicitor.

- Much often depends upon expert opinion as to whether a clinician was negligent, and/or whether the outcome would have been appreciably different had the alleged negligence not occurred. However, **experts** do not necessarily need to attend mediations, even where there is fundamental disagreement between them. Experienced lawyers, such as those on panels dealing with clinical negligence work, can and often do form a view as to prospects of success on liability and causation, and can frequently resolve disputes about future care regimes and employability without the presence of experts. However, there will be cases where the most efficient way of exploring possible settlement will be to assemble the experts as well as everyone else at the mediation. The expert issues can then be debated and a proper risk assessment made with everyone contributing to the process under the supervision of the mediator. This may well often be a better approach to adopt than having a formal Part 35 meeting. Ultimately, a trial judge may have to determine the dispute.

### 4.2 How should the parties prepare for a mediation?

Lawyers for each party will want to ensure that they prepare effectively for the mediation by:

- **agreeing on a suitable mediator:** ADR providers have databases to help them nominate suitable candidates for any case. Think carefully about what you want by way of mediation skills to deal most effectively with the dispute in question.

- **preparing a case summary and core document bundle** for the mediator and the opposing team to see in advance. These can even be done co-operatively with your opponent's lawyers so as to narrow and define the issues accurately and acceptably to all. The case summary should be as concise as possible. The bundle should contain the statements of the claimant and defendant clinician, and any other key witnesses as to the issues; copies of the statements of case and court directions as to timetable; experts’ reports; latest schedule of loss and counter-schedule; details of any informal or Part 36 offers. There is no need for huge paginated bundles with every possible relevant document of the kind required by trial. Supporting documents for special damages need not be included, unless there are major issues relating to specific items. Even these can usually be dealt with by production on the mediation day. Simply bring your complete files
to the mediation, and any document which becomes significant can be found, copied and circulated during the mediation.

- **by preparing clients** for the occasion. Work through possible negotiating positions and do a proper written risk analysis. This will almost certainly need to be modified during the mediation, but it is best to have one to start from, so long as it is clearly regarded as provisional. Assess what contribution your client might personally make at the joint meeting and see that they prepare their contribution. They might perhaps say how they feel about events giving rise to the claim, and what limitations they perceive for the future; or, if the defendant, how to express regret, with or without admission of liability, over what occurred. Plan for having to decide where you believe your bottom line to be, though tell your client that this may be affected by how the opposing case is presented. You and your client need to leave room for a possible change of mind, but equally you need to know what might make you change it.

- **making sure that someone attends with adequate authority to pay the worst case that may emerge**, even if they have no present intention of doing so. At the very least, have a telephone contact for out of hours referral on authority to settle: this is much less than ideal, as the remote opinion will not have been involved with the debate and will be dependent on your judgement.

- **liaising with the mediator** to ensure that you and your team know what to expect the mediator to do and how the day will be run.

- **carefully preparing the oral presentations** at the joint meeting, which usually occurs early in the mediation. This might well be the only time you have the chance to speak directly to the opposing party (unfiltered through their lawyer) before trial, if the case does not settle. Think about both content and style, carefully considering how what you say is going to be received. There are ways even of saying that you believe the other side’s case to be wholly without merit which can persuade rather than offend!

- **anticipating how to cope with time at the mediation on your own without the mediator**. The mediator will undoubtedly spend time with the other team. You may be given a task to do by the mediator. Make sure you have the right tools with you - the Ogden tables, JSB Guidelines, Kemp & Kemp or equivalent, relevant case reports, a calculator. There may be times when there is no task to perform, so bring some work, a newspaper, or a book, and tell your client to do the same.

- **bringing details of your costs up to the date of the mediation** and be prepared to estimate accurately your likely costs for the mediation to the trial: the mediator is quite likely to see if costs to date in the case can be agreed as part of any settlement, and may well discuss the desirability of risking costs to trial rather than settling.

- **remembering that you will be fully involved in drafting and advising on the settlement agreement**: think about any special problems, such as consideration for Part 20 parties joining in, whether a deed may be required; how to draft a Tomlin order. Bring a laptop and printer to speed the process up, if the venue does not have IT facilities.

### 4.3 What happens at the mediation itself?

The mediator’s role is to help the parties reach an agreed outcome through discussions off the record, both in joint meetings with each other (which the mediator will chair) and in private unilateral meetings with the mediator alone. The mediator does not make any decision on who is right or wrong, but acts as a facilitator of a negotiation and settlement process instead of adjudicating like a judge or arbitrator. The outcome thus belongs to and is controlled by the parties.
Each party’s team will have a private room as a confidential base for the day, for papers and private discussions. The mediator (who may have an assistant mediator without cost to the parties through some providers) will visit each team in their rooms to prepare for an opening joint meeting, at which each side is invited to make a brief oral presentation to the other side. The mediator will open the joint meeting by reminding the parties that the process is voluntary, informal and private and confidential. This gives a unique pre-trial opportunity for each team to explain their case directly to the other party, unfiltered through the opposing lawyer, and can be a powerful and useful occasion. Presentation skills are required to maximise the effect of this occasion. The client may well speak as well as the lawyer, often to great effect.

The mediator may try to summarise the issues, and then meet with each party in the privacy of their separate rooms, to explore the issues and see what scope there is to move towards settlement. The mediator takes responsibility for the order of discussions and the combinations of various members of each team with whom to discuss at each stage. Further joint meetings may be convened with everyone there, or sometimes selected members of each party’s team, such as lawyers or the claimant and the clinician, with or without the mediator.

While the process does not guarantee to produce a binding outcome, if agreement is reached it will be recorded in writing and have the force of a binding contract in its own right, or through being included in a consent order staying the proceedings on agreed terms.

4.4 What if a case does not settle at mediation?

Then the parties will resume the litigation process with nothing substantive lost through engaging in the process, apart from the expense of the mediation. Very often, the mediation process narrows the issues in a way that makes later settlement possible, or at the very least reduces the length of a trial. Even where a mediation seems to end in hopeless deadlock, the case will often settle within a few days or weeks. Parties go away and reflect on their positions and may well make or adjust or even accept a Part 36 offer to reflect their changed perception of their risk.

With trial by ambush now largely outlawed — see the adverse consequences discussed in *Ford v GKR Scaffolding* [2000] 1 All ER 802 - there is little if any risk attaching to the frank exploration of issues and risks at a mediation. Such discussions and any admissions are entirely "without prejudice" and privileged from being revealed in subsequent litigation in the same or indeed other cases - see also *Instance v Denny Bros Printing* The Times 28 Feb 2000.

The mediator may well keep in touch with the parties afterwards to see if further neutral involvement might help.

4.5 What are the chances of success in mediation?

Very high, according to the figures of the ADR providers. CEDR reports a success rate in this sector of over 90%. The NHS Pilot research supports this on its small sample. All twelve cases mediated during the pilot reached agreed settlement outcomes, eleven with monetary and non-monetary outcomes and one by withdrawal, yet confirming a valuable non-monetary outcome on the claimant.

4.6 How do I make decisions about using mediation?

The key questions about making a claim for any party, whether claimant or defendant, lawyer or funder, are:
• what do I (if I am a party or funder) or my client (if I am their lawyer) really want and need?
• how can I achieve these objectives in the best possible way?

In cases where benefits other than money would be of value to the claimant, mediation can provide a useful forum in which to define and deliver them. These might include an apology and explanation, or reassurance over a change of procedure as a result of the adverse event which triggered the claim. The NHS complaints procedure can deliver these but not compensation, whereas mediation can additionally deal with any compensation at the same time.

Mediation is a forum used to dealing with and working through high emotion in an active and constructive way. Clinical negligence claims often involve considerable emotions - anger and puzzlement for claimants; anxiety and anything from denial to guilt for clinicians. Both can be acknowledged within mediation.

But mediation is not simply about emotion. It is also a tough negotiating forum in which difficult advice may have to be formulated, difficult things said, and difficult decisions made. Yet the usefulness of assembling all who are needed if a timely outcome is to be reached is undoubted, and the success rate of the process speaks for itself.

ADR providers are always willing to give advice on the nature of the process, helping to get the parties to the table, discussing suitable mediators and making logistical arrangements for mediations, such as paperwork, venue and convenient dates.

4.7 How does a mediation get paid for?

It is easier now to fund ADR and mediation than ever before. The Legal Services Commission (LSC), the successor to the Legal Aid Board, is prepared to fund mediation fees and expenses as disbursements, subject to reasonableness and proportionality. Time spent by solicitors in attending a mediation is also allowable. The LSC’s Funding Code also makes provision for active encouragement of mediation and other forms of ADR by the LSC in proper cases as a condition of LSC funding. Guidance Notes explaining the LSC’s approach to encouraging those with LSC funding to use mediation are also published.

The NHSLA has adopted a positive policy of encouraging and funding mediation in appropriate cases. Insurers involved in before-the-event and after-the event litigation insurance are also examining the role of mediation within their policy and funding structures.

The normal payment basis when setting up a mediation is for each side to bear half the cost. If the outcome is that money or benefits are conferred on the claimant, it is usual for the claimant’s reasonable costs to be paid in addition, including the costs of the mediation. Agreement on the principle and amount of costs payable is usually negotiated as part of the settlement agreement at the mediation. It is open to the parties to agree in advance that one party should fund the mediation costs and expenses for both parties.

If a mediation does not result in settlement, there is no reason why the costs of the mediation should not later follow the event, subject to any Part 36 offers. But what happens within a mediation remains confidential unless otherwise agreed. There is no means at present for either party to use perceived unreasonableness by the other party during the mediation as a basis for changing the prior agreement over mediation costs thought to have been wasted. Part 36 offers made shortly after an inconclusive mediation may be the best way to secure the costs position in such circumstances.

With LSC funded claimants, the statutory charge will protect the fund against any shortfall in costs, including any unrecovered mediation fees and costs, if there are damages upon which the charge can bite. This is comparable to where a claimant fails to beat a Part 36 offer.
It is always a good idea to bring to a mediation an accurate assessment of costs and disbursements incurred to date, plus as accurate an estimate as possible of the costs of litigation from then until trial, so that the mediation debate is rooted in reality. It is often overlooked that smaller value claims are also about the costs at stake as well, which can sometimes double the value of the litigation.

4.8 Who are the main providers of ADR services?

The following ADR providers are Associate Members of the Clinical Disputes Forum, and were involved in the NHS Mediation Pilot Scheme:

**CEDR (Centre for Effective Dispute Resolution)**
Exchange Tower
1 Harbour Exchange Square
LONDON E14 9GB
tel 020 7536 6000
fax 020 7536 6001
e-mail mediate@cedr.co.uk
website www.cedr.co.uk

**ADR Group**
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e-mail info@adrgroup.co.uk
website www.adrgroup.co.uk

The Clinical Disputes Forum does not itself provide mediation services or advice about mediation in detail. For any further details from the Clinical Disputes Forum, contact the Administrator, Margaret Dangoor at 3 Clydesdale Gardens, Richmond, Surrey TW10 5EG.

**The Clinical Dispute Forum’s Mediation Working Group**

**Membership:**

<table>
<thead>
<tr>
<th>Name</th>
<th>Organisation</th>
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<tbody>
<tr>
<td>Tony Allen</td>
<td>CEDR</td>
</tr>
<tr>
<td>Jane Chapman</td>
<td>ALARM</td>
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<tr>
<td>Roger Clements</td>
<td>Expert Witness Institute</td>
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<tr>
<td>Katie Hay</td>
<td>Capsticks</td>
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<td>Gillian Jacombe</td>
<td>NHS Claims Manager</td>
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<tr>
<td>Michael Lind</td>
<td>The ADR Group</td>
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<tr>
<td>Matthew McGrath</td>
<td>Beachcroft Wansbroughs</td>
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<tr>
<td>Tamara Oyre</td>
<td>Institute of Arbitrators</td>
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<tr>
<td>Susan Polywka</td>
<td>Risk &amp; Legal Adviser, Oxford Radcliffe Hospitals</td>
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<tr>
<td>Kate Rohde</td>
<td>Kingsley Napsley</td>
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<tr>
<td>Alison Scott</td>
<td>Marshall &amp; Galpin (Claimants’ solicitor)</td>
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<tr>
<td>Arnold Simanowitz</td>
<td>AVMA</td>
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<td>Colin Stutt</td>
<td>Legal Services Commission</td>
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<td>Frances Swaine</td>
<td>alternate Rose James</td>
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<tr>
<td>Master Turner</td>
<td>Senior Master, QBD</td>
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<td>Master Ungley</td>
<td>QBD</td>
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<tr>
<td>Steve Walker</td>
<td>NHS Litigation Authority</td>
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<td>alternate Alison Clarke</td>
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