City employers are finally getting to grips with ADR as an alternative to costly, time-wasting litigation. Employers’ Law, June 2003

Mediation has gone mainstream. Clients have found it cheaper, quicker and more controllable than litigation or arbitration. They’re reaching for it more often, in a broader range of disputes. And as clients pull, institutions push. Commercial Lawyer, July/August 2003

Improving methods of commercial dispute resolution will facilitate increased European trade and benefit the Union as a whole. Lord Irvine of Lairg, European Union (EU) Law, 12 June 2003

Mediation lends itself to use in the property industry where disputes are often multifaceted, litigation can be horrendously expensive and the parties may wish, or need, to maintain some kind of ongoing relationship. Property Week, 11 July 2003

The mediation profession is at a sensitive stage in its development. We have some critical decisions to make in the next few years to ascertain how mediation is to develop to fulfil its potential. Over the last five years there has not only been a major uplift in the use of mediation in the civil justice system, but also an explosion in the number of organisational providers and self-employed mediators willing to offer their newly acquired skills to a client base that has become more aware of the benefits of the process. Competition is to be welcomed. However, we must all join forces to determine where the profession is to go from here and how we can protect the key principles of mediation. For us all, it has to be about servicing the best interests of the client while preserving real neutrality and independence. We are fortunate enough at CEDR to have extensive feedback mechanisms in place to help shape our business models and sufficient diversity of work and support to enhance our independence. We are therefore able to share with the wider community what client and mediator feedback tells us about client perception of the mediator’s qualities, effectiveness of the process, and their likes and dislikes. For these reasons we have convened the first Mediators’ Congress to gather together civil and commercial mediators, users, judges, and policy-makers to debate these critical questions (see page five). The outcome could determine the long term application and shape of mediation as a professional service. We will certainly be passing on views from the Congress to the European Commission’s action programme on ADR, as well as that of the Civil Justice Council in the UK. We have also encouraged the participation of members of the recently formed Civil Mediation Council and are currently working with them to identify the Council’s value and role when formally constituted next year. I hope you will be part of the Congress and have your say.

Working with Europe

As the development of effective dispute resolution (EDR) in Europe continues to progress, CEDR’s role in helping to formulate opinion and best practice with European colleagues is set to include two significant events.

Following Karl Mackie’s involvement in the European Commission’s public hearing on ADR in civil and commercial law in February 2003, he has been asked to participate in the first meeting since the hearing to discuss the first of two initiatives following the publication of the Commission’s Green Paper. The agenda of the meeting in Brussels on 26 September 2003 will examine the objectives and views of legal and EDR professionals on working methods to ensure best practice in mediation.

In addition, CEDR is working with the Union Internationale des Avocats (UIA) to host the fifth Forum of Mediation Centres, to be held in Windsor on 25 and 26 July 2003. The Forum of Mediation Centres was born at the First Mediators’ Congress in London in 1998 and is now being hosted by the UK Mediation Association. The members of the Forum of Mediation Centres have agreed that all organisations hosting the Forum next year will have special representation on the steering committee of the Forum of Mediation Centres, so Karl Mackie and Andy Grossman are expected to have significant presence at the event.

The confidentiality of the mediation process and even the perceived neutrality of the mediator could be under threat from judicial scrutiny on the one hand or individual mediators getting too close with ‘repeat players’ on the other. Perhaps the courts have simply run out of patience, expecting the legal imposition of cost sanctions in relation to mediation use and there remain many opponents of mandatory mediation. But while it is easy to assume that the courts feel the need to become so interventionist has not been sufficiently answered. There remains a very real reluctance by some lawyers to suggest, or by clients to use, mediation. When tested by the courts this unwillingness has proved unfounded, with court-ordered mediation claiming the same settlement rate as voluntary mediation. Perhaps the courts have simply run out of patience, expecting the legal community to have embraced mediation more quickly than it has.

The Forum of Mediation Centres was created by the UIA in 2001 to bring together the most important commercial mediation and ADR centres, offering a forum to exchange views on the development of ADR and best practice. The programme of the fifth Forum covers a wide range of issues and will include sessions on training lawyers and examining multi-cultural mediation.

Clients’ best interests must be protected through encouraging and maintaining the highest standards of practice in an increasingly fragmented environment.

The confidentiality of the mediation process and even the perceived neutrality of the mediator could be under threat from judicial scrutiny on the one hand or individual mediators getting too close with ‘repeat players’ on the other.

We must ensure that the mediation process, borne from the pragmatic needs of business, continues to evolve to keep pace with these needs and with what we are learning from practice.

 clients and mediator feedback tell us about client perception of the mediator’s qualities, effectiveness of the process, and their likes and dislikes.

We must join forces to determine where the profession is to go from here and how we can protect the key principles of mediation.

So where to now for clinical negligence lawyers? ... The lawyers need to change and evolve to meet the challenges ahead. They need to become problem solvers and not the problem. They should actually pursue alternative dispute resolution rather than litigation and seek imaginative settlements and client involvement.

The Lawyer, 28 July 2003

For us all, it has to be about servicing the best interests of the client while preserving real neutrality and independence. We are fortunate enough at CEDR to have extensive feedback mechanisms in place to help shape our business models and sufficient diversity of work and support to enhance our independence. We are therefore able to share with the wider community what client and mediator feedback tells us about client perception of the mediator’s qualities, effectiveness of the process, and their likes and dislikes.

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“Working with Europe”

Mediators’ Congress, London 2003

Karl Mackie
Chief Executive
Centre for Effective Dispute Resolution
Judicial education

In response to a plea for more training for judges from Lightman J at the CEDR Exchange forum ‘ADR case law - opportunities and challenges’ in February 2003, Karl Mackie commented:

“I think everyone is very conscious now that the system has its own design problems that need to be facilitated and developed in order to improve the way that ADR is integrated with judicial practice, for the improvement not just of ADR but of judicial practice and of the civil justice system as a whole. Undoubtedly there are critical questions about resources, funding and education which do have to be addressed.”

Six months later, CEDR has been asked by the Judicial Studies Board to contribute to the latest round of Continuity Training for all Circuit and District Judges. Over the next three years, 900 judges will attend a residential course, at which CEDR will present a session on dispute resolution with faculty on hand to answer questions and lead debate.

CEDR’s aim is to equip judges fully with the knowledge and skills, to raise their awareness and confidence as to what mediation really can deliver.

CEDR has also commissioned an educational video to use for this and other occasions with the help of a generous grant from the Department for Constitutional Affairs. Judges will also receive a revised edition of CEDR’s guide for the judiciary, Court-referred mediation, first produced in 1998 and now brought fully up-to-date with reference to recent case law.

With some critics of mediation ready to claim loss of human rights and access to justice, it is vital that users of the court system receive consistency of message and action. The Court of Appeal, Commercial Court and even the Central London County Court now have extensive knowledge and experience of mediation, judicial awareness must also be extended to district and local court mediation schemes.

With the risks of ignoring a judicial recommendation to mediate clear to all litigants through such cases as Dunnett v Railtrack, Hurst v Leeming and several others (all fully referenced and available in the EDR Law section of the CEDR website - note the latest Court of Appeal decision Virani v Manuel Revert), such training takes on immense importance, and CEDR is delighted to have been invited to participate. Judges are able to make decisions as to timing and suitability at every stage of the cases they hear, and CEDR’s aim is to equip them fully with the knowledge and skills, to raise their awareness and confidence as to what mediation really can deliver.

The video, guide and training programme will go some way to guiding judges throughout the country to determine where they should intervene to suggest mediation and other dispute resolution processes. It will also give them the confidence to assist lawyers and their clients, reluctant or under-informed, as to what can be achieved through mediation, and thus enhance the users’ understanding of the process.

How far should the courts go?
The courts are becoming more interventionist with regard to encouraging parties to mediate. Whilst we all welcome their acknowledgement of mediation as a mainstream dispute resolution tool, the community as a whole is unsure as to how far they wish the courts to go. Are we ready for mandatory mediation? Or are there any basic procedural adjustments which would have the same effect? How far can the veil of mediation be pulled back for cost sanctions? Should a mediator be treated as a ‘witless’ in any judicial decision-making? What will be the future shape of court schemes? Could a national mediation scheme be created?

Is ADR more than mediation?
We are always being reminded that ‘ADR is more than mediation’. But how much more is really going on? Why are other forms of ADR often unpopular? What alternatives are being missed or underestimated by lawyers? Is there life beyond mediation?

Can time limited mediation provide a successful niche practice?
Few mediators relish the pressures of a three hour time limited mediation (TLM). TLMs demand a robust approach, effective preparation and a tight control of the proceedings, especially opening statements and exploration of the issues. What special tactics exist for mediators to sharpen the process, maximising progress while minimising time? How and where is TLM likely to provide a successful niche practice?

How to keep mediation advocacy on track for results
Court activism, increased knowledge of ADR and, more particularly, greater experience of the mediation process itself, has brought about the need for more sophisticated training in advanced techniques for lawyers.

What major challenges do representatives face in an increasingly sophisticated marketplace?

What techniques can be employed to ensure clients are represented with maximum effectiveness?

What can we learn from feedback?
CEDR Solve’s commitment to the highest quality of service includes gathering regular feedback on mediators’ performance, from lawyers and clients on every case. But what is this feedback telling us about the personal qualities of mediators, effective moments in the process, clients’ likes and dislikes of the process?

How can this be used to ensure mediation develops to the highest standards?

The first Mediators’ Congress

Mediation is now ‘on the map’ in the UK legal system, and increasingly in other EU countries, but there is still tremendous untapped potential for use of the process.

The first Mediators’ Congress, ‘Accelerating the impact of mediation’, to be hosted by CEDR on Thursday 20 November 2003 at the Queen Elizabeth II Conference Centre in Westminster, represents a unique opportunity to review significant practical trends in the growth of mediation practice to date, and to shape and chart its future.

Further information can be found on the CEDR website at www.cedr.co.uk/congress
The CMO aims to:

- reduce the risks of care by responding to reported adverse incidents well
- compensate patients harmed by healthcare fairly and efficiently
- incentivise better care and not undermine the patient/carer relationship in the process
- co-ordinate and simplify the ways in which patients can express concerns about their care
- establish a compensation process which is affordable and predictable.

The process to be followed has yet to be clarified. NHS Redress is to be entered from any of the three stages of the NHS complaints process, or by a direct claim being made. It will investigate, explain what happened, why and what changes have been made, and propose a care package to remedy the harm. It will consider payment for pain and suffering and out-of-pocket expenses “in suitable cases” and for care and rehabilitation costs which the NHS cannot provide itself.

NHS Redress is apparently to be a legal cost-free zone. Whether representation is banned, or limited to support from the Patient Advice and Liaison Service (PALs) and the Independent Complaints Advocacy Service (ICAS), or permitted without payment (except perhaps for the cost of advice on the final package), patients will have to fund their own legal advice. This exclusion of legal costs is clearly the main hope for reducing the spend on claims against the NHS, and also perhaps for taking the destructive heat out of the current system. But it is hard to see how the scheme can be cost-neutral, with the need to expand rehabilitation services so dramatically to replace damages awards for future care. Unless it handles complaints with huge skill and sensitivity, NHS Redress also risks a sharp increase in complainants who might add compensation to their wish list.

What does the CMO reject and adopt?

Much to the relief of many, out goes any recommendation of no fault compensation, and a new tribunal system. But instead of merely improving the existing civil claim system, the CMO recommends the new NHS Redress Scheme, to handle claims for negligently caused harm up to £30,000, plus, it seems, the value of future care (though the ambition is to supply this in kind rather than as cash) and also to handle birth injury claims regardless of fault.

The process can bridge the gap between complaints and claims through a unified process, which makes all the cost-neutral, with the need to expand rehabilitation services so dramatically to replace damages awards for future care. Unless it handles complaints with huge skill and sensitivity, NHS Redress also risks a sharp increase in complainants who might add compensation to their wish list.

What is the CMO hoping to achieve?

In a sector which has recently seen huge growth and widespread application of mediation, the long awaited report by the Chief Medical Officer on clinical negligence claims, published on 30 June 2003, proves highly significant in advocating the role of mediation within this sector.

But what does it say and does it go far enough?

The challenge of mediation

Mediation of clinical negligence claims aspires to:

- heal fractured clinical relationships
- create a safe and relaxed environment for apology, explanation and reassurance to be given
- give control back to claimants and clinicians by restoring to them both a degree of centrality, providing a guaranteed occasion for claimants and clinicians to meet and listen to each other, with full legal advice available
- allow for full discussion of the issues leading to final settlement, with or without compensation, giving due regard to the undoubted hazards of litigating such claims
- enable lessons to be taken back as a result of what is learned
- provide a cheap, swift and final outcome in a large percentage of cases, with flexible forward-looking packages negotiable.

Welcome recommendations on mediation

Reporting positively on the NHSLA’s experience of mediation, the report underlines that the NHSLA’s use is almost exclusively for high value claims, including the largest single clinical negligence settlement so far, worth an estimated £12 million. Drawing on this, recommendation 15 of the Report proposes the consideration of mediation in every case above £30,000, (the NHS Redress scheme limit).

It recommends further training in mediation skills for NHS staff and PALs and ICAS, both of which seek to assist patients with complaints.

Many of these aspirations are shared by the CMO. Is it fair to ask whether the whole structure of NHS Redress would be quite so necessary if there had been a widespread adoption of mediation in such cases? Mediation can bridge the gap between complaints and claims through a unified process, which makes all the above benefits available in 80-90% of cases (in CEDR Solve’s experience), though with a lower overall success rate for the NHSLA at about 75%.

Conciliation within the NHS complaints system and mediation have much in common. Why not build on those parallels and seek a simpler and earlier process which can deliver good outcomes quickly? Given widespread adoption of such an idea, mediation providers can deliver lower costs through economies of scale. The merits of mediating to final settlement in lower value cases remain virtually untapped. If this course is not pursued first, then NHS Redress will need to mobilise the benefits that an independently run process can give to the NHS and its patients.

The above are just some of the possible points of debate around the consultation paper. CEDR is now putting together a response to the CMO’s Report (accessible through CEDR’s website at www.cedr.co.uk), due by 17 October 2003. This article is a first attempt to sketch an overview of where we think things might be taken even further.

Please contact Tony Allen, CEDR Director, at tallen@cedr.co.uk if you have any comments or contributions.
Tailored training for lawyers

As a regular user of mediation, leading law firm DLA are committed to their solicitors having up-to-date mediation skills.

The defendant personal injury practice within DLA’s Insurance Group were looking to bolster the skills of their team as part of a national initiative to promote the use of mediation within this sector. They approached CEDR Solve to provide Representing Clients in Mediation training, building on the previous mediation awareness training they had received.

The flexibility of CEDR Solve’s modular Representing Clients in Mediation course enabled DLA to select the most appropriate parts of the course to suit their needs, in terms of both subject matter and timeframe. One key module ‘Effective preparation for mediation’, equipped participants with the essential skills required for representatives to take full advantage of the mediation process.

The module included the exploration of early case assessment, suitability of cases for mediation, organising a mediation and the administration and preparation of documents.

Participants who included solicitors, associates and partners found learning through role-play one of the most useful aspects of the course and the subject matter was specifically tailored to suit the specialism of the attendees. One participant commented that the training offered a “good balance between lecturing, role-play and discussion.”

The strong focus on practical issues and actual role-play made the course of immediate benefit to the participants. Alan Jacobs, Partner at DLA commented: “The immediate impact of the training was to give staff more confidence in their abilities to represent at mediations, resulting in a significant increase in the number of cases where we are able to suggest mediation. This aligns with the strategy of the firm as a whole in providing the fastest and most commercial outcome in dispute resolution for the benefit of clients.”

Mediation personal injury claims

by Tony Allen, CEDR Director

In Legal Week’s Personal Injury (PI) feature on 7 August 2003, mediation is identified as an area of growing consensus across the personal injury sector, at a time when claimant and defendant lawyers have become more adversarial over cost issues. In addition, following their mediation masterclasses, both APIL (Association of Personal Injury Lawyers) and FOIL (Forum of Insurance Lawyers) endorse the idea of using mediation though they do not perceive it to be the answer for most typical PI cases and believe it to be potentially expensive.

I contest both these perceptions. PI has always been the single biggest mediation sector in all other common law jurisdictions. Mediation in multi-party PI claims is not new, in that it has often been used long before modern mediation procedures were established. As to the more orthodox type of PI claims, again a wide range has been handled by CEDR Solve in the same period involving more and more specialist PI mediators. In fact a strong indicator of this being a growth sector is confirmed by the increased numbers of PI specialists training as mediators on the CEDR Mediator Skills Training course.

Some higher value mediations put many commercial cases in the shade. For instance, CEDR Solve mediators have settled the biggest single clinical negligence settlement so far achieved (worth about £12 million) and perhaps the biggest dependency claim ever made (settled at £7.5 million).

Mediation can also accommodate unusual types of claim:

- parents claiming against a local authority for failing to protect an adult daughter with severe learning difficulties from physical abuse
- an ex-police officer claiming against the employing force for mishandling its investigation of a serious assault on the claimant
- several high profile fatal industrial accidents have been mediated, often involving disputes between defendants as to apportionment of blame between them.

It is true to say that CEDR Solve has little experience of mediating claims under £50,000 and we recognise our challenge is to provide cost-effective mediation for fast-track and lower multi-track claims.

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It is true to say that CEDR Solve has little experience of mediating claims under £50,000 and we recognise our challenge is to provide cost-effective mediation for fast-track and lower multi-track claims.

No doubt the potential for adding costs through mediation exists. But if you get it right and can mediate early, savings can usually be claimed.

Additionally, despite any cost savings, the intrinsic value of involving claimants personally in making presentations in opening joint meetings is a real benefit uniquely offered by the mediation process. Individuals simply have a platform to say what they wish and this almost always allows them to move on to closure.

CEDR Solve mediators have settled the biggest single clinical negligence settlement so far achieved

www.cedr.co.uk

Resolutions - Issue number 33, Autumn 2003
The second report on ‘Monitoring the effectiveness of the Government’s commitment to using Alternative Dispute Resolution (ADR)’ reveals that ADR has been successful in settling 89 per cent of cases referred to ADR by government departments.

Ongoing initiatives also mentioned include the joint NHSLA, AWMA and CEDR clinical negligence project (now in its second phase) and a pilot mediation scheme for resolving disagreements over the application of the ‘Compact on Relations between Government Departments and the Voluntary and Community Sector’, set up with the assistance of CEDR.

The Government Legal Service (GLS) Liaison Sub-Group on ADR also reviewed a draft of CEDR’s ADR guide for public authorities.

David Lammy, Minister for Civil Justice Policy, commented: “Progress on this scale clearly demonstrates that the pledge marks a major step on the road away from a culture of litigation, towards a culture of settlement. This order of improvement demonstrates Government’s very real commitment to use ADR to settle its disputes, in suitable cases.”

The full report can be accessed through the news section of CEDR’s website at www.cedr.co.uk.

CEDR Solve provides practical training solutions for business people and professionals engaged in mediation and other forms of dispute resolution. Most of CEDR Solve’s training is bespoke - delivered in-company, tailored to meet each organisation’s specific requirements.

For more information, please contact CEDR Solve on +44 (0)20 7536 6060, e-mail training@cedr-solve.com or visit www.cedr-solve.com

As a key part of realising our mission to develop and lead the mediation field, CEDR has placed increasing emphasis on its relationships with institutions at the forefront of academic thinking and learning in this sector.

Ongoing programmes with Pepperdine University School of Law, California and Harvard Law School bring the next generation of EDR professionals to CEDR, where post-graduate students add to and learn from CEDR’s own knowledge and expertise. Under the Harvard fellowship programme recent research explored effective mediator competencies, the results of which will form part of a presentation at the First Mediators’ Congress.

Pepperdine interns continue to play a key role in the development of the EDR law section of the CEDR website (www.cedr.co.uk), which brings together for the first time, all legal developments relating to effective dispute resolution.

In the past year CEDR has also worked with students from Cass Business School, South Bank University, and the University of Westminster. In collaboration with the latter institution and the London School of Economics and Political Sciences, CEDR has developed a pilot training course, ‘Examining the architecture of disputes’, which explores the sociological, anthropological and psychological aspects of disputing and their impact on mediation. Also, CEDR is currently in discussions with Professor Linda McAlvy of Birbeck College, University of London regarding a research study into the mediation process.

CEDR will continue to build on these relationships, working together to develop, educate and influence future thinking on EDR.

The statistics show a significant increase in the number of cases resolved through mediation.

CEDR trains registered mediators and provides courses on mediation practice and skills development. For more information, please visit the CEDR website (www.cedr.co.uk) or contact training@cedr.co.uk.

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# CEDR training and events

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<tr>
<th>Event</th>
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<td>The First Mediators’ Congress, ‘Accelerating the impact of mediation’</td>
<td>20 November 2003</td>
<td>London</td>
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<tr>
<td>Mediator skills training - Fast track</td>
<td>10-12 &amp; 15-16 December 2003</td>
<td>London</td>
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<tr>
<td>Spring School</td>
<td>12-17 March 2004</td>
<td>Amsterdam, The Netherlands</td>
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<td>Risk Analysis for mediators 21 January 2004</td>
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<tr>
<td>“This was the most intensive and rewarding training experience!”</td>
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For more information, including course dates for 2004, please contact CEDR on +44 (0)20 7536 6000, e-mail training@cedr.co.uk or visit www.cedr.co.uk.

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# CEDR open programmes

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<tr>
<th>Programme</th>
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<tbody>
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<td>Law and practice for non-lawyer mediators</td>
<td>22 October 2003</td>
<td>London</td>
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<td>Mediator debrief session 4 November 2003</td>
<td></td>
<td>London</td>
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<td>“Representing clients in mediation” (modules)</td>
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<td>Module one - Mediation principles</td>
<td>7 October 2003</td>
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<td>Module two - Effective preparation</td>
<td>14 October 2003</td>
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<td>28 October 2003</td>
<td>London</td>
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<td>Residential course</td>
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<td>Modules two and three</td>
<td>27 and 28 November 2003</td>
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# CEDR strengthen ties with academic institutions

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CEDR will continue to build on these relationships, working together to develop, educate and influence future thinking on EDR.
“Mediation is a great tool to have in your tool box” says Steve Walker, who has been Chief Executive of the NHSLA since it was formed in 1996 following a long career as a claims manager in the insurance industry.

At its inception the NHSLA inherited a chaotic, anarchic system whereby Health Authorities and Trusts were each hiring their own lawyers, with 1,000’s of cases across the country receiving separate independent legal advice and representation. There was no national handle on how much money was involved in these cases, and levels of delay were unacceptable. Therefore the aim of the NHSLA was to reduce wastage, delay and disharmony in handling clinical negligence claims. Coincidentally its formation coincided with Lord Woolf’s Access to Justice Report.

Having been involved in mediations whilst working in the insurance industry Walker could at least give an informed response when asked at his first AVMA conference what he thought of mediation and whether he would consider using it for clinical negligence cases. Responding in public with a positive “probably”, the NHSLA began to look more seriously at what mediation could offer.

Walker had witnessed mediation as a successful tool for resolving insurance disputes where the parties were dealing with other people’s money and no emotions other than professional pride. But at the NHSLA, where he is charged with robustly defending claims on behalf of the individual clinicians and Trusts whilst also properly addressing justifiable claims by patients, Walker appreciates the opportunity provided by mediation to deal with emotions, apologies, explanations and reassurances for the future.

“Mediation provides a catharsis for both sides, allowing for something which would not have the opportunity to be heard in court … In many cases emotions around an event need to be dissipated and mediation can provide the valuable process to allow this”.

Having successfully completed the CEDR Mediator Skills Training course recently, plus some assistantships, Walker sees mediation as a natural progression in his career. He has made the NHSLA a key agency in delivering the government’s pledge to use ADR. They now review every case as to its suitability for mediation, with 59 cases being mediated last year, an increase of 70 per cent on the previous year. “Every claimant solicitor should know that we will mediate if asked to”. Walker does however go on to note that “there is still work to be done in getting mediation accepted and in establishing it as a cost effective option - especially in claims where emotion far outweighs the financial value of the claim; these are cases where mediation has a lot to offer”.

Recognising the Chief Medical Officer’s recent recommendations to use mediation he notes that “it is great to have further endorsement”. “Mediation has to be voluntarily entered into by both sides but it doesn’t mean that it will not work if one party has to be encouraged. Sometimes being forced into mediation is better than not mediating at all.”

“... the imaginative way that it was dealt with”.