

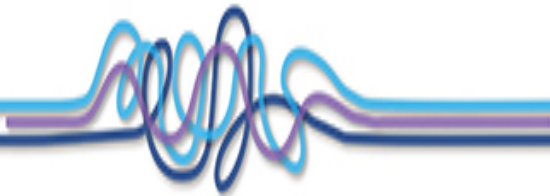
# Effective resolution of medico-legal disputes

A seminar for Conflict Dynamics

by Tony Allen

Solicitor and Mediator

Senior Consultant to CEDR





---

## The scale of the medico-legal claims crisis: 1

- **NHS LA** (UK): new claims rose by 10.8% from 9,143 in 2011-12 to 10,129 in 2012-13
- 40% reported claims are resolved without payment of damages
- Legal costs 55% of damages (C 44.3%:D10.6%)
- Known claims and future provision £9.6 billion: IBNR £13.4 billion



---

## The scale of the medico-legal claims crisis: 2

- **MDU (UK):** Claims notified in 2012 increased by 15%
- **MPS** (worldwide): opened 16,316 new claims: paid out £190m in 2011 and £290m in 2012, with a claims reserve of £746m
- **Overall:** about 1% go to trial; the rest settle – but when and how?
- **BUT does anyone mediate such disputes?**



## Why mediate clinical claims?

- Inevitable feelings – patient and clinician
- The continuing relationship between patients and healthcare professionals
- The inevitable risks of litigation
- The goodwill dividend
- The pre-action dividend – a protocol for disclosure?
- Flexible non-monetary outcomes are valued and possible



## The challenges for parties

- Pain in a personal encounter after entrenchment by litigation
- Revenge and defensiveness: a toxic mix
- Technicality – legal and medical
- Unreal appraisal of risks
- Taking advantage of a confidential process  
....and for their lawyers?



## What can be achieved?

- A rapprochement
- An apology or acknowledgement of pain
- An explanation of what happened
- Reassurance of changes to prevent a repeat
- Risk adjustment
- (Discounted) compensation settlement satisfactory to patient, clinician and insurer



## What can be mediated?

- Informed consent
- Causation problems
- Uncertain law – the retained organs litigation
- Apportionment cases
- Large claims in which liability and/or causation is denied
- Psychiatric and physical injuries
- Small claims with high emotional content



---

## The overall impact of mediating clinical claims

- Earlier and better settlement – pre-issue?
- A guaranteed “day in court”
- Cost, time and strain saved
- Claimants and clinicians at the heart of their case
- Lawyers and insurers can concentrate on the merits rather than the process, which can be deployed flexibly to meet the needs of all





## Preparing for a clinical mediation

- Venue
- Pre-mediation contact
- Who attends?
- Paperwork
- The mediation agreement and confidentiality
- Medical technicality
- Preparing possible non-monetary outcomes



## At the mediation

- Process design
- Pre-meetings – who do you see first?
- Preparing for a delicate encounter – coaching?
- Confidentiality as to feelings as well as thoughts
- Who goes first?
- Reinforcing safety



## During the mediation

- The importance of a wide spectrum approach to exploration – the “day in court”
- How serious need the mediation be? Light touch?
- The need to hear painful messages and move on
- Naming the difficulties – the insults inherent in damages calculation
- Flexibility of process design to meet everyone’s needs – some illustrations
- How to bargain and end the mediation (settled or not)

# Effective resolution of medico-legal disputes

by Tony Allen  
Solicitor and Mediator  
Senior Consultant to CEDR  
[www.allensmediate.com](http://www.allensmediate.com)

