

## ***Mediating Clinical Claims*** **Tony Allen (Bloomsbury Professional, 2018)**

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It is Sir Robert Francis QC who sets the tone for Tony Allen's comprehensive guide to mediating clinical claims: 'why is the professional reluctance to accept mediation as an effective means of settling disputes so resilient?' Sir Robert asks. 'In part, I am afraid, it is due to the cultural self-confidence of the legal profession in believing that the conventional means of resolving disputes by judicial determination remain the best ... In short, the present system is satisfactory for neither patients nor those who provide them with treatment.' It was Sir Robert who chaired the public inquiry into the failings of care at Mid Staffordshire NHS Foundation Trust between 2005 and 2008. He had heard for himself, the testimonies from bereaved families whose relatives had been failed by the NHS when they were at their most vulnerable and who had had to wait so long for their claims to be acknowledged and action taken to try and prevent similar failings from happening again.

It is the human costs and consequences of clinical error – whether to patients and their families, or to clinicians who are sued for alleged failures of care – that permeate Allen's book. His central argument, that mediation is capable of reaching the parts that legal process alone cannot reach, is supported by many years of experience in mediating sometimes apparently intractable cases as well as a wealth of published

research indicating that financial compensation is not the key outcome desired by claimants. Quoting research published in 2012, Allen points to the findings of one survey of trial plaintiffs which showed that ‘money was only the third most important reason for suing after an apology and information about why the adverse event occurred’. Indeed, Allen welcomes recent developments in mediating clinical disputes in which discussions about the emotional impact of clinical error on a patient or their family sometimes take place separately from discussions about the amount of compensation to be paid as a result. The importance of this is to allow claimants ‘permission to articulate what they *feel* as well as what they *think*’. As Allen argues throughout the book, the value of this to the ‘defendant’ health professionals as well as to the patient and family ‘claimants’ should not be underestimated.

Allen cites the neurosurgeon Henry Marsh’s book *Do No Harm* as evidence of the impact of clinical error on those who treat us:

Doctors need to be accountable, since power corrupts. There must be complaints procedures and litigation, commissions of enquiry, punishment and compensation. At the same time if you do not hide or deny any mistakes when things go wrong and if your patients and their families know that you are distressed by whatever happened, you might, if you are lucky, receive the precious gift of forgiveness.

The problem, as Allen describes so convincingly, is that the legal process does not permit the sort of encounter or conversation in which forgiveness could be sought or given. That is the powerful alternative conversation which mediation offers. ‘It is not always the case that what solves a problem is to find facts about it and make determination of fault,’ Allen says. ‘Even if that is one of the objectives of any given exercise, paying attention to the human needs of those swept up in it as well, if not in priority to fact-finding, is always essential and of often under-estimated importance.’

Allen is one of the pioneers of mediating clinical disputes in the UK. However, his frustration, bafflement even, at why it seems to be taking so long for mediation to be attempted routinely when in his experience it is such an effective process for achieving genuine resolution, is a theme which underpins his book. Between the first small pilot of mediating clinical claims whose findings were published in 2000 and a second pilot, carried out by the NHS Litigation Authority – now re-named NHS

Resolution in 2013/14 – there were, Allen points out, few clinical mediations for the next 10 or 12 years.

The NHS Resolution pilot and the subsequent introduction of its formal mediation scheme with a panel of approved mediation providers has, Allen hopes, marked the beginning of greater uptake and interest in mediating clinical claims. The scheme is the ‘first formal mediation scheme set up by an end-user of civil litigation in any sector’ and provides a real opportunity to extend the use of mediation in this complex, emotionally challenging arena. Uptake of mediation has increased year on year. According to NHS Resolution data, 606 completed mediations took place between December 2016 and 31 March 2019.

It is not just in the field of clinical claims that mediation offers potentially valuable opportunities for resolving differences of opinion between clinicians, patients and their relatives. In the past 18 months, the cases of Charlie Gard at Great Ormond Street Hospital and Alfie Evans at Alder Hey Hospital in Liverpool, have focussed judicial as well as public attention on the need to try and attempt mediation as an alternative to going to court. Allen quotes Mr Justice Francis, the judge in the Charlie Gard case, who said this explicitly: ‘it is my clear view that mediation should be attempted in all cases such as this one, even if all that it does is achieve a greater understanding by the parties of each other’s positions’.

For mediators (and indeed for lawyers who are unfamiliar with or unconvinced by, the mediation process,) the most valuable chapters of Allen’s book will surely be those which describe the process of preparation for mediation and the planning and management of the mediation day itself. The book was written before this year’s pandemic which has, of necessity, transformed mediation temporarily (but perhaps in some cases, permanently) from a face-to-face to a virtual process. However, many of the detailed bullet pointed lists of how to prepare (though written only with face-to-face mediations in mind) are relevant. In particular, what to cover in pre-mediation discussions with the parties themselves and the importance of body language, especially by members of the defendant team. Allen’s reminders about the importance of organising the space in which the mediation is to take place, the placing of the chairs around the table, the best place for the mediator to sit in order to be seen to be neutral at all times and ensuring that refreshments are available throughout the day, will have to await a time when face to face mediation becomes possible again.

Allen leaves no stone unturned in providing readers with a comprehensive ‘toolkit’ for mediating cases in which so often, the stakes couldn’t be higher. His message is that, properly, sensitively and meticulously managed, the mediation process offers the opportunity for patients, relatives and professionals to look at each other – often for the first time – and say things they may have been keeping bottled up for months, often years.

Should mediators be judged successful only if their mediations result in agreed financial settlements? Allen thinks not and in cases involving possible withdrawal of medical treatment leading inevitably to the death of a much-loved child, financial settlement doesn’t really come into it. As he says in many of the chapters of his book, the presence of a neutral, skilled mediator who takes responsibility for managing conversations that might not otherwise be possible between patients, their families and the clinicians with whom they disagree or who have caused them harm, has the potential to lead to solutions and resolutions which would not have been possible in a courtroom. Allen’s compelling descriptions of this process show us why this is so.