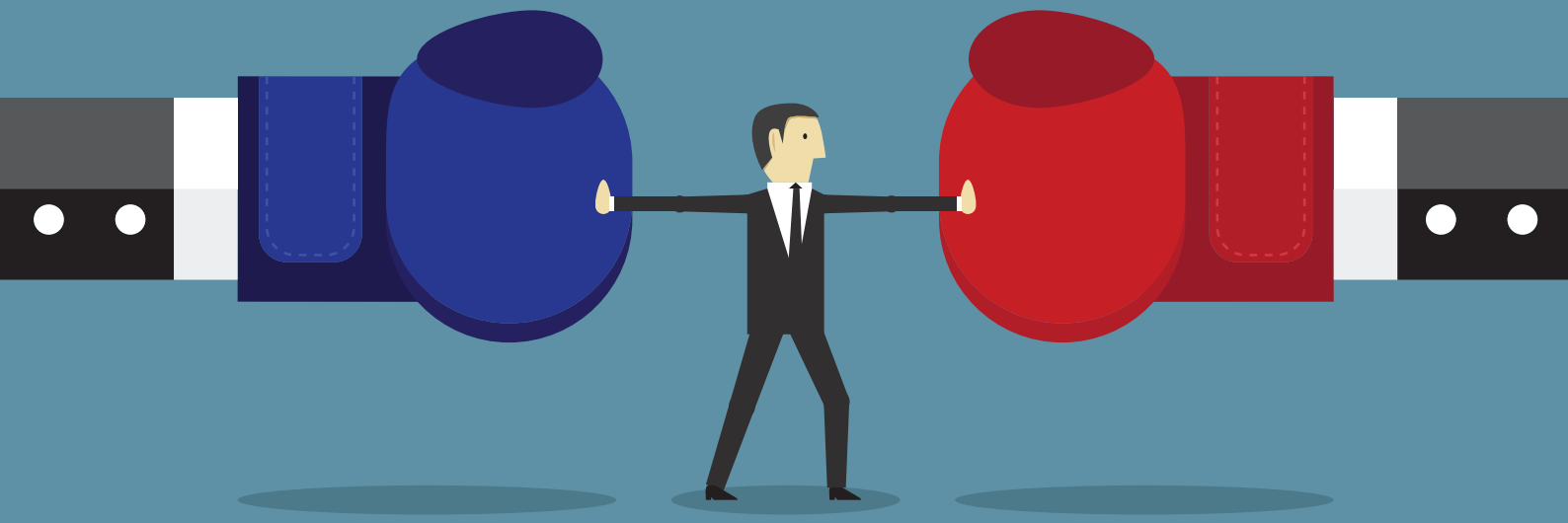

PACKING A PUNCH

Avi Dolties asks whether mediation is just what an ailing NHS needs?

Last month, the British Medical Association (BMA) and the Academy of the Medical Royal Colleges wrote to Justice Secretary David Gauke stating that the NHS spent £1.7 billion on medical negligence claims, with the annual cost having doubled since 2011.

They confirmed that the estimated total liabilities, which is the cost if all current claims are successful, stands at £65 billion, up from £29 billion in 2014/2015.

They added: 'This is money that could be spent on front line care. Given the wider pressures on the healthcare system, the rising cost of clinical negligence is already having an impact on what the NHS can provide.'

Towards the end of last year, in response to the level of public money being spent defending clinical negligence claims, NHS Resolution chief executive Helen Vernon said: 'We have been increasingly pushing cases towards mediation as a way of resolving claims without formal court proceedings.'

Ms Vernon added: 'To be frank, we have found that quite difficult to get off the ground, particularly because there has been some resistance from claimant lawyers whose preference is for the more formal route.'

Is wider use of mediation the obvious and necessary step to alleviate the present crisis?

What is mediation?

Many legal commentators have provided their own definitions of mediation.

The most frequently quoted definition is that provided by Jay Folberg and Alison Taylor in their book, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation. They define mediation as 'a process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop options, consider alternatives and reach consensual settlements that will accommodate their needs.

'Mediation is a process which emphasises the participants' own responsibilities for making decisions that effect their lives'.

To some, this definition serves to simply further their view of mediation as a concept with no real substance and leaves them wondering; 'what exactly does the mediator do?' To others, it fuels their desire to engage with mediation.

Mediation today

In litigation today, there is clearly an enthusiastic movement towards alternative dispute resolution, and mediation in particular.

Ireland has recently signed the commencement order for the Mediation Act 2017 that came into force on 1 January 2018. The Act places the promotion of mediation as an attractive alternative to court proceedings on a statutory footing.

Back home in the UK, in October 2017, the Civil Justice Council (CJC) found the following: 'We think that the threat of costs sanctions at the end of the day is helpful, but that the court should be more interventionist at an earlier stage when the decisions about ADR are actually being taken.'

Over the years, mediation has been employed to solve commercial disputes, but are clinical negligence matters really suited for mediation?

Arguments against mediation in a clinical negligence setting

Checks and balances

An agreement reached between the parties and their experts at mediation lacks the precise checks and balances which litigation and the

Court provides. Is an agreement over a complex clinical negligence claim, reached in one day, a just result? Does this really provide justice for a victim of clinical negligence?

Fairness

The definition of mediation provided by Folberg and Taylor above says the mediation process systematically isolates dispute issues. In a clinical negligence setting, this would mean that a 'broad brush' casual approach should be adopted when considering the injuries suffered and likely damages.

Where a claimant has suffered unimaginable physical and psychological injuries as a direct result of substandard treatment, is it fair to isolate the dispute issues? Clearly a 'broad brush' approach will not do.

Bargaining Power

Every time a mediator is instructed to assist two parties to resolve a particular dispute, the issue of potential power imbalance emerges.

The media is saturated with criticism of greedy clinical negligence lawyers at the expense of the NHS. Recently the headlines in one UK tabloid read 'Britain's NHS facing BANKRUPTCY from greedy lawyers chasing negligence claims.' But there is arguably a power imbalance in the NHS's favour. Perhaps clinical negligence disputes should be best left to the judiciary to resolve matters by way of a pure application of the law to the facts?

Joint Settlement Meeting (JSM)

Solicitors are of the view that there simply is no need for a mediator.

At the stage where experts have exchanged evidence and proceeded to joint statements, both parties will have a very good indication of the strength and weaknesses of their case and what is likely to ensue as the claim progresses. All that is left, is to arrange a JSM.

The JSM is conducted, and in the majority of claims, the matter settles at the JSM. Why mediate, then? Proponents for mediation would, however, argue that there is a lesser chance of settlement at a JSM than a mediation. Supposing parties enter into the JSM set in their ways, what is to stop the parties from simply abandoning it?

Arguments for mediation in a clinical negligence setting

Savings in cost and time

Very often litigants are deterred by the expense of litigation.

In clinical negligence matters, while it is accepted that initial expert evidence needs to be obtained by both parties, where costs really surge is following exchange of expert evidence through to trial.

The costs of this stage together with costs of trial can quite often be nearly as high as the rest of the costs so far incurred. In addition, it is at this stage that progress of the case takes its toll, as quite often, in view of the pressures the Courts are under, it can take months until a trial is listed.

Sensitive nature of clinical negligence

The sensitive nature of a clinical negligence claim lends itself to mediation.

It is often the case that the litigation process increases psychological stress on the claimant. Often, it can get to the point where the claimant instructs a family member to deal with the claim as they cannot deal with constantly revisiting the allegations of negligence.

Delicate management of the process by an experienced mediator allows the claimant, if unanimously agreed, to speak directly to the doctors and nurses involved in a safe environment. Hopefully, this would allow the parties to find a way forward where they themselves feel they have been involved in resolving their own outcome of their case.

Increased satisfaction

There is undoubtedly greater satisfaction and compliance with settlements when parties have directly participated in crafting agreements.

Supposing a clinical negligence matter progresses and causation is in dispute. Both parties have psychiatric evidence, and one expert says the psychological injuries are a direct result of the negligence, while the other party argues to the contrary.

The chances are that at trial, following consideration of the expert evidence, the Court will favour one expert's evidence over the other. It could be that the claimant will have gone through four years of arguing with the NHS to receive no compensation whatsoever, or vice versa.

However, by proceeding with the mediation process, the parties will have made their own decision and there will be no looking back.

Flexibility and informality

A further advantage in mediation is that the mediator does not need to be constrained by the strict rules of evidence.

Providing the parties agree, the mediator can cut straight to the point and in some cases offer a solution that may not be available in Court proceedings. For instance, it may be that while the claimant is of course seeking damages, perhaps what they are really after is a sincere apology from the NHS. The flexibility and informality of the mediation process allows for this kind of remedy, which the Court cannot accommodate. A final order following trial is unlikely to order the defendant to issue a sincere apology!

Conclusion

In conclusion, mediation may not be suitable in every case. There will certainly be those cases that will be resolved through a JSM, but those meetings often take place a considerable way down the litigation path, and well after mediation could have taken place.

Effective mediation will result in a low-cost and efficient way of resolving clinical negligence matters, and even if mediation fails, the costs will not substantially increase the overall costs involved.

Although it may take time for clinical negligence practitioners to consider a change in how to resolve claims, is it not time to start viewing mediation as a mainstream, rather than an alternative process?

In summary, perhaps mediation should be given a go; and if you will forgive the author, maybe this is just what the doctor ordered!

Avi Dolties is a solicitor and costs mediator at MRN Solicitors; www.costexperts.co.uk