CENTRE for EFFECTIVE
DISPUTE RESOLUTION

Resolving Clinical and Personal Injury Claims:

Practical Guide for Claimant and Defendant Lawyers and NHS Resolution.

www.cedr.com

About CEDR.

We help our clients achieve better outcomes from disputes and conflict. By putting people and dialogue first, we enable people and organisations to rethink internal and external conflict to improve relationships and enhance innovation, performance, wellbeing and save money.

We do this by working with individuals, teams and leadership, focusing on:

Designing and operating dispute resolution mechanisms and interventions

Empowering people with practical conflict skills

Advising on process improvements to prevent the escalation of conflict

CENTRE for EFFECTIVE DISPUTE RESOLUTION

Centre for Effective Dispute Resolution
100 St. Paul's Churchyard
EC4M 8BU

Introduction

Dispute resolution has suddenly been thrust to the forefront of civil justice by the decision in *Churchill v Merthyr Tydfil CBC* and the October 2024 amendments to the Civil Procedure Rules. Courts must now promote and facilitate its use and expect court users to do so as well. It also needs to be seriously considered pre-issue, with further reforms likely to the relevant Pre-action Protocols[1] . NHS Resolution uses a variety of more "informal" processes involving discussions between their case handlers and claimant law firms, usually relating to simpler and lower value claims.

This checklist looks at the more "formal" dispute resolution processes available in heavier cases, though the same considerations may apply in lower value claims, as, whatever their size and complexity, clinical and personal injury claims readily give rise to significant emotional issues which should not be forgotten or regarded as unimportant. Clinical claims are repeatedly initiated because claimants feel badly let down by what they perceive as the delays and inappropriateness of the NHS complaints system.

The leading "formal" dispute resolution process is **mediation**, which has been used successfully within the NHS Resolution Mediation Scheme for nearly ten years to settle hundreds of clinical negligence claims, though far less often in personal injury claims.

Neutral evaluation is far less commonly used in either sector to date, although interest in it has grown recently and NHS Resolution is planning to use this process more, following an initial pilot scheme of approximately 50 evaluations which completed in 2024.

This guide provides guidance to assist lawyers and clients to decide whether a mediation or evaluation is suitable for their case, a detailed checklist of the relevant considerations for each process , with useful tips for those already experienced in mediation. It concentrates mainly on clinical claims, but much of it is just as relevant to personal injury claims of other types, such as employers and public liability claims against NHS Trusts.

This guide has been a collaboration involving CEDR's panel of clinical negligence and personal injury specialist mediators together with Head of Commercial Disputes at CEDR, Richard Nunn.

The principal contributor and editor, Tony Allen is widely regarded as being a pioneer in the use of mediation in clinical negligence and personal injury claims. Having mediated in this space for over 25 years, Tony is also the author of several books on mediation including the third edition of *Mediation Law and Civil Practice* published in October 2024 and Mediating *Clinical Claims* (2018).

CEDR wishes to thank all of the contributors to this guide.

[1] See the Civil Justice Council's Final Report on the Pre-action Protocols: Part 1 published in August 2023 and Part 2 in November 2024.

Settling Clinical Claims – The Facts From NHS Resolution Annual Reports

- The majority of clinical claims settle – less than 1% of notified claims go to trial
- 80% settle before proceedings are issued
- Over 50% of claims result in payments, so something under 50% of claims settle without payment

These statistics mean that with any clinical claim

- settlement is the expected norm: never promise a trial or day in Court!
- settlement is very likely to occur before issue of proceedings
- payment of damages is by no means certain, and settlement terms are not always or only about money
- the important question is not “will it settle? Or even “when will it settle?” but “how will it settle?”

The settlement rate of personal injury claims is also very high.

Over

50%

of claims result in payments, so something under 50% of claims settle without payment

Settlement Process Options Involving Inter-Party Contact

- Informal negotiation between lawyers or NHS Resolution by phone or e-mail;
- Joint settlement meetings (JSMs) of lawyers, which rarely if ever include clients;
- Part 36 and Calderbank offers, including offers made without prejudice except as to costs;
- Mediation;
- Neutral evaluation.

Mediation Or Evaluation? A Guide For Claimant And Defendant Lawyers On Which Process To Use

Key considerations for both claimant and defendant lawyers

- Do you have enough information and advice to form a reasonably reliable view of your prospects of succeeding or defeating the claim on liability, causation and/or quantum, with due awareness of risks that you will **not** win on liability, causation or any head of damage?
- If so, you are ready to explore settlement and to decide what process to use, even if not every piece of expert evidence is complete, or witness evidence exchanged, or the case fully pleaded – as noted above, 80% of cases settle before issue of proceedings, which is exactly what Pre-action Protocol compliance is designed to achieve.
- If not, you need to assemble such information and advice as soon as possible, asking yourself what is the best way to get it. Would fixing the date for use of a settlement process help to focus on completing what you need, bearing in mind that exchanges in mediation will almost certainly help fill gaps in knowledge and opinion for both sides? Or would a neutral evaluation help with clarifying the strengths and weaknesses in your case? Can this only be done by issuing unissued proceedings?

But research and feedback have consistently shown that settlement of clinical claims is very frequently not just about resolving the legal issues, so:

Questions for claimant lawyers to ask of their clients

What does the claimant/s actually want out of making a claim? Have they been asked:

- What they feel about the NHS and what if any complaint process to date has been delivered?
- (in a fatal case) what do they feel about the outcome of the inquest (if convened yet)?
- Do they want to be personally involved in settlement discussions in some kind of "day in court" (bearing in mind the extreme unlikelihood of a court trial)?
- Do they want the opportunity to be heard as to how they feel about what happened; to request an apology or acknowledgement face to face with Trust representatives; or need an explanation of what happened and why; or to know if lessons have been learned; and/or to be reassured as to how the NHS will treat them in future?
- Whether they seek revenge, exposure of negligence or malpractice by a clinician or NHS Trust?
- Do they want money and/or closure as quickly as possible?

Questions for the defendant case handlers and lawyers to ask

Have you asked the claimant's lawyer whether they know the answers to the above questions and can tell you what the claimant/s want? Given that information, how can you try to meet that need with your clients? Furthermore, what do the NHS staff who are involved or are the subject of a claim want from the settlement process?

- To show that they care about the claimant's concerns?
- Or to be sheltered from its impact by NHS Resolution and their legal team?
- Are they worried about their professional competence being impugned?
- Might they want to be directly involved in settlement discussions?
- To listen to the patient or family who perceive that harm has been done to them by the NHS and be responsive to their concerns?
- The opportunity to explain what went wrong or that nothing went wrong?
- To reassure the claimant/s about lessons learned?

The process choices are as set out in page 4 above.

Mediation offers managed confidential conversation between claimants and defendants in person with lawyers available to advise is with settlement rates recorded as being over 70%.

The other process options normally involve contact between lawyers only, with reports back to absent clients for instructions. If the claimant has no need for personal involvement for the purposes set out above, then settlement by negotiation between legal representatives, or a JSM may be appropriate.

If either party is unreasonably rejecting your case, a Part 36 offer might be appropriate.

If there is a good faith disagreement over a legal or expert issue which both parties agree needs independent guidance which is likely to lead to resolution, then neutral evaluation might be appropriate.

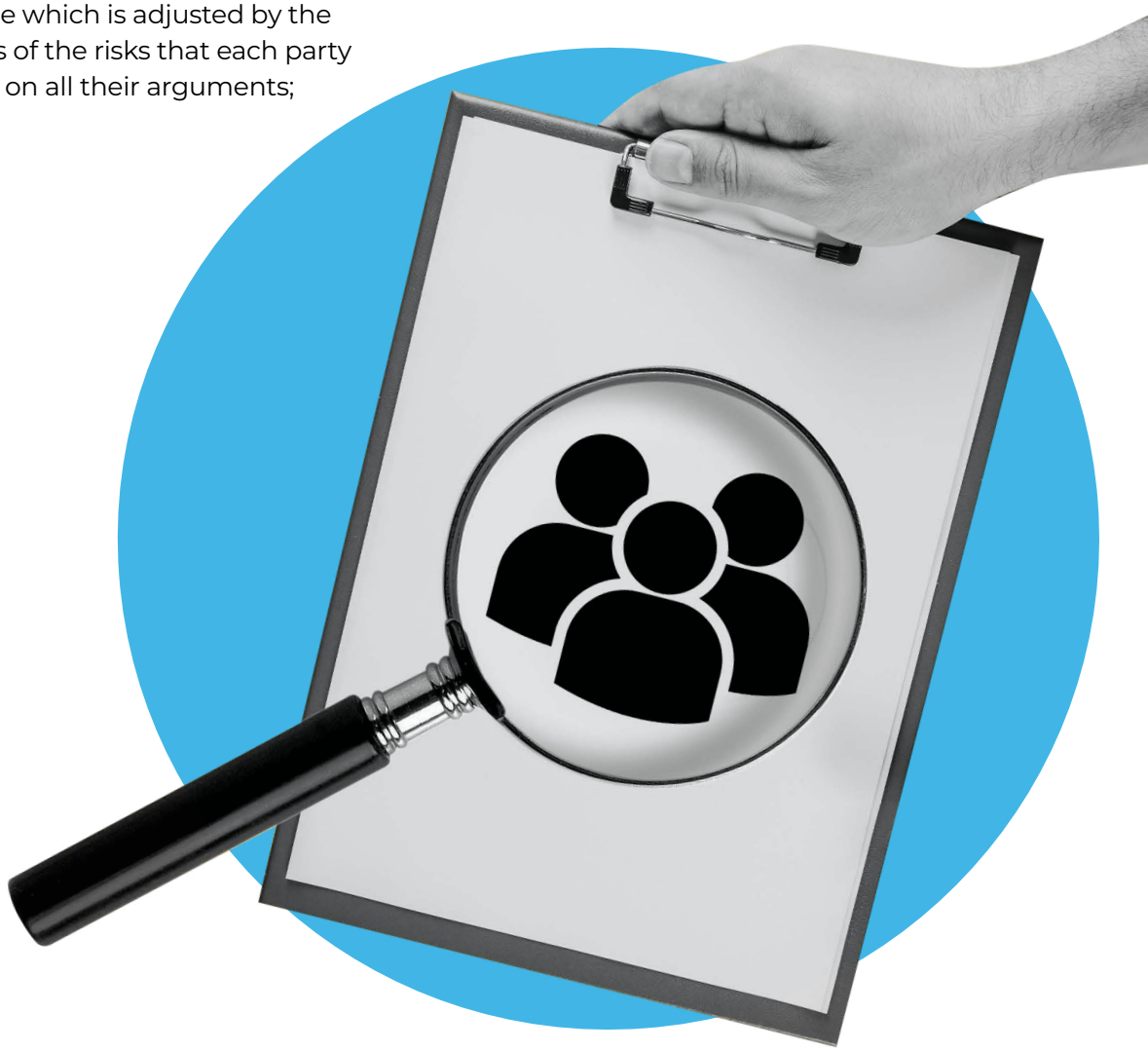
How To Get The Process Of Your Choice

- Note that since 1 October 2024, the CPR have been amended:
  - to make "promoting and using 'ADR'" part of the overriding objective applicable to judges, lawyers and court users – CPR 1;
  - to allow judges to order, order a stay for, or direct use of "ADR", even against the wishes of one party or all parties – CPR 3, 28 and 29;
  - to penalise in costs any party who fails to observe a court order or unreasonably fails to engage with "ADR" proposed by another party – CPR 44.
  - There already exist powers to make summary assessments and orders for immediate payment of costs against losing parties on applications.
- So, if your opponent disagrees with your choice of process **before issue**:
  - cite the requirements of the pre-action protocol to use "ADR";
  - warn in open correspondence that once proceedings are issued an application for an order for the chosen process will be made, with the risk of immediate application for costs thrown away
- **After issue**, apply to the court for an order, as allowed now since 1 October 2024.
- **"ADR"** in the context of ordering it under the CPR is likely only to be a choice between mediation and neutral evaluation, the latter either being by a judge or possibly a private evaluator. Courts have firmly recommended use of mediation for many years, and standard orders have required use of "ADR" to be considered "at all times". Since Churchill, courts have begun to order parties to mediate even when reluctant or opposed[2]. Courts have very occasionally ordered judicial neutral evaluations[3], but not so far private neutral evaluations, which if sought may probably have to be set up consensually without a court order. The court will probably take into account the answers to questions under Section 4 above in deciding which process to order.
- Bear in mind that courts may not be prepared to treat correspondence dealing simply with setting up or refusing to use a dispute resolution process as privileged and without prejudice, even if marked WP[4].

[2] See Elphicke v Times Media [2024] EWHC 2595 (KB) and DKH Retail v City Football [2024] EWHC 3231 (Ch)
[3] See Lomax v Lomax [2019] EWCA Civ 1467
[4] See Jones v Tracey [2023] EWHC 2256 (Ch)

How To Set Up And Prepare For A Neutral Evaluation Once Agreed Or Ordered

- Neutral evaluation has been used to a very limited extent but some detailed considerations as to its use are set out below. There are some initial practical points on which the parties must agree – what do you want to be evaluated, how and by whom? For example, are you asking for an evaluation of:
  - what the likely **outcome of a trial of the whole case** might be – using the evaluator as a substitute judge to deal with the merits on all disputed issues and in effect to render a sort of all-encompassing non-binding judgment;
  - what a sensible **settlement value for the whole case** might be – so using the evaluator to assess risks for each party on all disputed issues and pronouncing a non-binding outcome which is adjusted by the evaluator's views of the risks that each party will not succeed on all their arguments;
- Or an evaluation on a more limited basis, so as to inform later inter-party settlement discussions, for example:
  - what the likely outcome of one or more discrete points of law in dispute might be;
  - what the likely outcome of a discrete matter of expert opinion in dispute might be; do you want an independent medical expert to evaluate the difference of opinion, or a barrister or judge to weigh up the alternative opinions as a judge would and evaluate which seems preferable;
  - (more rarely) what the likely outcome of a discrete matter of disputed fact might be;
- What kind of evaluation do you want to receive?
  - A closely reasoned evaluation?
  - A number for each party to accept or reject?



- In reaching the right agreed decision on the above,
  - Can the parties agree on who should be the evaluator?
  - Do you have an agreed bundle for the evaluator with an agreed case summary and all the evidence, expert reports and other material needed to make a useful evaluation on paper? Is it too early for an evaluation to be useful or persuasive?
  - Does it matter if the evaluator does not see and appraise the witnesses under oath, as a judge would do?
  - Are the chances good that the matter(s) in dispute will be mutually resolved by this evaluation? Will a further settlement meeting be necessary or do you expect settlement to follow swiftly and easily on receipt of the evaluation?
- By what date should the evaluation be delivered?
- What will you advise your client to do next if:
  - the evaluation is one which you would advise your client not to accept?
  - Your client rejects your advice (positive or negative) on the evaluation?
  - You and your client accept the evaluation, but it is rejected by your opponent?
  - What will an ATE insurer's approach be?
  - Might you then use mediation (in which perhaps use mediation anyway), or proceed with litigation, perhaps considering a Part 36 offer?

- Will the evaluation be kept confidential from the trial judge if one or both parties decline to accept it? Could there be unwelcome adverse costs consequences for one or all parties if the judge took a view that it should have been accepted by all when issued, thus avoiding a trial?

A written agreement for each neutral evaluation needs to be signed by the parties, the evaluator and any dispute resolution service provider involved.

Are the chances good that the matter(s) in dispute will be mutually resolved by this evaluation? Will a further settlement meeting be necessary or do you expect settlement to follow swiftly and easily on receipt of the evaluation?

How To Set Up And Prepare For A Mediation Once Agreed Or Ordered

- Mediation may be chosen as the right process because:
  - it provides a one-stop shop involving all necessary parties meeting (either online or in-person) and fully prepared for settlement discussions, usually with authority to settle the claim and a final outcome likely (bearing in mind mediation's high settlement rate);
  - the claimant(s) wants the opportunity for direct involvement and contact with the defendant NHS Trust, which itself is willing to meet directly with the claimants, giving all the opportunity to speak frankly and be heard in a safe environment;
  - the mix of party autonomy and confidentiality in a process framework managed and facilitated by a neutral is felt likely to be productive;
  - its confidentiality offers the opportunity to explore different approaches towards settlement and a sharpening of risk analysis which face-to face negotiation would make less likely to be productive;
- Parties will need to agree on the appointment of a mediator with suitable skill, experience and style, who in clinical claims is usually selected or nominated from an approved panel.
- The likely shape of CEDR mediations can be found in its model mediation procedure , however the process is entirely flexible and the mediator will adapt and manage the process to meet everyone's needs at the mediation:
- As soon as appointed, the parties will be asked to sign a mediation agreement which includes important provisions to ensure the process is confidential and without prejudice
- The mediator will contact each party's lawyer by way of personal introduction and to arrange to have a private pre-mediation meeting with each team, usually suggesting preparatory contact by the mediator with the lay or clinical client by telephone or online, with or without their lawyer present (as the client wishes). Pre-mediation meetings are valuable to answer questions about an unfamiliar process, reassure them about what not to fear, and to potentiate their participation.
- The mediator may propose or ask the parties to agree a pre-mediation timetable which will usually include the preparation and exchange of case summaries; these are confidential and without prejudice documents.
- Mediation could be an in-person face to face meeting, or take place online using video conferencing software or possibly a hybrid mediation with some participants attending in person and others joining online.
- If a claimant is acting in person without a lawyer, then the mediator will contact the claimant directly. Mediation can work well even with unrepresented parties, but the mediator will certainly check that independent advice is available to them on the merits of their claim.
- It is wise to have a good idea of costs to date available at the mediation (including the costs of the mediation), although costs are not always discussed in detail or agreed then.

[5] Such a proposal has been made by the Ministry of Justice in relation lower value clinical claims within a fixed recoverable costs regime under consideration.
[6] https://www.cedr.com/wp-content/uploads/2019/10/CEDR_ENE_Agreement_2019.pdf.
[7] To be found at https://learn.cedr.com/hubfs/Model%20Documents/Mediation%20Guidelines%20and%20Procedures/Model-Mediation-Procedure-July-2023.pdf.

TOP TIPS ON PREPARATION FOR BOTH CLAIMANT AND DEFENDANT LAWYERS

- Do encourage your clients (whether claimants or clinical and Trust staff) to say what they feel about the alleged negligence: if they do not want to speak extempore, they can read an "impact statement" or have it read for them by you if they prefer. Such statements often have a profound effect on the other team and elicit sensitive and well appreciated responses.
- Assume and accept that mediation confidentiality applies to all pre-mediation contact between the mediator and each party.
- Advise clients that they will never be ambushed by something unexpected – the mediator will always consult all parties before each proposed stage of the mediation, giving time for advice and preparation. No early joint meeting will be convened before everyone is ready for it, and what is to be discussed, and the order of events is clear and agreed.
- Check in good time whether anyone in particular would be welcome (or not welcome) to attend from the other team; always consider and agree that an NHS Resolution Safety and Learning team member might attend to embody NHS determination to learn from the alleged error.
- Check if any kind of apology, acknowledgement, explanation or account of lessons learned would be welcomed and prepare for this, giving thought to who best to deliver it, when and how it is best done (e.g. in a plenary, or between selected team members, early or late on in the process).
- Consider whether any other imaginative non-monetary outcome beyond the powers of a court might be proposed, such as claimant involvement in further staff training, or some named memorial.
- If breach of duty has been admitted, do not assume that the mediation will only need to deal with quantum issues: the more egregious a mistake, the more it needs apology, explanation, and reassurance that steps to avoid recurrence have been taken.
- Make sure that the mediator is told of all prior offers, whether informal or by Part 36 procedure, to give an accurate idea of the likely parameters for settlement debate: if these parameters have changed since those offers were made, make clear privately in advance to the mediator why and to what extent – there is no reason to keep this information from the mediator (as there would be from a judge).
- Have a frank review of your risk appraisal of disputed issues, and manage your client's expectations as to the likely outcome: mediations almost always involve reappraisal of risk and seeking an agreed settlement value which takes into account each party's private acceptance of the risk that they may not succeed on all matters in the dispute, whether over breach of duty, causation, heads of damage or quantum.
- Think about where your provisional bottom line might be but come to the mediation with an open mind and room to manoeuvre in case a new and unexpected fact, opinion or perspective emerges.
- Agree a simple bundle for the mediator, including key documents only – don't include for example all medical notes or special damages invoices: the mediator is not an adjudicator and just needs to understand the parameters of what is in dispute. Usually, the letters of claim and response or (if post-issue) pleadings, witness statements, expert reports (with any Part 35 joint statement) and schedule of loss and counter-schedule will do: given these, the mediator may not see the need for position papers.

TOP TIPS FOR CLAIMANT AND DEFENDANT LAWYERS AT THE MEDIATION

- Advise your client that your team will be housed in a private room on arrival at the mediation venue, and that there will be as many private meetings with the mediator and each team as seem necessary before the parties are invited to meet jointly (if at all).
- Do not instinctively reject or advise your client against the idea of a joint meeting towards the beginning of the mediation, as mediations where parties simply stay separate in their private rooms and never meet rarely work well.
- The mediator may suggest:
  - A full plenary, with each side making a presentation first on the personal/ emotional issues (usually done by clients rather than advocates) in an agreed order, and then by lawyers on medico-legal issues; or
  - Alternatively, each of the above but in separate meetings with a gap between, and often not involving lay clients in the medico-legal meeting;
  - Just a joint meeting between lawyers on medico-legal matters, leaving the possibility of a meeting between lay clients for later; or
  - Simply a meet and greet of all attending, quickly adjourned for a meeting of lawyers as above: even this informs all as to who is attending, breaks the ice and models interpersonal contact.
- Bear in mind the overall confidentiality and privilege which applies to mediations: this means that no offer which is not accepted can be used by or against the offeror or against the refusing party in trial evidence: the only offer you should not make is one that you would regret if it were accepted!
- The mediator may seek to test out your strengths and weaknesses in private meetings: this will only be on a confidential basis to assist your risk evaluation, and you will be free to take account or not of the points that arise in subsequent discussion without the mediator: remember that mediators have no power to direct parties to answer their questions or indeed to do anything, but they will always respect the confidentiality of what they are told in confidence.
- The mediator may suggest when an offer might be formulated and conveyed, and even express a view as to how or at what level it might be pitched for maximum effect: remember that the mediator knows more than you about what the other team is thinking, but you will always be free to choose the level of offer that you decide is wise.
- While reasoned discussions on disputed issues take place at first, offers will often be exchanged later on a global basis, without detailed justification. This allows for undefined flexibility about the way a global number is made up – one party may have given more than the other on various risks, to achieve the same number. This calls for care in considering them and how to respond.
- Do not despair if the parties seem very far apart or negotiations to be deadlocked: the mediator may well have ideas as to how this might be overcome, though you will always have the absolute right to walk away from the process without fear of criticism by the other team in front of the judge; nevertheless what is offered today may be encapsulated in a Part 36 tomorrow at the same or a less advantageous level.
- Use the mediator to help plan next steps both if the case does not settle, in effect carrying out an immediate stocktake; or if there are follow-up meetings to plan to check lessons learned or satisfy any extra-legal wishes.
- If the case does settle, even in part, or even only as to what happens next, or an offer is left open for acceptance for a set period, all such agreement should be recorded in writing and signed, even if simply recorded as such in an e-mail exchange, otherwise those wholly or partly agreed terms will not be binding.
- Whatever the outcome, the mediator is likely to invite all attending to consider how best to end the day, perhaps by a brief joint meeting of all or a brief handshake in the corridor.

FURTHER INSIGHTS ON CLINICAL NEGLIGENCE MEDIATION

CEDR'S CLINICAL NEGLIGENCE AND PERSONAL INJURY SPECIALIST MEDIATORS'


Alan Jacobs


Heather Allen


Fiona Colquhoun


Jeremy Connell


Shona Crallan


Muiris Lyons


Lisa Drake


Charles Feeny


Terry Renouf


Tracey Fox


Neil Goodrum


Kevin Smyth


Gillian Caroe


Patricia Hitchcock KC

To learn more about CEDR's Mediators and to get support on mediating clinical claims, contact the CEDR Team.

CONTACT CEDR

KEY CONTACT

Richard Nunn
Head of Commercial Disputes, CEDR
rnunn@cedr.com

GET IN TOUCH

CENTRE for EFFECTIVE
DISPUTE RESOLUTION

Centre for Effective Dispute Resolution
100 St. Paul's Churchyard, EC4M 8BU
www.cedr.com