Complete Mediation

Welcome to the first edition of

Mediation Matters

Newsletter | **November 2019**

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Mediation? 21st Century Resolution and Redress?

Charles Feeny Barrister & Mediator

If someone seriously injured you through their negligence or lack of care, the worst thing they could do is nothing and the second worst is just offer you money. In practical terms, this is all our current legal system is able to offer in the vast majority of cases to the victims of clinical negligence or trauma.

By way of contrast it is reasonable to think that in these circumstances you might wish for a number of responses, quite reasonably to include an explanation, an apology, and some reassurance that the incident would not be repeated. Whilst it is possible to obtain some of these outcomes, albeit obliquely through concurrent processes such as complaints or regulatory action, there is no unified procedure whereby a victim can reasonably address all their concerns about what happened at the same time and, most importantly, at an early stage.

In this context, and indeed in others, it could reasonably be observed that the legal system still displays the psychology of the 19th Century whilst attempting to address the much more complex demands of the early 21st Century. This is perhaps best exemplified by the continuing references to the simplistic concepts of victim and wrongdoer, leading to the Courts largely ignoring the implications of the vast growth in State-provided Social and Healthcare in the 20th Century. The position has been reached where a movement equivalent to that of Legal Realism which was seen in early 20th Century America is needed. The legal realists correctly perceived that the legal system was far too limited and arcane to perform the function that was needed in a rapidly developing and changing society.

This problem was well-illustrated in the recent case of MR v Commissioner of the Police of the Metropolis. The Claimant had been arrested but released without charge. In bringing an action against the Police, his primary concern was to clear his name since his work involved visiting different countries and in some he would be required to declare the fact that he had been arrested, albeit not charged. The Commissioner made an early Part 36 of £5,000. Subsequently, the Claimant made a Part 36 offer of damages nil provided that an admission was made that his arrest had been unlawful. The Claimant succeeded at Trial with a finding of unlawful arrest but damages of only £2,750, less than the Defendant's Part 36, were awarded. The Judge at first instance considered the Defendants the successful party, at least in terms of damages, and made no Order for Costs. On appeal, Mrs Justice McGowan reversed the decision insofar as it related to costs after the Claimant's Part 36, determining that the Claimant was then the successful party. This was even though the Claimant had recovered in financial terms less than that offered by the Defendants. Mrs Justice McGowan's acceptance of the creative use of the Part 36 procedure by the Claimant's solicitors is welcome but decisions like this are going to be isolated and related to specific facts. The case ultimately merely indicates the need for change rather than promotes a widescale change.

Mediation, therefore, has some cardinal virtues which makes it very suitable for the early 21st Century. The process is not impersonal but rather the victim has the opportunity to articulate all his or her concerns. Against this background, issues can be addressed going beyond the simple payment of financial compensation. The success of the NHS Resolution Mediation Scheme has resulted in a real appreciation in clinical negligence litigation, both amongst Claimant and Defendant solicitors that there is real and distinct advantage in mediation rather than traditional negotiation or litigation to Trial. This is particularly appropriate in cases such as fatal claims involving close relatives where the financial value of the claim may be limited but the Claimant has significant personal concerns about what has happened, which can be addressed in discussion in mediation in a way which would not otherwise be possible.

Many insurers and commercial organisations remain apparently sceptical about the value of mediation. They still seem to think that it does not add anything to the usual means of disposal; that is impersonal negotiation conducted often on a fairly adversarial basis. The success in clinical negligence litigation is rationalised on the basis that the NHS and NHS Resolution as public bodies have an interest in the outcome of medical accidents which goes beyond the narrow financial consequences of the same. However, it is time that these doubters joined the journey into the early 21st Century. Mediation clearly can have significant economic benefits, in particular in terms of early and reasonable resolution. Further, there is clear reputational value to such organisations in being seen to have dealt with a person injured in a sensitive and conciliatory way. It is hard to see why insurers embrace rehabilitation but not mediation.

Perhaps the answer lies in an addiction to old-fashioned, positional negotiating? If judgements are formed on mediations on the basis of pre-conceptions then the judgements are inevitably going to be wrong. The best way to judge the value of a mediation is to participate in one.

How to make the most of the private session with your Mediator

Tony Wilson Legal Consultant & Mediator

Following the first joint open session each party retires to their own room to wait for the first private session with the Mediator. There can be mixed emotions in the room from being content with the exchanges or anger at comments made by the other party.

When the Mediator meets you in private session he will re-in force the confidentiality of the meeting and try to explore your position further. Below are some tips as to how best to make progress in the first private meeting:

- It is confidential so make use of that, you can have a frank conversation with the Mediator and decide what if anything he can disclose to the other party at the end of the meeting;
- Lawyers like to lead the discussion on behalf of their client but if you are the client do not be afraid to speak (remember it is your case!);
- Make use of the meeting to put questions to the other party through the mediator, tell the Mediator what other ideas you may have which would help you resolve the case. If there is something you want to know from the other party do not be afraid to tell the Mediator;
- Be prepared to discuss the strengths/ weaknesses in your case as the Mediator may be able to guide you as to when to make best use of that information;
- In clinical negligence claims on occasions the family may be looking for an apology or re-assurance that the same mistake will not happen again. If this is important discuss that with the Mediator;
- Although the early meetings are usually the exploratory stage of the mediation process if you want to make an offer it can speed up the process. You can always advise the Mediator that you want to make an offer but suggest to him that he uses his discretion when in private session with the other party as to when he can make best use of an offer;
- At the conclusion of the private session make sure you agree any conclusions with the Mediator and make sure you all agree what he should communicate to the other party;
- Finally, some mediators will leave you with a task before you meet again, which you should take seriously as he may be a specific task which he may believe is a way to settle the claim;

The key to remember is that the private session is confidential so if you do make concessions to the Mediator it does not necessarily mean you are giving him permission to make that concession to the other party. Too often parties are cautious or defensive in the private meetings which only prolongs the mediation.

Good luck with your next private session & hopefully these tips may shorten the mediation & lead to a settlement.

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Our Experienced Mediators & Consultants

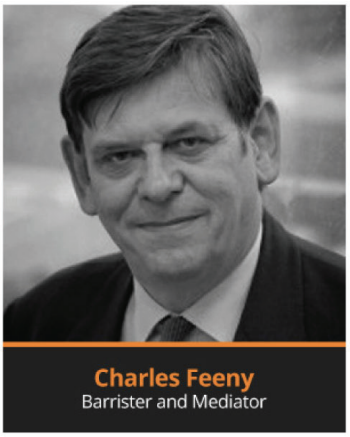
We believe in continually assessing and improving our performance. Following each Mediation, feedback as to how the day went is sought from those who attended.

This feedback is used to further develop the skills of each Mediator. Our Mediators attend yearly practice meetings with us where we assess their feedback together. At these meetings we check our Mediators insurance is up to date and we also check they have dedicated enough time to professional development for that year.

Our Mediators will benefit from peer support and in house training events.

Claire Labio
Practice Manager & Mediator

Ana Samuel
Barrister and Mediator



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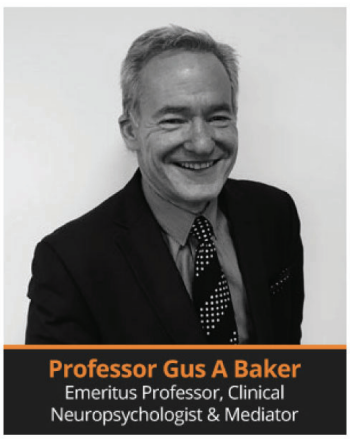
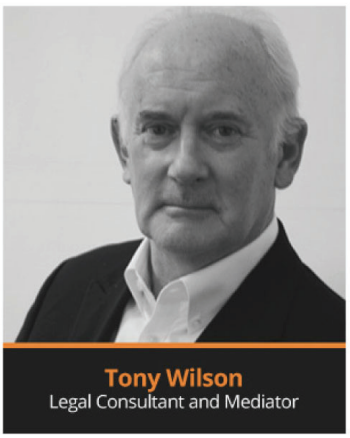


Professor Gus A Baker
Emeritus Professor, Clinical Neuropsychologist & Mediator



Tony Wilson
Legal Consultant and Mediator

Mediation

A guide to what we need from you

- Ideally all papers must be delivered by email at least 7 days and preferably 14 days before the mediation takes place
- Each party to submit a brief summary setting out the chronology of facts. Length should be between 1-10 pages for straightforward matters and up to 25 pages in more complex cases
- An agreed bundle of documents should be submitted. This should contain only relevant documents to the mediation and be kept as condensed as possible. This bundle should be paginated and indexed.

Full guidance can be found at completemediation.co.uk/paperwork

For further information please contact Claire Labio or Emma Wall:
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Next Edition, January 2020

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