Alternative Dispute Resolution (ADR) / Alternatives to litigation

This guide gives a broad overview of the alternatives available to you in seeking redress for a medical accident in England, ADR can avoid the stress of pursuing litigation although it does not work for everyone. The procedure in Scotland, Northern Ireland and Wales may be different.

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Introduction

The way in which lawyers refer to resolving cases out of court is 'Alternative Dispute Resolution' or ADR for short. There are a range of ways to engage in ADR the most common ones include:

- Mediation
- Early Neutral Evaluation
- Round table meetings (RTM): If you have already instructed a lawyer to bring a clinical negligence case then you may find that they suggest an RTM
- Arbitration

The main purpose of ADR is to provide parties with flexibility and a focus on settlement rather than conflict. There is the added benefit that ADR provides an opportunity to resolve cases early thereby avoiding the stress and formality of court hearings. However, there is no guarantee that a case will settle just because you have explored ADR.

ADR can be introduced at any time, either before or after court proceedings have been issued. You do not need a lawyer to represent you if you go to ADR although the more complex and high value your claim is, the more usual it is to have a lawyer support you through the ADR process.

ADR is very much encouraged in clinical negligence litigation.
The Pre Action Protocol for resolution of clinical disputes (www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd#intro) makes it clear that litigation should be a last resort and that parties should consider whether ADR might enable them to resolve their dispute without commencing proceedings.

Where proceedings have been issued, the court will give directions as to how the case should be conducted. The High Court has standard model directions in clinical negligence cases, these directions make ADR a step which must be considered as part of the litigation process.

Mediation

What is it?

Mediation is conducted confidentially by a neutral person (the Mediator), who is not involved in your case – this may be a practising lawyer (solicitor or barrister) with specialist knowledge and experience of clinical negligence however the mediator does not have to be a lawyer. The mediator actively assists parties in working towards a negotiated settlement of the dispute however **the parties are ultimately in control of the decision to settle and the terms of resolution**.

Mediation can be a quick, flexible and cost-effective way to resolve a dispute you may have. You have greater control over resolution of the disagreement than you would do in court.

Frequently asked questions:

Question: Do I need to be represented by a lawyer to attend mediation?

Answer: The short answer is no, you do not need to be represented at a mediation, any more than you need to be represented at court. However, you should seek advice on whether it is appropriate for you to participate in mediation or in any other form of ADR before agreeing to the process.

If you are unrepresented and do not have a solicitor or barrister acting for you, it is highly likely to be in your best interest to take some independent advice and gather information on the mediation process. AvMA's caseworkers will be able to offer you support, talk you through the options and give you some general information on the process. AvMA's advice is free of charge and without obligation, but please give us as much time as possible to consider your case, we may need to review your papers and this takes time. To obtain advice from AvMA please complete our written advice New Client Form and submit it without delay. One of our experienced caseworkers will contact you further: www.avma.org.uk/new-client-form

Question: How is the mediator appointed?

Answer: The mediator is selected by the disputing parties by mutual agreement. The Mediator must be independent of the proceedings and impartial.

Question: Does the mediation take place in a court room?

Answer: No. The mediation can take place anywhere the parties agree to hold the process. It will most likely take place in a neutral but formal setting but there should be a separate room for each of the parties to spend time in and there is usually a larger room which will enable all parties to come together. The mediation might take place at a hotel with conference facilities or a barrister's chambers. Due to coronavirus, more recently arrangements have been made for mediations to take place virtually.

Question: What is the mediator expected to do?

Answer: The mediator aims to facilitate discussion and will work to try and enable the parties to reach a settlement. The mediator may try to reality check each party's position by teasing out the strengths and weaknesses of each party's case but they must remain neutral throughout the process, not advocating for one party or another.

Question: How long does a mediation last?

Answer: Usually the parties will agree how long the mediation will last prior to the mediation meeting taking place. Mediations can last half a day or longer depending on the complexity of the case, the issues under discussion and what the parties are hoping to achieve and/or agree.

Question: Does the mediator decide the terms of settlement?

Answer: No. The parties decide whether they can agree terms of settlement. The mediator cannot impose a decision on the parties in the same way judges do.

It is important to note that mediators do not determine liability (fault).

Even if a mediation does not reach a full settlement, parties will often agree some aspects of the claim, this can be helpful in identifying the core issues in dispute between them when they go to trial.

Question: Is mediation free?

Answer: It can be if one side agrees to pay all of the costs, this might happen if you do not have legal representation, but it will vary from case to case. If you are represented by a solicitor, the cost of mediation will usually be shared between both parties, see below for more details on cost.

How do I find a mediator?

Mediators are often trained although they do not have to undergo any form of training or accreditation. However, the Civil Mediation Council has taken steps in this direction by creating a registration scheme. We recommend that you consult their website https://civilmediation.org/for-the-public/how-to-choose-a-mediator; they have a search tool where you can look for mediators specialising in a particular field within a particular geographical area.

The NHS has its own mediation service. They have partnered with CEDR (the Centre for Effective Dispute Resolution) and Trust Mediation Limited to provide mediation services for clinical negligence claims.

You should contact the two providers for more information about engaging with the NHS through mediation:

Contact details for CEDR

Telephone: 020 7536 6062

Website: www.cedr.com/commercial/mediationschemes/nhsmediationscheme

Contact details for Trust Mediation

Telephone: 020 7353 3237

Website: www.trustmediation.org.uk/nhs-resolution

How much does mediation cost?

The mediator's fee will be calculated on an hourly or daily basis, which should include preparation time. Hourly rates can range from £200 to £500 plus VAT and daily rates can range from £700 to £1,000 per party.

If you use an ADR accredited provider such as CEDR or Trust Mediation, it is likely they will charge a fixed fee, which will include all associated expenses (travel etc.) as well as the mediator's fees.

Other costs to be aware of include your own expenses (e.g. travel to and from the location, printing etc.), your lawyer's fees and those of the mediator. You may also require a medical expert's opinion and they will charge for their time and work.

Who pays for mediation?

The mediation agreement will usually state that the mediation fees and expenses will be split equally between the parties and that each side will pay their own costs, but there is no reason why you could not reach a different agreement with the other side. For example, you may agree that the winner is to pay the loser's mediation costs.

If you mediate using one of the NHS providers (CEDR or Trust Mediation) and the mediation results in NHS Resolution either admitting liability (in full or in part) or if you are unrepresented at the mediation, then NHS Resolution will usually pay the costs of the mediation process in full. You should check the position with regards to costs before you commence the process. There may be penalties payable for any party who agrees to attend mediation but who subsequently fails to attend or cancels their attendance with less than 48 hours' notice.

The Legal Aid Agency occasionally funds the costs of mediation for a given party. See **www.gov.uk/check-legal-aid** for more information. This is not usually available in clinical negligence cases.

Conditional Fee Agreements can also be used to fund the cost of your lawyer attending the mediation. It is possible to agree for the mediator's costs to be dependent on the successful outcome of the mediation (a settlement) although this is not usual in clinical negligence cases.

Strengths and weaknesses of mediation compared with litigation

Strengths:

- It's helpful to have a neutral party or mediator to promote discussion and try and get the parties to focus on negotiation with a view to reaching settlement;
- The mediator can help each party present their case more effectively to the other side;
- Mediators have a good understanding of styles, strategies and tactics that can help a negotiation;
- It is a flexible process (you can decide the date, length of meetings etc.);
- It offers the opportunity for parties to vent emotions such as anger and distress, these emotions can often get in the way of achieving resolution and settlement.
- The parties can have more control over the terms of settlement; for example, it might be possible to negotiate an apology and/or an agreement that a hospital trust will learn certain lessons and/or make changes which prevents the same injury from happening to anyone else. A judge cannot impose this as part of their judgment;
- It can be arranged more quickly than court proceedings as you are not waiting on court availability and so forth;
- it can be more cost effective than litigation and a trial of the action;
- Many people find the process less formal and intimidating than court proceedings;
- It is confidential.

Weaknesses:

- Mediations are not subject to the rules of court (e.g. compelling a witness to give evidence);
- There is no guarantee that a mediation will result in the parties reaching any agreement or terms of settlement in which case it becomes an additional step in the litigation process and an additional cost;
- Although mediation can take place at any time after the dispute arises, it can be difficult to know when the best time to mediate is. It is possible to mediate before you obtain your own independent expert evidence. There may be risks with mediating before you have exchanged your expert evidence with the other side. If you are represented your lawyer can guide you as to when the best time to mediate is.

There are very few notable weaknesses but very often parties are not willing to engage in mediation, unless compelled to do so by a court. Mediation probably works best when both sides agree to try and resolve the dispute, rather than being compelled to mediate by force of say an order of the court that it must take place.

Early Neutral Evaluation (ENE)

What is it?

Early Neutral Evaluation (ENE) is a non-binding assessment and evaluation of the evidence and legal merits of an issue in your case, or of your case as a whole. Parties usually engage in this process together, although it can be undertaken by one party in relation to their own case.

How does it work?

It is commonplace to appoint a neutral third party to evaluate the facts, evidence and law in relation to a given case. The third party will then offer their opinion. This is different from mediation in that ENE is an evaluative process, as opposed to a facilitative one.

The purpose of ENE is that a neutral evaluator, looks at all of the available evidence and gives their opinion on the likely outcome if the case were to go to court and be decided upon by a judge. This independent assessment and indication of likely outcome by a neutral third party might help the parties settle the dispute. ENE is particularly helpful where one or both parties have taken an unrealistic view of the claim and need a reality check of their chances of success.

Frequently asked questions:

Question: How do you chose the evaluator?

Answer: The choice of evaluator can depend on the specific issues in the case. For example, if the key issue in the case is causation in relation to a complication during childbirth, it may be possible to appoint a suitable clinical expert to evaluate.

You can appoint a lawyer or an independent party, such as an expert, or you can consult an ADR provider and ask for their help in selecting a suitable evaluator. Both parties should agree on who the evaluator should be.

Question: Who can help me find a suitable evaluator?

Answer: The following organisations can provide ENE services:

CEDR:

Telephone number: 0207 536 6062

www.cedr.com/alternative-dispute-resolution-processes/earlyneutralevaluation

Independent Evaluators (IE)

www.independentevaluation.org.uk/areas-of-law/clinical-negligence

Chartered Institute of Arbitrators: 020 7421 7455

www.ciarb.org/disputes/dispute-appointment-service/early-neutral-evaluation

Some barristers chambers also offer evaluation services

Question: Who pays for Early Neutral Evaluation?

Answer: The parties usually pay for their own costs (legal fees) and those of the evaluator.

Strengths and weaknesses of ENE compared with litigation

Strengths:

- ENE can be undertaken at any stage, pre or post issue of proceedings;
- It is confidential;
- It is a good way of making another party take a more realistic approach to their chances of success and ultimately reaching a settlement
- It is not binding but if you reject the evaluators assessment you do so in the knowledge of what your likely risk will be.

Weaknesses:

- It does not result in a guarantee settlement and may result in additional costs being incurred;
- It may be expensive if you instruct a clinical expert to evaluate the case

Arbitration

What is it?

Arbitration is an adjudicative process; a neutral third party settles a dispute by considering both sides and ultimately making a decision in favour of one party or another. It is rarely used in clinical negligence cases.

Unlike other forms of ADR, arbitration is governed by legislation: the Arbitration Act 1996. This means that there are several rules you have to follow, which can make arbitration more attractive than other forms of ADR because there is less choice involved and, therefore, less to agree with the other side.

How does it work?

Most arbitrations relate to contractual disputes; it is therefore extremely rare to engage in arbitration over a clinical negligence matter although it is possible if both sides agree.

There must be an agreement between parties to engage in arbitration before the arbitration takes place. This means that big corporations often have clauses in their contracts which state that they will engage in arbitration should a dispute arise. The NHS is unable to make health care services contingent upon you agreeing to any subsequent dispute being referred to arbitration.

Arbitrators will be appointed by the parties and will often have specialist knowledge of the issue at stake. This means that some private arbitrators can and do charge fees at commercial rates.

Who pays for it?

Parties usually pay for the services of arbitration themselves. Sometimes the services of High Court judges are provided for free as part of the court process; in order for this to be available, you would have to already be engaged in litigation.

Strengths and weaknesses compared with litigation

Strengths:

- Parties have more control over the process than they would do in court;
- The process is less formal than litigation;
- Most arbitrations are held in private, so any information exchanged between parties is confidential.

Weaknesses:

- Arbitration can be very expensive;
- Whilst there are statutory rules, the arbitrators themselves have limited powers in relation to imposing sanctions and so parties can cause delays and get away with it;
- There is very little and possibly no experience of parties to a clinical negligence claim using arbitration to resolve a dispute;
- It can be difficult to get parties, especially healthcare providers defence organisations to agree to the process.

The unrepresented claimant:

Tips on how to prepare for a mediation or Early Neutral Evaluation process

Clinical negligence claims are complicated especially for the unrepresented lay person, understandably non lawyers can find it very difficult to understand the legal concepts of a breach of duty and causation (injury arising because of the breach). It can be equally difficult to understand and use medical terminology. For this reason, we do caution against patients engaging in these processes without legal representation. We encourage you to at least obtain some legal advice prior to agreeing to these processes.

If you would like further advice, please visit AvMA's help and advice page: www.avma.org.uk/help-advice. Look for detail on how to access our free advice helpline or complete a New Client Form.

To get the most out of a mediation or Early Neutral Evaluation process you should try and make sure you are prepared. The following are some useful tips on how you might start your preparations:

- **Medical Records:** Getting copies of your or your loved one's medical records is usually a good starting point: www.avma.org.uk/wp-content/uploads/Medical-records.pdf.
- **Serious Incident Report:** A serious incident report should be prepared by NHS providers (including in the community) where an act and/or omissions has occurred that has resulted in unexpected or avoidable death or unexpected or avoidable injury to one or more people that has resulted in serious harm. For full details see our SIR leaflet: www.avma.org.uk/wp-content/uploads/Serious-incident-reports.pdf.

  If you are not sure whether an SIR has been prepared you should write to the NHS provider (usually the hospital trust or GP) and ask them to confirm if a SIR has been prepared and if so, to let you have a copy.

  The reports are prepared internally by NHS staff, some trusts are quite good at preparing SIR reports, but how fair and impartial the report is will vary. Nonetheless, the SIR will help you understand whether the NHS provider accepts that something went wrong with the care provided and if so, what that was.
- **Hospital Complaints process:** The complaints process may offer another opportunity for you to understand what the care provider says about the treatment they did or did not give. See our leaflets for more information: 'Making a complaint about NHS or Private Healthcare' for more information. www.avma.org.uk/help-advice/guides/#complaints.
- **The Duty of candour:** This is a statutory duty which requires healthcare providers to be open and honest with you when something has gone wrong with your medical treatment and a notifiable patient safety incident has taken place. The duty of candour requires that the patient is told when something has gone wrong as soon as reasonably possible after the event. It also requires that support be provided to the patient along with an explanation of what went wrong and all the facts, written notification of the facts should be provided. The written notification may help you understand the healthcare providers position before you attend the mediation. For more information on the duty of candour please see our leaflet: www.avma.org.uk/wp-content/uploads/Duty-of-candour.pdf
- **Cost of ADR:** Do check who is paying for the cost of the mediation or Early Neutral Evaluation before you agree to it. You may be able to negotiate that someone else be responsible for the costs of the process, including your expenses.

Obtaining copies of the medical records, Serious Incident Report (SIR) and/or using the hospital complaints process and requesting information as part of the duty of candour is not part of any ADR process, but they are free and may provide you with information which you will find useful if you do attend ADR without representation.

These processes are not designed to resolve financial matters, but they may explain what went wrong with the care provided. By contrast ADR can and is used to resolve financial matters.

You can say that you want to use the SIR, receive written notification under the duty of candour and use the complaints process before agreeing to ADR.

- You may also find it helpful to read our leaflets Legal Action: Bringing a claim in clinical negligence (www.avma.org.uk/wp-content/uploads/Legal-action-England.pdf) and Clinical negligence – What compensation can I claim? (www.avma.org.uk/wp-content/uploads/Compensation.pdf)

www.avma.org.uk/donate

Be part of the movement for better patient safety and justice

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You can help make healthcare safer and fairer for all

Our vision is a simple: **People who suffer avoidable medical harm get the support and the outcomes they need.** This vision is underpinned by four objectives, we believe, will transform trust in the NHS and healthcare generally and significantly cut the cost – financial and human – which is incurred annually in settling legal claims as well as dealing with the human costs associated with traumatic medical injuries and death. Our four key objectives are:

- To expand the range of communities we serve and so enabling more people experiencing avoidable harm to access services from us that meet their needs
- To empower more people to secure the outcomes they need following an incident of medical harm, whilst providing caring and compassionate support
- To eliminate compounded harm following avoidable medical harm
- To have the necessary diversity of sustainable resources and capacities to deliver

Ongoing donation from as little as £5 a month could go a long way:

£5/month could provide vital advice to patients and families via our helpline

£10/month could help train a volunteer helpline advisor

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