

brownejacobson^{LLP}



medical mediation
foundation
resolving conflicts in health and social care

NHS
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Shared Insights

Medical Mediation in Health and Social Care

Kelly Buckley, Browne Jacobson

Sarah Barclay, The Medical Mediation
Foundation

Annie McBain, Barts Health NHS Trust

Bev Hunt, NHS Resolution

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Medical Mediation in Health and Social Care

Sarah Barclay, Founder of The Medical Mediation Foundation

Sarah is the founder of The Medical Mediation Foundation, a not for profit organisation established in 2010 to provide mediation and conflict resolution training to NHS hospitals. MMF has received grants from the Department of Health, the Guys and St Thomas's charity and more recently, from the True Colours Trust to support development of its work and research into conflict between families and health professionals and to pilot the use of mediation to resolve treatment disputes. She is an accredited mediator and has been co-director of The Evelina Resolution Project which has been providing mediation and conflict management training to clinical and non-clinical staff at the Evelina London Children's Hospital since 2012. In 2020, MMF was awarded a three year grant by the True Colours Trust to embed and evaluate the use of a structured pathway for recognising and managing conflict between parents and health professionals, developed by MMF in three NHS children's hospitals. In 2018, The Medical Mediation Foundation won 'Mediation Programme of the Year' in the National 'Mediation Awards for its work on the Evelina Resolution Project. Sarah has a Masters degree in 'Medical Law and Ethics' from King's College London and is a former award winning BBC social affairs presenter.

Sarah.Barclay@medicalmediation.org.uk

Introduction

The focus of the work of MMF is as much about training and supporting health professionals to recognise and manage conflict as it is about mediating.

Health professionals often say they feel out of their comfort zone when they are in high conflict situations. Conflict takes us into the territory of the 'unfixable'. MMF's role is to try to support them to feel equipped entering that zone before disputes escalate.

Since 2010 MMF have trained more than 7,000 health professionals in many different hospitals. Recognising potential conflicts at an early stage is helped if conflict is seen as a spectrum which ranges from early triggers to warning signs to the extremes when relationships have broken down.

The impact of conflict

When asked to describe the impact of conflict, clinicians and parents of patients used words such as anxious, frustrated, uncomfortable, deflated exhausted and scared.

Medical Mediation in Health and Social Care

Sarah Barclay, Founder of The Medical Mediation Foundation

Recognise and manage it early

Healthcare is complex with many ethical dilemmas; although disagreements are inevitable, they do not have to escalate into conflict.

Defining conflict

The outcome of MMF's pilot research identified three key factors:

1. A breakdown in trust and/or communication between health professionals and a patient or family which has an impact on all involved.
2. A breakdown in trust and/or communication which affects the ability of a treating team to provide the care they deem optimal for a patient; or
3. A breakdown of trust and/or communication which affects staff.

Recognising the symptoms of conflict

Causes of conflict:

1. Communication breakdown
2. Disagreements over treatment
3. Families 'micro-managing'
4. Unrealistic demands and/or expectations

“Micromanaging” often comes from a place of feeling out of control. When families appear to be doing that consider what is going on underneath and explore that with them.

Triggers

- Insensitive use of language
- Conflicting messages
- Making assumptions
- History of unresolved conflict

Warning Signs

- Entrenched positions
- Avoidance
- Micro-management
- Separate camps/us and them
- Consequences
- Child/Patient no longer the focus
- Conflict takes on a life of its own
- Physical and verbal threats
- Attack

Medical Mediation in Health and Social Care

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The role of mediation - when can it help

- When professionals & families/patients cannot agree about treatment/care.
- Where there is a disagreement about the care/treatment of a young person or adult without capacity.
- When communication has broken down and positions have become entrenched.
- When parties feel their voices are not being listened to, acknowledged, understood and respected.
- As an alternative to making an application to Court, or the mediation process can also be run in parallel to the Court application.

What is mediation?

- A process of supporting parties in conflict to understand each other's positions and find solutions acceptable to all.
- The mediator is **impartial** and facilitates conversations which might not otherwise be possible between parties in conflict.
- A mediator does not decide or arbitrate. Their role is to support others to **resolve disagreements**.
- Mediation is voluntary, **confidential** and legally privileged.

Factors to consider in medical mediation

- **Timing**: consider involving mediators early on rather than after the legal process has begun. Mediation shouldn't be a tick box exercise.

- Mediation may need more than one meeting - think of it as a **process over time** in some cases, especially where religion/culture is an important factor.
- Consider how **second opinions** are sought - ensure families are involved and help to set an agenda. Ensure a second opinion giver is an **empathetic communicator**, spends time with the family and time with the patient/child and goes through the medical evidence together with them.

Testimonials on the impact of mediation:

Consultant Paediatrician

“Bringing in an external team allowed us to build a better position of trust and provided a clear moment in time to refresh the relationship between medical team and family... there was something unique and important for the parents about having (mediators) as part of the conversations.”

Nurse

“It absolutely changed how we felt... it made me realise that this is a set of parents that are absolutely, desperately wanting the best for their baby... It made us think, it made us reflect and see where we had, not gone wrong, but where communication could have been much, much better.”

Parent

“The first meeting was an eye-opener to how both sides were feeling. It was just like giving us space for both teams to walk towards something, towards a goal together, not like walking from different perspectives.”

Discussion

Sarah Barclay, Founder of The Medical Mediation Foundation

There was some discussion as follows:

Whether anyone has utilised mediation in any Court of Protection/Children's cases where there is a dispute as to best interests?

Sarah Barclay - Yes increasingly we are getting requests either involving treatment decisions or disputes e.g. the place where a young person without capacity resides. We are increasingly being asked to try and resolve those disputes.

Annie McBain, Barts Health NHS Trust - I have dealt with cases where the parents do not agree with the treatment. Even if mediation doesn't lead to the parents coming round to the clinician's point of view it is still a helpful part of the process in achieving a greater understanding of people's positions and bringing people closer together. The Court does expect you to have done it if possible.

Whether it was possible to use it in other circumstances, e.g. after an error had occurred to discuss the feelings of those involved?

Sarah Barclay - Yes absolutely the harm and long term impact of a clinical incident can be significant. Mediation allows a space for patients to have an explanation as to why something went wrong and if there has been learning from it; the mediation space can be a helpful space for those conversations to take place.

What are the benefits of providing a safe space, promoting and allowing the quietness and encouraging questions being raised?

Sarah Barclay - we have found that health professionals benefit from being supported and coached in how to have those conversations. There is understandable fear about going into that space with a patient or family member. A lot of MMF's work is to support professionals in having those conversations differently. The pacing of the conversation may be very different: utilising silences in the room, letting a clinician's point land with the family and leaving a reflective space to respond. Professionals who are understandably anxious and nervous may speak fast and give a lot of information at once which is often not helpful for the family. Supporting them in having those conversations in a different way is a significant part of the mediation.

How can Trusts access mediation?

Annie McBain - at our Trust it is accessed through the Trust's legal team. Divisional Directors are good at putting things on our radar early. Some services have direct relationships with the mediators but it usually comes through the legal team, often before panel or external lawyers are involved.

Medical Mediation - the Trust's perspective

Annie McBain, Head of Legal, Barts Health NHS Trust

Annie McBain is Head of Legal at Barts Health NHS Trust. Annie is a Lawyer with over eight years of medical law experience, including in-house at an NHS Trust, claimant clinical negligence and at NHS Resolution as a Senior Early Notification Case Manager.

Introduction

Annie has worked with Sarah on quite a few mediations and as a big acute Trust has lots of cases that may need mediating. Quite often there is no conflict between the clinicians and family, rather a treatment disagreement; or there can be a real breakdown in communication and distrust about doctors and medicine generally. The family's position might come from a religious/ethical/moral place which differs from what the clinicians consider are in the child's best interest.

Sometimes the Trust cannot move the family from their position and are often not in a position to move from the clinicians' treatment decision. The medical mediation process gives an opportunity to help the family to understand how the proposed treatment ties in with their own beliefs and religion. Using mediation as an early step in that process helps with communication. It helps bring people together and ultimately come to either a joint decision which avoids going to Court or even if a Court application is still needed, medical mediation can give a greater understanding of everyone's position.

Benefits for families and clinicians:

- An independent person to articulate their concerns to who can identify issues.

- Compromise and solutions where even if the treatment is not altered, small things that may help are suggested e.g.
 - Timing (important round religious holidays or visits);
 - Additional support i.e. chaplaincy. They can be present at the mediation as another lay person/independent third party who can help;
 - In the cases of divided opinions within a family, medical mediation can bring their views together or mediate between family members.
- Clinicians really value assistance from mediators and the feedback from clinicians is that it is very helpful in getting their opinion across from a neutral position.
- Ultimately families should feel heard and understood and it is also helpful for clinicians to feel supported by the Trust.

The process of implementing mediation

- Mediation is usually considered after an MDT and a best interests decision has been made and there are signs emerging that the family are not on board.
- A second opinion is requested and it is important that the family is involved in that situation.

The Trust's perspective and Discussion

Annie McBain, Head of Legal, Barts Health NHS Trust

- Contact is made with the mediators and once we have that second opinion, appointments are put in place.
- Alongside these three steps, consider connecting the families with Trust chaplains and involve the ethics committee. At Annie's Trust they have a "three wise person system" where they get three people together (often 2 doctors and a lawyer) to discuss the issues and consider whether there is an ethical question that needs to be considered at a full ethics committee. It is really useful to have the input and perspective of doctors not involved in the care and they often have suggestions outside of the ethical questions being considered.
- A Court application may still be necessary: the family may not change their opinion but is still worth undertaking mediation to allow greater understanding of each other's positions and as part of the process for going to Court. If you apply to the court at the same time as starting the mediation process, careful communication is required so the family understand a Trust is committed to the mediation process.

Discussion

How can a Trust's legal advisors help and support clinicians and those involved in incidents to prepare for and deal with the outcome of stressful mediations?

Annie McBain - We have meetings with them and usually by this point we have explained the process and we will have meetings to support them in the run-up. Usually the mediation situation is very supportive in itself.

The mediator will have a clinicians meeting and the family meeting separately in advance of the mediation. The feedback is that they find those meetings really helpful. Our main role is to support them and often we will be doing things like the ethics committee at the same time so there are lots of avenues of communication and we explain the legal process early. The mediation process is not often the stressful part but the Court application and the day to day relationship and communication to maintain is probably more stressful.

It is important to make sure you have the right clinician /clinicians attending the mediation - usually the lead clinician.

Are mediators registered with a professional body or can anyone set up as a mediator?

Sarah Barclay - They need to be accredited.

What sort of costs are generated by the process?

Annie McBain - It depends the complexity of it and how long it is going to take. If it is a simple case with a few meetings and can be done quickly in a day, usually say £1,500 - £4,000 but with a large family and more clinicians and more complexity taking over a few days, it would be more.

Is it straightforward time-wise given that these cases are often very urgent?

Annie McBain - it can be difficult, Sarah is brilliant at squeezing things in and moving things around for example have the clinician meetings on separate days. We do have cases where mediation may be helpful but just can't be done time-wise because the treatment is so urgent/imminent.

Mediation - NHS Resolution's perspective

Bev Hunt, Safety and Learning Lead, NHS Resolution

Bev is the Safety and Learning Lead for mediation at NHS Resolution. She is a Registered General Nurse and Registered Midwife. She joined NHS Resolution in April 2018, as Safety and Learning Lead for North England. She is passionate about improving patient safety through lessons learnt and sharing information. Bev is helping to shape the Safety and Learning contribution in clinical negligence claims that are mediated to support trusts and GPs in extracting clinical learning, disseminate themes across the wider NHS and improve patient safety.

Bev explained her perspective comes from much further down the line, specifically when settling disputes and claims.

The Lead for Mediation role was implemented by NHS Resolution because it was recognised how important it is to share:

- Learning
- Improvements
- Apologies
- Condolences

In some mediations, the learning may already have been identified because the incident happened years previously, but the mediation is an opportunity to discuss other options and extract that learning on a wider scale. Conversations before mediation regarding safety and learning with clinicians and the Trust are really valuable. Lots of **resources** can be found on NHS Resolution's website here in the [Faculty of Learning - NHS Resolution](#).

There is a responsibility to identify learning and make sure that it is shared with patient-facing clinicians.

Apologies and explanations of what went wrong and the learning/ improvements made to mitigate future risk have added non-financial benefits to standard mediation. These can have a positive impact on the outcome of a mediation because, in some cases, claimants do not want others to have the same experience as themselves and NHS organisations demonstrating commitment to improve safety can be a conduit to settling a claim.

Mediation doesn't have to be at a fixed point after a claim has been initiated. It is important to be open to the possibility that anything is possible in terms of mediation. Find out what your patients and families want to know and need in order for them to move positively from their current position. Rebuilding trust and confidence is an important restorative objective.

Discussion

Bev Hunt, Safety and Learning Lead, NHS Resolution

When apologising many people struggle with trying to find the right words and apologising can be a honed skill that perhaps doesn't come naturally to everyone or they worry that if they say sorry, they will be found liable. What tips can you offer - especially to someone who may be new to a patient facing role - to someone dealing with complaints or incidents?

Bev Hunt - When I apologise in mediation I use phrases like “I am so sorry this has happened to you” or “I am sorry you’ve had this experience in the NHS”. Our team is empowered by our Director and Chief Executive to offer apologies - apologising is the right thing to do and not an admission of liability. Avoid phrases like “I am sorry you feel that way” which can be inflammatory. You can find our [guide to saying sorry here](#).

NHS Resolution are also introducing a suite of resources on duty of candour - including a video on our website [here](#).

Examples of how mediation can be used in non-clinical situations

Sue Slade, Browne Jacobson - Mediation can also be very useful in non-clinical situations particularly where there is an ongoing employment relationship with a potential Claimant to protect. Stress at work/bullying/harassment claims for example can really benefit from mediation. We have also had some great results following mediation involving public liability claims from families bringing Human Rights Act claims for example. Mediation allows creative solutions that just cannot be achieved through the Court process.

How we can help

If you have any queries on medical mediations/mediations generally or would like any assistance with the same, please contact our mediation champions [Kelly Buckley](#) for claims or [Victoria Colclough](#) for Court of Protection and advisory.

Please also see our attached [Mediation Guide for Clinicians](#) drafted by our Kelly Buckley to help support clinicians and prepare them for attendance at a mediation.

Contact Us



Lorna Hardman
Partner

Nottingham
lorna.hardman@brownejacobson.com
0115 976 6228



Simon Tait
Partner

Nottingham
simon.tait@brownejacobson.com
0115 976 6559



Damian Whitlam
Partner

Nottingham
damian.whitlam@brownejacobson.com
0330 045 2332



Kelly Buckley
Partner

Nottingham
kelly.buckley@brownejacobson.com
0115 908 4867



Nicola Evans
Partner

Birmingham
Nicola.Evans@brownejacobson.com
0330 045 2962



Rebecca Fitzpatrick
Partner

Manchester
Rebecca.Fitzpatrick@brownejacobson.com
0330 045 2131



Susan Slade
Senior Associate

Nottingham
susan.slade@brownejacobson.com
0115 976 6580



Victoria Colclough
Senior Associate

Manchester
Victoria.Colclough@brownejacobson.com
0330 045 2133

Contact us

Birmingham office

Victoria House
Victoria Square
Birmingham
B2 4BU
+44 (0)121 237 3900
+44 (0)121 236 1291

Exeter office

1st Floor
The Mount
72 Paris Street
Exeter
EX1 2JY
+44 (0)370 270 6000
+44 (0)1392 458801

London office

15th Floor
6 Bevis Marks
London
EC3A 7BA
+44 (0)20 7337 1000
+44 (0)20 7929 1724

Manchester office

3rd Floor
No.1 Spinningfields
1 Hardman Square
Spinningfields
Manchester
M3 3EB
+44 (0)370 270 6000
+44 (0)161 375 0068

Nottingham office

Mowbray House
Castle Meadow Road
Nottingham
NG2 1BJ
+44 (0)115 976 6000
+44 (0)115 947 5246



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