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MEDIATION NOW - Tools for Tricky Times



Wednesday 7th December 2022

THE PLAN

Welcome and introduction – Heather Rogers KC

Encouraging clients to engage in mediation - paths to success – Althea Brown

Developing mediation in medical cases - Sophy Miles

Making mediation mandatory - what it may mean - Amelia Nice

Developing mediation in the workplace - Louisa Weinstein

Mediating as a tool to tackle the climate crisis or Can Environmental Mediation Save the Planet? - Lawrence Kershen KC

Q&A - making mediation work in a changing environment – with the panel

Drinks and opportunity to talk more



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Introduction



Heather Rogers KC
h.rogers@doughtystreet.co.uk



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Encouraging clients to
engage in mediation
- paths to success



Althea Brown
a.brown@doughtystreet.co.uk

ENCOURAGING PARTIES TO MEDIATE

“It is madness to incur considerable expense of litigation – usually disproportionate to the amount at stake- without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory... Parties should be given strong encouragement to attempt mediation before resorting to litigation’

Lord Phillips of Worth Matravers, India, 29 March 2008

PSYCHOLOGY IN MEDIATION

Four psychological elements that drive conflict –

- Emotions,
- Self-esteem,
- Values
- Perceptions

Being heard translates into being valued, appreciated and understood. Many disputes are the result of parties feeling undervalued, ignored, misunderstood or misrepresented

- active listening,
- reflecting back,
- paraphrasing and
- summarising

Be willing to have difficult conversations.

Ultimately mediation is a profoundly human experience. It's always about people.

The essential tool in the toolkit is to embrace the reality that we all come to the table with our biases and foibles and misperceptions

 @sophymiles1

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Mediation and conflict reduction in medical cases



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chambers

Sophy Miles
s.miles@doughtystreet.co.uk

OVERVIEW

- Context
- Challenges
- Tools

CONTEXT-1

- Differences between about serious medical treatment for children/adults lacking capacity
- In some cases two points of view- health body and patient -where issue is whether patient has capacity to refuse treatment/validity of advance decisions (eg Nottinghamshire Healthcare NHS Trust v RC [2014] EWCOP 1317)- mediation unlikely to be relevant
- 3 points of view- family, health body, patient- who is either a child or adult who may lack capacity

CONTEXT -2

- Many such situations result in shared decision-making leading to an agreed course of action –even when this means the end of life
- Others lead to protracted and distressing litigation – high profile examples Great Ormond Street Hospital v Constance Yates and Others [2017] EWHC 1909 (Fam); Alder Hey Children’s NHS Foundation Trust v Evans and others [2018] EWHC 308 (Fam)
- Some cases will always need resolution by courts but can mediation help?

CHALLENGES IN MEDIATION

- Families facing unimaginable trauma
- May be a sense of power imbalance
- Restrictions on legal aid for families (especially in relation to means)
- What about the interests of the patient?
- Involving 3rd party supporters

And

- How often is it taking place? Anecdotal evidence suggests infrequent. No medical cases in the COP Mediation Pilot

CHALLENGES ACROSS THE BOARD

Nuffield Council on Bioethics Briefing Note 2019: Disagreements in the care of critically ill children: Why do disagreements arise?

- Poor communication
- Differing perspectives
- Feelings of powerlessness (families and staff)
- Delays in seeking help to resolve differences
- Avoiding subject of death.

RECOMMENDATIONS

- **Policy-** supporting developments of conflict management frameworks: increasing access to resolution; gathering data on effectiveness of those methods
- Increasing training on ethics and conflict management for paediatric healthcare staff (see work of Medical Mediation Foundation)
- Making independent advocates and support such as legal aid available to parents in disputes with hospitals
- **Providers:** providing parents with appropriately trained communicator/; improve support to professionals; improving awareness of conflict reduction framework.
- **Research:** on levels of access to and effectiveness of mediation/second opinions/ethics committees

TOOLS- MANDATORY MEDIATION?

Francis J in Great Ormond Street v Yates [20]:

*“It is my clear view that mediation **should be attempted in all cases such as this one** even if all that it does is achieve a greater understanding by the parties of each other's positions. Few users of the court system will be in a greater state of turmoil and grief than parents in the position that these parents have been in and anything which helps them to understand the process and the viewpoint of the other side, even if they profoundly disagree with it, would in my judgment be of benefit ”*

TOOLS-MANDATORY MEDIATION?

Unsuccessful attempts in 2020 to pass “Charlie’s Law”- Children’s Medical Treatment (Dispute Resolution) Bill which would have

- Increased weight to be given to parents’ views and
- Required mediation in the case of a dispute

Amendment by Baroness Findlay (palliative care specialist and former Chair of National Mental Capacity Forum) to Health and Care Act 2022 on dispute resolution in children’s palliative care- duty on health authorities to “take all reasonable steps...**to allow for a mediation process, acceptable to both parties**”

Not accepted but....

TOOLS-AN INDEPENDENT REVIEW?

What will come out of Section 177 Health and Care Act:

“The Secretary of State must arrange for the carrying out of a review into the causes of disputes between (on the one hand) persons with parental responsibility for a critically ill child and (on the other) persons responsible for the provision of care or medical treatment for the child as part of the health service in England.”

TOOLS- DOES IT WORK?

Mediation of Medical Treatment Disputes: A Therapeutic Justice Model-
<https://gtr.ukri.org/projects?ref=ES%2FW00089X%2F1#/tabOverview>

- Research Project led by the University of Essex
- Qualitative analysis of mediation in medical cases (children and adults)
- Are there therapeutic (broad sense) benefits of mediation?
- Does it simply end up reflecting the power imbalance?
- Is there anything about the healthcare environment which makes it particularly amenable/challenging?
- What can we learn about when and how to mediate?

Obtaining ethical approval – please consider participating.



@nice_amelia

www.doughtystreet.co.uk

Making mediation mandatory




Amelia Nice
a.nice@doughtystreet.co.uk

WHAT'S TO BE GAINED?

Mediation benefits:

- Saving costs and time
- Finding a more comprehensive, imaginative and potentially commercial solution
- Reducing grief, stress and repairing relationships
- Ensuring a sustainable agreement

Introducing compulsion might also:

- Increase take up
- Remove arguments about “whether” to mediate
- Protect lawyers from concern it appears weak to advise mediation
- Prevent lawyers blocking mediation for financial / other gain
- Even reluctant parties can warm up 

TRICKY QUESTIONS

1. Voluntary; “the mediator’s objection”
2. Access to justice and rule of law; “the lawyer’s objections”
3. Good faith, bad faith & sanctions
4. Confidentiality
5. Costs
6. Public confidence

TOOLS 1: LANGUAGE AND CONCEPTS

Automatic referral; (👉 “alternative” & “mandatory”)

“As I have said before, ADR should no longer be viewed as “alternative” but as an integral part of the dispute resolution process; that process should focus on “resolution” rather than “dispute”. Sir Geoffrey Vos to CJC

Voluntary

- Settlement and terms still voluntary
- Is voluntary nature of mediation overplayed?
- Already elements of compulsion in the system

Access to justice/rule of law

“..any form of ADR which is not disproportionately onerous and does not foreclose the parties’ effective access to the court will be compatible with the parties’ Article 6 rights. If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not..... “an unacceptable constraint” on the right of access to the court.” CJC

Sanctions

TOOLS 2: FUNDING & INFORMATION

Provision of information to disputants; funding of mediators

Pilots and research

- SCMS Proposal;

Claim → Defence → Directions Questionnaire

→ automatic referral (if not exemptions) → 28 day pause

→ mediator advises disputants re process and then conducts mediation

→ possible stay/sanctions for non-compliance

→ settlement or litigation resumes

- Monitoring and evaluation including re use of technology

- Comparative research: E.g., other countries Australia, America, Canada, Italy, Greece, New Zealand [CJC paper]

TOOLS 3: PUBLIC CONFIDENCE & PROTECTION OF DISPUTANTS

Training and standards

- Unregulated market
- Uniformity of standards; benchmarking
- Training re vulnerable disputants/litigants in person

Regulation

- Complaints mechanism
- Right to redress

Towards greater professionalisation of the mediation sector

CONCLUSION: TOWARDS A NEW DEFAULT?

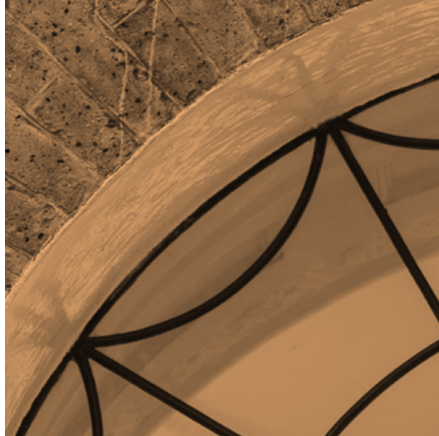
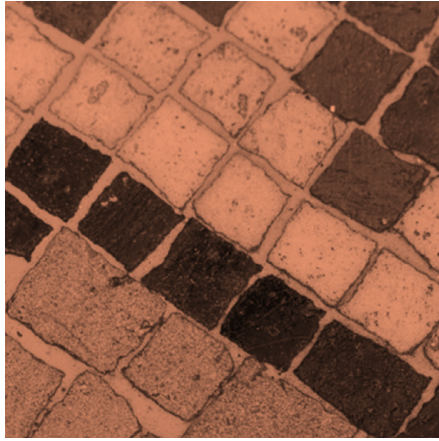
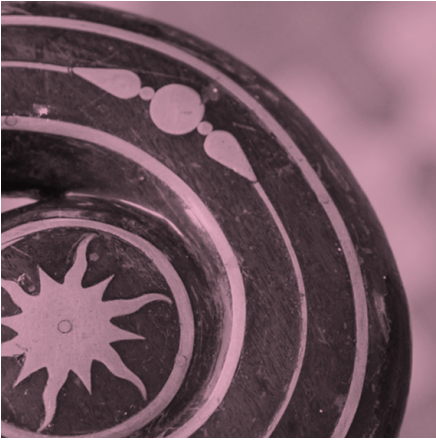
Baroness Scotland: MDR not ADR - Mainstream Dispute Resolution system

Opt out of mediation; opt into litigation. Sir Andrew MacFarlane, e.g.

"Family Court should be the option of last resort, rather than, as it is seen by many, the first port of call" [October 2022]

Towards a default system of dispute resolution?

"Humans select defaults not necessarily because they are optimal, but because they do not require an affirmative act. Thus when an alternative becomes a default, humans automatically behave differently" [A Nudge to mediate; Daniel Watkins]



LINKS

Government consultation

https://consult.justice.gov.uk/dispute-resolution/increasing-the-use-of-mediation/supporting_documents/mediationconsultationlrgrprint.pdf

Civil Justice Council

<https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf>

Bar Council response

<https://www.barcouncil.org.uk/uploads/assets/dd6ed03e-a779-4df3-952281c19da0d572/Bar-Council-response-to-the-Moj-Consultation-Increasing-the-use-of-mediation-in-the-civil-justice-system.pdf>

Law Society response

<https://www.lawsociety.org.uk/campaigns/consultation-responses/increasing-mediation-use-civil-justice-system>



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Developing mediation in the workplace



Louisa Weinstein
l.weinstein@doughtystreet.co.uk



Workplace and Employment

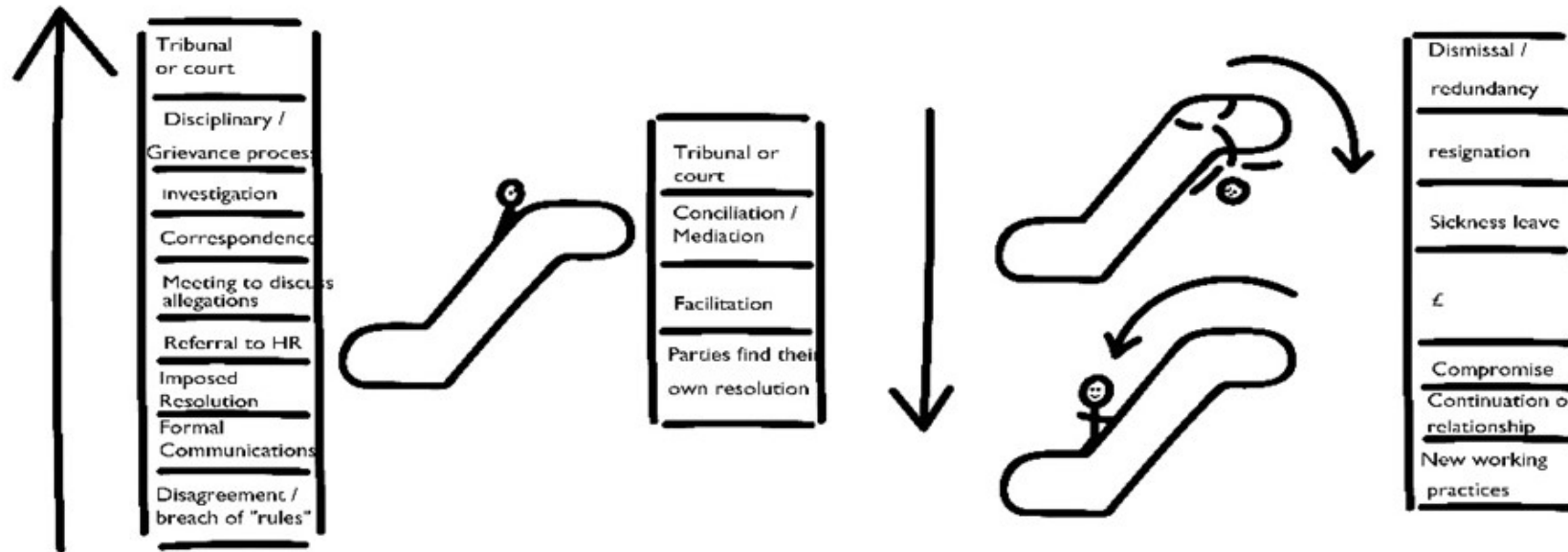
TRICKY TIMES

- Close to 10 million people experience conflict at work each year, with more than half reporting stress, anxiety or depression as a result.
- The cost of conflict to UK organisations was £28.5 billion – the equivalent of more than £1,000 for each employee.”
- "In 2018 to 2019, just over one-third (35%) of respondents to a CIPD study reported having experienced either (i) an isolated dispute or incident of conflict (26%); and/or (ii) an ongoing difficult relationship (24%) (including conflict with parties external to the organisation) over the last 12 months."
- ACAS report on Cost of Conflict 2021
- In Q1 2022/23, the Employment Tribunal received 7,700 single claim receipts and disposed of 6,500 single claim cases. There were 43,000 single claim cases outstanding at the end of June. This quarter there were 12,000 multiple claim receipts, 8,200 disposals and caseload outstanding stood at 443,000 at the end of June.
- Tribunal Statistics Quarterly: April to June 2022
- Published 8 September 2022

WHAT WE KNOW

- Compulsory mediation for all small civil claims up to £10,000 is on its way
- Compulsory mediation is set to be in place in family mediation for all but the most serious of cases
- More than 65% of Early Conciliation notifications received between April 2020 to March 2021 did not progress to Employment Tribunal
- At least 77% of Employment Tribunal cases received by ACAS during April 2020 to March 2021 did not go on to have a hearing

WHAT WE KNOW



- Failure to raise a grievance can lead, if there is a tribunal claim, to a reduction of compensation of up to 25% for the employee unless s/he had a good reason not to raise a grievance. Section 124A Employment Rights Act 1996 & section 207A of Trade Union Labour and Relations (Consolidation) Act 1992.
- Change in the ACAS code?
- Conflict competence' is an essential ingredient in good management and it has a positive impact on organisational effectiveness and performance." ACAS report on Cost of Conflict 2021

TOOLS

- Early Resolution Scheme / Framework
 - Early Resolution and mediation policy with the following aims:
 - To provide individuals with alternative, impartial, non judgemental framework to address and resolve conflicts to the satisfaction of all involved
 - To provide a framework which helps to improve empowered communication throughout the organization
 - To offer alternatives to a formal grievance to resolve issues
[The 7 Principles of Conflict Resolution]
 - Contractual Provisions for Employment and Workplace Disputes
 - Pre-empting grievance and disciplinary process through raising “concerns”
- Conflict competence
- Internal / External mediation capacity



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Lawrence Kershen KC
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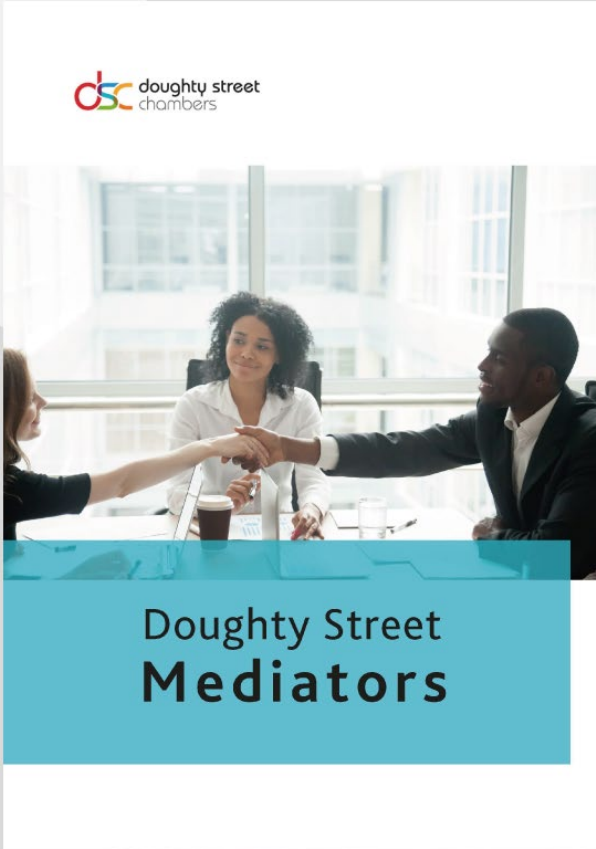
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Q&A



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