

Mediation in Medical Negligence Cases.

Doctors Afraid to Explain.

It is sad to read the unfortunate news of the removal of the wrong kidney of child resulting in Proceedings before the fitness to practice committee of the Medical Council. It is nearly three years since the operation was performed; the enquiry before the Medical Council is now happening; God knows where the compensation due the victim/his parents is at.



In terms of Mediation in Medical Negligence cases two particular legislative provisions immediately come to mind: Section 62 of the Medical Practitioner Act, 2007 and Sections 15 & 16 of the Civil Liability and Courts Act, 2004.

The Civil Liability & Court Act, 2004 (S. 15 & S.16) provides for the setting up of a "Mediation Conference" in certain circumstances. If one of the parties involved in any Personal Injuries litigation requests a Mediation Conference and the Court thinks that it would assist in reaching a settlement then it can be ordered by the Court. The details of the Mediation can be agreed by the parties and/or, if necessary, directed by the Court.

If the Mediation succeeds that will bring a quick and relatively inexpensive conclusion based upon an agreement entered into by the parties themselves - with the assistance of the Mediator. In such cases the parties will - certainly should - be legally represented. In these circumstances the agreement of the Parties will be provided to the Court.



If the Mediation does not succeed there will be no prejudice to either side in that the cornerstone of Mediation is confidentiality. Absolutely nothing that takes place during the Mediation can be used

in evidence in any later case. In these circumstances all the Mediator will be required to do is to inform the Court as to whether the Mediation took place or not and that it was unsuccessful - nothing more. However, if one of the parties refused to attend the Mediation then the Court will be so informed and there is a growing body of case-law to suggest that that party will be likely to be punished when costs are ultimately awarded -irrespective of the outcome of the substantive case.

The Medical Practitioners Act, 2007 (S. 62) states, in effect, that a recommendation can be made at a preliminary stage that a complaint against a doctor may be capable of resolution by Mediation or other informal means. It states that the Medical Council may prepare Guidelines for this. Unlike the Civil Liability & Courts Act provisions this section states that the complaint can not be dealt with in this way without the consent of both the complainant and the doctor. It seems that this provision has been rarely utilised, if at all.

In his Access to Justice Report, Lord Woolf says that the Medical Negligence area is one that would particularly benefit from the greater use of Mediation. It



remains

underutilised however because, he says, of "the climate of mutual suspicion and defensiveness that is prevalent in the area of clinical negligence litigation". In this blame-oriented climate, fuelled by the litigation processes, it has become impossible for a doctor to even give an explanation of something to an aggrieved patient, much less an apology. The doctor will be afraid of any such explanation or apology being used against him - maybe even included in the Pleadings; further, he will be afraid that anything he says might be used by his insurer to avoid their liability on his policy. There may be a simple explanation for a minor event and the doctor may have changed his practices as a result but he feels that he cannot even tell the patient. The patient becomes even more aggrieved and suddenly the minor matter snowballs out of all proportion before both the Medical Council and the High Court, goes on for years and costs a fortune.

Perceived barriers to settlement, and how to use Mediation in Medical Negligence cases

Mediation in medical negligence cases will enable the resolution of disputes in a more timely, confidential and economical manner than the current system which places huge burdens - personal, psychological and economic - on all of the parties involved.

For a plaintiff mediation provides a method of resolution that has less risk and can provide satisfaction within a period of time that such satisfaction has real meaning. For the plaintiff's legal team the case moves and often provides the best chance to work out a structured settlement while those non-monetary matters - like explanations and apologies - that can enhance the real value of a settlement are still meaningful to their client.

A defendant doctor or consultant can spend years being virtually terrorized by the threat of public embarrassment, professional ostracism, and financial ruin. He is frequently most anxious to give that explanation and apologise that the plaintiff suffered harm - even if not admitting that he caused the harm, just stating the truth that he is sorry that the plaintiff suffered it.



What happens, however, is that the defendant and his insurance company, his employer and their insurance company and any other involved medical personnel and their insurance companies take up entrenched denial matrices between themselves. Thus, usually the first part of a mediation will be between the different defendants. If the defendants can agree on a reasonable range figure - before they go into battle between themselves on apportioning the liability - then whether or not the Plaintiff is willing to move into that range can be explored. If the plaintiff's expectations are within that range, given acceptable explanation and apology, the defendants can then seek to agree their respective contributions.



The "reasonable range" figure will give incentive to all sides and even if it does not lead to full resolution it will open the possibilities for partial settlements between the plaintiff and some of the defendants.

International experience indicates that Cases seem to resolve more consistently if mediation occurs very early. Unlike many defendants, most medical negligence defendants are

experts who can understand the facts, the risks and the theories. They may very likely have access to almost all the facts long before the plaintiff's discovery even seeks them. At that stage the plaintiff will be only be at a stage of beginning to significantly increase the costs by engaging his own (usually foreign) experts.



By now the plaintiff's negative feelings towards the doctors and health care providers will have hardened significantly. The defendant's "denial matrices" will also have hardened. What was a great tragedy for which a defendant felt sorry eventually became a past matter, an historical event that the defendant does not wish to remember or to accept any responsibility for. Medical negligence cases always involve personality problems as well as the specific issues. Mediation works best when both parties are still able to communicate and listen.

Medical costs are now a big issue. Costs of fully litigated cases are enormous, professional indemnity insurance premiums are huge and all of these costs are eventually "passed on" to the consumer and the State and become reflected in both the actual cost of healthcare and the standard and level of that care and places a considerable economic burden on society. The process helps both parties be heard and arrive at an amicable solution.

American studies show that the average cost of a case which results in a relatively early mediated agreement is about 20% of the average cost of a fully litigated case. Mediation allows all parties to be heard and facilitates a fast, cost-effective, confidential and satisfactory outcome for all - including the considerable benefit for practitioners of increased client satisfaction.

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