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by Jennifer Veitch

When something goes wrong during medical treatment, then the consequences can be devastating for all concerned. Patients and their families, who may suspect mistakes have been made, want answers. But, if there is a risk of court action, doctors may be advised not to say too much.

The stakes are high, as the potential cost of litigation against the NHS runs into hundreds of millions of pounds every year. In England, the NHS Litigation Authority pays out around £560m annually in clinical negligence claims, while the theoretical cost of all outstanding claims against it is valued at a staggering total of £8.22bn.

In Scotland, cases are dealt with by the NHS Central Legal Office, and pay-outs have been limited to less than £10m a year - compared to £40m a year in Wales. This disparity has prompted the Scottish Consumer Council to question whether patients here face greater barriers to taking cases to the courts and call for further research into levels of compensation.

In a report, the SCC highlighted that patients who may be entitled to compensation may have to contend with a lack of information, advice and support and the high cost of bringing a case. The report added that the adversarial nature of court proceedings "can affect an important on-going relationship with a health professional".



Mediation, where cases are referred to a third party who aims to open lines of communication and help the parties agree a solution, has been billed as a more effective way forward.

A report published by the Royal Society of Edinburgh in 2002 recommended that the CLO should pilot mediation, mirroring work being done by the NHSLA in England, where alternative dispute resolution - which includes mediation - is used in 96% of cases.

Two years ago, the CLO set up a three-year pilot project to evaluate whether mediation would help. But as the project enters its final year, mediators and the consumer lobby question whether the pilot is working, as so few cases are being referred.

According to the original remit, only cases where the NHS would be prepared to make a payment to settle the case out of court - and with a value higher than £10,000 - would be suitable. In reality this meant only 10 cases a year could be referred to a mediator.

It is understood that the actual number of cases referred has fallen even short of this figure. A recent CLO newsletter highlighted a "perceived reluctance" by pursuers to embrace mediation. "Consequently, the take-up rate has been minimal," it added.

Ewan Malcolm, director of the Scottish Mediation Network, says the CLO project has limitations because of its narrow remit. "The number of cases suitable for mediation was estimated to be 10 each year. This figure was based on the average of 150 cases that result in a settlement of more than £10,000 each year and the 60 of these cases where a court case had been started.

"Where there is an intention to settle and the cost of starting court action has already been incurred, it seems more likely that solicitors will negotiate a settlement figure in the traditional way.

"While this exchange between professions is efficient it does not usually offer the patient the opportunity to understand and question what went wrong. Mediation has a much wider utility in the NHS for disputes and conflicts of many forms."

Malcolm adds that many other countries use mediation to resolve clinical negligence disputes, and patients often welcome the opportunity to understand more about what has gone wrong.

"Mediation is a well-established option for settling clinical negligence claims in a number of English-speaking countries. Patients find that mediation offers a sensitive way to explore difficult issues and helps to bring an early conclusion.

As well as settling the financial claim, mediation can result in important things such as an explanation, an acknowledgement and a reassurance about changed practice.

"Once they have used mediation, clinicians and managers like the fact that in at least eight of every 10 cases, the case will settle without court action. They also get a chance to speak openly with the patient about something that has been hanging over them."

Sarah O'Neill, legal officer with the Scottish Consumer Council, adds: "We are very much in favour of mediation. Our general policy is that the courts should be a last resort as it is much better to resolve disputes informally. Research shows that compensation is not the first thing that people are looking for - they want an apology and a reassurance that the same thing won't happen again."

John Sturrock QC, chief executive of the Core Solutions Group, whose Core Mediation division is one of Scotland's leading mediation providers, says it offers a different approach to the adversarial court system.

"A mediator can bring individuals together in a structured environment and help to open and maintain lines of communication," he says. "The mediator can enable those with a stake to express themselves, to be heard and better understood and to move on to find a forward-looking outcome.

"Where maintaining or renewing relationships is of importance, the non-adversarial setting can reduce antagonism and avoid escalation while building collaboration and achieving practical results."

Sturrock believes it could be of much wider benefit to the NHS. "The NHS is a vast organisation employing large numbers of staff with a huge customer base which inevitably leads to disputes of many kinds and at many levels," he says. "There is a need to embrace mediation at all levels and to incorporate it into thinking and language."

As mediation can produce quicker results, it addresses one of the key frustrations for complainers - the length of time taken to resolve problems. "Complaints could be dealt with in a more open manner from the outset, with information and explanations to complainers creating a culture where mistakes can be learned from - to the benefit of all."

He adds: "In clinical negligence claims, many claimants are not motivated by financial compensation. Some may be seeking an explanation, acknowledgement, reassurance or change in practice.

"A cultural change which allows clinicians to say sorry' without that being construed as admission of liability would be beneficial."

Core solutions worked in one case with the family of a mother who died in hospital after a routine operation, leaving her husband and two children. A case relating to concerns over the decisions and procedures adopted by health workers was proceeding towards a court hearing six years later. Mediation took place over one day in a series of private meetings between the parties and their representatives.

It was agreed that a sum of money would be paid to the patient's family and that the husband could discuss procedures with the hospital. Mediation brought closure and certainty for each of the parties and avoided a lengthy court hearing with the related stress, expense and unwanted publicity.

Sturrock says that mediation could also be useful in resolving disputes that arise between health professionals.

At present, patients who are unhappy with the way their complaints are handled by the NHS can take the issue to the Scottish Public Services Ombudsman. The ombudsman, Alice Brown, has called for legislation to enable public bodies such as the NHS to be able to apologise when mistakes are made - without the apology being treated as an admission of liability or negligence.

Brown told The Herald: "Health complaints that come to my office can often involve high levels of emotion, particularly if they are about a situation where someone has died. Relatives are usually looking not for financial compensation but are simply seeking an explanation of what went wrong, acknowledgement of their feelings, an apology and assurance that the same thing will not happen to someone else."

A spokeswoman for the CLO concedes the use of mediation has been limited so far, but adds that the NHS and patients appreciate its value.

"The Scottish Executive Health Department and the CLO have been engaged since 2005 in a mediation pilot in clinical negligence actions in an endeavour to reduce the number of actions which have to proceed to a formal proof in court.

"While in the normal course, proposed settlements of most claims and actions will be resolved by negotiation between the solicitors representing the parties, there are instances where the quantification of the action can appear to be intractable.

"In such instances, the opportunity to be able to use the services of an independent mediator may facilitate the unlocking of the disagreement. While the use of mediation in such actions has been very limited so far, nevertheless its availability is appreciated both by the NHS and patient representatives."