DENTISTRY, A SUITABLE CASE STUDY FOR ADR

By Gareth R Thomas & Corbett Haselgrove- Spurin

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Aims and Objects:

to define and explain Alternative Dispute Resolution (ADR); to discuss the role that ADR can play in the dental complaints and recompense systems in the UK.

Introduction

This paper will concentrate on the role that ADR can play in dental patient complaint. procedures in the UK. ADR could have a valuable role to play in other areas of dental practice, including contracts of employment and supply. Initially it will be necessary to define ADR, to explain what it is and to outline the general areas of dental dispute which could benefit from ADR. Following this the reasoning behind its applications to dentistry will be discussed in more detail. The authors explain why dentist/patient disputes are suitable for ADR. The discussion will consider whether ADR can replace the present patient complain procedures or could at least add to those systems of dispute settlement that are presently used in dentistry. It should be noted however, that ADR is not a replacement or a substitute for complaint procedures or the regulation of the profession. A good rapid settlement procedure could however, do much to minimise complaints and raise the standing of the profession in the eyes of the public. ADR will never make a visit to the dentist enjoyable, but it could boost the public's confidence in the profession by reducing the number of media horror stories about dissatisfied patients.

What is ADR?

ADR is short for alternative dispute resolution and is the alternative to the accepted practice of using the law courts to settle disputes between parties. The principal forms of ADR are arbitration, adjudication, mediation and conciliation. The most commonly used form of ADR for small claims is that of mediation and is the ADR technique which will be discussed in this paper.

Mediation

Mediation is regarded as being the most flexible and fastest of the ADR techniques as well as being the most cost-effective.

It is a voluntary, non-binding, without prejudice process in which trained third party mediators attempt through negotiation techniques to bring the parties to a dispute together in a binding or non-binding settlement agreement. If the mediation process succeeds then it ends with a binding agreement between the parties. From a legal point of view the new agreement is the equivalent of an accord, variation in contract or a new contract which replaces the old contract where the dispute is purely contractual. It is also possible to reach a mediated settlement of a personal injuries claim which may be purely tortious or may be a tortious action arising out of a contractual relationship. Since the case of Henderson -v-Merritt the courts have recognised tortious actions even where there has been a contractual relationship and so happily there is no longer any legal constraint on the settlement of such disputes by mediators under English law.

If any of the parties to the mediation process, including the mediator, are dissatisfied with the process at any time that party can terminate the process. The plaintiff may then proceed to assert his legal rights through the court system.

The problem with the court's system is that it is adversarial and leads to a "winner takes all" outcome. Often the court's decision is the result of a very fine distinction drawn on the basis of a mere "balance of probabilities". There is little room for compromise and the parties may not be left with a feeling that justice has been done. The system guarantees that at least one of the parties will be dissatisfied, and where there has been a counterclaim both parties may be disgruntled with the judicial decision. Mediation avoids these problems.

Arbitration provides an alternative to the courts. Recent reforms introduced by the Arbitration Act 1996 have speeded up the arbitration process and have done much to reduce costs. Nonetheless arbitration is more formal, more expensive and slower than mediation. Arbitration does provide an attractive second stage for dispute resolution in the event of a failure to successfully reach an agreement via mediation. As a long stop in the event of a failure to settle a dispute by mediation or arbitration the parties are still entitled to resort to the courts. This does not mean that two additional layers have been added to the dispute settlement process rendering it even more long winded and more expensive. Quite the contrary - mediation has an eight-three per cent settlement rate and the settlement rates at arbitration are in the region of ninety-seven per cent. The most common reason for recourse to the courts is to enforce the award and this is extremely speedy and inexpensive and the defendant is almost certain to fail in an attempt to avoid the award. A failure to pay following a judicial award could lead to a contempt of court and an appropriate punishment. The beauty of an arbitration award is that it is enforceable in any court in 128 countries world-wide.

Ground Rules For Mediation

For mediation to be successful certain ground rules have to be observed.

- it must be understood and accepted that mediation is at present voluntary, non-binding and without prejudice
- the mediator must be trained in the art of mediation
- the mediator must conform to a strict code of conduct and ethics
- the mediator must instil confidence and trust in the parties that he is unbiased and not there to judge the merits of the case

The Lord Chancellor's office is currently reviewing the role that ADR could and should play in society. The UK Government's primary concern is to minimise the role played by the courts in dispute settlement in order to save money, in particular with respect to Legal Aid, and the chancelleries of several of the member states of the European Union are currently addressing the same problems. A secondary concern is with speed of dispute settlement and consumer satisfaction. In the UK the Government has already experimented with a compulsory adjudication process for preliminary dispute settlement in the construction industry. It is likely that any industry or profession that does not address the problems of speedy, cost-effective dispute resolution could find the Government imposing a compulsory system on them. If the system works in the UK it is likely that other European states would wish to emulate it. Indeed, in the spirit of harmonisation and consumer satisfaction, the European Union might well choose to impose the UK model on the whole of the community. In order for the dental profession to retain control of dispute settlement between the patient and practitioner, the profession would be well advised to consider seriously embracing a system of ADR designed by the profession and tailored to meet its needs, to ensure that a system is not imposed upon it.

Steps in a mediation

Mediation is a very flexible process and there are many different models. There is no consensus about which is the best and perhaps there is no one single superior system. The method to be adopted should reflect the needs of the industry it is serving. The following describes the steps that can be adopted in a mediation process:

1. joint session (not always adopted since it can result in an irreconcilable confrontation between the parties)
2. first private meeting with claimant
3. first private meeting with defendant
4. second private meeting with claimant
5. second private meeting with defendant
6. closing conference

The joint session, as its name implies, is where all parties to the mediation are in the same room and the mediation process is explained to them. To avoid confrontation, it is possible to brief the parties separately or to show them a video explaining the process. In contrast to this, when the mediator meets the parties individually he attempts to help them reach agreement. The meetings are entirely confidential and no information will be given to the other party unless expressly agreed. The mediator is, however, expected to play the "devil's advocate" and ask searching questions about the strengths and weaknesses of the case.

Advantages of mediation

1. speed of dispute resolution
2. cost savings
3. improvement in communication between the parties
4. a flexible procedure (which can be informal)
5. addresses unreasonable claims and expectations

Why does mediation work?

1. venting - it allows the parties to have their say.
2. the day in court
3. see legal representatives in action
4. hear the issues and facts of the case
5. parties have reached the point where they are prepared to settle
6. the bottom line can be reached (may need a second session).

Mediation is a flexible system which allows the parties to a dispute to air their views in an informal setting where the case is put to the other side through a mediator. The process has the advantage of flexibility for the parties as well as the cost reductions associated with the procedure. The authors consider dentistry to be particularly suited to the procedure as will be explained in the next section.

Even where a mediation fails the parties often narrow down the scope of the dispute to a single issue - saving legal fees and solicitors' charges when proceeding to judicial conflict resolution. Often, all the paperwork, bar form filling, is completed at a fraction of the cost.

Dentistry and ADR

Dentistry, in common with all health care, provokes strong reactions in those patients who consider they have been wronged by the health care professional. Whilst medical malpractice cases may settle for sums in excess of one million pounds, the same cannot be said of dental claims as can be seen from the figures below which have been taken from the JSB Guidelines (3rd Edition).

> ***"(f) Damage to teeth***
> *In these cases there will generally have been a course of dental treatment. The amounts awarded will vary as to the extent and discomfort of such treatment. Costs incurred to the date of trial will, of course, be special damage but it will often be necessary to award a capital sum in respect of the cost of future dental treatment.*
>
(i)	*Loss of one front tooth*	*£1000 to £1,600*
(ii)	*Loss of two front teeth*	*£2,000 to £2,500*
(iii)	*Loss of or serious damage to several front teeth*	*£3,750 to £4,750*
(iv)	*Loss of or damage to back teeth: per tooth*	*£500 to £800"*

These figures demonstrate that the range of awards for dental malpractice in the United Kingdom are on the low side when compared to those awarded for medical malpractice. The awards may well be low, but the costs involved are very similar in that the rates allowed on taxation are the same. Cardiff County Court allows a rate of £76 per hour for solicitors plus the "mark up" for care and conduct which would be a minimum of 50 per cent for a successful plaintiff. If the case is funded by the Legal Aid Board, a barrister's opinion will also have to be canvassed at an early stage adding to the legal costs involved, defendant lawyers costs being of the order of £75 to £110 per hour depending upon the status of the solicitor handling the claim.

The added costs of expert fees which are in the order of £200 to *£250* per report, further increase the sums of money involved. It is not unheard of for there to be two or more reports. The figures for running a case against the potential level of damages awarded make little sense in that, for the most part, the value of dental claims are small, whilst the costs are high.

On purely economic grounds it is difficult to argue against reform of the dental malpractice systems of compensation and recompense, especially when the time scale involved is also taken into the equation. The argument for the adoption of ADR to resolve dental disputes is overwhelming on purely economic grounds, even if other criteria were not taken into consideration.

This paper to date has dealt with the practical aspects of ADR and the strong economic reasons why the legal system is not a satisfactory method for settling dental disputes. There is, however, an even more compelling reason for adopting ADR in dentistry and it allows patient and dentist to "air" their views on what, if anything, went wrong.

There is an established complaints procedure for NHS patients, but not for private patients, short of an official complaint to the GDC or taking direct legal action to claim for perceived damages.

It is taken as read that the majority of medical malpractice cases in the United Kingdom do not start off as legal cases, but are the result of patients not being given explanations for what has gone wrong in their treatments. The patients then take recourse to legal action and it is this failure prior to legal action to achieve an explanation at an early stage, which leads to legal action being contemplated against the health care provider.

The dental profession should consider adopting a uniform mediation process for the whole of

the profession. By centralising the process a mediation provider could establish a fixed set of charges for the settlement of individual disputes. Following the US model each practitioner would pay a nominal fee for registration which could be as little as £10 per annum and then the mediation provider would guarantee a fixed price currently approximately £70 for the settlement of any dispute submitted to it. The mediation provider can first act as a filter between the client and the practitioner in respect of complaints and queries by receiving and analysing information provided by the patient and, having solicited information from the practitioner, the provider may often be able to provide the patient with sufficient reassuring information that the concerns of the patient are addressed and there is no need to proceed to the mediation stage. Effectively, the mediation provider acts as a centralised complaints bureau.

Where the complaints bureau fails to assuage the patient's concerns, mediation gives both parties an opportunity to address the differences they have without the full weight of the law being invoked. The difficulty is that under the present systems "wronged patients" have little choice but to resort to the full recourse of the law. This in reality may not be what patients want as there is no requirement to give an explanation in a legal case as long as the correct procedures are followed - situation which would be addressed by mediation.

Conclusions

There is no doubt that the present systems of complaint and recompense for a wrong when applied to dental practice fails to meet the needs of the parties involved, both financially and emotionally. Systems should be put in place which address the problems whilst allowing the parties to maintain their dignity, the obvious answer would be to include the concept of mediation in the "contract" between provider and patient. Any difficulties or problems which may occur have an outlet for explanation and meeting away from the confrontational atmosphere of the court room. The beauty of the mediation process is that no lawyers are needed to represent the clients. Under European Law, it is not possible to incorporate an enforceable dispute settlement process into a consumer contract. The consumer must always have the right to take a dispute before the courts. A provision in a contract which seeks to oust the jurisdiction of the courts is both illegal and unenforceable. There is however, nothing to prevent a contract which offers mediation as an alternative to judicial dispute settlement. It is advisable, therefore, that, where mediation is offered, the profession should take steps to point out the clear cost and time advantages of mediation to patients and to explain that the process is consumer friendly and, unlike the judicial system, is not an intimidating process and that the mediators will gently guide the patient through the process.

Personal injury law, as Lord Woolf's proposals demonstrate, is an area in which reform is needed. Dentistry in the UK may provide the solution to these problems if it is prepared to adopt mediation as a process of explanation and patient care, whether for an NHS patient or a private patient. The arguments for adopting mediation are strong both financially and in terms of patient care and mediation is a proven means of dispute resolution which can generate a settlement equitable to both parties at an affordable price.

Dentistry is a suitable case for ADR.

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