




**Trust Mediation**  
specialist personal injury and  
clinical negligence mediation

## MEDIATION in CLINICAL NEGLIGENCE CASES

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- ▶ not-for-profit company.
- ▶ resolving difficult personal injury and clinical negligence disputes.
- ▶ specialist knowledge and experience of personal injury and /or clinical negligence claims.




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## Why patients take legal action

1. Compensation
2. Admission of fault
3. Concern with standards of care
4. Investigate how and why injury happened
5. To obtain an apology

“Mediating claims for clinical negligence” Mulcahy 2000



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ADR

Negotiations

RTM

Mediation

Claims Handling Agreements



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## The Legal Framework


- ▶ 2001 ADR pledge
- ▶ 2004 Halsey v Milton Keynes General NHS Trust
- ▶ 2010 Jackson report
- ▶ 2013 Briggs LJ:PGF II SA v OMFS Co
- ▶ 2015 Laporte v The Commissioner of Police of the Metropolis
- ▶ 2017 Thakkar v Patel



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## Sanctions against the NHS

- ▶ Reid v Buckinghamshire Healthcare NHS Trust
- ▶ Bristow v The Princess Alexander Hospital NHS Trust




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## Mediation and the NHSLA

- ▶ 2002 NHSLA/CEDR pilot
- ▶ 2015 NHSLA/CEDR pilot
- ▶ 2016 NHSLA Mediation Tender
- ▶ 5 December 2016

NHSLA Mediation Contract awarded to  
CEDR and Trust Mediation Ltd  
and for costs disputes:  
Costs ADR



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## NHSLA Annual Report July 2016

“Mediation is a powerful forum, giving the injured person the opportunity and the “voice” to articulate the basis of their case and other related concerns which is not possible at a meeting with just lawyers. It is also a good setting to explain why a legal liability has not been established to justify a financial payment!”

Helen Vernon: NHS Chief Executive



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**NHS**  
**Litigation Authority**

**PRESS STATEMENT**  
**05 December 2016**  
For immediate release

**NHS Litigation Authority launches mediation service**

The NHS Litigation Authority (NHS LA) today launches its new mediation service with the announcement of its panel following a public tender. The service follows a successful pilot and has been designed to support injured claimants, their families and healthcare staff in working together towards resolution without the need to go to court.



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**NHS**  
**Litigation Authority**

**Helen Vernon, Chief Executive of the NHS Litigation Authority says:**

*Our plans to launch a mediation service have been well received by all those involved in the resolution of incidents resulting in harm. I am delighted that we have awarded contracts to CEDR, Trust Mediation and CADR which will increase our capacity and capability to provide high quality mediation services on behalf of the NHS."*



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**NHS**  
**Litigation Authority**

**Helen Vernon continues:** *“Mediation is an excellent forum for dispute resolution and provides injured patients and their families with an opportunity for face-to-face explanations and apologies when things go wrong and reducing the need for unnecessary litigation. We have used mediation to good effect throughout our 20 year history, including in high profile cases and group actions. The new contracts come into play from today, Monday 5 December, and we will closely monitor the service to ensure we see the positive benefits we believe can result from greater uptake of this non-adversarial approach to dispute resolution.”*



**NHS Litigation Authority to  
become NHS Resolution**

22<sup>nd</sup> March 2017

From April 2017 the NHS Litigation Authority is changing its name to NHS Resolution and launching a five year strategy underpinning the change. NHS Resolution will be more involved in incidents at an earlier stage and as part of this strategic shift has launched a new approach to the way in which it responds to incidents involving brain damage at birth. We already approached trusts to ask them to report all maternity incidents that occur on or after 1 April 2017 which are likely to result in severe brain injury in order to increase the level of support we provide when these rare incidents occur..... Increased support to the NHS in delivering candour in practice and in sharing learning for improvement will be coupled with a fresh approach to resolution which reduces the need for costly and stressful court proceedings.

## NHS RESOLUTION

NHS Resolution will bring together the three operating arms of NHS Litigation Authority (NHS LA) the National Clinical Assessment Service (NCAS) and the Family Health Services Appeal Unit (FHSAU) under a shared purpose to provide expertise to the NHS on resolving concerns fairly, share learning for improvement and preserve resources for patient care.

Our statutory remit as defined by the 2012 the Health and Social Care Act is unchanged. The legal name of the organisation will remain as the NHS Litigation Authority - NHS Resolution will be our 'public alias'. The NHS Litigation Authority can adopt a public alias without the need for legislative change. This same approach is used by NHS Digital (HSCIC) and NHS England (NHS Commissioning Board).

## Helen Vernon, Chief Executive of NHS Resolution

“The focus of NHS Resolution will be on prevention, learning and early intervention, to avoid unnecessary court action. This will improve the experience for those who are injured as well as address the level and cost of negligent harm.

NHS Resolution will:

Improve the experience for patients, families and healthcare staff, with support for candour and the learning which goes hand in hand with a claim for compensation.....

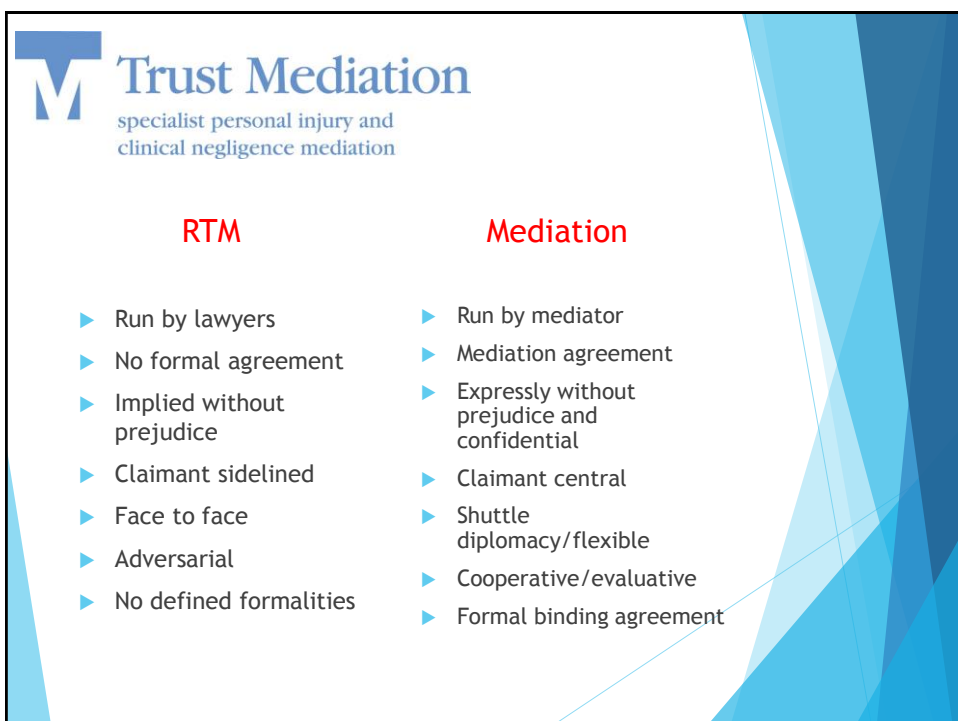
Resolve concerns and disputes fairly and effectively to deliver resolution in its broadest sense, which is about more than just money.

Our primary focus for the future is to resolve concerns fairly.”



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## Round Table Meetings



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<b>RTM</b>	<b>Mediation</b>
<ul style="list-style-type: none"><li>▶ Run by lawyers</li><li>▶ No formal agreement</li><li>▶ Implied without prejudice</li><li>▶ Claimant sidelined</li><li>▶ Face to face</li><li>▶ Adversarial</li><li>▶ No defined formalities</li></ul>	<ul style="list-style-type: none"><li>▶ Run by mediator</li><li>▶ Mediation agreement</li><li>▶ Expressly without prejudice and confidential</li><li>▶ Claimant central</li><li>▶ Shuttle diplomacy/flexible</li><li>▶ Cooperative/evaluative</li><li>▶ Formal binding agreement</li></ul>



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## Mediation Benefits



- ▶ Quick
- ▶ Confidential
- ▶ Cheap
- ▶ Successful
- ▶ Facilitative
- ▶ Range of outcomes

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## Mediation Characteristics




- ▶ Confidential
- ▶ Consensual
- ▶ Facilitated negotiation
- ▶ Private
- ▶ Empowers parties
- ▶ Added value
- ▶ Extra judicial outcomes

*When pigheadedness brought the mediation to a standstill, Malcolm employed his unorthodox, but effective, samurai technique of negotiation.*

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## The mediator



**THE MEDIATOR...**

*relationships of labor and management leading to their mutual understanding and solution of problems. See also American Arbitration Association Mediation Board.*

**Mediator.** Neutral third person who helps parties to reach agreement through the mediation process. See also Arbitrator; Referee.

**Mediators of questions.** In old English law, authorized by statute (27 Edw. III, St. 2, c. 1) upon any question arising among merchants, unmerchantable words were not to be used before them.

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## Our mediators

<p><b>Clinical Negligence Specialists and Mediators</b></p> <ul style="list-style-type: none"> <li>Paul Balen</li> <li>Andrea Barnes</li> <li>Angela Curran</li> <li>Brian Dawson</li> <li>Jonathan Dingle</li> <li>Kevin Grice</li> <li>Andrew Hannam</li> <li>Peter Maughan</li> <li>Robert Seabrook QC</li> <li>James Watson QC</li> </ul>	<p><b>Experienced Personal Injury and Clinical Negligence Mediators</b></p> <ul style="list-style-type: none"> <li>Lea Brocklebank</li> <li>Frances McCarthy</li> <li>Tim Wallis</li> </ul>
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## Mediation testimonials

*"Just wanted to thank you for your mediation yesterday. I have to confess I have hitherto been slightly sceptical of the value of mediation, working on the basis that 2 reasonable counsel could thrash out most issues."*

*"I have to say I was very impressed with the way you conducted matters and would be the first to concede that I very much doubt the claim would have settled but for your input."  
(Claimant's counsel)*

*"Just a note to say thank you for your help on Monday at the Mediation. It was my first experience of a Mediation and I was impressed with your skills and delighted that we were able to reach a settlement in a case with so many difficult issues. I did not think we were going to settle but at the eleventh hour we managed it and I have to say it is unlikely that we would have done so without your last minute shuttle diplomacy."  
(Claimant's solicitor)*

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## Preparing for mediation



- ▶ Brief client
- ▶ Bundle
- ▶ Agreement to Mediate
- ▶ Mediation statement
- ▶ Confidential briefing
- ▶ Schedule
- ▶ Counter schedule of loss
- ▶ Settlement brackets
- ▶ Costs

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## The mediation



- ▶ Opening session
- ▶ Meetings
- ▶ Analysis
- ▶ Offers
- ▶ Costs
- ▶ Outcome
- ▶ Final Session

*Judith sensed that the mediation would take more time than the half-day that it had been scheduled for.*

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## MEDIATION in CLINICAL NEGLIGENCE CASES

**ANY QUESTIONS?**

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