Guest Editorial

This special issue of the journal presents a selection of the papers given at the Medical Mediation conference hosted by the UCLan Centre for Mediation on 23rd March 2018. The event was inspired by Mr Justice Francis' recommendation at the conclusion of his judgement in the Charlie Gard case that mediation should be attempted in 'all cases such as this one'.[1] This was expressed, interestingly, at around the same time when the NHS Litigation Authority (NHSLA) changed its name to NHS Resolution to reflect their change of focus from defending clinical negligence claims to early settlement through a more extensive use of Alternative Dispute Resolution (ADR), especially mediation.[2] More recently, Charlie Gard's parents are in the process of introducing 'Charlie's Law' which would, as one of its goals, prevent disagreements over the care of seriously ill children from reaching court through the provision of medical mediation.[3] Given the growing interest in this form of ADR, the conference '*Healthcare Disputes: Is Mediation the Best Medicine?*' aimed at providing a balanced view on mediation's potential in the resolution of several healthcare disputes.

It goes without saying that its increasing significance in the medical field does not happen in a vacuum. In her paper, McAndry highlights the change in the broader legal landscape, particularly in the last two decades which have seen the courts and the government actively encouraging the use of mediation instead of litigation for civil and commercial claims. She demonstrates how this development has provided the impetus for the launch of the UCLan Centre for Mediation in 2014, and documents the range of activities which the Centre has since engaged in to embrace this change.

Redfern's paper, which was based on his keynote address at the conference, explores the significance of this call to push healthcare disputes and particularly clinical negligence claims away from litigation to mediation. Drawing on his extensive experience in litigating such cases, he identifies the main disadvantages of litigation like costs, delays, the psychological distress caused to the parties, and the lack of creativity and flexibility in the outcomes. In

[1] *Great Ormond Street Hospital v Yates, Gard and Gard* [2017] EWHC 1909 (Fam) at para. 20.

[2] J. Hyde, 'NHS Litigation Authority Rebranded to Focus on "Early Case Settlement"', *Law Society Gazette*, 22 March 2017.

[3] Charlie's Law, available at https://www.thecharliegardfoundation.org/charlies-law/ (accessed 31 October 2018).

advocating the use of mediation for the resolution of such disputes, he shares his experience of witnessing the productive use of mediation techniques in the two government inquiries he chaired.

Although litigation is generally distressing, Randolph reveals that mediation too can be an unpleasant experience for the parties, not least because they would have to confront one another without the protection offered by the courtroom layout, procedures and decorum. His starting point is that conflict is not always destructive and can indeed have positive effects. However, in order to maximise mediation's potential in the resolution of conflicts, including those arising in the healthcare context, an appreciation of the psychology of conflict is essential. For this, the paper provides a useful and interesting insight into the psychological issues which mediators should consider to make the process less unpleasant for the parties and get more productive outcomes.

Choong's article focuses on the area addressed by Mr Justice Francis, namely medical futility. Drawing insights from the existing literature, she casts doubt on mediation's potential for a satisfactory resolution of such conflicts, the so-called 'win-win' outcome. This is on two main grounds. The first relates to the absence of a middle ground. Since the options present themselves in stark terms (e.g. to continue or withdraw life-sustaining treatment; or to attempt or forego life-prolonging or life-saving procedures), there is no movement to middle ground. Secondly, since the law on medical futility is generally on the doctors' side, the parties go in mediation with unequal bargaining power.

By contrast, Allen takes a more optimistic view. He puts forward the argument that the value of mediation as a dispute resolution process is not undermined just because a 'win-win' solution is unattainable. Acknowledging the difficulty of achieving such an outcome not just in end-of-life situations but in other bioethical cases, he emphasises how the engagement in the mediation process can be as important for the parties as achieving settlement outcomes. Redefining mediation as 'a confidential complex conversation facilitated by a skilled neutral', he observes that the opportunity to have a frank and open discussion in the secure environment provided by mediation, means that even if win-win is not possible, then maybe 'gain-gain' is.

It is hoped that readers will find these articles interesting and useful, and that this special issue will stimulate further research in this intriguing field.

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