JOURNAL OF MEDICAL LAW AND ETHICS; VOL. 6, NR. 1, 31-40, PARIS LEGAL PUBLISHERS © 2018

Spoonful of Mediation Helps the Medicine Go Down

Paul Randolph*

Barrister and Mediator, Field Court Chambers

Abstract

Although mediation is often preferable to litigation when resolving medical negligence claims, the process may not be a pleasant one for both sides to the dispute. This is mainly due to the intensity of the emotions involved and a number of unseen factors at play. This article highlights a range of psychological issues which the mediator would need to understand and consider when mediating conflicts, including in the healthcare context. The process can, if sensitively and adroitly handled, transform this into a positive experience for the disputants. This could, in turn, lead to productive outcomes.

1. Introduction

The title of this paper is somewhat disingenuous and misleading. It is taken from a line in the musical: 'Mary Poppins'. However, mediation in healthcare disputes is often not a pleasant process. The patient who sees him or herself at the wrong end of an injustice feels obliged to come face to face with the perpetrator of that injustice; and the alleged perpetrator has to endure the often-venomous allegations of the patient. In court, by contrast, the doctor is protected by his or her counsel and by the judge, and both parties give their evidence from the safety of the witness box.

This paper aims to illustrate that through sensitive handling by a skilful mediator, both parties can nevertheless be made to feel more at ease with the concept of a roundtable meeting; and if the individual meetings are conducted adroitly and sensitively, the parties should be itching to tell the other side their story, their version, and their perception of the facts. For these, an awareness and understanding of the psychology of conflict are invaluable.

* DOI 10.7590/221354018X15446248389235 2213-5405 2018 Journal of Medical Law and Ethics

2. Mediation and Healthcare Conflicts

2.1. Positive Aspects of Conflict

It should be remembered that conflict is not always destructive.[1] It is ever present in our everyday lives, and every decision we take involves an element of conflict: for when we say yes to someone or something, we are also saying no to something else or someone else. Conflict brings with it change, and is part of our evolutionary development: without it, we would never modify our behaviours and practices, and there would be no transformation, no improvement, and everything would remain stagnant. Conflict is therefore part of a cycle which is essential to our progress: initial harmony -> challenge to that harmony -> conflict -> a new harmony. Interestingly, even where unity and commonality exist, these would eventually be subjected to question and challenge.[2] As can be observed in all groupings (be these corporate organisations, democratic states, political parties, sports teams or domestic households), unity of thought and deed will inevitably be contested.[3] Factions or separatist groups will then develop, and conflict soon follows. Hegel, the eighteenth-century German philosopher, identified this continual cycle of unity followed by challenge as a dialectic triad. He described the process in these terms: where *thesis* represents the unity or status quo; *antithesis* is the challenge to that status quo; and *synthesis* the new product resulting from the conflict between the two.[4]

Conflict also results in a bonding effect. The parties on each side bond together to face a common 'enemy'.[5] Furthermore, the existence of conflict can occasionally be evidence of the strength of a relationship. According to Coser, the closer the relationship, the more passionate the conflict.[6] Whilst this offers reassurance to many, a relationship where the parties are overly fearful of conflict between them may be indicative of the fragility of that relationship since neither party is confident enough to express their views candidly lest the bond be strained.[7] The converse may be indicative of a strong relationship. Thus, when a child says: 'I hate you, Mummy!', or: 'I wish you were dead!', this signifies an enormous level of confidence in the strength of their affiliation as the child is

---

1 J. Dixon & M. Levine (eds.), *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (New York: Cambridge University Press, 2012) p. 227.
2 P. Randolph, *The Psychology of Conflict: Mediating in a Diverse World* (London: Bloomsbury Continuum, 2016) p. 39.
3 *Ibid.*, p. 39.
4 *Ibid.*, p. 40. For further discussion, see J. McTaggart & E. McTaggart, *Studies in the Hegelian Dialectic* (New York: Cambridge University Press, 2012).
5 P. Randolph, *op. cit.*, p. 90.
6 L.A. Coser, *The Function of Social Conflict* (New York: The Free Press, 1956) p. 67.
7 P. Randolph, *op. cit.*, p. 90.

not frightened of compromising or destroying his or her attachment to his or mother.[8]

This may be particularly relevant in the hospital environment, where junior staff and other medical practitioners are fearful of levelling criticism against their more senior colleagues. Where there is a good, strong and trusting relationship, such criticism will not prove to be a problem.

2.2. The Mediator's Role and Challenges

2.2.1. Shifting Attitude

All those seeking to intervene in a conflict with a view to resolving it will have one primary objective: to secure a perception or attitude shift on the part of one or both of the parties.[9] Each party enters into the dispute with a fixed perception and attitude about themselves, about the other side, and about the dispute in itself. But without a change in attitude or perception the parties will leave the mediation as entrenched as they were when they entered.

Achieving an attitude shift will not be easy. These perceptions may have been long in the development and reinforced over time through the advice and opinions of family, friends, and professional colleagues. Overlaying these deeply held and 'sedimented' perceptions will be a high degree of emotion – a level of emotion which is so powerful as to tend to overwhelm reason. This prevents each side looking at the facts dispassionately, rationally and logically. One of the mediator's tasks will be to defuse that emotion, and bring the parties down from that passionate and overly sensitive platform to a more clear-thinking and realistic position.

Each side to the dispute frequently enters the mediation with a prayer that 'common sense will prevail'. There may however be much sense, but it will rarely be common. The problem is that there is no such thing as 'objective truth'. No truth is universal, but, rather, truth is what is true for the individual. As Polonius advises Laertes in Shakespeare's *Hamlet*:

This above all: to thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man.[10]

Each party will see the position from their own perspective, fervently believing that their recollection of the facts, their interpretation of the events, and their understanding of the situation are the only accurate, correct, and true re-

8 *Ibid.*
9 F. Strasser & P. Randolph, *Mediation: A Psychological Insight Into Conflict Resolution* (London: Continuum, 2004) p. xvi.
10 *Hamlet*, Act I, Scene iii.

flections of the position. An American comic, George Carlin, encapsulated this situation beautifully when he said: 'Have you ever noticed when driving along the freeway that those driving slower than you are idiots, and those driving faster than you are maniacs'.[11] In the world of conflict and healthcare disputes, the mediator shuttles between rooms filled with idiots and maniacs. Each side perceives the other to be either an idiot or a maniac, and sees themselves as the only normal, reasonable and utterly rational people in the dispute.

2.2.2. Logic Does Not Work

The second problem that the mediator faces is that neither side will be able to persuade the other simply through logic. Nor will the mediator be able to convince either party to shift their position through rational argument. Logic simply does not work. Ardent litigators seem wholly unable to accept that disputes are rarely won through logic. Substantial amounts of cogent evidence presented to contradict extreme views rarely succeed in changing perceptions. For the party presented with such evidence, may simply discard it all and retain only indications which confirm their view.[12]

One of the tasks given to barristers is to draft letters before action for their solicitors to send to the other party. These letters are carefully drafted with numbered paragraphs setting out in impeccable logic and unassailable legal argument, why their client was right and the other side's client was wrong. They naïvely believed – and to this day continue to believe - that the other side would read the letter and say to themselves: 'My goodness! We never looked at it that way. They must be right and we must be wrong'. Regrettably, there will be few instances in litigation when the letter before action has this desired result. On the contrary, back would come letter asserting that the first side's 14 points were 'absurd', and that their 28 points reflect the real truth. A sad revelation indeed, to realise a lawyer's deployment of logic served simply to spur the other side to greater extremes of argument.[13]

2.2.3. The Power of Emotions

So why are emotions so strong as to completely overwhelm reason? Why do we say: 'I can't think straight, I'm so angry'; or 'Sleep on it, you'll see it differently in the morning'.[14] The answer in most cases is the

---

11 George Carlin: Carlin on Campus (1984) – Full Transcript, available at https://scrapsfromtheloft.com/2017/06/29/george-carlin-carlin-campus-1984-full-transcript/ (accessed 31 October 2018).

12 See the discussion on 'bias' further below.

13 P. Randolph, *op. cit.*, p. 31.

14 *Ibid.*, p. 53.

amygdala: two small almond-shaped structures on either side of the brain, which govern our instinctive 'fight or flight' responses.[15] Medical research has revealed that the amygdala was formed in the earlier stages of the development of our brain and was a vital part of our evolution.[16] It controls our instinctive responses and serves to bypass a lengthier cerebral and analytical process that could prove fatal in the face of an imminent attack.[17] The amygdala intervenes in these circumstances by 'taking control' of the reasoning brain, so as to produce a speedier physical response. This phenomenon is sometimes referred to as an 'amygdala hijack' and is clearly crucial for the survival of the species, by preventing 'paralysis through analysis'.[18]

2.2.4. Emotions and Loss

The most common emotion in all disputes, but particularly in healthcare disputes, is anger[19] – and anger is nearly always referable to loss. We are all hardwired to be loss-averse; it is part of our anthropological development. When life was a struggle for survival, any loss had the most severe consequences, and so was something to be avoided at all cost. Hence loss precipitates the most powerful emotion. When the loss is perceived as a result of an injustice, the anger is most acute. This is well illustrated by an experiment conducted by Dutch/American biologist and ethologist Frans de Waal and his colleague Sarah Brosnan, where two monkeys are placed in separate cages side by side.[20] Each monkey is given a piece of cucumber which they happily receive as a reward for a task they complete satisfactorily. The second monkey is then given a grape (much nicer than cucumber!) and the first monkey sees this. The first monkey angrily rejects the next piece of cucumber he is given, hurling it back in rage at the experimenter, and proceeds violently to shake the cage in utter fury.[21]

The monkey's self-esteem will not allow him to be humiliated by this. The amygdala is triggered and he reacts emotionally and irrationally by rejecting

---

15 *Ibid*., pp. 53-54.

16 For discussion, see e.g. J. Ledoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (New York: Simon & Schuster, 1996); D.G. Amaral & R. Adolphs (eds.), *Living Without an Amygdala* (New York: The Guildford Press, 2016).

17 P. Randolph, *op. cit*., pp. 53-54.

18 *Ibid*.

19 H.D. O'Hair *et. al.*, 'Communication-Based Research Related to Threats and Ensuing Behavior', in: C. Chauvin (ed.), *Threatening Communication and Behavior: Perspectives on the Pursuit of Public Figures* (Washington: The National Academies Press, 2011) p. 39.

20 The experiment can be viewed on YouTube at: https://www.youtube.com/watch?v=-KSryJXDpZo (accessed on 31 October 2018).

21 S.F. Brosnan & F.B.M. de Waal, 'Monkeys Reject Unequal Pay' (2003) 425 *Nature* 297.

food, which a few moments previously was perfectly acceptable. For an animal to reject food is illogical and irrational, and contrary to everything instinctive in the animal world. However, in this instance, the monkey would rather starve than accede to this flagrant injustice.

2.2.5. Self-Esteem

Our self-esteem (or ego or self-image), lies at the heart of most of our daily activities and deeds. We all have self-esteem and a perception of our self-worth; and we all seek approval, both from ourselves and from others.[22] We want to feel good about ourselves, and one way of achieving that is to know that others approve of us, that they support our actions and commend our behaviours. In healthcare disputes, self-esteem or ego can affect the disputants in several ways:

a. *The need for vindication*: the party which sees itself as being in the right from the outset will have a strong desire to prove to others in the outside world, that they were in fact right, and have been right all along.[23] Where, for example, a doctor has been continually criticised and accused of being in the wrong, the need for exoneration can be particularly strong. His or her reputation will be at stake, and his or her self-esteem requires protection and reinforcing. Similarly, on the part of the patient, the doctor's stubborn refusal to accept any responsibility is perceived as a violation of the patient's self-esteem.

b. *The desire for revenge*: where either the doctor or the patient feels that they have been at the wrong end of a grave injustice, and have suffered considerably for it, they have a primordial desire for some form of revenge.[24] Vindication may not be enough. Such desire is timeless; it is noted in the first book of the Bible: 'An eye for an eye, a tooth for a tooth'.[25] If they have suffered, they want the perpetrator of the injustice to suffer equally, if not more so. Their self-esteem demands it.

c. *Need for an effective remedy:* neither party would wish to see the end of the mediation without some degree of closure. Their image of themselves will not be assisted by the knowledge that the injustice has not been properly

---

22 For discussion, see e.g. A. Mecca, *et. al.*, *The Social Importance of Self-Esteem* (Berkeley: University of California Press, 1989); C.J. Mruk, *Self-Esteem Research, Theory, and Practice: Toward A Positive Psychology of Self-Esteem* (New York: Springer, 2006).

23 P. Randolph, *op. cit.*, p. 117.

24 *Ibid.* , p. 117.

25 Exodus 21:24.

or fully addressed. Consequently, each party requires some effective remedy in order to satisfy their self-esteem.

It is here that the concept of 'Golden Bridge' comes into play. This is derived from the writings of Sun Tzu, the fourth-century bc Chinese military strategist. In his treatise *The Art of War*, he commented that '[a] wise conquering general is one who builds a Golden Bridge upon which his defeated enemy can retreat.'[26] By providing a dignified exit route from the conflict, the vanquished will be able to 'save face' and retain his self-esteem. Were he to encounter only shame and dishonour in defeat, he will be left with no other choice but to fight on, as this may be the only route in which he may believe that his self-esteem can be regained.[27]

Let us take an example: a patient's mother is insistent upon pursuing her claim for very substantial damages for the alleged clinical negligence of the obstetrician, which she claims resulted in severe brain damage to her child. No amount of negotiation or persuasion is successful in shifting her determination to secure a large amount of money from the hospital. However, with the collaboration of the NHS Trusts lawyers, the Trust is able to demonstrate to the mother that a pay-out by the Trust in the sums demanded would result in the hospital not being able to purchase several sorely-needed incubators for the children's ward. This information is enough to provide the mother with a golden bridge, a dignified reason for 'climbing down': by substantially reducing or even withdrawing the claim, she can persuade herself and others that she is not capitulating, but rather, she is being magnanimous in defeat. She can leave the mediation with her dignity and self-respect intact.

2.2.6. Perceptions, Biases and Assumptions

We are all biased in one way or another.[28] Indeed, one of the most dangerous of our assumptions is that we are *not* biased at all. We are all very ready to draw conclusions from what we believe we see around us. When we come to a conclusion, we stop thinking; and when we jump to conclusions, we circumvent the thinking process altogether.

---

26 T. Sun, *The Art of War: A New Translation (by Jonathan Clements)* (London: Constable & Robinson, 2012).

27 P. Randolph, *op. cit.*, p. 76.

28 H.J. Ross, *Everyday Bias: Identifying and Navigating Unconscious Judgments in Our Daily Lives* (Lanham: Rowman & Littlefield, 2014) pp. xi-xii.

2.2.7. Physical Misperceptions

We have physical misperceptions, whereby we make instant judgements of people simply from the way they look, sound and behave.[29] It is said that if a person walks into a room, within seven seconds we have made up our minds as to whether or not that person is likeable or friendly, or trustworthy.[30] These judgements are based upon a library of lifetime experiences that we maintain in our brains. For example, if a gentleman walks into the room wearing a pinstriped suit, many will immediately assume that that person is possibly a lawyer or accountant, or some other professional. That may be entirely wrong: it may be a street cleaner who has purchased a suit simply for the purposes of an interview. Similarly, a person wearing sandals and long hair may not immediately present themselves as a cardiovascular surgeon. This equally could be an incorrect assumption. We consider a person who is smiling probably to be a kind and warm person; this is because in our library of images, we associate this with a smiling. Yet that person may be smiling because he has just managed to knock over four cyclists in the street, and he hates cyclists.

In healthcare disputes, as in all other disputes, such perceptions abound. In many instances the parties have not met, or seen each other since the incident complained of, and will almost certainly not have met the respective lawyers and advisors. They will each have built up an image of the other party or their lawyer, and it is for this reason that a joint session around the table can be most productive: it can be beneficial for parties to see what type of person the 'other side' is, and who is driving the dispute: whether it is the hard-nosed lawyer or rather the aggressive client. This can put an entirely different perspective upon the proceedings.

2.2.8. Mental Misperceptions

Letters written by lawyers, emails sent between the parties, voice-mail messages left on answer phones, can all give rise to the most dangerous misperceptions and misunderstandings. Emails are particularly dangerous: they can be written in such a way as, inadvertently, to give an entirely incorrect impression of the tone and meaning intended to be conveyed.[31] Similarly, when reading or listening to the messages, they can equally be interpreted in entirely the wrong way. For example, emails and letters customarily start with 'Dear…',

---

29 P. Randolph, *op. cit.*, pp. 102-106.
30 *Ibid.*
31 *Ibid.*

or 'Hi…' or 'Hello…'. Consequently, when an email starts simply with the name, e.g., 'Paul,' this may be interpreted as 'Paul!!', leading the recipient to believe that the sender is angry with them. Then the entire letter or email is read with that interpretation in mind.[32]

2.2.9. Self-perception

Self-perceptions are the most pernicious of all. We all tend to believe that we are the only sane and normal people in the room: everyone else is a little bit strange in comparison. Using ourselves as a comparator can be highly precarious: it is judgemental and leads us to entirely false conclusions.[33] However, it is important to note that this will be the case with the mediator as well as with each of the parties in each of their separate rooms.

2.2.10. Getting to 'Good enough'

It was stated earlier in this article that one of the prime objectives of the mediator is to achieve a perception shift. Fortunately, this shift in perception need not be an entire 'volt-face', namely a 180 degree turn, but only possibly a small shift from the original entrenched position to one of 'good enough'. It comes from Donald W. Winnicott, a twentieth-century English paediatrician and psychoanalyst, who suggested that parents who constantly strive to be perfect parents may be doing themselves and their children more harm than if they were content to be 'good enough' parents.[34]

In litigation terms, the 'good enough' principle enables the parties to re-evaluate and reassess their aims and aspirations, so that they reach an objective point where they can state: 'This may not be ideal, or as good as I had hoped for; but it is *good enough* for me.' With a little luck, good will on both sides, and a genuine desire to draw a line under the past, this might propel the parties to an amicable settlement.

3. Conclusion

Mediation, though often lauded for its many benefits including for the resolution of medical negligence claims, is by no means a pleasant and straightforward process for the disputants. To make it more manageable and

32 *Ibid.*
33 *Ibid.*
34 D.W. Winnicott, *Playing and Reality* (Oxford: Routledge, 2005).

productive for the parties, mediators would need to have a good understanding and a deep awareness of the psychology of conflict. It is hoped that the discussion will further their interest in and appreciation of this important dimension to conflict resolution.