

# Conflict Resolution and the Court of Protection

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Expert witness in *Aintree v James*  
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# Scale of the problem

- 2015-16 – 271,079 admissions to Critical Care
- 144,000 collected by ICNARC
- 23,131 deaths in the ICNARC data set
  - 16% of admissions

Secondary Care Analysis, NHS Digital. 'Hospital Adult Critical Care Activity 2015-16', 23 February 2017.  
<http://www.content.digital.nhs.uk/catalogue/PUB23426/adul-crit-care-data-eng-apr-15-mar-16-rep.pdf>.

ICNARC. Key Statistics from the Casemix Programme.

<https://www.icnarc.org/DataServices/Attachments/Download/a30185e2-0e19-e711-80e6-1402ec3fcd79>

# Decisions

- Few patients die on ICU unexpectedly
- 70% of patients who die on ICU have some form of limitation of treatment

Sprung, Charles L, Simon L Cohen, Peter Sjokvist, Mario Baras, Hans-Henrik Bulow, Seppo Hovilehto, Didier Ledoux, et al. "End-of-Life Practices in European Intensive Care Units: The Ethicus Study." *JAMA* 290; no. 6 (August 13, 2003): 790–797. doi:10.1001/jama.290.6.790.

# Conflict

- 70% of ICU staff members have reported conflicts in intensive care – staff/staff and staff/family
- Families, ICU physicians and nurses report conflicts in up to 80% of patients requiring a treatment-limitation decision

Azoulay E et al “Prevalence and Factors of Intensive Care Unit Conflicts: The Conflicus Study.”  
*American Journal of Respiratory and Critical Care Medicine* 180, no. 9 (2009): 853–60.



# Best Interests

However, having weighed all these matters up, I have reached the clear conclusion that it would not be appropriate at this time to make the declarations that are sought, even though they have unanimous medical support and the backing of the Official Solicitor.

An NHS Trust v DJ & Ors [2012] EWHC 3524 (COP)

# More recently

I have concluded that it would not, at this stage, be right to grant the Health Board's application ...

In my judgement, deep suctioning has become, for the moment, delicately poised between what can properly be described as 'burdensome' and that which is 'overly burdensome'. In the absence of understanding RY's own views I believe the balance tips, for now, in favour of supporting life.

# Most recently

It was a case in which the court did not have power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do. In those circumstances, the court was entitled to conclude that, in the exercise of its case management powers, no useful purpose would be served by continuing the hearing.

N v ACCG and others [2017] UKSC 22



# Mediation

**Mediation** is a dynamic, structured, interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques.

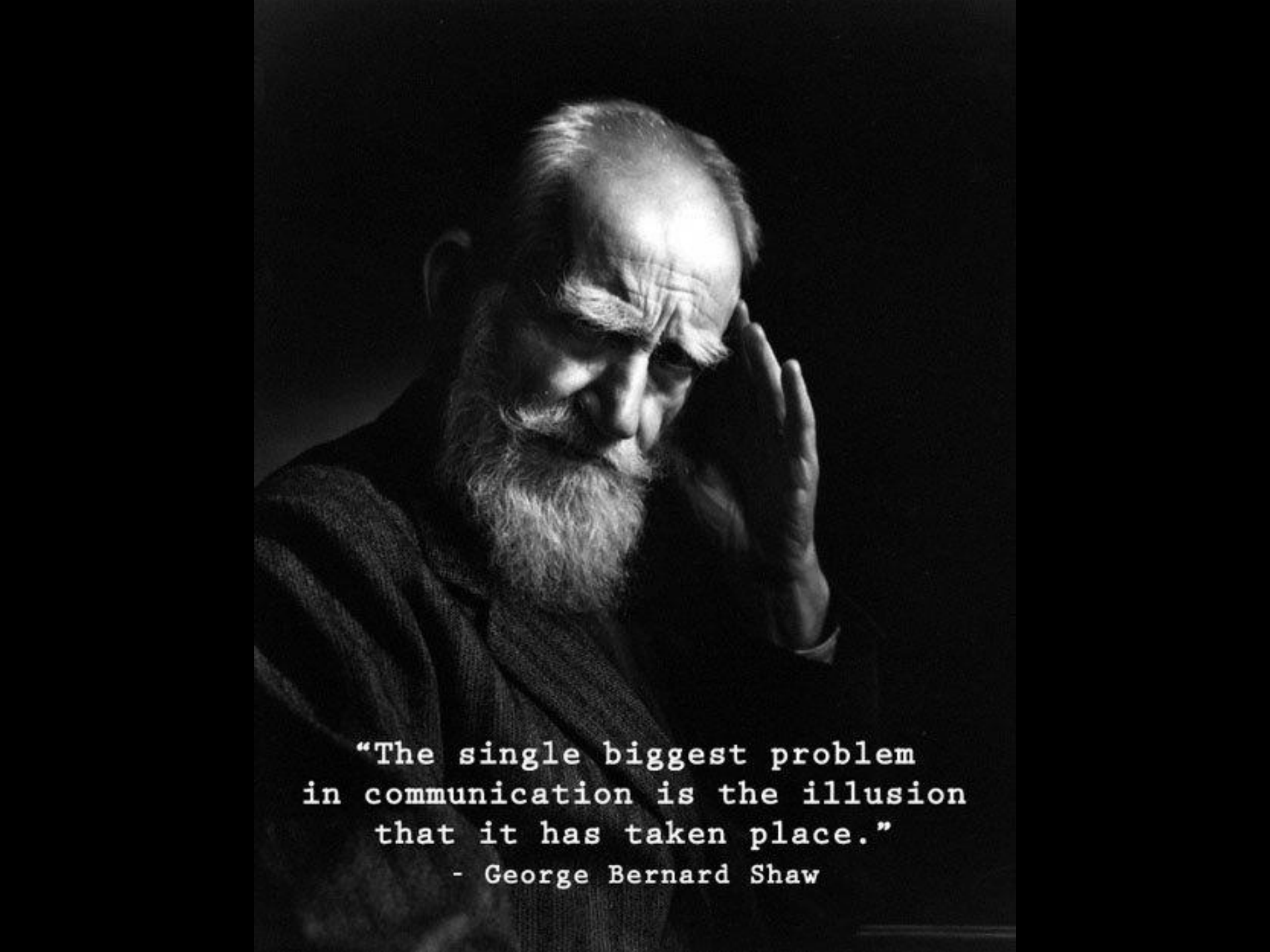
All participants in mediation are encouraged to actively participate in the process.

Mediation is a "party-centered" process in that it is focused primarily upon the needs, rights, and interests of the parties.



# Mediation

The art of finding a deal no one can refuse

A black and white portrait of George Bernard Shaw, an elderly man with a full white beard and hair, looking down and to the right with his hand near his face. The lighting is dramatic, highlighting his features against a dark background.

“The single biggest problem  
in communication is the illusion  
that it has taken place.”

- George Bernard Shaw

# US / Canadian experience of mediation

- Michigan – 1991
- Ontario – 1999
- Alaska – 2005
- Maryland – 2010
- British Columbia – 2016

# Learning from international experience

- The only 2 areas not considered to be appropriate for mediation are:
  - Whether an adult lacks capacity
  - Whether abuse has occurred.
- Premediation meetings are key
- Understanding of both of law and medicine by the mediator - Specialised training needed.
- Mandatory mediation should be limited to attending the mediation, not required participation.

# Learning from international experience

- Cost
  - COP can be £100k, Mediation ~£5k
- Time – Mediation is faster
- 60 – 90% settle without going to court
- 90% of participants found the experience useful

# Mediation in England

- High Court Family Division
- High Court Civil Division
- NHS Resolution (NHS LA) – Clinical negligence
- OPG mediation pilot – finished, starting a new one
- COP pilot project hopefully starting 2018
  - A number of national bodies interested – e.g. FICM, RCP, GMC, CQC

# Consequences

Failed Mediation

Court of Protection decision

The day after!

Are we discussing the real  
problem?



**Table 2** Data describing numbers of adult acute care, intermediate care and intensive care beds per European country

	Acute care beds <sup>a</sup>	Acute care beds/100,000 population	Intermediate care (IMCU) beds	Intensive care (ICU) beds	Critical care beds	ICU and IMCU beds/100,000 population	ICU beds as % of acute care beds	GDP (\$million)/ICU beds
Andorra	188	224			6	7.1	3.2	482.2
Austria	48,446	635	569	1,264	1,833	21.8	3.4	205.9
Belgium	50,156	456			1,755	15.9	3.5	266.5
Bulgaria	57,460	766			913	12.2	1.6	52.2
Croatia	15,629	353			650	14.7	4.2	93.6
Cyprus	2,813	350	9	83	92	11.4	3.3	251.9
Czech Republic	91,068	865			1,227	11.6	1.3	156.5
Denmark	17,124	308			372	5.7	2.2	833.0
Estonia	5,096	380	72	124	196	14.6	3.8	98.2
Finland	12,442	231	28	301	329	6.1	2.6	727.0
France	232,821	358	3,471	4,069	7,540	11.6	3.2	339.9
Germany	469,791	575			23,890	29.2	5.1	137.6
Greece	11,111	332	50	650	688	6.8	1.5	112.1
Hungary	41,574	416			1,374	13.8	3.3	94.9
Iceland	1,169	367			29	9.1	2.5	434.3
Ireland	12,202	272	88	201	289	6.5	2.4	716.2
Italy	201,932	333			7,550	12.5	3.7	272.2
Latvia	11,833	531			217	9.7	1.8	110.7
Lithuania	17,061	526			502	15.5	2.9	72.5
Luxembourg	2,511	204	27	100	127	24.8	5.1	432.7
The Netherlands	56,085	337			1,065	5.4	1.9	733.0
Norway	13,639	277			395	8.0	2.9	1,045.5
Poland	156,662	410			2,635	6.9	1.7	178.1
Portugal	31,722	298		451	451	4.2	1.4	508.1
Romania	108,611	507	2,574	2,000	4,574	21.4	4.2	35.3
Slovakia	32,560	599			500	9.2	1.5	174.9
Slovenia	7,656	373			131	6.4	1.7	364.4
Spain	124,194	269			4,479	9.7	3.6	314.8
Sweden	26,131	278			550	5.8	2.1	834.0
Switzerland	28,896	257			866	11.0	2.1	609.6
UK	147,805	257	1,757	2,577	4,112	5.6	2.8	547.0

<sup>a</sup> World Health Organization Regional Office for Europe (2009)

