MEDICAL NEGLIGENCE LITIGATION – ISSUES, PSYCHOLOGY AND WHY MEDIATION OFFERS THE BEST SOLUTION FOR ALL PARTIES

Introduction – the Problem

In “Access to Justice - final report” by Lord Woolf (1996), His Lordship correctly identified what is collectively referred to as “medical negligence litigation” as especially problematic. Like Lord Woolf, this paper, in referring to “medical negligence”, is referring to litigation involving allegations of negligence in the delivery of health care by hospitals, doctors, dentists, nurses or other health professionals, including chiropractors, and others.

It has been easy to identify litigation falling within these categories as being especially problematic from the perspective of failing to meet the needs of litigants on both sides. Lord Woolf identified, among other causes, the following factors:-

(a) In many medical negligence cases, especially the smaller ones, the costs are disproportionate to the damages which might be recovered.
(b) The complexities of this litigation can result in far greater delays in getting to trial.
(c) Unmeritorious cases are often pursued, and clear-cut claims defended, for too long.
(d) The success rate (for Plaintiffs) is lower than in other personal injury litigation.
(e) The suspicion between the parties is more intense and the lack of co-operation frequently greater than in many other areas of litigation.

The experiences of most jurisdictions in which medical negligence litigation is common have been consistent with the observations of Lord Woolf. The problems, from the perspective of Plaintiffs, have been similar in many cases. There are very significant costs of preparing, gathering evidence, and bringing a medical negligence to trial which have been disproportionate to the likely verdict in many cases where the injuries are of a moderate to less serious nature, even when the Plaintiffs succeed. In order to prosecute the more serious catastrophic claims, the legal costs

can be horrendous. In many such cases, particularly those involving catastrophic injuries to children, the personal cost to Plaintiffs and their families can be equally damaging in a different sense.

From a doctor or hospital's perspective there are the same severe monetary costs of litigation. In addition, there are impacts upon a doctor's practice costs through increased insurance premiums. In some cases doctors may even move out of high risk practice areas such as obstetrics, or medical graduates may be unwilling to train in high risk areas to the detriment of the ability of the public to obtain the best medical services. Finally, the very taking of such proceedings against a professional involves not only some damage to his or her professional reputation, but also often intense personal feelings of anger and resentment not unlike those suffered by the Plaintiff.

Mediation and Mediation Models

The precise nature of mediation is often misunderstood, even by lawyers. Mediation is defined on the Singapore Mediation Association website as:-

> *Mediation is a voluntary means of dispute resolution in which the parties to a dispute engage the assistance of an impartial third party (called the Mediator) to facilitate negotiations between them with a view to resolving their dispute privately and in an amicable manner. The focus is not on who is right or wrong, nor on who has a stronger or weaker case in court. Rather it is on how the parties can move forward and put the dispute behind them. The Mediator helps the parties to adopt a problem-solving approach, move away from their respective positions and focus on their interests, needs and concerns.*

There is no specific definition which is determinative – indeed it is unhelpful to get too entangled in the semantics of this or that definition.

The real effectiveness of the mediation process in general, as opposed to litigation, is that it fulfils four fundamental needs:-

(a) it is economical;

(b) it is fast;

(c) in most instances the parties perceive it to be fair;

(d) it minimises risk for the parties whether the risk be financial, cultural or risk of any other sort.

It is also particularly significant, for reasons which will be explained in this paper, that the whole process and the outcome will remain confidential unless the parties otherwise agree.

The classic mediation model - facilitative mediation - is directed, among other things, to maintaining relationships. Strict adherence to such a mediation model does not usually apply in insurance litigation because the interest of one side is completely unilateral, i.e. the insurer's interests usually concern only the cost of the claim and risk. Usually insurers have no interest in maintaining relationships at all. The author's experience is that the classic facilitative mediation model for such mediations usually needs some adaption, or the utilisation of a hybrid facilitative/evaluative model to be effective.

Medical negligence litigation is quite different to most other tort-based or commercial disputes. More so than most disputes, there is often a rare combination of multiple factual, legal and medical difficulties (with commensurate expense). The interests of the Defendant/Insurer will include a real concern about the reputation of their insured doctors or hospitals. Throw in the high emotion often present on both sides and a skilled mediator will have his or her work cut out for them. It is for these reasons that litigators in the field tend to be experienced specialists.

Because most mediators (whether they know it or not) use a mediation model incorporating elements of an evaluative model, lawyers with experience in the field are usually engaged as mediators for the parties. While many excellent mediators without specific expertise in the field often do an excellent job, the experience of the author in jurisdictions in which he practices is that there are a relatively small number of mediators who are retained by the parties in the majority of these disputes. Frequently the lawyers for the parties will normally choose the mediator, and presumably work on the basis that in evaluative mediations it can be an advantage if the mediator has substantive legal expertise in the field of medical negligence litigation.

Cultural Change is Needed

The debate about whether mediation "works" involves, on a superficial level, a simple consideration of what proportion of cases settle at mediation (i.e. on the day of the mediation) or shortly thereafter. The Australian experience of the rise of and effectiveness of mediation in such disputes is instructive. Twenty years ago, Australia was among the most litigious societies in the world. Virtually any dispute, however trivial, was the subject of Court proceedings and most matters proceeded to trial. There were interminable appeals and often re-trials. The burden, financial and otherwise, on litigants was severe. The public purse was severely strained by the necessity of allocating huge resources in terms of infrastructure and personnel (judges, juries, facilities and support staff) to the hearing of all these cases. Our largest medical insurer almost collapsed under the burden. These days the landscape is completely different. A major difference in the litigation landscape now is that the government, the courts, and the parties are almost totally focussed on alternative dispute resolution, with mediation not arbitration in the forefront of that push.

While the change in culture has been initiated by the Court, it has been driven by the clients. Insurers demand that their lawyers be active and competent at the mediation process. The sophistication and awareness of clients, particularly insurers, is such that any lawyers who actively advocate protracted litigation as an alternative to mediation, will run a great risk of forever losing the client. The overwhelming tide of a culture of ADR in general and mediation particular has swamped the previously existing strong adversarial legal culture of Australia. There is now no culture of a perception that a suggestion of some form of ADR indicates a sign of weakness or vulnerability.

Insurers like mediation because that it gives them prompt disposal of claims at far lesser cost than contested hearings. Driven by the insurers in particular and by commercial enterprises in general, there has been a dramatic change in the culture of litigation in Australia. These days the majority of disputes which get close to a hearing are successfully mediated. Mediation is also implemented to resolve complex interlocutory disputes such as discovery in major commercial cases.

The Results

The evidence that mediation enables parties to resolve most of their disputes in a more satisfactory to them is overwhelming. Hard statistics on resolution rates of court proceedings which come to mediation (either voluntarily or with the consent of the parties) are surprisingly scarce but sufficient material as there is couple with the writers personal experience from having participated in over 50 medical negligence mediations alone the past 12 months alone bears out this conclusion. Now outdated figures from the Federal Court of Australia record that between 1994 and 1999 cases settled after court-annexed mediation averaged 55% of those referred to mediation by the court. In the case of mediations conducted with the consent of the parties, the rate may well have been even higher.

More recent statistics from 2006 in Western Australia deal with over 400 actions in 2006. These days in Western Australia, as in other states, almost all civil actions will go to mediation either pursuant to a court order or by agreement of the parties. According to a paper of Sandra Boyle and Pamela Eldred (both Court Registrars) given at the 3rd International Conference on Therapeutic Jurisprudence in June 2006 entitled "Mediation in the Supreme Court of Western Australia: is this Therapeutic Justice in Action?", statistics show that the settlement rate at mediation is around 60 per cent. In reality many other matters will settle between the mediation and the trial, often as a direct result of what transpired at the mediation.

Other benefits of mediation (even if a case does not finally resolve) include the resolution of other issues which would have occupied much greater court time. In the author's experience, "unsuccessful" mediations have on occasions resulted in reducing the duration of forthcoming trials by several weeks – on one occasion by having four defendants (represented by seven insurers) resolve their most complex apportionment and insurance issues at the mediation, and on other occasions the parties have agreed on either damages or liability with the Plaintiff, leaving only one major component of the case in issue rather than two.

There has been a radical change of culture resulting in the referral to mediation of now virtually all cases in most Australian jurisdictions. The author's recent

experience in the field of medical negligence litigation is that at least 80% settle either at the mediation or within a short time thereafter. Such a change of culture has of course brought tremendous benefits to the financial burden placed on litigants and the State. As lawyers, if we refuse to recognise a wide spread change of culture of large and small commercial enterprises (which universally have a pathological dislike of paying large legal fees) to quickly resolve commercial disputes more cheaply than through litigation or arbitration, we do so at our peril. Those same organisations often do not perceive commercial arbitration as the answer because the issues of excessive time and great cost remain as they did in litigation. Mediation is a much faster process with spectacularly reduced costs.

The Courts in many widespread jurisdictions have and will wholeheartedly embrace a culture of mediation. Once aware of the benefits, the courts and the governments come to regard the culture of mediation and the success of mediation as a great way of freeing up the resources available to the courts which are universally severely stretched. The court rules can be recast to push litigants in the direction of alternative dispute resolution generally and mediation in particular. The courts in many jurisdictions can be extremely pro-active in ensuring the success of the mediation process. In many jurisdictions the courts have co-operated with the changes in culture towards mediation by ensuring that a mediated outcome is equally enforceable whether it is done pursuant to a Court ordered mediation or a mediation by consent of the parties without a court order.

It is suggested that the culture will work best when there is no practical distinction between Court ordered mediations and those which take place without a Court order. The experience in Australia has been that while some years ago most mediations were ordered by the Court, the culture now is so strong among the legal profession, the courts and the business community that it is very rare for either party to resist a mediation at the suggestion of the other even though there has been no formal order from the Court.

Why Mediation should be effective in Medical Negligence Litigation

There are three principal reasons referable to medical negligence litigation in particular why that litigation is best resolved by mediation as opposed to a trial. The reasons why mediation is so effective in this field include:-

(a) The matters of the parties emotions and professional reputations which are at stake in such litigation;
(b) The cost of conducting such litigation which is invariably complex and lengthy.
(c) The difficult legal issues involved.

It is instructive to analyse why medical negligence litigation is different to most other insurance litigation. Whereas most litigation involving insurers and claims under policies involves scenarios where one side (the plaintiff), has a personal interest because of their subjective loss but the other side's interest is only in having the claim compromised of being disposed of at the cheapest overall cost, including the necessity that the claim be disposed of within an insurer's preset reserve, medical negligence litigation is completely different. It is personal.

From the perspective of the defendant, it involves a doctor's or a hospital's professional standing and reputation among the public at large and his peers. In many cases the plaintiffs are severely injured, close relatives die as a result of the allegedly negligent conduct or cases involve particularly tragic circumstances such as catastrophic injuries such as quadriplegia, paraplegia or devastating injuries to young children such as occurs in cerebral palsy and other birth injury cases. Feelings of being aggrieved and guilt are far more rife than they might be in what could be called *"normal"* personal injury litigation. Both sides have very strong views and both sides have much to lose in such litigation, not only from a monetary cost perspective, but also from the perspective of collateral costs such as personal distress and damage to reputation. The parties are often known to each other and sometimes have been in a relationship of trust over many years.

Parties to such litigation will often have a strong psychological need to be heard and have their grievance understood. The strict nature of more formal litigation and its

rules of evidence often leaves parties (who may be from the perspective of their lawyers and the judge) excellent witnesses or litigants as the case may be, intensely personally dissatisfied. Witnesses are simply not able to give their version of events as they may see it, but rather are required to respond to a specific series of questions in what may be a restrictive context. The result is that they may feel that they have failed to get their message across and harbour feelings of dissatisfaction. Such feelings can be a significant impediment to settlement.

On the other hand, an empathetic mediator who demonstrates some understanding about how they really feel and acknowledges their concerns will greatly assist in having them come to a decision which will resolve the case. Court pleadings define issues and define solutions in terms of money, but often the needs of litigants can be quite different. Medical cases can be more about feelings of grievance, where issues of acknowledgement and apology will be foremost in the litigant's mind. The usual court processes do not accommodate these needs. For psychological reasons, much "conventional" litigation cannot be resolved until these needs of the litigant are met.

A skilled and experienced mediator has the ability to allow the parties engaged in medical negligence litigation to examine the differences in a relatively detached, confidential and non judgmental atmosphere which is different to normal litigation. However difficult it may be at first, the reality is that the parties are usually more able to separate the issue of personalities from the problem in a mediation setting than they would be in the context of litigation. Plaintiffs are able to air at a mediation their strong sense of grievance which often stems from the death of someone with whom they are very close, often a parent, sibling or child or catastrophic injury to themselves or someone very close to them.

The litigation involves protagonists who know each other. Psychologically, this is quite a different scenario to a case involving a motor vehicle accident, an occupier or product liability case where the opposing parties are most commonly complete strangers. Often there has been a doctor/patient relationship in existence for a significant period of time. This very much complicates the feelings of anger which the plaintiff patient will have towards the provider of medical services. In many such

cases, the path to litigation begins because of a lack of communication on the part of a doctor or hospital (which often results in the patient storming off to his or her lawyers). Then the feelings of a patient can be so strong that there can even be a revenge element in their psychological landscape of the litigation. It is unusual for these feelings to be present in more conventional litigation. To successfully mediate such disputes, these feelings must be diffused by the mediator.

From the Defendant's perspective, doctors whose professional reputations are at stake will feel very much affronted, aggrieved and offended. They feel that their professional reputation is challenged by someone for whom they often and genuinely feel they did their very best. Doctors and hospitals in such circumstances are most concerned at having their names dragged through the mud in the media or before their peers. They are justifiably terrified of the damage which might be done to their reputation as in such circumstances, any publicity is invariably bad publicity. The press have a habit of reporting the plaintiff's opening and the plaintiff's evidence in chief which is invariably less favourable to the defendant doctor or hospital than what is to follow. Even if the doctor is able to salvage the legal situation by means of a verdict, it is often the case that he or she cannot restore his or her reputation to its pre proceedings state. The last things doctors want, for obvious reasons, is the airing of dirty linen in public.

The worst scenario for medical providers (and the best for a plaintiff who wishes to win a difficult liability case) is a situation where there are multiple defendants, usually involving a combination of doctors and one or more hospitals who engage in an undignified public debate, each blaming the other about what occurred. Such a scenario the best opportunity the plaintiff has of winning the case. It also frequently involves the destruction of truly valuable professional relationships such as the relationship between a specialist doctor and a hospital which they may have worked for many years. It is in the best interests of everyone, particularly the community, if such arguments can be avoided. In a mediation, the differences between Defendants (which if aired publicly) would only assist the Plaintiff, can be aired in a way far more advantageous to the Defendants if the matter does not settle.

On the issue of cost, most medical negligence trials are complex and time consuming. They are, by the standards of most common law litigation, very expensive. It is not uncommon for highly qualified experts (frequently from interstate or overseas) to attend and give lengthy evidence dealing with issues of breach of duty and causation. In many types of negligence litigation, these two issues are dealt with more or less concurrently and it is more usual than not for only one of them to be hotly contested. In medical cases, the existence of a duty of care and the nature and extent of such a duty is usually clear but the resolution of the breach and causation issues give rise to complexities far above and beyond what is usual in negligence based litigation.

The Australian experience is that even the simplest medical negligence cases take in excess of a week, usually between 1 and 2 weeks. The more complex cases can take up to 2 or 3 months. Self evidently, the costs in such litigation where not only the expert witnesses but many of the witnesses as to issues of fact are themselves experts are horrific. In Australia, the plaintiff, if he or she has assets, can be faced with financial ruin if the case is unsuccessful. The defendant is in the unfortunate situation where if it is successful, it cannot recoup the huge cost which has been expended on a trial from an impecunious plaintiff.

Apart from purely monetary legal costs, there are other costs. A defendant doctor will be required to give up a significant portion of time when he would otherwise be better engaged in professional practice to attend the Court and give evidence. A number of his peers who may be witnesses will be in the same situation. The personal toll with such litigation takes on all participants, professional and otherwise, simply because of the nature of the allegations made against them, is great.

In the case of plaintiffs who have undergone the types of traumatic events which give rise to such litigation, they are required to re-live the experience, whether it be a particularly traumatic birth involving a catastrophic injury to one or more of their children or the death of a close relative or spouse. The personal cost of all of these issues is enormous.

The purely legal issues debated in such cases are interesting (at least for the lawyers) and difficult. This fact increases the risk that the litigation will drag on for years with interminable appeals, perhaps with the ultimate result of a new trial. In Australia, much of the appellate litigation involving the issue of breach of duty of care and causation has stemmed from a medical negligence cases – cases such as *Albrighton -v- Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Rogers -v- Whitaker* (1992) 175 CLR 479; *Naxakis -v- Western General Hospital* (1999) 197 CLR 269 are all cases involving medical negligence issues. Because medical negligence cases often involve very substantial claims consequent upon catastrophic injuries, significant and interesting damages issues will arise which one party or the other is not slow to take on appeal. The nature of medical negligence litigation because of the complexity of the damages and liability issues invites appeals above and beyond many other simpler forms of tort litigation. Medical negligence litigation can also involve particularly interesting "cutting edge" areas of law. The litigation involving HIV and the so called "wrongful life" cases are all areas of litigation where a decision one way or another is sure to trigger an appeal.

Why Mediation works

Because the cases are difficult, they usually involve experienced and competent lawyers on both sides. In my own experience as a mediator, most of the work in my home jurisdiction is done by about 20 law firms who are experienced in such litigation. There are a relatively small number of barristers in the field who do most of the work.

Preparation is a key to the success of a mediation. In medical negligence litigation it is necessary for parties to do a fair degree of ground work and gather witness statements, including expert reports prior to the mediation. Plaintiffs will also provide detailed pleadings and particulars. Accordingly, each side has a pretty good idea of where the other side is coming from before the mediation starts.

The insurers will sometimes engage claims managers, particularly in the larger cases, with particular expertise and knowledge of the technical issues involved in a particular type of dispute.

In some jurisdictions one distinguishing feature which separates medical negligence mediations and proceedings to other proceedings is the professional peer review procedure which the medical insurers of doctors utilise. After all this material is gathered, it is subjected to a review panel by the insurer of medical experts within the particular field. Thus, the panel will review all of the evidence and form a view, from an expert perspective, as to what they realistically perceive to the prospects of success or failure in a case. This means that if the review panel for example, forms a view that notwithstanding expert opinion, that a case is unlikely to succeed, little further time and effort will be spent in debate about liability. Generally, medical insurers come to mediation with a more realistic assessment of their own prospects. This does not mean that they are any more inclined to capitulate. It simply means that they are aware of the appropriate range for compromise.

One of the main roles of a mediator is to reality test and hopefully create some uncertainty in the minds of the parties so as to cause them to resile from what they perceive to be firmly entrenched positions. In a medical negligence case, there is plenty of scope to do this. Often the defendant remains the sole depository of many of the primary facts because the plaintiff was either too ill or unconscious to be able to give meaningful evidence. Usually both sides have recourse to and know how to use competent experts who are highly credible. The criteria for selection of an expert is often their expertise in a particular field rather than a consideration of whether or not they might be favourable. There is plenty of scope in relation to both factual and legal issues to engender in the parties a desire to resolve the case rather than run the risk of litigation.

The parties are terrified of losing for financial reasons. The plaintiffs and their lawyers are particularly afraid for these reasons. The culture of the world at the moment is very much that businesses and insurers regard money spent on legal costs as money which could be better spent elsewhere. Indeed, in Australia, the push towards mediation is largely driven by a strong feeling on the part of litigants, whether institutional or private citizens that money spent on litigation is money wasted and accordingly, they have lost the willingness to spend vast amounts of money for the sake of simply having a fight.

The likely duration of a mediation in such a case will rarely exceed one day. The mediator may require a brief preliminary meeting (which can be almost always done by telephone), and he or she will be needed to be provided with some relevant documents and a position paper from each side. The author has yet to see a case in which the parties cannot (but sadly do not always) set out their views on liability , damages and the other side's case in a position paper of less than 10 pages. The mediator may need from a couple of hours to a day to familiarise himself or herself with the material.

On the other hand, the cost of a hearing will often be many thousands of dollars a day. The witnesses because of the nature of the dispute are invariably expensive. In a mediation, there are no witness fees or transcription costs. The additional cost of a mediation involves only the cost of premises (which can often be arranged for nothing in the board-room of one or another of the law firms or at various other premises at minimal cost), the cost of the mediator (usually a day's fees plus a limited amount for preparation plus any other incidental expenses). In the case of a contested hearing occupying several weeks, there will be daily fees together with substantial costs for preparation. In any jurisdiction, the overall cost of conducting a mediation (including the mediator's fees and incidental expenses) will be a fraction of the cost of a hearing in a Court.

The parties recognise that apart from the financial cost of litigation, there is also costs in terms of collateral damage to matters such as time, reputation and other matters, these aspects are minimalised if a mediation rather than a contested hearing takes place.

The actual procedure at a mediation is more user-friendly for the parties. A skilful mediator will allow the mediation to take place in a relatively relaxed, simple and flexible way. The practice of the author is to make perfectly clear to the parties that it is their mediation and it is the mediator's intention only to become involved in procedural matters as and when required. There is no set formula to joint sessions in terms of the occurrence of them, their duration or their frequency. It is all within the discretion of the mediator who ought simply react to the course of discussions as the mediation unfolds. Pre-mediation conferences are the exception rather than the rule.

It may be necessary to clarify aspects of position papers with one or another of the parties but this usually can be done by telephone.

A potentially difficult situation is a case where there are multiple defendants. It is useful to either contact them informally or have a pre-mediation conference to ensure that they will jointly or severally be in a position to make an offer to the plaintiff before the mediation takes place. It is very frustrating for a plaintiff to be ready and willing to resolve a case but cannot do so not because the defendants did not want to offer any money, but because they cannot as a result of intransigence or sharp differences on the part of one of more of them. Most pre-mediation difficulties in medical negligence cases can be sorted out by the Mediator on the telephone to ensure that the proceedings are conducted with a minimal amount of expense.

Confidentiality is a major reason behind the success of mediations in medical negligence cases. Plaintiffs regard the giving of evidence and perhaps the reporting of it in the press as humiliating and distressing particularly when it concerns what will often be very personal aspects of their life. Doctors dread the publicity. As stated earlier in this paper, no matter what the outcome of a contested hearing, the very making of the allegations publicly is extremely damaging to their reputation. Insurers enjoy the lack of publicity because an unfortunate fact of this sort of litigation is that the publicising of one case may well be a trigger for others, particularly if there have been similar offending conduct by the same doctor.

From a psychological point of view, the issue of apologies and the atmosphere in which mediations are conducted is far more conducive to settlement than a contested hearing. Plaintiffs often need to get feelings off their chest in a way that cannot be done in a conventional litigation proceeding. Often the plaintiff will not want money but will have a strong desire that his or her grievances be appropriately redressed. This can be done by way of an apology in some circumstances or by way of simply having a doctor or a representative of the hospital even a lawyer in most cases take on board the specific complaints of the plaintiff, and acknowledge them.

While it is desirable that a doctor be present sitting across the table at a mediation, the facts of life in some jurisdictions are that it cannot be done for legislative and disciplinary reasons. Be that as it may, the effect on plaintiffs being able to air their grievances directly at the other side or its representative is often highly therapeutic and indeed, many cases would not settle unless this could be done. In a relatively short time-span, in an informal environment, people can at minimal risk and with minimal embarrassment, address their grievances and endeavour to put the whole of a dispute behind them. It is for this reason that the mediation procedure has been such a success.

How to Prepare for a Mediation in a Medical Negligence Case

First – select your mediator! As to who is an appropriate mediator, there is much support for the view that mediation should be left to mediators and judging should be left to the judges. There is a fundamental distinction between the roles of the Courts on the one hand and the provision of mediation services on another. It is said by some experienced mediators such as Sir Laurence Street, the former Chief Justice of NSW, that it is wholly inappropriate for a Court to provide mediation services within their own institutions and fabric.

In "*Mediation Principles, Process and Practice"*, by Laurence Boule (2nd edition), Professor Boule speaks in some detail beginning at p.269 about the choice of mediator. Some matters (utilising many of the matters referred to in Professor Boule's book) which are relevant but not determinative include the following:-

(a) The mediator must be trustworthy.

(b) The mediator must have empathic qualities, i.e. he or she must have the ability to listen to the grievances of both sides and leave them with the feeling that their complaints are being heard and acknowledged by him.

(c) He must have the capacity to be organised and remain focussed. Very occasionally mediations can become a little more heated and it is important that the mediator can insist upon rules of common courtesy and not lose sight of the issues.

(d) The mediator must be creative. There may be more than one way of defining or redefining an issue in order to allow a solution to be taken.

(e) The mediator must be persistent but patient. It is often part of the process for people to take time to make a decision. If they are rushed, it will not occur. Parties should be told that there is no immediate time constraint and they ought to be aware that decisions made quickly can often be bad decisions.

(f) Mediation qualifications, experience and background in a particular field of discipline can be useful but are not essential. While there is a view held by some that mediation is strictly a stand alone skill and knowledge of the subject matter is optional, the author does not share this view. Knowledge of the subject matter of the debate, the forum and the personalities involved can all be of assistance. While not stepping into the arena, there may be occasions when reality testing when you may need to have a discussion about the merits of a legal argument or ask someone to analyse a position which is either untenable or is certain to jeopardise a successful outcome of the mediation.

(g) If there is particularly complex technical issues beyond what is encountered in normal forensic day to day life of experienced practitioners, or there are particularly sensitive cultural issues, then it may be appropriate to consider whether co-mediators would be appropriate, one with expertise in a scientific field or from a particular cultural background and one from another area such as a lawyer.

(h) It is important that the mediator be accountable. Professional lawyers are generally subject to disciplinary proceedings of their own Bar Association or Law Society whereas many other mediators may not be subject to such constraints.

Having selected your mediator, the documentary preparation for a mediation is relatively simple. The mediator should send you a copy of his or her usual mediation agreement and confidentiality undertaking. The mediator should be asked how he or she wishes to proceed, but usually will be provided with either an agreed bundle of

documents by each side or separate bundles by each side. Whichever way the documents are produced, they should include at the very least the pleadings, any particulars setting out damages, a number of salient expert reports dealing with the primary damages and liability issues, any relevant source documents (or rather the relevant parts thereof) and any witness statements.

Many experts' reports by a plethora of experts are rarely useful, particularly if they cover the same issues for the same side. A single report which precisely states the opinion of a party on a particular issue is more use than a large number of reports and voluminous supporting material which takes the matter no further. So far as concurrent source material such as hospital records are concerned, it is always useful to have records of the actual entries dealing with the precise subject of the litigation. Voluminous other material which hospitals are prone to generate which relates to the treatment of the patient in general but not specifically confined to the treatment the subject of complaint is not of assistance. A competent solicitor will have little difficulty in reducing the material sufficient to support a plaintiff's claim to less than one lever arch folder of paper.

While position papers are always of assistance, some are of significantly more assistance than others. A good position paper will succinctly spell out an outline of the dispute, a summary of the evidence, what the party providing the paper perceives to be the issues, the arguments which it propounds in support of the issues and an analysis of the contrary arguments, not simply a rebuttal of them. If the case involves a claim for damages as well as a hearing on liability, a summary of the evidence relating to damages and a schedule of damages setting out a figure or a range realistically recoverable by each side is most useful. Position papers which are formulated principally as an attack on the other side's case are never helpful.

From the perspective of a lawyer acting for a party, do not create false expectations in the mind of your client. Remind your client that the course of the day can be an emotional roller coaster with its good and bad moments. Tell your client that it may well not be a wonderful "win/win" situation where everyone will be overcome by a state of joint euphoria at the end. Many settlements will involve equal pain on the part of both sides – one side will feel that it has paid too much and the other feels

that he or she did not get enough. A good settlement will often leave the parties feeling a little flat, but in the cold light of day the next morning, next week or next year the parties will realise that they in fact made the right decision.

Ensure that your side has someone present at the mediation with the authority necessary to finally settle the case on the day if the opportunity presents itself.

When you arrive at the mediation, maintain an open mind and be reasonable. It is rare for one side to be completely right and the other completely wrong. There are usually many sides to the same argument, and no case cannot be won or lost. Remember, as Oscar Wilde said, “the truth is rarely pure and never simple”.

Campbell Bridge SC
Maurice Byers Chambers,
Sydney NSW
Australia
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