MLSQ WORKSHOP

18 OCTOBER 2024

MEDIATION OF AN INSURANCE (MEDICAL NEGLIGENCE) CLAIM

RICHARD DOUGLAS KC

- Mediation is a procedure whereby parties to a legal dispute – with the assistance of a skilled and experienced independent mediator – can explore the prospect of, and enjoy the opportunity to strike, a tolerable resolution, in lieu of an unpredictable, protracted and expensive "winner take all" court adjudication.
- As a corollary, mediation focuses on satisfying the interests and needs of the parties to a dispute, rather than vindicating their strict legal entitlements.
- If a dispute settles at – or shortly after – mediation, invariably that is because - despite ambitions, if not "hopes and dreams" – the parties arrive at a mutually inconvenient outcome.
- Importantly, mediation is part of the path – not an alternative – to court adjudication. Parties need to have the "Sword of Damocles" of trial hanging over their dispute, firm in the knowledge that – absent compromise – such adjudication will ensue.
- Due to the above characteristics, advocacy deployed at a mediation contrasts with court advocacy. While always the

merits are front and centre, equally it is focused on outcome uncertainty, cost, convenience and finality. The latter are not pivotal come trial.

- Below I address fifteen matters apropos such mediation construct.
- My focus today, given the occasion of this workshop, will be upon mediation of damages claims conducted against insured or self-insured defendants in medical negligence claims. That stated, such matters are equally apt to the mediation of any litigated insurance dispute, where the ultimate issue is about the amount of money – if any – the plaintiff can garner from the defendant or defendants.
- First, the obligation to mediate:
    - In the court proceeding phase (cf, pre-proceeding phase of a claim for damages, which is ordinarily conducted bereft of same), mediation is forced on the parties in any event, by the court, short of a party or parties convincing the court it would be utterly pointless.
    - Usually, however, mediation will be availed of consensually, because the parties – in the case of the defendants, by their insurers, self-insurance arms or MDOs (Medical Defence Organisations) - recognise the uncertainty of litigation outcome, the high cost of litigation and mediation's inevitable impact – absent resolution – of spawning a narrowing of the issues for required adjudication.

- Second, the timing of mediation:
  - Expert evidence is de rigueur in insurance litigation. Given the inexorability of expert conclaves being ordered by the court - on liability and/or quantum issues - it is usual nowadays for a mediation to be post-conclave rather than pre-conclave, despite the expense of the conclave process.
  - Recently Justice Michael Osborne – Head of the Insurance List in the Supreme Court of Victoria – wrote that "court ordered mediations are very useful … in my view they are of the greatest utility where there is a trial date fixed. It serves to focus the minds of [the parties]".
  - Due to the burden of legal costs, however, earlier mediations are often sought out, though if unsuccessful a further mediation will often ensue.
  - Keep in mind, mediations per se remain an expensive procedure, with many professionals needing to be booked and organised, so as to maximise the prospects of success. Careful preparation – in particular of decision makers - is required (see below).
- Third, the duration of mediation:
  - Usually a mediation is set down for half a day (4 hours) but occasionally a full day (7 hours). That is in respect of a case which, at trial, will ensue for 5 to 10 court days. With a raft of parties, it can be longer.

- Enough time ought be allowed having regard to the number of parties, number of issues and client intransigence difficulties.
- It need to be made plain to all attending that a "half day mediation" means that all necessary participants need be present for at least 4 hours. Same for a full day mediation. No "early leaver, with other obligations" is permissible (without exception).
- So much is because – by dint of Parkinson's Law ("work expands to fill the time available") - much occurs in the last hour of the mediation, as the foxing between the parties diminishes. If there is to be an attendance difficulty, start early.

- Fourth, the selection of mediator:
  - There is a raft of good mediators – solicitors and barristers – available to mediate cases of various kinds, including in the medical law space.
  - One size does not fit all! In formulating a panel – or selecting from a submitted panel – of mediators, lawyers ought give consideration to the character of the dispute issues and the idiosyncrasies of the parties (including the intransigence of the lawyer's own client or the opposing client).
  - Some mediators, aptly, are "broad brush" and "stay out of the fight" while others are anxious to ensure that indecisive issues are discarded, so that the parties can

necessarily focus on what is important (in the view of the parties, ultimately). Some mediators "reality test" more strongly, which is not apt in every case.

- Fourth, the use of mediation outlines:
  - Given the usual half day mediation, in particular, absent outlines – with consequent sole reliance solely upon the pleadings, disclosed records and correspondence and expert reports – there can result a wasting of the available time upon the mediation, protracting the opening session.
  - That stated, it is usual only for the plaintiff to comply with any direction by the mediator of outlines.
  - An outline ought, preferably, contain a succinct statement of contentions – with references to core evidence - on each of the key issues, and preferably make an opening offer so that same may be considered in advance of the mediation. So much avoids the first offers emerging hours into the allocated mediation time.
  - Proper concessions can and ought be made. The occasion is without prejudice (see below) so the same fall away absent settlement.
  - Provision of a balanced and persuasive outline by a plaintiff to an MDO or insurer may be acted on by them as the foundation for a greater settlement sum being afforded for resolution.
- Fifth, attendees at mediation (apart from lawyers):

- A decision maker from each party ought attend, not only to make a decision but also to hear the arguments that are put so they can inform the decision making., either on the day or later. So much is hardly "rocket science" but also often more on the breach than the observance (but not in court ordered mediations where the attendance of a decision maker is compulsory).
- The plaintiff decision maker – themselves or guardian if intellectually disabled – need always attend a mediation.
- Rarely - in a dispute the defence of which is being conducted by a defendant's insurer, self-insurance arm or MDO - will a defendant hospital administrator or medical practitioner attend the mediation. Ordinarily, little is achieved in so doing.
- Occasionally, but rarely, expert or lay witnesses will attend the mediation to assist the lawyers. That may be apt in complex factual or technical disputes
- Often, nowadays, the plaintiff will attend with a "support person" (eg, spouse, relative, close friend). Such person may sit in on the hearing – if the other parties agree – but cannot do so if they will be a witness upon the trial (eg, upon a likely allegation of recent invention, care provision in proving damages).
- Such support person ought be advised in advance, and again on the day of the mediation, that their role is merely one of support, not to participate in the decision making, nor, more importantly, ought they disrupt decision making

by the plaintiff. This is a real issue. Such issue becomes more difficult where such person is a spouse of the plaintiff, for obvious reasons.

- Sixth, mediation as a "without prejudice" occasion:
  - For that reason, the exchanges – including offers –which ensue are confidential, not available for a court later to pick over. So much, inexorably, spawns greater candour in negotiation.
  - Thus, either party– for the purpose of making its submissions – can make apt mediation concessions, so as to focus the issues, but if the matter does not resolve then those concessions do not bind that party.
- Seventh, pre-mediation meetings with mediator:
  - These are common. They are largely "meet and greet" but are more merits focused if with an individual defendant or the defendants collectively.
  - Ordinarily such a meeting will ensue on the day of the mediation, but in the case of multiple defendants may ensue on a prior day (and if not then sometimes after the formal opening session).
- Eighth, communication of and agreement on mediation ground rules:
  - The mediator ought write to the parties in advance, setting a set of rules (usually simple) for the conduct of the mediation (ie, transcending the occasion being a

"without prejudice" discussion as to potential compromise).

- The solicitors for the parties ought ensure that the decision makers know those rules in advance, rather than being told of them for the first time, by the mediator, at the commencement of the mediation, being those that follow below.
- Courtesy is a critical requirement.
- There is no binding settlement between the parties – as to the entire dispute, or any factual or legal sub-issue – unless and until it is written down and signed by or on behalf of the parties.
- The mediator is neither an adjudicator of the dispute if it remains, nor an advisor to the parties. Rather, their role – at core – is to "push" the parties to consider a "mutually inconvenient outcome" if they can stomach the same.
- The parties ought be informed – and it is an important role for the mediator to undertake in most, but not all mediations – that the mediator will engage in "reality testing" the parties.
- That does not – and at no time can – entail the mediator expressing, in open session, that one or other party will win or lose. Rather, it involves the parties being told that the mediator – only in private session – may identify issues which that party ought more seriously consider as an obstacle in their quest for success (including matters

not yet raised by the opponent, but which may be so raised by trial).

- Ninth, preparation for a mediation:
  - I cannot emphasise enough that while a mediation is not a trial, it is usually the first occasion, after court pleadings, when the opposing party will be scrutinising every word mouthed by the opponent for "chinks in the armour", whether evidentiary or legal in character. Every word is important.
  - Prior to appearing at the mediation, the lawyers for a party ought usually provide a written advice to their client as to substantive and tactical issues, and offers, but in any event have the case theory of their party clear.
  - The decision maker ought be assisted in harbouring – come mediation - a clear appreciation of the competing issues, and encouraged to have a "clear head" for the exchanges and "horse trading" which will ensue.
  - A cascade of potential early offers should be discussed with the client in advance, even though final instructions are not obtained.
  - Arguments which are likely to be put against another party ought be considered in advance, and answers prepared, to avoid surprise at such an issue.
  - The plaintiff's team ought have a schedule of costs - party and party, and solicitor and own client – and list of refunds. Thereby, the plaintiff can be told with each offer

– which will be expressed in “court dollars”, how much they receive in hand. Also, the same will allow assessment of value of offers if made “all up” by the defendant.

- Thus, the view – abroad in some quarters – that mediation is a “whistle stop” in the passage to trial or later settlement which can be prepared for in short order is a mistake. That is the view harboured usually by the indolent or the opportunist!

- Tenth, the mediation opening session:
  - While views on the same differ, the prevailing view is that such openings constitute an essential component of any mediation.
  - Decision makers like to see their key points articulated by their lawyers to the other side, even where written outlines have been furnished, so they feel they have had a front row to their “moment in the sun” on issues they feel strongly about.
  - Only lawyers speak at the opening – or any other – session at the mediation. No evidence is adduced from the plaintiff or any other issue (as upon trial), but occasionally the plaintiff will be asked by their lawyer to speak on some confined factual point or points.
  - If an offer has not already been made by the plaintiff immediately before the mediation – which is preferable – it ought be made during the plaintiff’s opening.

Sometimes the plaintiff will not do this, but rather listen to what the defendant (or defendants) have to say in response, and then revert with an offer. In my view this is an inefficient way to go about the task, and indeed can display lack of courage or inadequate preparation.

- Eleventh, mediator confidentiality:
  - Following the opening session, the mediator will have frequent private discussions with the respective teams for the parties. In doing so, the mediator endeavours to elicit the particular interests, concerns and ambitions of a party. That process is an important one in informing the mediator in his dealings with other parties, and in affording assistance resolution.
  - It is a very strict rule that the mediator not disclose to a party's team the content of private discussions with another party. To do so would be a gross breach of the mediator's obligations of confidentiality.
  - The only exception to that is where the mediator – at the request of the disclosing party, albeit in some instances suggested by the mediator – is directed and authorised to articulate a particular fact, proposition or submission to the opposing party. The mediator need be clear that she or he is in possession of such authorisation before proceeding to so do, and that they do not go beyond the bounds of the authorisation in question (even with a "wink or nudge").

- On occasions it will be the case that a party decision maker becomes frustrated with the negotiations that ensue, to the point of suggesting recalcitrance on the part of another party making offers. The mediator need keep this under control, so as to not allow the frustration to spill over into obviation of further offers, or further proper offers.
- A golden rule of mediation – in the case of an unsuccessful negotiation – is that each party should never leave a mediation without knowing – or having a very good idea from the negotiations that have taken place – of the best position available for settlement of an opposing party. Leaving the mediation – in a fit of frustration or pique - without that knowledge will be inimical to any further negotiations, and to the likely content of formal offers that may be made by that party after the mediation.

- Twelfth, the making of offers:
  - Practices vary, but ordinarily – after opening offers – subsequent offers are conveyed by the mediator.
  - A common endeavour where it is perceived an opposing party is not moving appropriately is to "bounce" by repeating, sometimes more than once, a party's previous offer.
- Thirteenth, mediation final offers:

- The lawyers for party have to know "when to hold up, and when to fold up!". To persist in engagement where the opposing party is not moving is only likely to project some measure of desperation to settle on the part of the persisting party.
- While mediators ordinarily don't like a party describing an offer made as a "final offer", often that is – and can reasonably be – a reflection of the fact that a party is prepared to go no further.
- But that it may be that party's "final offer" does not mean that such party will not accept another offer which is made by the opposing party, or a "mediator's bid" (see below).
- A "final offer" is sometimes made but left open for a day or a week, so as to enable the opposing party to consider the same, sometimes with the assistance of a written advice from counsel or solicitor.

- Fourteenth, mediator's bid:
  - If the parties come to an impasse – even if it be on the back of the mutual "final offers" - a mediator, in their discretion, will sometimes make a "mediator's bid" – being their own proposal for settlement - and leave it open for a day, a week or longer, for the parties to consider the same on what is referred to as the "two yeses" basis.

- That is a process whereby the mediator will advise – only – whether or not they have "two yesses". So much tactically protects the "yes" responder where the opponent is a "no" responder.
- The mediator will make it plain that the "bid" is not what their assessment is of the likely result at trial, but an indication of what the mediator – having been involved with the parties in open and closed sessions at the mediation - believes might be a result which the parties may accept as a "mutually inconvenient result".

- Fifteenth, release terms for mediation:
  - Orally agreeing upon a settlement of the claim by reference to a dollar sum is one thing, but arriving at a binding settlement is quite another. A release – containing all agreed terms need be signed by the parties before there is any binding settlement.
  - It is critical for the defendant's side of the record to have a release in draft prepared – as to basic terms – in advance of the mediation. Preferably it ought be provided to the plaintiff, at latest, early in the course of the mediation (any settlement sum left blank). There is nothing worse than the parties arriving at an oral agreement only to have time taken up – which may not be available – to produce the terms.
  - So much is pointed up by the now common "confidentiality" and "no disparagement" clauses. While

plaintiffs usually come to heel on such clauses if advised of same in advance, a minority are falling over themselves to settle and then connive with the press as to their adversity.

- In multiple defendant cases, the terms of settlement will usually provide for the respective contributions by the defendant parties to a settlement sum. Sometimes the settlement sum contributions are provided as payable on a several, not joint and several, basis.

Richard Douglas KC