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Mediation v Informal Settlement Conference

And a look at the economics of early v later settlement on both sides

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The context of my point-of-view:

➢ My background

- I am a sole legal practitioner with over 20 years of litigation experience before becoming a full-time mediator in 2016;
- For the first 10 years of my career I acted for injured plaintiffs, including the establishment of a successful medical negligence practice in 2000 operating on a contingent basis and without recourse to advertising;
- I then acted at partnership and consultant level in 2 Sydney CBD mid tier law firms for 6+ years, representing various state government departments and commercial insurers in areas such as education, police, roads, health, occupier's liability and professional liability;
- From 2013 to 2016 I acted for approx. 150 insulation industry clients in the 2014 Home Insulation Program Royal Commission, which led to high level consultation with Ministers of the Commonwealth regarding a payment scheme, sourcing of litigation funding and launching of a class action against the Commonwealth.

➢ Why I went into Mediation

- Mediation is often the best way of resolving a matter, cost effectively and to the relative satisfaction of all parties;
- Informal settlement conferences are often unsuccessful because there is no mediator to keep the negotiations on track and to de-toxify the communications and keep the negotiations on track;
- ISC's are often preferred to mediations because of the imagined costs savings in not having to engage a mediator, (even though they often fail, requiring mediation to be attempted thereafter, which essentially doubles the costs and also lessens the net result to the plaintiff);
- Mediations should be affordable, so that they are the ADR tool of preference and I believe that I have priced my services modestly and in accordance with these principles.

➢ District Court Practice Note 1 – October 2017

- Part 11 re Alternate Dispute Resolution: Where a case is estimated to take 3+ days at hearing, the Court will generally make orders requiring a mediation.
- In case of hearing estimates less than 3 days, the Court will generally make orders requiring a mediation or settlement conference – (where the parties & their legal reps and re an insured party: an officer with authority to resolve the case, are required to attend).
- The Court will also generally require expert witnesses to have participated in a conclave with production of a joint report, before a matter proceeds to hearing.

➢ My own experience trying ISC's

I came from a plaintiff lawyer background with a strong belief in utility of mediation, having settled the majority of my matters over 10 years, in that way.

When I turned my hand to work as a defendant lawyer, I thought I would attempt to "tick the same boxes" with Informal Settlement Conferences instead of mediations, and save my client some money. However, I found that my ISC's fell over quickly, with some common reasons as follows:

- I found that some plaintiffs' barristers wouldn't allow me to have any contact with the plaintiff/s – they felt I was simply using the process to attempt to "size up" their client as a prospective witness at hearing; and

- I found that some plaintiffs' barristers took a very adversarial approach to the process from the get-go, and there was little evidence of a willingness to compromise on an opening offer that I felt was putting the strength and potential value of the plaintiff's claim, at it's highest.

I've had a really positive experience recently as a Mediator, with a firm whose usual practice was to attempt settlement by ISC of a number of its "smaller" District Court matters, but where the ISC's were often not productive of a settlement. Such matters invariably did not settle until "at the door of the Court", which was very stressful for the plaintiff and also not a cost effective result.

Engaging me to mediate a number of their matters instead: the matters have been settling. What is more, I am informed (and can see why this might be the case) that these same matters which settled at mediation, are very unlikely to have settled if ISC had been the chosen method.

This is essentially because:

- in the mediator role, I was able to elicit from the defence, the highest offer that they were willing to make, beyond which they were prepared to defend the matter at hearing;

- the assumption that there would be more money on offer at the door of the Court would have been a dangerous one to make;

- the plaintiff herself did not wish to "run the gauntlet" in that way (and as I later discovered – was determined not to go to hearing);

- notwithstanding counsel's advice about a much higher potential value of the plaintiff's claim, the plaintiff chose to settle – with the final amount being for a greater sum than the defence had been authorised to offer originally, because they could see the plaintiff's genuine desire to settle and the value in disposing of the matter.

Mediation works where ISC does not, because the various layers of stakeholder approaches to a matter are able to be managed by the mediator, and worked into a settlement. These same factors at ISC often mean that settlement negotiations reach an impasse quite early in the process – whilst essentially the same legal costs in preparing for and attending on the day, have been incurred.

The argument for Mediation over ISC

Many ISC's don't achieve a settlement - because:

- There is less emphasis to attend an ISC with a genuine willingness to compromise;

- ISC's may be seen as an opportunity to settle on certain terms only, as a "look - see".

This may be particularly so if there is no looming trial deadline and plenty of time to continue to prepare the case and/or hold out for "a better result" when the parties try again next time. But that's precisely when every responsible lawyer would want to get a settlement – before costs have become an impediment to settlement and the plaintiff's best net result are maximized.

It is the mediator's job to analyse not only the merits of the legal arguments (for reality testing and for evaluative purposes if requested), but the layers that are added to the dispute by the various stakeholders – solicitors, barristers, individuals, claims officers – who have often become entrenched in their views over time and have various objectives that may not be apparent to the other side.

ISC's fall over too easily because of the absence of a mediator to act as a buffer to the adversarial process and to manage the parties through any potential deadlocks. A mediator:

- provides a zone of objectivity and safety within the midst of the conflict enables wildly polarizing allegations and offers to be exchanged in a way that allows the parties to posture, to express and advocate for their positions without leading to a walk-out or loss of face when those parties end up compromising on seemingly concrete demands.

- Supports the legal teams by inspiring the trust of their clients in their lawyers to give difficult instructions required to settle.

For example:

  - By acknowledging the skill & experience of the legal teams;

  - By encouraging the clients to listen to their legal advice; and

  - By reality testing the clients on their positions and alternatives (which may serve to reinforce advice and concepts already explained by their lawyers, or indeed encourage them to ask their lawyers more questions that are needed to be asked before they are prepared to provide instructions on settlement).

In my view, a fundamental reason why Mediations make all the difference to settlement is because at an ISC there is no sense of occasion; no real engagement between the parties themselves. It's only about the number$ and a mere exchange of offers often may not be enough to resolve a dispute.

Even though civil proceedings are about monetary compensation, all legal representatives know that it's always about something, often so much more, than money. A mediation is often the crucial difference in facilitating authentic engagement that ticks all of the boxes and enables a compromise to be negotiated.

An attitude shift and a genuine preparedness to compromise without seeing compromise as a sign of weakness – is not possible to achieve without the authentic engagement of the parties. This often isn't addressed at an ISC yet it is fundamental to settlement.

> A mediator extracts the highest offer that the Defendant is willing to make and simultaneously: the lowest offer that Plaintiff is willing to accept – so that the respective parties can then decide in a genuine way – whether to settle. If they reach an impasse, it is REAL.

If not settled on the day, reaching an impasse after best attempts at Mediation may often lead to settlement thereafter owing to the fresh insight and adjusted expectations that emerge when the dust has settled.

The parties have a much more genuine and accurate idea of the compromises that may need to be made in order to negotiate a settlement on the most favourable terms following Mediation.

It is unlikely that the same degree of insight could be gleaned in the course of a failed ISC; and so there is a risk that any settlement thereafter, whilst positive in itself, may not be based on the most optimal information.

A look at the economic argument for early settlement (and why Mediation is so important)

Scenario:

- a personal injury claim under CLA where issues of liability, causation & quantum are all contested, with potential quantum / liability discount factors ranging from $75k to $750k;
- an assumption of $5k Medicare reimbursement is applicable as well as a minimum of 80% of the plaintiff's costs are recoverable as party/party
- *the settlement figures re $75k + costs assume a compromise for liability where costs are not restricted to the $100k rule*

Settlement stages:

1. 8-12 months after filing SOC (when evidence has been exchanged but costs contained)

2. 4-6 months down the track when further preparation has been required (including expert conclaves) so parties can take a hearing date – ie a hearing date is within a few weeks

3. following / during a 3-5 day trial when further intensive preparation and trial costs have already been incurred

The key observation here is that: settlement negotiations at 8-12 months post filing SOC, when liability & quantum evidence has been exchanged and both sides understand the strengths / weaknesses & potential quantum – are optimal as demonstrated by the numbers (over the page).

The take-home point:

> It makes good economic sense all round for the defendant to be prepared to pay more and for the plaintiff to be prepared to accept less to secure a settlement at "stage 1", because as the figures show: holding out for a more favourable result down the track can have serious adverse economic consequences.
>
> So why risk the crucial opportunity to secure a settlement at "stage 1" by opting for an ISC instead of a mediation?

For example, the numbers show that:

- With respect to a typical scenario District Court matter where the liability and quantum factors produce a potential range of between $75,000 to $750,000 plus costs, an early settlement for $150,000 + costs may be achieved at a total cost to the defendant, of $285,000.

- If this is attempted by ISC which fails, typically a mediation it is only then that a mediation will be agreed to, say 4-6 months down the track (when significant further preparation costs have been

incurred on both sides. A settlement at that stage for $150,000 + costs may cost the defendant a total of $600,000 – (*ie more than double*).

- A settlement delayed until "stage 2" is also far less favourable for the plaintiff, who ends up with a near 30% less net result: ie $140,000 at stage 1 versus $96,000 at stage 2 for the same settlement amount of "$150,000 plus costs".

- In fact, settlement via mediation another 5-6 months down the track will still come at a considerable disadvantage to the parties, because the figures show that it may well cost the defendant a total of $525,000 to settle the matter for as little as $75,000, at that stage. That means it would have been cheaper for the defendant to settle earlier, for up to $350,000 + costs.

Table A:

Settlement outcomes at typical settlement stages:	**$75,000 + costs**	**$150,000 + costs**	**$450,000 + costs**	**$750,000 + costs**
Stage 1: SOC + 8-12 months Net result to the Plaintiff: (sol/client costs: $5,000) Defendant spend: - Plaintiff costs p/p: $65,000 - Defence costs: $50-70,000 - Total costs say $115-$135,000 - Plus damages =	$65,000 $210,000	$140,000 $285,000	$440,000 $585,000	$740,000 $885,000
Stage 2: SOC + 11-18 months Net result to the Plaintiff: (sol/client costs: $50,000) Defendant spend: - Plaintiff costs p/p: $205,000 - Defence costs: $222-245,000 - Total costs say $423-$450,000 - Plus damages =	$20,000 $525,000	$96,000 $600,000	$396,000 $900,000	$696,000 $1,200,000
Stage 3: SOC + 12-22 months Net result to the Plaintiff: (sol/client costs: $70,000) Defendant spend: - Plaintiff costs p/p: $300,000 - Defence costs: $287-340,000 - Total costs say $555-$640,000 - Plus damages =	$1,000 $715,000	$76,000 $790,000	$376,000 $1,090,000	$676,000 $1,390,000

** Refer to Table B at the end, for a more detailed analysis of the various stages of litigation and attempts at ADR before trial and related costs on both sides.*

Observations:

Re settlement at "Stage 1":

If the matter settles at this point, assuming a payment in favour of the plaintiff on a compromised basis, the containment of legal costs payable by the defendant at this stage may well be in the vicinity of $115,000 - $140,000

> (*$70,000 re plaintiff's costs and $45,000 - $70,000 re defence costs – the lower figure having regard for lower hourly rates and tendency not to brief counsel so early*).

Re settlement at "Stage 2":

From the defence point-of-view, if the matter fails at ISC and goes on to mediation (usually a few months down the track, closer to hearing, this could add $140,000 to $170,000 to the costs on both sides, depending on whether the expert conclave process occurs before mediation.

Re settlement at "Stage 3":

The legal costs on both sides at this stage may well be the greatest burden of the case. Such an increase in legal costs together with further developments in the evidence, may render settlement more difficult to achieve, or a settlement at this point far less optimal.

By "optimal" – I mean in terms of the greatest net result to the individual plaintiff, as opposed to the plaintiff's legal representatives in terms of revenue.

This analysis demonstrates that settlement of this type of matter is critical at the 8-12 month stage, ie when:

- sufficient evidence has been exchanged to inform both sides of the risk;
- legal costs are relatively contained and don't become a barrier to settlement;
- the defendant may be motivated to offer more money at this point to limit the overall spend, and the plaintiff may be motivated to accept a compromise that gets a better net result than may be possible down the track.

Accordingly, for the sake of the additional mediator's fee (of $2,500 to $7,000 depending on the choice of mediator) which can often make all the difference between successful early settlement v unsuccessful informal settlement conference – there is great prudence in the decision to mediate first in preference to ISC.

Requesting Mediation before ISC – selling it to the other side

- The matter is ready for attempted settlement with a willingness on the part of both sides, to settle on a compromised basis.
- In many cases, the plaintiff may be concerned with a number of issues separate to monetary compensation which are motivating the claim and which would benefit by being addressed a mediation (and in fact may be exacerbated by an adversarial ISC process).

- Mediation ought be requested in favour of ISC because it is the most effective way of exhausting the negotiations and maximizing the prospect of settlement.

- A mediator extracts the highest offer that D is willing to make / lowest offer that P is willing to accept – so that the respective parties can then decide in a genuine way – whether to settle. If they reach an impasse, it is REAL.

- An early mediation in favour of ISC is worth the additional expense because it produces the most cost-effective outcome, as shown on the case study figures which demonstrate that:

  - With respect to a typical scenario District Court matter where the liability and quantum factors produce a potential range of between $75,000 to $750,000 plus costs, an early settlement for $150,000 + costs may be achieved at a total cost to the defendant, of $285,000.

  - If this is attempted by ISC which fails, typically a mediation it is only then that a mediation will be agreed to, say 4-6 months down the track (when significant further preparation costs have been incurred on both sides. A settlement at that stage for $150,000 + costs may cost the defendant a total of $600,000 – (***ie more than double***).

  - A settlement delayed until "stage 2" is also far less favourable for the plaintiff, who ends up with a near 30% less net result: ie $140,000 at stage 1 versus $96,000 at stage 2 for the same settlement amount of "$150,000 plus costs".

  - In fact, settlement via mediation another 4-6 months down the track will still come at a considerable disadvantage to the parties, because the figures show that it may well cost the defendant a total of $525,000 to settle the matter for as little as $75,000, at that stage. That means it would have been cheaper for the defendant to settle earlier (at "stage 1"), for up to $350,000 + costs.

- Early settlement is genuinely achievable via mediation whereas attempted settlement via ISC is fraught with the risk of premature impasse.

- If the parties have attempted mediation (as opposed to ISC) before asking for a hearing date, the likelihood of a Court Ordered mediation may be decreased.

THE DETAIL:
Re looking at the optimum time for settlement and the economic argument for mediation over ISC

Assumptions:

- A modest personal injury claim under the Civil Liability Act but where issues of liability, causation and quantum are contested

- Re damages: Potential quantum ranges between $150,000 (ie GD and modest treatment costs) to $750,000 (ie also including economic loss and GvK).

- Statutory reimbursement factors: HIC $4,000

- Estimated hearing length of 3-5 days and expert conclaves required before the matter goes to hearing.

The settlement scenarios examined are as follows:

1. Scenario 1: Attempted settlement by ISC at 8-12 months after filing SOC – no settlement.

2. Scenario 2: Revised attempt to settle by mediation a few months after ISC, closer to hearing date and after further preparation costs have been incurred.

3. Scenario 3: Finally, a look at trial costs also included – as many claims may still settle "on the door of the Court", at a time when trial costs have already been incurred.

Arguably, all of the variables referred to in this analysis are necessary to be considered when advising a client in accordance with a Smythe Order[1]

It should also be noted that these scenarios assume a settlement for a monetary damages sum in favour of the plaintiff – which will include total legal costs payable by the defendant. However, the costs components are also relevant to plaintiff lawyers in terms

[1] **Advice re costs etc – as per "Smythe Orders", Regulation 42.32 UCPR**:
At any stage of proceedings, the court may order a party's legal representative to serve on the party:
(a) a notice that specifies:
(i) an estimate of the largest amount (inclusive of costs) for which judgment is likely to be given if the party is successful, and
(ii) an estimate of the largest amount (by way of costs) that the party may be ordered to pay if the party is unsuccessful, or

(b) a notice that specifies:
(i) an estimate of the best outcome that the party is likely to achieve if the party is successful, and
(ii) an estimate of the worst outcome that the party is likely to undergo if the party is unsuccessful.

of lost revenue and debt for disbursements carried on behalf of a plaintiff where the claim is NOT successful and the plaintiff is not able to pay them.

Table B:

Event / Timeline	**Plaintiff's Costs**	**Defendant's Costs**	**Total costs payable by Defendant at point of settlement**
Filing of SOC			
+ 8-12 months from date of filing SOC: when liability & quantum evidence has been exchanged and both sides understand the strengths / weaknesses & potential quantum	$60,000 Particulars: Sol: $30k Counsel: $15k Disbursements: $15k	$45,000 - $60,000 Particulars: say same costs as P or less, due to lower hourly rates and tendency not to brief counsel early	Judgement for D: $45,000 - $60,000 (recovery to be sought from the Plaintiff) Judgement for P: $100,000 - $115,000 Partics: assuming 90% P's costs are party/party
PLUS +			
1 Costs of attempted settlement by ISC (assumed to run between 3 hours and 1 day)	$10,000 Partics: Sol: $2,500 Counsel: $6,000 + some preparation time in advance of the day Total costs: $70,000 PP: $65k / SC: $5k	$5,000 - $10,000 Partics: same costs as P or less, if counsel not briefed Total costs: $50,000 - $70,000	Judgement for D: $50,000 - $70,000 (recovery to be sought from the Plaintiff) Judgement for P: $115,000 - $135,000 Partics: assuming 100% P's costs for ISC are party/party
Settlement outcomes:	$150,000 + costs	$450,000 + costs	$750,000 + costs
Net result to P: Defendant spend: - Total costs say $115-$135,000 - Plus damages =	$140,000 $285,000	$440,000 $585,000	$740,000 $885,000
Comments: • This is a critical stage of the case where there is greatest opportunity for a cost effective settlement which maximizes net outcome for P and minimizes total costs payable by D • Obviously it is most cost effective if a settlement can be negotiated by way of			

correspondence between solicitors, but this isn't always possible.

- In settlement negotiations - Remember that a case where liability, causation, & quantum are all contested – the need for compromise on both sides is very important. This is where a Mediator's role is crucial. Genuine compromise at ISC may not be forthcoming given the relatively adversarial setting.

- Legal costs become an impediment to settlement the further this type of case progresses towards hearing – and are a reason why many cases don't settle at mediation conducted closer to hearing.

- A "winner takes all" approach that is the only option once decision to run a trial is made – is risky for all stakeholders. P may lose, P's lawyers don't get paid, can't recover disbursements, or D's costs payable for all parties may well exceed the value of the judgement also payable

- For the extra cost of a Mediator's fee at this stage to make the difference between settlement at early mediation rather then failed ISC – makes good economic sense.

- This point is illustrated by looking at how a typical case such as this is likely to progress towards hearing:

PLUS +			
Event / Timeline	**Plaintiff's Costs**	**Defendant's Costs**	**Total costs payable by Defendant at point of settlement**
+ 11-18 months from date of filing SOC: (ie 3-6 months after failed ISC) – Further preparation costs towards readiness to take a hearing date (incl expert conclaves)	$170,000 Sol: $60k Counsel: $70k Disbursements: $40k Total costs: $240,000 (PP: $190k / SC: $50k)	$160,000 Sol: $50k Counsel: $70k Disbursements: $40k Total costs: $210,000 - $230,000	Judgement for D: $210,000 - $230,000 (recovery to be sought from the Plaintiff) Judgement for P: $400,000 - $420,000 Partics: assuming $190k P's costs are party/party (80%)
PLUS +			
2 + 11-18 months from date of filing SOC: (ie 3-6 months after failed ISC) – Attempted settlement by Mediation for 1 day	$11,500 - $13,500 Sol: $2,500 Counsel: $6,000 + some preparation time in advance Mediator ½ share: $1,500 to $3,500 depending on choice Total costs: $252k- $255,000 (PP: $205k / SC: $50k)	$11,500 - $13,500 same costs as P Total costs: $222,000 - $245,000	Judgement for D: $222,000 - $245,000 (recovery to be sought from the Plaintiff) Judgement for P: $423,000 - $450,000 Partics: assuming 100% P's costs for Mediation are party/party

Settlement outcomes:	$150,000 + costs	$450,000 + costs	$750,000 + costs
Net result to P: Defendant spend: - Total costs say $423-$450,000 - Plus damages =	$96,000 $600,000	$396,000 $900,000	$696,000 $1,200,000
PLUS +			
Event / Timeline	**Plaintiff's Costs**	**Defendant's Costs**	**Total costs payable by Defendant at point of settlement**
3 + 12-22 months from date of filing SOC: (ie 1-4 months after failed mediation) – Trial – say 3-5 days + wait time to delivery of judgement Appeal costs not considered	+ $65,000 - $95,000 Partics: Sol: $15,000 - $30,000 Counsel: $25k - $40k Disbursements: $25k Total costs: $320k- $350,000 (PP: $250-300k / SC: $70k)	+ $65,000 - $95,000 Partics: Same as P Total costs: $287,000 - $340,000	Judgement for D: $287,000 - $340,000 (recovery to be sought from the Plaintiff) Judgement for P: $555,000 - $640,000 Assumptions: - 100% P's costs for trial are party/party - 80% P's costs overall, are party/party
Settlement outcomes:	$150,000 + costs	$450,000 + costs	$750,000 + costs
Net result to P: Defendant spend: - Total costs say $555-$640,000 - Plus damages =	$76,000 $790,000	$376,000 $1,090,000	$676,000 $1,390,000

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