

[Slide 1] LIDG 2019 – “MEDIATION - THE PROCESS WHERE DISPUTES ARE MEDIATED INSURER-INSURER”

1. Kavita told me to talk about liability insurance mediations where the participants were sophisticated and experienced. They come to mediation having done their risk and costs analyses. They know what they are doing. **[Slide 2]** Basically, no muppets.
2. **[Slide 3]** In fairness, I think it is right to say that insurers are sophisticated users of mediation. Professor Robert H. Jerry (of the Missouri School of Law) has gone so far as to say of insurance that:

“..it is hard to imagine an industry where dispute avoidance is more highly valued, dispute resolution rules and processes matter more, or the number of occasions in which dispute resolution procedures are invoked is larger.”¹

3. Recent survey work undertaken by Dr Grant Morris at Victoria University suggests that there are around 200 insurance mediation in New Zealand a year, making up about 20% of the commercial mediations undertaken overall².
4. When insurers were asked “*With which parties would your organisation be likely to use mediation?*”, 44% said “*other insurance companies*”³. So we can assume that there are quite a few insurer v insurer mediation in New Zealand.
5. So, having been asked to speak on them, I reflected on some of my insurer v insurer mediations. There was one in particular which sprung to mind. A homeowner was suing a supplier and an architect, about an allegedly faulty outdoor fireplace that had caused a house fire. All three parties were insured. Only the lawyers attended the mediation, which was scheduled to go for a day. The conversation was high level, courteous and candid. A deal was crunched by morning tea, and tidily documented (bar a few scone crumbs) afterwards. For me it was a disaster, because I felt unable to charge my full day rate. But it was in fact a great example of well-organised and prepared, rational, and commercial parties dealing sensibly with a dispute.
6. But, as you will all well know, it is often not that easy. I see insurer v insurer disputes in multiple contexts. Most commonly for me, they are between insured defendants. Sometimes these disputes are incredibly difficult to resolve. Whilst the people I am working with are generally wearing suits and flourishing laptops, what they really look like is this **[Slide 4]**.
7. So, what I thought I would do is talk about how and why some insurer v insurer mediations can come to look like this, and what can be done about it.
8. The starting point is to never forget that, no matter how sophisticated and commercial the participants in a mediation are, they are all still people **[Slide 5]**.

He aha te mea nui o te ao

What is the most important thing in the world?

He tangata, he tangata, he tangata

It is the people, it is the people, it is the people

9. **[Slide 6]** In my experience, more often than not, it is subjective, personal, factors that create issues in mediation. I want to talk about these briefly, under the following headings:
- (a) Personality clashes;
 - (b) Bias; and
 - (c) The challenges faced by the insured in mediation.

[Slide 7] Personality clashes

10. Sometimes personality clashes are pre-cast. How many people in this room have had a file come across their desk, started to read it, and gone :".uh huh, uh huh, uh huh, aw gawd, it's that [@%*#...!]"? No matter how Mandela-esque we might aspire to be, we all end up dealing with people who rub us up the wrong way. It is also a relatively small world that we work in, and we do tend to keep seeing repeat players.
11. Sometimes we perceive people to be unduly aggressive, condescending, shifty and self-serving. There is of course a fair chance that they are not that fond of us either!
12. Personality clashes can have a corrosive effect on disputes. In a speech on mediation in 2015 Lord Neuberger, then President of the UK Supreme Court, cited a 2007 UK survey,
- "which reported that 47% of respondents involved in commercial litigation admitted that a personal dislike of the other side had been responsible for driving them into costly and lengthy litigation"*
13. **[Slide 8]** The stress and pressure of mediation can enhance personality clash issues, or give them an opportunity to arise. I have certainly seen my share of drama. And I have seen it in the most sophisticated insurer v insurer mediations. Classic lines have included (add petulant tone/shouting/heavy sarcasm for effect!):
- "Don't tell us to get commercial, you're the one who needs to get commercial"*
- "Have you even read the file?"*
- And the old: *"[cough cough] bulls#*t"*
14. Often I think these outbursts are a function of stress, but sometimes they are motivated by a belief that the aggression will yield a tactical advantage.
15. If there is one take-out you get from today, I would want it to be this - unduly aggressive or personal approaches backfire in mediation. As soon as the drama starts, the listening stops. When I go into private sessions with the people on the receiving end

of that kind of approach, they are no longer interested in the merits of the case. All they want to talk about is what an [insert expletive] the person on the other side is.

16. For me, as mediator, managing these dynamics is one of the most challenging aspects of my job. I use a whole variety of preparatory steps, micro-interventions, and reframing exercises to head it off, and deal with it when it happens.
17. For participants in mediations, I recommend that you do your best to take personalities out of the equation. Play the person not the ball. As Professor William Ury says, “*be hard on the problem, soft on the person*”. The best advocates I see in mediations are always calm and courteous. Even when the other side gets worked up, they just return to the issues. And they are the ones that actually get traction with the other side. That is not the same as being soft. But an iron fist should always be sheathed in a velvet glove.
18. For those of you who are still fond of a table thump, I would finally add: beware the risk of unintended consequences. I mediated a case recently where one of the lawyers was very aggressive and personal in his approach. The lawyer on the other side reacted calmly. Later I complimented her on that. She said: “what that really told me was that they had an empty deck”.

[Slide 9] Bias

19. Even in sophisticated insurer v insurer legal disputes, biases can come to the fore. In this context, by biases I mean “*tendencies to think in certain ways that can lead to systematic deviations from a standard of rationality or good judgment*”. It can also be known as “*why people do dumb stuff*”.

Optimism bias

20. Optimism bias is a major impediment to settling any case. This is the tendency to overestimate the prospect of favourable outcomes. It is essentially wishful thinking. But this can hide behind quite complex self-justifications in legal disputes. As a mediator, you can get a sense of whether optimism bias is at play when, in a win/lose dispute between two parties, you ask both privately what they think their percentage chances of success are. Often, they give you numbers that add up to much more than 100%. In fact, around 150% is common. Granted, part of this will be about gaming the mediator. But still, the exercise tends to suggest that one party, or both, is/are kidding themselves to an extent.
21. And there is science to this:

“A recent study that surveyed subjects on a variety of different future events concluded that, on average, eighty-five to ninety percent of people think that the future is going to be more pleasant and less painful for them than for the average person”

[Slide 10] *Memory errors and biases*

22. Memory errors and biases are also an issue. In particular:
 - (a) There is a wealth of evidence on the extent to which our memories play tricks on us. The “misinformation effect” can be important, when memories become less accurate because of interference from post-event information;
 - (b) Egocentric bias in memory is also common. People gain confidence from recalling the past in a self-aggrandising way. More than 90% of college professors say they do above-average work. One quarter of high school seniors say they are in the top 1% in terms of their ability to get along with other people.
23. Memory errors and biases can affect any material witness, and the credibility of their evidence. Sometimes mediation is the first time that evidence is tested by an opponent.

[Slide 11] *Confirmation bias*

24. Confirmation bias is also common amongst those involved in disputes. This is the tendency to search for, interpret, focus on and remember information in a way that confirms your preconceptions. People perceive reality, past and present, through a prism of self-interest. Or, as the old saying goes, “*people hear what they want to hear*”.
25. A particular issue with confirmation bias can arise when a dispute involves more than one insurer defendant. The lawyers and the insurer personnel often know each other, and view things in a similar way. They can be drawn together. A desire to seem both positive and strong can mean they can encourage confirmation bias in each other. American lawyer, and insurance mediation commentator, Mark Plumer notes that:

“..mediation with a group of insurers may give rise to a “pack” mentality among the insurers, each assuring the other that its position is sound”⁴

26. I mediated a multi-unit leaky home claim a while ago. In the open morning session, my sense was that the plaintiffs, and their experts, had much the better of the exchanges. Repeatedly the defendants were pressed for answers that they did not seem to have. Later that day, I had a private session with a sub-group of insured defendants, their lawyers and experts. I started the session by asking them how they thought the morning had gone. “*Crushed it*” would be a neat paraphrase of the collective response, expressed with ever-more confidence as I went round the room...!

[Slide 12] *Bias – diagnosis and cure?*

27. Bias can be tricky to diagnose, and even trickier to cure. Its two-step dance partner is confidence, which is a precious commodity in disputes.
28. For participants in mediations: know your case, reality-test yourself and your approach, ask yourself whether you are bringing any biases to bear, and think about what it might mean if you are wrong about something.

[Slide 13] The challenges faced by the insured in mediation

29. The insured does usually attend a liability mediation. And it is a difficult day for them. One way or another, they always have some skin in the game. Their credibility may be important to the case, and they may have financial decisions to make. It is important for the rest of their team to take that into account.
30. The insured is also the insurer's client, and statistics show that customers with a positive claims experience are likely to buy further policies⁵.
31. What are the challenges for an insured in mediation? And what can you do to help?

[Slide 14] Stress

32. Overall, the main thing to remember I think is just how stressful the experience will be for the insured as a disputant.

"For some people, the pressure can cause loss of sleep, anxiety, anger and problems dealing with others, including their own families...There may even be serious psychological consequences such as depression".

Vaughan-Birch, in Raconteur (25 May 2016)

33. Litigation Response Syndrome – like PTSD.

Lees-Haley, Defence Counsel Journal

34. Even being on the stronger side does not necessarily ease the pain:

- *"A successful lawsuit does not provide the "greenback poultice" "*

Strasburger, J Am Acad Psychiatry Law

- 70% of doctors win malpractice suits in the US, but 70-86% still report symptoms of depression during the lawsuits.

<http://www.mentalhealthy.co.uk/anxiety/anxiety/lawsuit-stress-the-dark-side-of-litigation.html>

35. Stress is obviously an issue of itself, but it can also compromise performance, memory, and decision-making.
36. The stress that an insured will face in a mediation can probably never be entirely eliminated. But you can reduce it, and support them through it. Make sure they are well prepared. Communicate clearly about risks and issues. Explain the process and the plan. Take as much of the pressure of the day off their shoulders as you can.

[Slide 15] Financial exposure

37. Sometimes the insured has a financial exposure – excess, cover limits, unresolved coverage issues, future premium hikes, future insurability. Obviously, that will add to

their stress on the day. Again, you cannot eliminate these issues. But you can help by being clear and up-front early with the insured about them.

Pride

38. Often pride will be at stake for the insured. I have noticed this as a particular issue with professionals in negligence claims. I recently mediated a claim against an insured lawyer. Through most of the mediation, the lawyer sat with crossed arms, looking at the floor. The lawyer found the whole process insulting, and said so. The lawyer's counsel had to work very hard to get the lawyer to agree to a settlement which, on any economic/risk analysis made total sense.
39. Pride often dances a neat two-step with shame in this context. And it can inhibit good decision-making. As a mediator, and I would suggest as counsel for the insured, you need to manage pride carefully. Acknowledge and respect the strength of the emotion, but keep working gently back to the risk and cost realities.

Credibility

40. The credibility of an insured can be at stake in a number of ways in a mediation:
 - (a) They will be concerned about their credibility with their own team, internal and external;
 - (b) They will be concerned about their credibility/reputation in the marketplace. Many insureds do not repose the trust I think they usually should in the confidentiality of the process; and
 - (c) Their credibility as witnesses may be important to the risk analysis.
41. I want to comment further on the "credibility as a witness" point. It is rare in my observation for credibility in this sense to be about "*liar, liar, pants on fire*" moments. More often it is about how composed the person is, how across the materials they are, how clearly they are able to answer questions.
42. For those on the insured team, helping them with credibility will involve being supportive but realistic, and preparing them well.
43. The insured can be your biggest asset in a mediation, or your biggest problem. Remember the challenges they face, and try and do as much as you can, to get the best out of them on the day.

[Side 16] Concluding remarks

44. As I said, in my experience, more often than not, it is subjective, personal, factors that create issues in mediation, even in the sophisticated, commercial dynamic of insurer/insurer claims.
45. Prepare well, stay calm, be as objective as you can, and look after the insured. Always reflect on what you can do to get the best result. As Brett McKenzie wrote:

*I reflect on my reflection
and I ask myself the question
what's the right direction, to go?
I don't know
am I a man or am I a muppet?
(am I a muppet)
If I'm a muppet then I'm a very manly muppet
(a very manly muppet)*

¹ Robert H. Jerry, *"Dispute Resolution, Insurance and Points of Convergence"*, Journal of Dispute Resolution (forthcoming, 2015), University of Missouri School of Law legal Studies Research Paper No 2015-28, p8

² Morris & Shaw, *Mediation in New Zealand*, 2018, p262

³ Morris & McKechnie, *"Users of Commercial Mediation in New Zealand – Insurance Industry Report"*, 2017, p7

⁴ Plumer, Mark, *"Mediation of insurance disputes: wise or waste?"* 4 August 2010, Lexology.com

⁵ Morris & McKechnie, *"Users of Commercial Mediation in New Zealand – Insurance Industry Report"*, 2017, p8