MEDICAL NEGLIGENCE LITIGATION – ISSUES, PSYCHOLOGY AND WHY MEDIATION OFFERS A SOLUTION

What is medical negligence litigation?

- Litigation involving allegations of negligence in the delivery of health care by hospitals, doctors, dentists, nurses or other health professionals, including chiropractors, and others.

Difficulties of all Medical Negligence Litigation

- In less serious cases, the significant costs of preparing, gathering evidence, and bringing a medical negligence to trial have been disproportionate to the likely verdict in may cases;
- In the more serious catastrophic claims, the legal costs can be horrendous.
- The personal cost the personal cost plaintiffs and their families can be equally damaging in a different sense.
- From a doctor or hospital's perspective there are impacts upon a doctor's practice costs through increased insurance premiums.
- There is harm to the public at large because 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.
- 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 Models

- The classic mediation model of a facilitative mediation is directed, among other things, to maintaining relationships. Strict adherence to such a mediation model does not usually work in insurance litigation because the interest of one side is

completely unilateral, i.e. an insurer's interest is about money and has nothing to do with relationships at all.

- 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).

- Should you chose a mediator with specific expertise in the area?
- What is a successful mediation? Even if a case does not settle - other benefits of mediation may include the resolution of other issues which would have occupied much greater court time.

Why Mediation should be effective in Medical Negligence Litigation

- There are three principal reasons why medical negligence litigation is best resolved by mediation as opposed to a trial. Not surprisingly, there are the reasons why mediation is so effective in this field. Those reasons are:-
  (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.

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.

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 acknowlegement 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 or 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. While it is true that many such cases begin 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), 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 this 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.

- 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.

- 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. Because medical negligence cases often involve very substantial claims consequent upon catastrophic injuries, significant and interesting damages points 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.

Why Mediation works

- Because the cases are difficult, they usually involve experienced and competent lawyers on both sides.

- 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 New South Wales one distinguishing feature which separates medical negligence mediations and proceedings to other proceedings is the peer review procedure which the medical insurers of doctors utilise.

- 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. In New South Wales it is not unusual for the same experts are commonly used by both sides in different cases. 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 set out their views on liability , damages and the other side's case in 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 be many thousands of dollars a day, particularly if Senior Counsel are involved. 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 (assuming that it is a senior counsel will be a days fees and a limited amount for preparation plus any other incidental expenses). In the case of a 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 my 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 because 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 short, in a relatively short time-span, in an informal environment, people can at minimal risk, minimise their 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.

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discretion of the mediator who ought simply react to the course of discussions as the mediation unfolds. In my case, in medical negligence cases, I rarely have a pre-mediation conference. If I am given position papers (as is almost invariably the case) I may contact one or another of the parties to clarify matters within them. The only potential trap is in the 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.

- A further factor which leaves the parties strongly supporting mediation is the whole issue if confidentiality. The 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 because as stated earlier in this paper, no matter what the outcome of a contested hearing, the 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.

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