Mediation Institute Professional Development Presentation by Christopher Erskine – 18th May 2021

MEDIATION IN COURT LITIGATION

Context

1. In the last 20 years, mediation has become almost obligatory in most civil litigation. Courts have become proactive in ordering that it occur. The reason is obvious. If the parties can reach an agreement without needing a judge to hear the case, scarce court resources are available for other cases.
2. There are exceptions, however.
   (a) mediation does not happen in criminal matters
   (b) mediation does not happen where the major issue is the interpretation of the law – for example, constitutional cases in the High Court, or test cases exploring the meaning of important provisions in statutes
   (c) mediation generally does not happen where the parties have already explored settlement and it is clear that they are so far apart that there is no hope of resolving the case by agreement – though even here, some judges might order mediation before final hearing in a last-ditch effort to encourage the parties to settle
3. But that still leaves the majority of civil cases in courts. My best guess is that every year there are several thousand mediations in civil matters in Australia, often ordered by the courts, but sometimes occurring voluntarily.

The distinctions with Court Ordered mediation

4. However, mediation as developed in court matters looks rather different from facilitative mediation which is the basis of training and accreditation for mediators. If you train to be a court-appointed mediator, the training is in facilitative mediation (in the absence of any other accepted accreditation method), where the assumptions are often very different from what happens in court related mediation. While there is some useful cross over, as a general statement facilitative mediation does not equip you well to deal with the different situation in court related mediation.

Pleadings

5. The first major difference is this. In court related mediation, the mediator will get the pleadings in the case, and often some of the evidence, before the mediation takes place. At a practical level this sets out the claim and its response, but it is more important than that.
6. <u>The pleadings define the scope of the dispute.</u> If it's not in the pleadings, it's not something the court will be dealing with.
7. As a result, a great deal of care goes into drafting pleadings, in order that the parties can set out clearly the whole of their dispute.
8. Pleadings are required at the start of a case, though they can be amended along the way. A case begins when the plaintiff files their claim in the court registry – it's the document that initiates the court case.
9. The defendant is also required to provide a pleading – a defence to the claim. This sets out what the defendant says about each part of the claim – some parts might be

admitted, others might be denied, there may be counter allegations. By reading the claim and the defence, you ought to be able to work out what is actually in issue between the parties.

10. Let me give you some examples in summary form.
11. Claim for breach of contract – the plaintiff will set out -
    (a) where and when the contract was created, and by whom on each side,
    (b) whether the contract was entirely in writing, or was at least partly made orally
    (c) the essential terms of the contract – what did the parties agree would happen
    (d) where, when and how the defendant breached the contract
    (e) what the result of the breach has been – for example, losses, damage, other harm
    (f) what remedy the plaintiff wants – maybe to terminate the contract (if it's ongoing), damages to compensate for the losses – but maybe the plaintiff wants the defendant to carry out their promises instead (specific performance).
12. The defence will respond. The defendant might do some of the following -
    (a) maybe the defendant denies there ever was a contract – denies that it happened in the way the plaintiff says, or says that it was a casual chat but nobody intended to be bound by a contract at that stage
    (b) maybe the defendant will say that the plaintiff has not stated the essential terms correctly – there is a dispute about what exactly the parties agreed to do
    (c) maybe the defendant will deny that there was a breach – perhaps there was a breach by the plaintiff, which led the defendant to terminate the contract
    (d) maybe the defendant will deny that any loss has actually occurred
    (e) maybe the defendant, as a result, will oppose the remedies sought, perhaps because the legal preconditions for the remedies have not arisen.
    (f) maybe the defendant will make a cross claim against the plaintiff, alleging that the plaintiff actually breached the agreement and as a result the defendant should be compensated for loss.
13. A building dispute – this will look rather like the breach of contract claim I've already set out, but it will go into detail about what the building defects or mistakes are – the floor slab is cracked, the kitchen equipment is not what was ordered, the paintwork is shoddy, the roof leaks, and so on.
14. The defendant will respond in detail to the allegations about the building work – perhaps there will be a dispute about whether the building contract was varied along the way, which explains why what was built is not quite what the original specifications said, for example.
15. The defendant might also say that any defects are actually caused by somebody else – for example, the slab has cracked because the engineer designed it negligently, and the builder merely built what the engineer designed. In that situation the builder will add a claim against the engineer, joining the engineer to the dispute. There is a notice that does this by setting out the claim against the third party, and the engineer will then respond, and these form part of the pleadings too.
16. A work accident – much of this is now governed by specific workers compensation legislation which has severely limited other causes of action such as claims in negligence. But the claim will still need to set out the employment details, the nature of the accident, and the ongoing effects – and the employer (through their

insurer) will need to respond with what they say happened and what (if anything) the effect is.

17. An employment dispute - for example, unfair dismissal, or challenging disciplinary action. The claim will set out the employment history, what happened that led to the dismissal, the dismissal documentation, and so on. The employer will respond with an answer to each part of the claim.
18. You can see the picture. The pleadings will define the dispute in some detail and with much precision. Courts are hostile to vague claims – they want a situation where everybody understands what is alleged, and what is actually in dispute.

Evidence and Position Statements

19. Sometimes, the mediator will also get some of the evidence that the parties have prepared – for example, if there have been affidavits filed in the case that set out the evidence that the deponent says happened. This does not always happen, but if it does, the mediator gets some idea of how strong the evidence is that supports all the parts of the claim.
20. Usually, the mediator will also get a position statement from each party. These are exchanged between the parties just before the mediation. A position paper summarises the claim set out in the pleadings, the evidence that is going to be led, and explains exactly what the plaintiff wants and why (or why the defendant denies that the plaintiff is entitled to all that is claimed).
21. In some mediations, the mediator will order a confidential position paper that is not exchanged. This is given to the mediator but not to the other side. Each party must set out what they think their strengths and weaknesses are, and what the range of likely results might be. The intention is to help the mediator work out how the dispute might be settled.
22. *So the role of the mediator is not to spend much time at the mediation finding out what the dispute is all about. The ambit of the claim has already been set out in the pleadings. The aim is to try to resolve all or some of the dispute, based on what is set out in the pleadings and the position papers.*
23. It doesn't take much imagination to realise that a lot of work has to go into drawing up pleadings. That leads to the second major difference.

Legally Represented Parties

24. In most court mediations, there are experienced lawyers representing all parties.
25. This is not universal. But it is true for the vast majority of disputes in the Supreme Court and the Federal Court, and for many of the disputes in the Magistrates Court. It is less true in administrative tribunals like NCAT, VCAT, ACAT and so on.
26. The lawyers don't just represent. They will have been instrumental in drafting the pleadings, the affidavits, and the position papers. They will have spent many hours talking with the client and with witnesses, finding out what the evidence is, and distilling all that into claims that fit the requirements for a legal claim.
27. From the point of view of actually resolving the claim – understanding its strengths and weaknesses, working out what might settle it – the lawyers will usually understand the case better than their clients do. This is not a slur on clients. The

client has a grievance and a loss. The lawyer gets all that information from the client and presents it in the terminology of a legal claim. Some parts of the grievance aren't something that courts can make orders about – for example, in an employment dispute, a court can't order your work colleagues to like you in future. But particularly with calculating the loss, lawyers are expert in distilling what the grievance amounts to in dollars, and what remedies a court is likely to order.

28. So in a court mediation, the mediator will usually deal extensively with the lawyers on each side, because they understand the legal strengths and weaknesses of the claim and are likely to see ways to resolve it.
29. Good lawyers will have spent some time before the mediation with the client, explaining the legal issues in the case, and getting the client prepared for possible settlements. How much will the plaintiff accept in damages? If the builder offers to fix the defects, does the client still trust the builder or must it be done by a new builder? And so on.
30. Before I go any further, there are a few exceptions to what I have just said.
31. First, particularly in administrative tribunals, lawyers are not always involved. In those cases, the mediator might need to spend a bit of time working through claims that are badly written or evidence that is irrelevant to what the claim seems to be about.
32. Second, while lawyers are usually involved, sometimes (but not always) the client wants to be heard. I've had a number of interesting examples of this over the years, where a client wants the other side to hear in their own words what the grievance is and how it has actually affected them.
33. This does not always happen, however. In probably the majority of mediations, the client is intimidated and stressed by the process, and does not want to make a fool of themselves in front of everybody else. They are often very happy for their lawyer to do the talking. But while more clients than not don't want to say things, you have to be aware of those mediations where the client *does* want to be heard, and find how that can be accommodated.
34. Third, there are a few mediations – very much the minority – where the clients on both sides want to settle but the lawyers for whatever reason are against the proposal. This is pretty rare – I can only recall two occasions out of hundreds of mediations – but it does just occasionally occur. Maybe they are concerned that settlement robs the client of a certain victory, but whatever the reason might be, just occasionally you might have to take a bit of time to work around the lawyers rather than with them.
35. That's not easy, however. The lawyer is entrusted by the client with running their case, and that includes the mediation. You can't refuse to let a lawyer represent their client. How you deal with that unusual situation is a topic for an advanced mediation seminar, not this one.
36. But with those exceptions noted, the presence of lawyers at a mediation significantly changes the dynamic. The lawyers will understand the case well, they will know its legal complications and weaknesses, and they will be experienced in trying to find a resolution. Notwithstanding the bad press lawyers get, in my experience the vast majority of lawyers always want to settle cases, because they know that it's much riskier running a case before a judge where witnesses don't say what you expect and where judges don't like witnesses you thought were impressive.

37. That means that for the most part, the discussions and negotiations will take place with the lawyers – not uncommonly, between the various lawyers with the mediator to some extent in the background. I've been in a few mediations recently with very competent and experienced lawyers, who had already had preliminary discussions between them and their clients about how to resolve it and what the content of an agreement might look like.
38. However, you always have to have in your mind that clients don't always like being sidelined. Some clients, understandably, want to be actively involved. Lawyers are enormously useful, but ultimately it must always be the client who makes the final decisions. In the enthusiasm to get the lawyers to come up with an agreement, it must always be an agreement made on instructions from the client, and the client must always agree.

The Structural Differences

39. Against all of that background, how does a court mediation progress? There is an almost universal pattern to them, that looks something like a facilitative mediation to begin with.
40. A court mediation almost always will begin with everybody in the same room with the mediator.
    (a) The mediator will explain briefly how the mediation works (though remember that the lawyers for each party should have done this already), and give a little road map of what is likely to happen.
    (b) Then each side gets to say something for a few minutes, trying to make sure that each side gets about the same time. Bear in mind, however, that there is no point in trying simply to rehash what is in the pleadings. The oral presentation should have a purpose to it beyond merely repeating what has already been explained in writing.
    (c) Then the mediation breaks out into separate rooms and the mediator gets to chat with each party separately. The purpose of this is perhaps to explore things that aren't clear in the position papers or pleadings, or to explore what the possible basis of a settlement might be.
41. After that, however, court mediations almost always turn into shuttle diplomacy of one form or another, in which offers are exchanged in order between the parties (plaintiff offers, defendant counter offers, plaintiff puts a further offer, and so on). Sometimes these will be done by the mediator being instructed by one party to put an offer to the other side, sometimes the lawyers will talk to their opposite number and put the offer.
42. At its simplest, this works most easily when the issue in dispute is "how much money" – for example, damages in a personal injury case. The mediator needs to make sure that the parties are exchanging offers like for like, however. Does the offer made by a party include the legal costs, or is it plus the costs? That can be important in many cases, where the legal bills run into tens of thousands of dollars or worse. It's important that both sides understand what exactly is being put, however, and that needs to be agreed from the outset.
43. While I said that the parameters of the dispute are set out in the pleadings and you can't go outside them, that is not completely true in some cases. Particularly in disputes involving a strong personal element (for example, unfair dismissal or

workplace discipline), the offer of an apology might be an important matter for the plaintiff. An apology costs nothing, and it might be a way in which a defendant might get a satisfactory outcome, but it can't be ordered by a court. Another related issue in workplace disputes is that the plaintiff might offer to resign as part of a settlement, but would only do so if they can get a good reference to find a job in future. This is not something a court could order, but it might be an easy way of resolving the dispute in a way that doesn't just involve paying someone money. In the case of public service employment, there might need to be consequential conditions – the workplace file is labelled "confidential" and can only be accessed with the permission of the supervisor, for example, so that the investigations that led to the dismissal or disciplinary allegations don't get accidentally raised in the future.

44. The opening session I mentioned that most court mediations begin with a session where everybody is present. A mediator needs to be aware, however, that this is occasionally not a good idea, though it usually is. Let me give you two examples.
(a) in cases involving, say, a claim of sexual assault at a school years earlier, we know generally that many victims find it very difficult to confront their assailant, or the school hierarchy who didn't listen to them at the time. There are no easy solutions here, but you need to be aware of the possibility.
(b) in a mediation last year which COVID restrictions required to take place on Zoom, the restrictions eased just before the mediation began. I asked whether the parties would like to reorganise the mediation so it happened in person. They said that they would like to continue to take part via Zoom, in part because there was far more control seeing the discussion on a computer screen and being able to turn it off if it got too bad to handle.
45. Conversely, however, there are some mediations where it is important for the client to speak. Almost my first mediation involved a public servant who had been put on leave with pay for a number of years while the department tried to investigate disciplinary allegations. Every time an investigator got across the file, they found themselves promoted and had to pass the file onto someone else. The public servant was articulate and thoughtful and made a quite impassioned opening statement, in which they pointed out that while it sounds good to be paid to sit around doing the gardening at home, actually it was quite dispiriting – peers were promoted and given responsibilities that they would like to have done too. It was extremely important that this was said, not only for these thoughts to be heard, but because it put an important context onto how the matter was ultimately resolved.

Multiple Parties

46. More than two parties. It is relatively common for a civil dispute to involve more than two parties. There are often two defendants, for example, each of whom contributed to the problem. Or one defendant joins another party because they did something wrong – see my building dispute example above, where the builder joins the engineer and claims damages from the engineer for the defective slab. Occasionally you will have two plaintiffs, though for this to happen there must be a commonality of interest that justifies having them both in the same case.

47. Particularly where the claim involves more than one defendant, resolving it can be a long and frustrating process. There will often need to be extensive discussions between the defendants about who will contribute how much to a settlement offer, before the negotiations can involve the plaintiff. Will the first defendant contribute 65% or 70% of the total amount? Will the offer be $100,000 or $150,000? Will one defendant put a ceiling on their contribution regardless of what the other defendant wants to do?
48. Often this can drag out the negotiations enormously. I've been in mediations for a plaintiff in the past, where the negotiations between the defendants took longer than it took to settle the matter with the plaintiff. While the defendants are arguing with each other, the plaintiff just sits around waiting for an offer to be made. I have heard of mediations where one of the multiple defendants took a dog-in-the-manger attitude and made only a desultory offer to contribute, which derailed any realistic attempt to settle the matter with the plaintiff.
49. For a mediator in this situation, you have to identify early on in the process how the negotiations need to take place. It's almost always the case that the defendants will need to conduct their own discussions and negotiations first, in order to come up with a joint offer to make to the plaintiff. So you may have to devote the early part of the separate discussions to deal with this, before you can turn to talking with the plaintiff. And obviously, the more defendants you have, the more difficult these negotiations become.
50. <u>Are there people at the mediation for each party authorised to make a decision?</u> Few things are more frustrating than to have extensive negotiations which look promising, only to have one party such as an insurer or a public service delegate say that somebody else is the only person authorised to agree and they are not present. Court orders often insist that persons who attend mediations have to have authority to agree to settlements, but this is not always properly honoured.
51. <u>How is the mediation resolved?</u> As with all mediations, there should be a written agreement, and you should try to get the text agreed and signed before everybody leaves. But be aware that if the terms are too vague, the agreement might come unstuck because one party changes their mind or doesn't understand fully what others thought was agreed.
52. I appeared in a case last year in the Supreme Court where exactly this happened. I had not been the mediator, but was asked to act for one of the parties after they had apparently resolved the case at a mediation. The other side then tried to get out of the agreement, and the circumstances of the mediation had to be put to a Supreme Court judge. There were statements from the mediator, from the lawyers appearing for the parties, and from the clients, and there was the text of the mediation agreement itself. Eventually, the judge decided that the agreement was sufficiently clear and certain to be enforced, and there is a lot of authority from very high courts that urge courts to err on the side of enforcing settlements rather than nitpicking about the detail. But it was a reminder that there is sometimes a fine line between spelling enough out in an agreement (which will take time and might derail the agreement) and not spelling out enough to make the agreement enforceable.
53. And returning to my opening point about the pleadings, if you resolve a court claim completely at mediation, that should resolve the entire dispute. There is a long-established principle that you should bring everything in relation to your dispute in

one case. If you fail to include some claims, the simple position is that you are barred from raising those further claims in a new case. I've summarised a much more complicated principle (called Anshun estoppel) but you get the general idea. So if the dispute as explained in the pleadings is resolved, that *should* resolve everything by way of a legal claim that arises from the core facts in the dispute.

54. If you can't resolve everything, however, there is sometimes merit in exploring how much might be agreed. For example, in my contract example above, the parties might disagree about *whether* there was a valid contract, but agree that if there was, the amount is not disputed. So the case could go to the court just on the issue of liability -was there a contract? – with the judge knowing that if the decision is that there was a contract, the judgment will be for an agreed amount of money. There are many, many instances where a part-settlement might be useful to explore, even if the whole case can't be resolved. While the parties are present with an experienced mediator with litigation experience, it's worth trying to see what can be agreed to reduce the size of the case or the matters in dispute.
55. This presentation has only scratched the surface of some key issues in court mediation, notably the interaction between lawyers, clients and the mediator. As a general statement, the involvement of lawyers is almost always positive and helpful to getting an outcome. But it changes the dynamic quite significantly from what is included in facilitative mediation training. My own experience of the training is that what I learned was useful in understanding how to facilitate outcomes generally, but had little to say (and sometimes was quite unhelpful) in dealing with the very different dynamic of a court mediation where the pleadings already define the dispute and the lawyers for the parties are well across the detail. How a mediator deals with that situation needs experience and thought.

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