

Mediating Historic Child Abuse Claims – How to Get the Best Outcome for All

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Overview

- Neuroscience 101 – some basics of human behaviour
- What Makes for a Powerful Apology
- Preparation techniques to get the best settlement outcome
- Common barriers to settlement on both sides
- Where the mediator can best assist



Why I became a Mediator



Typical human response

1. "I just want to know what happened"
2. Communication shut down
3. Breach of trust + Lack of empathy
4. "I don't want the same thing to happen to anyone else"
5. Serious adverse consequences on health & livelihood



Gold Standard Mediation Factors

- Plaintiff / Lawyer relationship:
 - is advised early and often – good communication
 - mutual respect and trust
 - P cognisant of risks & wants to settle
 - P feels supported by legal team
- Sufficient evidence is exchanged and parties are ready
- Each side wants to settle (reflected in position paper)
- Mutual respect and professional courtesy shown at mediation
- Joint Opening: the plaintiff speaks and words of empathy or apology are conveyed in response
- Monetary negotiations are realistic / justified on the evidence
- Genuine compromise on each side



But....

“I still never got an apology!”

“Neuroscience 101”

The Key Drivers of Human Behaviour:

- Fairness – a sense of justice
- Community – a sense of belonging
- Status
- Autonomy
- Certainty



Social Stimuli
is as

Powerful
as

Physical
Stimuli

Fairness = Reward

Unfairness = Acute Pain

Increase in Status = Financial Windfall

Apologies are not an admission of liability

S 68: An expression of sympathy or regret, or a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.

S 69: An apology does not constitute an admission of fault or liability, is not relevant to the determination by the Court of liability – and evidence of an apology or anything said in that regard is not admissible in court proceedings as evidence of liability.

Civil Liability Act NSW



Apologies in historic child abuse matters

“Dying Man Wins Record \$1M Compensation Payout For Christian Brothers Abuse” – ABC News Aug 2018



What Makes for a Powerful Apology

- It is desired by the Claimant
- It is offered by / on behalf of the Respondent
- Each have the opportunity to prepare
- Agree on logistics such as – who, how, where, when
- The apology person is skilled and genuine

Solid Matter Preparation = Happy Client & Best Results



Case Management:

New client inquiry triage





Roadmap for getting the best outcome

Triage

- First consult: record their story for later statement prep
- Give oral advice then back up in writing
- Advice to include investigative process & costs considerations

Investigation

- Manage expectations: 2 yr process
- Explain the ADR/mediation process to client and the strategy behind it
- Comprehensive discovery of records
- Prepare a comprehensive statement which has historic dates & names as correct as possible, and includes all of the factual particulars that would otherwise be requested
- Prepare a chronology as well (for experts, LOD, etc)
- Select experts who are respected, objective and write reports which set out their reasoning
- Briefing the expert: ask for teleconference before expert writes their report
- Advice to client on conclusion of investigation



Roadmap for getting the best outcome

Legal Proceedings:

- Letter of demand / SOC: should be in accordance with Garling J principles
- Serve with liability evidence & disclose instructing docs (eg chronology)
- Ask experts to respond to defence reports

Preparation for settlement:

- Provide updated written advice re liability, causation & damages – (low, high, most realistic)
- Invite client to ask questions well in advance of mediation – manage expectations
- Request mediation – 1 day with in-person apology
- Provide position paper (as per Garling J principles), damages schedule and costs breakdown to D at least 4 weeks in advance
- Advise client of all costs & reimbursement figures before mediation
- Meet as a team before arriving at mediation venue, discuss with P the prospect of who says what at joint opening & mediation strategy

How the mediator can assist

- Thorough review of the brief
- Investigate the “lie of the land” before mediation
- Anticipate roadblocks and how to remedy
- Conference the parties separately before the joint opening
- Establish rapport & trust
- Be aware of and use techniques to manage stress
- Listening, positivity & time

Barriers to Settlement - Plaintiffs

- Evidence not reflective of quantum claimed
- Claim not adequately particularised
- Where the legal costs are disproportionate to the damages / apparent work performed
- Lack of preparation for mediation
- Failure to manage client expectations
- No apparent appetite to compromise or settle
- Minimal engagement with the mediator



Effective Particulars of the Claim

- **Garling J interlocutory judgements re pleadings:**

PM v The Council of Trinity Grammar School [2020] NSWSC 1353

PWJ1 v The State of New South Wales [2020] NSWSC 1235

In *BB6 v State of New South Wales* [2021] NSWSC 1516, His Honour stated:

"I venture to repeat what I said in *PWJ1*, after a review of the authorities on appropriate pleading in cases such as this one:
"93. And so it is that the detail and specificity of the pleadings in each individual case are of critical importance. There is no room for general, broadly phrased pleadings which are applied to a broad range of claims without discrimination, and which do not pay careful attention to the relevant facts. Mere rubrics and hollow incantations are not a substitute for proper pleadings which pay attention to the principles discussed as well as the requirements of the CLA and the Uniform Civil Procedure Rules 2005."

Summary re Pleadings

Garling J's judgment in [*PWJ1*](#) clarifies the level of detail required in pleadings, which can be summarised as follows:

- Pleadings of breach should refer to and pay close regard to earlier pleaded duties and facts.
- The risk of harm must be identified, as well as how such a harm was caused by the breaches of any of the pleaded duties (per [s5B](#) and [s5D](#) of the CLA).
- The identification of risk of harm is particularly important where the scope of liability is not clear.
- The three elements set out in [s5B](#) of the CLA should be addressed with reference to the pleaded facts, matters and circumstances, namely that the risk of harm was foreseeable and not insignificant; and a reasonable person in the circumstances would have taken such precautions.
- Precautions to avoid risk of harm should be articulated, pursuant to [s5C](#) of the CLA, outlining: the burden of taking precautions; the fact that the risk of harm could have been avoided; and the reasons such action would have avoided the risk of harm.
- Where vicarious liability is alleged, close regard should be paid to the roles and nature of the employment or engagement held by each respective perpetrator, such that the employment or engagement is sufficient to enable a conclusion of vicarious liability to be reached. Where there is an existence of statutory duties owed by the specific perpetrator, this should be pleaded.

Ref: Amanda Do

<https://www.lawyersalliance.com.au/opinion/the-level-of-detail-required-in-pleadings-pwji-v-the-state-of-nsw>

Barriers to Settlement - Defendants

- Claims manager not “present” at the mediation
- Multiple defendants
- Lack of empathy at joint opening / like an opening address at trial
- Lack of professional courtesy / hostility in dealings
- Minimal use of the mediator
- Sitting on evidence that could persuade the Plaintiff’s approach
- Timing re Deeds as a condition of settlement



When dealing
with others:

Robert Cialdini, an expert on the science of persuasion and influence, writes that:
**we are most likely to be influenced by and
comply with people we like.**

Empathy plays
a crucial role.
Always.

- “They may forget what you said – but they will never forget how you made them feel.”
- “The ability to share someone else’s feelings or experiences by imagining what it would be like to be in that person’s situation.” Oxford Dictionary
- No participant in a mediation should ever underestimate the importance of their manner and approach to others at all stages of a mediation or negotiation. From my viewpoint, empathy often provides the vital magic ingredient to achieving a settlement.

Informal Settlement Conferences

- No direct communication between the actual parties
- No opportunity to express empathy and/or respect
- No sense of occasion
- Straight-out “horse trading”
- no buffer zone ie mediator to keep the negotiations on track





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