



Trauma Informed Practice and Mediations

Karen Stott, October 2024



Prefacing Observations

- Acknowledgement that there is a conflict between adversarial model of litigation and adopting a trauma-informed approach to dispute resolution.
- Minimising the harm to traumatised Claimants whilst protecting the State's interests, regardless of fault.
- Guidelines for the Conduct of Civil Claims.
- Model Litigant Guidelines.



Overview



- Conflict between adversarial model of litigation and adopting a trauma-informed approach to dispute resolution.
- When to obtain an IME or JME report.
- Preparing for Mediation.
- Position papers.
- Joint sessions.
- Congratulations point: when concessions are made appropriately at mediation.
- Monetary negotiations.
- Apologies and DPR's - timing, availability, preparation, implications re legal liability, etc.



Preparation Prior to Mediation

- Acknowledge challenges in providing accurate advice in difficult circumstances:
 - evidentiary challenges of historic matters, (records, memory, witnesses)
 - Time taken to gather records (departmental and medical) & take instructions
 - Time taken to get expert evidence
 - Advice re liability, causation, quantum & merits
- Benefit of IME
 - If State doesn't accept conclusions in Claimant IME then it is beneficial to obtain D IME
 - Provides the State with concrete and evidenced based reasons for rejecting C's IME
 - Gives the State more certainty in their advice. (see making offers)
 - Gives the Claimant rep scope to alter their advice. (potential to bring the parties closer)
 - Consider jointly briefing an expert where possible.



When to Obtain an IME & Report: ***before agreeing to Dispute Resolution***

- ▶ Mediations experience when only the Claimant has served an IME
- ▶ A forensic psychiatrist should:
 - ▶ Be briefed with the claimant's medical records & relevant historic records
 - ▶ Be asked to take a comprehensive history from the claimant and not merely adopt any witness statement
 - ▶ Opine on apportionment of multiple causal events to the Claimant's diagnoses
- ▶ Scope for obtaining joint IME's
- ▶ If no joint IME, consider agreeing a panel of specialists with Claimant lawyers?
- ▶ Consider agreeing on a pro-forma letter of instruction; ie which includes a requirement for the criteria referred to above?

Judicial commentary re IME reports

- **DP v Bird [2021] VSC 850, per Forrest J**
- Claimant abused by Father Coffey at age 5, during visits by the priest to his parents at home (fondling & tickling)
- Multiple traumatic events & compensation attempts:
 - Violent & abusive relationship with father
 - alleged 2yr "corporal & psychological abuse" by primary school teacher,
 - suicide of partner age 17,
 - death of parents in MVA age 19,
 - drug abuse,
 - workplace back injury,
 - difficult spousal relationship turned into disability pension carer for past 20 years,
 - sister died of a brain tumour 2014,
 - investigation parents' death,
 - 2015 claim Toward Healing (involving psych IME) - rejected,
 - failed business venture & bankruptcy
 - No previous disclosure re Father Coffey until retaining current legal reps
- Forensic Psychiatry experts:
 - Quadrio: 3+ hr in-person consultation & no background docs provided (CPTSD, Chronic Anxiety Disorders & Depressive Disorder, causing inability to complete secondary education)
 - Jager: 43min video and did not refer to background docs provided (Panic Disorder with Agoraphobia, 1/6 causally related)

Judicial commentary re IME reports

- **DP v Bird [2021] VSC 850, per Forrest J**

- Contrary to P&D psych opinions, Judge ultimately attributed P's psych injury & timing to P's more recent reading of solicitor advertisement re Father Coffey

[55] "There are multiple reasons .. for not accepting DP's account of the way in which the assaults by Coffey have affected him during the course of his life. I should make it clear, however, that I am not able to conclude that DP deliberately lied when giving evidence. Rather, he appears to be a complex individual who at times reconstructs events to suit his current perception of a particular occurrence."

[63] .."explanation is that advanced by the Diocese: that DP's account is tailored to further the particular wrong which he perceived as the cause of his problems — whatever that might be at the time..."

- Damages for \$230,000 upheld on appeal and presently awaiting High Crt decision re vicarious liability (\$200k GD and no award for economic loss)
- Trial judge comments re IME's – Dr Jager and A/Prof Quadrio:

(Despite "far greater specialist knowledge" than Dr Jager, Forrest J found:...)"Associate Professor Quadrio's opinion was based on one (admittedly lengthy) interview with DP at her rooms and DP's statement. DP's solicitors elected not to provide the Associate Professor with any material which might have assisted her at this consultation, such as reports or notes from the treating general practitioner, or the psychologists.

Nor did they provide any material that accompanied his claims for compensation from the New South Wales government, TAC and Towards Healing in respect of other unrelated insults to his psyche.

The Associate Professor did not seek any additional information and simply relied upon DP's word as to the cause of his problems and the asserted basis for the delay in disclosing the Coffey allegations. In these circumstances, reliance upon generalised propositions are ill-conceived and do not substantiate the opinion she ultimately provided...

I shall return to this when I deal with the assessment of damages, but the end result is that I cannot be satisfied that the Associate Professor had anything like a true picture of DP and this undermines any confidence I could have in her opinion....

[368] "I do not think that Dr Jager's 43-minute Skype conference with DP could give him anything near a proper understanding of DP's condition and the factors that influenced his current psychological condition."

- **Lonergan v Trustees Sisters of St Joseph & Bird, [2021] VSC 651 per Keogh J (103 to 106)**
- Claimant (married farmer in rural Vic) abused by Coffey in primary school, (undressing before & after sport in the Presbytery and weighing the boys naked; and alleged routine spanking across his bare buttocks coupled with molesting of genitals).
- Previous claim in 2000 settled by Deed and payment of \$45,000
- Forensic Psychiatry experts in current proceedings:
 - Dr Diamond: (initial 3hr consultation and follow-up 1+hr video interview) Diagnosed chronic PTSD, persistent depressive disorder with episodes of major depressive disorder, and substance use disorder, all of which he said were directly caused by the abuse and had been present since.
 - Dr Jager: (1hr video interview), similar but less detailed history obtained. Diagnosed alcohol abuse, male erectile disorder and chronic PTSD. Attributed development of chronic PTSD to the abuse, and concluded the abuse was the predominant cause of the male erectile disorder. He said it was more likely than not that Mr Lonergan would still have developed alcohol abuse absent the abuse by Coffey, and that alcohol use contributes to the erectile disorder.
 - Dr Jager: “cherry picking reasons for people drinking in Australian society is fraught and speculative, and the cause and effect relationship does not stand up when it is considered that so many non-abused people follow exactly the same pattern. In Mr Lonergan’s case the prolonged periods of not abusing alcohol suggest that peer pressure and circumstances such as parties and football functions played a big role in the initial perhaps non-hazardous consumption of alcohol which led to alcohol abuse.”
- [103] “Dr Diamond was not provided with the reports of Drs Epstein and Kornan, and Mr Purchase. Dr Diamond was initially reluctant to accept that his assessment of the lifelong impact of the abuse on Mr Lonergan might be assisted by information about how he was feeling and coping in his 30s, and said it was of no particular interest to him what Mr Lonergan may have told someone else when he was in his 30s. Dr Diamond’s apparent unwillingness to engage with information which may have informed his assessment of Mr Lonergan’s condition over time was unimpressive.... I accept that Dr Diamond has considerable experience treating and assessing victims of child abuse, and that he obtained a comprehensive history and undertook what in many ways was a careful analysis of Mr Lonergan’s psychiatric condition and the effects of the abuse on him. However, I conclude that in some respects Dr Diamond overstated the impact of the abuse on Mr Lonergan.
- “Dr Jager’s assessment of Mr Lonergan was less comprehensive than that of Dr Diamond.
- [127] Defence submission (not accepted): Mr Lonergan was an unreliable witness whose recall of details was coloured by recall bias caused by viewing past events through the filter of his current point of view.
- [142] It is relevant to consider the history of symptoms and medico-legal assessments made at the time of the earlier claim. Mr Lonergan did not complain of depressive symptoms in the Hollows questionnaire. Dr Epstein did not obtain a history or make a diagnosis of depression. Dr Kornan recorded that Mr Lonergan felt he was depressed and emotional, and diagnosed anxiety with some depression. Mr Purchase made no reference to depressive symptoms, and did not diagnose depression.
- [77-78] Mr Purchase diagnosed chronic PTSD. He said Mr Lonergan was markedly over-protective of his children, and spoke with great intensity about the need to raise his children in a caring and protective way. He considered Mr Lonergan had been significantly influenced by the abuse, which had shaped and would continue to shape his life. Of the three earlier examiners I was most impressed by the assessment of Mr Purchase, who obtained a more detailed history than either Dr Epstein or Dr Kornan, and whose analysis and opinion was insightful, and best reflects the consequences of the abuse which were being experienced by Mr Lonergan at the time. Dr Epstein’s assessment, in particular, lacked depth.
- [146] In broad terms, I find Mr Lonergan’s psychological symptoms were most florid in the period immediately following the abuse, and again in more recent years, when the abuse and its impacts had been more prominent in Mr Lonergan’s thinking. I conclude it is likely that Mr Lonergan’s symptoms moderated when he married and had a family, and was able to engage in a more stable work life.
- [157-158] Mr Lonergan submitted a reasonable assessment of general damages was \$350,000 to \$400,000. The defendants submitted an appropriate figure was in the range of \$150,000 to \$175,000. I conclude a reasonable assessment of damages for pain and suffering and loss of enjoyment of life is \$250,000. (+ Economic loss: \$390,000 and \$10,000 future treatment). P’s appeal that eco loss was manifestly inadequate was dismissed.



Preparing for Mediation

- Role of the mediator – to assist parties to prepare
- Eg, to suggest timeframes for service of evidence / exchange of information
 - Eg, ideally the Claimant's legal reps will serve sufficient evidence with enough time in advance to allow the State to know the claim to be met, advise client re same, and receive instructions on the position to be negotiated
- How the mediator prepares
 - Confer with the legal reps in advance of the day
 - Understand who will be participating & how that may influence the dynamic on the day
 - “trouble shoot” issues in advance of the day; eg if a pastoral session is requested / particulars outstanding, etc
 - Understand and manage expectations / begin the reality testing process
 - Form a view regarding joint sessions
- Position Papers (next)



Preparing for Mediation – Position Papers

- Approaches taken by practitioners in different jurisdictions
- Position Papers signal the approach being taken to the claim
- Benefit of Position Paper is it indicates prior to a mediation what will be said and what the Claimant can expect – gives the Claimant time to digest – Assists with resolution generally.
- Communicate the party's legal position in a trauma-informed manner, so that a more empathic approach may be taken in mediation joint sessions



Position Papers

- ▶ Example prefacing statements:
 - ▶ “The (Respondent) recognises the abuse that the Claimant describes and the impact that this has had on their life. Further, the State attends the mediation in good faith and with a genuine desire to resolve the claim. However, any resolution of the claim must be informed by the significant liability and causation issues the plaintiff faces in her case”...
 - ▶ “This position paper is prepared for the Respondent, for the purpose of the mediation and is provided on a confidential and without prejudice basis for the purpose of the mediation only. In setting out the position of the Respondent does not seek to cause anxiety, upset or distress to the Plaintiff in any way. The (Respondent name), however, has a duty to set out in an objective manner the likely issues in dispute which will have to be considered and determined by a court in these proceedings if the matter does not resolve.” ...



Preparing for Joint Sessions

- Prefacing comments:
 - A Claimant does not always attend joint session.
 - What do you wish to achieve in a joint session?
- Find out beforehand whether the Claimant will attend either through mediator or contacting the Claimant's legal rep.
- Indicate to the Claimant's rep what you intend to cover in a joint session.
- Consider asking the mediator for a joint session with the Claimant present and then a separate legal joint session (party reps only), eg if robust discussions are required, especially regarding the Claimant's credibility.
- Allow the Claimant the autonomy to decide on their participation.
- Consider use of a Position Paper



At Mediation

- Joint Sessions
- Concessions
 - Observation is that the State clearly and directly makes concessions where appropriate in a joint session.
 - This ranges from acknowledging the bravery of the Claimant in making the Claim
 - Making concessions regarding components of the claim and articulating them (rather than omitting or ignoring in their opening).
 - Eg abuse in care matters: Emphasising (where appropriate) that the issue is not whether the Claimant is believed or the abuse occurred but centres on legal arguments eg vicarious liability or future economic loss.
 - An apology for the abuse and acknowledgment that they were not protected and the abuse should not have occurred.
- Monetary Negotiations (next)
- Observations re approaches of various parties in other jurisdictions and by different Respondent institutions



At Mediation – Monetary Negotiations

- The State should have a clear and expected way of negotiating.
 - Ideally the State will have a reputation for making offers that are within the advice settlement range.
 - Avoid a low first offer out of settlement range. The Claimant interprets this negatively and often becomes anxious.
 - Consider 3 to 4 offers and get to your final offer quickly – be guided by the mediator.
 - The first offer should indicate where you will end up. (not large ranges bw offers). This will assist the Claimant rep and mediator prepare the Claimant for a likely final offer and what can be achieved.
- 



Apologies, DPR's & Concessions

- timing
- availability
- preparation
- implications re legal liability
- Direct Personal Response wording for potential use at mediation
- other issues



Personal Injury Claims involving Trauma – the Current Climate

- Exponential increase in claims volume
- Need for more team members
- Traumatic subject matter of the work
- Increased pressure to provide accurate advice in difficult circumstances:
 - evidentiary challenges of historic matters, (records, memory, witnesses)
 - Time taken to gather records & take instructions
 - Time taken to get expert evidence
 - Advice re liability, causation, quantum & merits
- To provide advice in a timely manner at regular / milestone intervals
- Resolve matters expeditiously and cost effectively
- Manage client expectations
- Adopt a non-adversarial approach with colleagues in an adversarial arena
- Look after your own mental health and have a life!