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The Value in a Good Conversation

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There is no "contest" between ADR (or mediation) and a good trial – one is not "better than" the other.

Mediation is not about settlement per se. It is about having the right conversation to determine if a settlement is the right thing, and, if so, to maximise the value of that settlement for all concerned.

This paper was written for International Section Conference of PIAA in Amsterdam, 8 to 10 October 2014. At that conference I will be participating in a forum with Domenic Crolla, a defence attorney from Ottawa, Canada. Domenic is the author of two articles relating to the defence of Medical Claims by judicial proceedings.[2]

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[2] Colla, D 2000, 'The Value of a Good Defence', *The Advocates Society Journal*, August; and Crolla D, 'Alternative Dispute Resolution in Contemporary Civil Justice: A Wine that is Improving with Age', written in September 2014 in preparation for the International Section Conference of PIAA in Amsterdam, 8-10 October 2014.

Introduction

When a doctor, a drug company, hospital or other medical provider gets sued, it is easy to succumb to the temptation of defining the problem as a legal one. Allegations of medical misadventure do not have origins in the law. Rather, the root cause is almost always in communication, relationship, medical or management issues.

No matter what process is used to deal with the impact of medical misadventure, at some stage there will be a conversation between the stakeholders and/or their representatives, especially between insurers and claimants. The question is not whether there should or should not be a conversation between the claimant (and/or their representatives) and the defendant (and/or their representatives), rather: what should that dialogue be about, who should participate, and when it should occur. The more effective the conversation, the more likely all parties are to have their goals, interests and needs met.

One way of having the conversation is in a court or tribunal. This is a most valuable and important option for those involved in medical disputes. The lawyers involved on both sides represent their clients with great skill and knowledge. Their clients are fortunate to have their advice and service, and the opportunity to have their claims and defences tested in a fair and transparent process.

The conversation that takes place in the court room, however, through the judge or magistrate, in a purely legal context. The procedural and evidentiary rules of courts and tribunals create a filter through which events of the past are viewed, and a language foreign to medical professionals. The result can only be an apportionment of responsibility and a financial readjustment, usually through an insurer (or the like) that pays compensation for those who are wronged. The reputation or good name of the accused medical professionals is rarely a factor in the determination. There is an inexhaustible pool of "experts" prepared to tell the judge whether or not there is fault on the part of the medical provider. The process in my country is adversarial, and is rarely about learning, though after the trial there may be lessons about how the law views the conduct of the doctor. From my experience in the law (and as the son of a surgeon), often the legal conversation is highly unsatisfactory equally from the perspective of doctors and medical professionals, and in the view of the claimant/s.

> *In the strange heat all litigation brings to bear on things, the very process of litigation fosters the most profound misunderstandings in the world.* Renata Adler

Another possibility for dealing with medical claims is that a different conversation takes place, either directly between the stakeholders, or with the assistance of another person. In this paper I will call her the mediator, though she could be called a conciliator, facilitator, case manager, neutral third party or some other name, and her role is to assist the parties to have the best conversation.

In this paper I do not want to diminish the value of a good defence or a good claim or compare a trial procedure with mediation. They are completely different conversations with very different purposes.

Instead, I want to examine the possibilities in the conversation so that lawyers, insurers, and their clients can make optimal choices about what conversations they will attempt in order to deal with allegations of medical misadventure.

The following questions need to be asked about any conversation that will take place after an event or allegation or medical misadventure:

- Should there be discussions about the prospect of resolving the allegations without the need for a trial?
- Is there any other purpose in having a conversation or conversations about what happened and its consequences?
- What else should the discussion be about?
- What are the risks and opportunities in having such a discussion?
- Who should be involved?
- Should the conversations be facilitated (mediated) and, if so, by whom?
- When should the conversation take place?

When an adverse medical outcome is defined as a legal issue, what is sometimes overlooked is an analysis of the value of a good conversation and a thorough understanding of what can be gained from principled decision-making occurring as a result of clear and honest communication.

It is dangerous to reject talking and proceeding to trial without answering these questions, just as it is risky not to examine whether the best method of resolution might be the determination of the case by the judge or magistrate. One thing that is clear is that having a conversation using ADR should never prevent anyone from seeking legal redress. It is just as obvious that the event of a contested trial where "right and wrong" is a major component of the decision will affect the capacity of the parties to have open and honest conversations aimed at achieving different outcomes. In my experience as a trial lawyer, never once after a contested adversarial trial did any of my clients (or the other parties for that instance) shake hands and say words to the effect *"OK the trial is over. Can we now discuss what we can learn from each other and what we should do to avoid similar events in the future?"*

Value in a Good Defence *and* Value in a Good Claim

There is value in a good defence. Experience informs us that there are a class of cases that just have to be litigated. G.D. Searle were correct in defending claims brought against them in relation to the Copper-7 IUD, when the science indicated that it was generally a safe and reliable form of contraception and had not caused injury.[3]

[3] G.D. Searle & Company, Ltd.

So, too, were the victims of Thalidomide correct to ask their lawyers to support them on the very long road of proving, to the satisfaction of Courts around the world, that the drug was a cause of birth defects when taken during pregnancy. The battle of Thalidomide victims was despite a robust defence. Some say the victims were never acknowledged, though their legal courage was, in hindsight, remarkable:

> *"On 31 August 2012, Grünenthal chief executive Harald F. Stock, PhD, who served as the Chief Executive Officer of Grünenthal GmbH from January 2009 to May 28, 2013 and was also a Member of Executive Board until May 28, 2013, apologized for the first time for producing the drug and remaining silent about the birth defects. At a ceremony, Stock unveiled a statue of a disabled child to symbolize those harmed by thalidomide and apologized for not trying to reach out to victims for over 50 years. At the time of the apology, there were 5,000 to 6,000 sufferers still alive. Victim advocates called the apology "insulting" and "too little, too late", and criticized the company for not compensating victims. They also criticized the company for their claim that no one could have known the harm the drug caused, arguing that there were plenty of red flags at the time."* [4]

Thalidomide was sold in the 1950s and early 1960s.

In the non-medical world, if Erin Brockovich and the people of Hinkley had not pursued with such vigour their cases against Pacific Gas and Electric Company (PG&E), they would never have been compensated for the cancers caused by the pollution that the company allowed to contaminate the water sources of the town.

There is undoubtedly much to be learned, wrongs to be righted, and a wonderful opportunity to define social norms that can be achieved by a good claim and defence being decided by a court.

As such, there is value in a good claim *and* a good defence. If nothing else, it makes for a dramatic story and, of course, assists, as does the legislature, in the definition of appropriate professional, corporate, and social behaviour.

There are many cases (in hindsight) that demonstrate meritorious claims and equally meritorious defences. Claims and defences add to our knowledge, not only of medicine and the law. For example, the famous case of *Donoghue v Stevenson*, which related to injury caused by an adventurous snail in a ginger beer bottle, changed the legal landscape of the Common Law of England and its (then) colonies by articulating the duty we have to others, even those we have never met.[5] People who we will never meet (except in court) are our "common law" neighbours and are liable if their negligence causes loss.[6]

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[4] Stock, HF 2012, 'Speech to mark the unveiling of thalidomide memorial', presented in Stolberg/Rhineland, Germany, 31 August 2012: "http://www.contergan.grunenthal.info/grt-ctg/GRT-CTG/Stellungnahme/Rede_anlaesslich_Einweihung_des_Contergan-Denkmals/224600963.jsp'.

[5] Donoghue v Stevenson [1932] UKHL 100.

[6] There are of course other requirements to found liability such as foreseeability and causation.

It was not, however, the intention of the House of Lords in England when it decided *Donoghue v Stevenson* in 1932 that it would be necessary for a Court to determine every time whether a claimant had a valid claim in negligence and the damages that flow from the negligent act.

Justice does not require that all claims be determined by Courts. Justice requires that each of us have relatively free and equal access to the courts. Justice does not guarantee us a fair outcome, rather a fair process. The sort of legal justice that I am describing here is a cornerstone of almost every advanced democracy, whether the legal system be inquisitorial or adversarial as it is in my country.

Just as there is value in a good defence, there is value in a good claim, *"as a voice through which the client's story can be told, and consequently, as an opportunity to articulate societal values".*[7]

Mediation *and* a Good Defence or Claim

Likewise, *"Alternative Dispute Resolution has a role to play in our legal system".*[8] Lawyers have always assisted their clients to settle cases. To doubt this fundamental truth about the practice of the law is to deny the realities that, with or without mediation, with or without judicial pressure, with or without modern ADR techniques, the vast majority of cases that are filed in courts throughout the world are settled outside of the courtroom. For example, 95% of cases in the United States are settled.[9]

There is, in my view, no tension or conflict between settling cases (resolving peoples' concerns and claims collaboratively) and the value of a robust defence or claim in a fair and impartial judicial system. I am a mediator, not a judge. My job would be next to impossible without parties to disputes having access to a system of final, judicial, decision-making, if simply because I do not have any power to make a final binding decision, if parties cannot agree. If there were no final arbiter, the defendant would have no incentive to negotiate. If that was the case, the alternative course of doing nothing would reward the defendant with the perfect outcome.

If there were no final arbiter, there would be no need for insurers.

If there were no final arbiter, no one would be accountable for their behaviour or actions no matter how heinous or negligent.

Lawyers and courts are fundamental to societies, probably even more necessary than democracy.

There is no "contest" between ADR or mediation and a good trial – one is not "better than" the other and I wish, quite sincerely, that some of my well-meaning colleagues, when they first "discovered" mediation, did less to talk up its value while denigrating the value of a robust judicial system. What is interesting is that many of the passionate lawyers who discovered mediation since the 1980s were retired judges (including Lord Woolf himself whose reports sparked a marked change not in the way

[7] Colla, D 2000, 'The Value of a Good Defence', *The Advocates Society Journal*, August, pg. 10, 20.
[8] Ibid.
[9] Gershuny, P., McAllister, CD., & Rainey, C. 2010, 'Reaching Settlement', *Midwest Law Journal*, vol 43, pg. 1, 7.

lawyers do business when settling cases, but in the language we use to describe those processes).[10] I have always thought it slightly unseemly that recently retired judges who seek to leverage their deserved reputation in post-bench career as a mediator speak soon after retirement of the failings of the judicial system that they themselves were part of.

There are "faults" in most judicial systems, but those faults are of process or resources, not of principle. In some places it is too expensive to access Courts and financial assistance is not available for the poor and indigent who most need access to a fair trial. In most countries the judicial process is considered far too slow and, in some, too complex to be truly accessible to common people. These faults are failings of process and are raised not to criticise the fundamental value of peaceful and fair determinations. Indeed, I wish in these times of interstate violence that there was a truly independent and trusted world court to arbitrate sovereignty issues. Imagine the wars that such a body could prevent!

It is time to stop the “contest" between the value of a judicial determination and a fair settlement, and focus instead on how lawyers, mediators, administrators, medical "consumers" and their representatives, drug companies, medical institutions and medical professionals can collaborate to achieve fairness and equity and deliver the best medical services at an affordable cost.

In what follows, I am making the assumption that doctors, drug companies, insurers and legislators are invested in the principle that medical professionals should be accountable for their practice and behaviour.

I also assume that those who suffer as a result of medical misadventure should seek and be granted fair compensation in the right circumstances, whether they are required to prove fault of not.

Rather than embark upon the reductionist argument of the competition between trial and (for instance) mediation as a methodology for addressing medical misadventure, I would rather focus on *why* insurers and their clients settle cases – drawing on my former experience both as lawyer representing insurers as well as claimants, and in my present role as a facilitator of conversations in which settlement is discussed – as a mediator. There are many reasons why people settle cases and they are valid.

I would then like to examine what mediation and ADR can bring of value (if anything) to the process of making a decision – a question inherent in every claim, that is, “should we settle or not?”.

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[10] Lord Woolf, *Access to Justice: Final Report* (1996), viewed 15 August 2014, http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm. Another example is the speech given by the Honourable Michael Kirby, where he says, “Access to justice remains a cardinal weakness ...occasioned by the highly expensive technique of interposing talented lawyers between the decision-maker and the disputants. ... I am convinced that ADR has a glowing future in Australia. That future will be assured if we are conscious of the abiding need for effective courts and judges, and of the concurrent provision of alternative ways of resolving disputes that help parties to a just outcome more quickly, more cheaply, by their own empowerment and without some of the downsides that court proceedings can entail“. (‘*Alternative Dispute Resolution – A Hard-Nosed View of its Strengths and Limitations*’, delivered at The Institute of Arbitrators & Mediators Australia, South Australian Chapter, on 29 July 2009 at the Adelaide Festival Hall, Adelaide, South Australia, Australia).

I would also like to debunk some of the myths that are sometimes raised about my present profession by those who perceive a contest between settlement using ADR and judicial determination.

Why Do Insurers and their Clients Settle Claims?

Insurers and their clients settle claims for a number of reasons:

- Because it is just and fair to do so. Justice demands that valid claims be paid quickly and fairly. If insurers are not doing this the legislators will be called upon to change the rules and claimants will rightly organise themselves politically and legally;
- In order to manage the risks of an adverse finding. Those risks include:
    - Reputational risk,
    - Health risk for all concerned, particularly as a result of the stress of leaving decision-making to a stranger, no matter how fair that stranger may be,
    - The risk to integrity and of information inherent in a judicial examination of records,
    - The risk of delay and non-financial cost on insurers, their clients and other stakeholders,
    - The risk of appeal or of perverse findings,
    - The risk of adverse precedent being created, and
    - The financial risk of an adverse finding (or even the financial risk of a favourable decision). It was once said that there are two things that have the potential bankrupt a good man: losing a court case, and winning one;
- Because they don't have any idea about the "right answer" and there is no value in finding out;
- To save legal costs or money generally (the purely economic rationale); and
- Courts don’t always get it right.[11]

Rarely do these reasons exist in isolation. Never are they divorced from other motivators such as the desire to avoid acquiring a reputation as an "easy target", or the desire to discourage frivolous claims, or the health concerns of practitioners and patients. Medical misadventure and human interactions are much more complex than that, and the systems that govern medical treatment are not simple nor what we really imagine them to be. They are infected with all manner of economic and political influence that impact on professionals, service providers, drug companies, and the like. The environment in which

[11] "The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box." To Kill a Mockingbird (23.38-40) and, “The lawyer's truth is not Truth, but consistency or a consistent expediency.” Henry David Thoreau

claims relating to medical misadventure are made is incredibly complex as decisions made need to address a myriad of legitimate concerns.[12]

Are the reasons why insurers and the other parties to litigation seek to resolve cases without a trial invalid? If so then they should be forced to go to trial. Sometimes if a doctor questions a settlement reached to address an economic imperative, shareholders will be happy if profits are greater, or other members of a mutual will be relieved to know that reserves are protected. If the risk of an adverse reputational or liability finding is high, or the determination of a case may result in serious adverse consequences for an individual or her professional colleagues, the insurer may pay more to achieve a settlement to the short term detriment of its shareholders, but to the benefit of the medical professional, and her colleagues.

Further, the legal profession is not just about rights and defences. The practice of law is about healing, learning, trust, damage control and social justice, especially when the law interacts with medicine.[13] As Scott says,

> *"Much like doctors' duties to their patients, lawyers' ethical and legal obligations to their clients include fiduciary duties to provide competent representation, to be honest, to safeguard the client's confidences, to make relevant information known to clients, to not abandon their clients, and to avoid conflicts of interest. Much like the doctor-patient relationship, the lawyer-client relationship is founded on trust and confidence, giving rise to a paramount duty of undivided loyalty."*[14]

To divorce medical litigation from the environment in which claims arise is dangerous. It is damaging and demeaning to healers and patients alike to suggest that medical litigation is only about a pot of money for the *"winner",* and damage and distress for the "*loser"*.

There are many equally, perhaps even more important, issues at stake. Making good decisions about those things – the goals, needs, interests and desires of the many stakeholders – are not always served by leaving those decisions to a judge, no matter how wise they may be. There are many reasons why Insurers and their clients settle claims. It is dangerous to generalize about those motives.

Mediation is not about settlement

As a practitioner of mediation, I am often surprised that some people (especially lawyers) suggest that mediation (and settlement generally) is in any way responsible for the civil justice system *"becoming a value neutral dispute resolution mechanism".*[15] If civil litigation is "value neutral" (and I do not believe that it is) then why is that the "fault" of the mediators and peacemakers, and not equally the

[12] For example, see Coben, JR 2007-08, 'An International Conversation About Conflict Resolution in Health Care', *Hamline Journal of Public Law and Policy*, vol 29, pg. 211.

[13] Scott, C 2007-08, 'Doctors as Advocates, Lawyers as Healers', *Hamline Journal of Public Law and Policy*, vol 29, pg. 331.

[14] Ibid, 344-345.

[15] Colla, DA 2000, 'The Value of a Good Defence', *Le Journal The Advocates' Society*, pg. 10, 16.

responsibility of lawyers or judges or the business models of the legal and insurance industries? The claim and defence and settlement of medical claims should never be value neutral, and certainly in my country it is not.

There are many "myths" about ADR and mediation, mostly repeated by the legal profession who feel that good settlements do not allow the law to do its job, and perhaps by a very small minority who mistakenly fear that the settlement of cases threatens their business models. Some of those myths are addressed in the attachment to this paper. There is one *big myth* about mediation that needs to be addressed head on so that the true value of the good conversation can be understood.

<u>The myth is that mediation is about settlement and nothing else.</u>

Mediators themselves and many lawyers are responsible for developing this myth to the regret of many talented and committed mediators. The reason why the myth is so damaging is that if, when you engage a mediator to assist with a discussion about a case, you think that she is motivated by achieving settlement above all else, then you might be concerned that the mediator will use trickery, or whatever it takes, to satisfy her egotistical desire to reach a settlement at the expense of value.

In other words, if the mediators' reward comes from settlement they might be inclined to talk their "clients" into a bad settlement.

The problem is compounded when judicial offices use mediation as a "case management" or docket management system. I have heard lawyers complain of judges who exert extreme "pressure" on parties to settle. I have been told of situations in which lawyers are scared of retribution personally or towards their clients if a case is not settled in mediation. This is a serious abuse of power.

Mediation is not about settlement *per se*. It is about having the right conversation to determine if a settlement is the right thing for the parties, and, if so, to maximise the value of that settlement for all concerned.

If anyone feels like they are being tricked, pressured or bullied into reaching a settlement, or are told by a mediator that settlement is better than pursuing or defending a court case, my advice is to get another mediator and review the quality of your legal advice and strategies.

Mediation is likewise not a forum for hand holding, incense and the joint singing of "kumbaya".[16]

The conversations possible in mediation are far too important to be premised on a philosophy that we are always better off if we "get on" and agree with each other or that disputes can be resolved in a value neutral environment. Even in mediation the value of constructive disagreement is obvious. Further, in mediation, it is possible to make good decisions while "agreeing to disagree". For instance, all parties to a case may be better served for any number of the reasons articulated above to settle the case on

[16] "Kumbaya" has been used to refer to artificially covering up deep-seated disagreements. We "join hands and sing 'Kumbaya'" or "it's all 'Kumbaya'" means we pretend to agree, for the sake of appearances or social expediency. Jeffery, Weiss (November 12, 2006). "'Kumbaya': How did a sweet simple song become a mocking metaphor?". The Dallas Morning News. Archived from the original on September 14, 2008. Retrieved July 17, 2008

agreed terms than to argue out who is right and wrong. They may walk away with a settlement of the case but not of the argument.

Mediation involves having a good conversation about the dispute or conflict that exists, and there is unlimited value in having a good conversation. The decision at the end of mediation is not as simple as "what is a good settlement", rather it is whether the settlement that is proposed is good for me, and one of the criteria for a good outcome is whether it is better than continuing with the conflict. In the case of medical misadventure, continuing the conflict involves having the case determined by the judge, that is conducting the good claim or the good defence. In that sense, the decision-making in mediation, for an insurer or any party, is never divorced from the benefit of a good defence, and rather involves a comparison between the good defence and the settlement proposed. If continuing with the good defence is better than settling, then do not settle.

Mediators sometimes talk as if each settlement is another notch on their belt, another success story to tell to the unbelievers as if there is something divinely "good" about a settlement. They do themselves a disservice.

What good mediators focus on is the good conversation, not settlement. The good conversation creates the environment in which good decisions are made. Parties to a dispute make the decisions, not the mediator, and so it makes sense, then, that the role of the mediator is the facilitation of a good conversation, not to force a single discussion focused only on settlement.

If mediation and having a good conversation was only about settlement then why is it used in various forms and guises to assist with serious complaints about abuse in defence forces,[17] to deal with complaints about doctors (even when there is no financial settlement available as part of the package of outcomes),[18] to facilitate conversations with institutions about abuse of all types,[19] to have restorative justice or engagement conversations, or to facilitate conversations in dysfunctional workplaces?

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[17] As used by the Defence Abuse Taskforce (Australia) in its Restorative Engagement Program, whose "Framework is underpinned by the best practice principles and values of restorative practice and mediation.", Defence Abuse Response Taskforce 2014, *Restorative Engagement Program Framework*, Australian Government, viewed 15 August 2014, <http://www.defenceabusetaskforce.gov.au/Outcomes/Documents/RestorativeEngagementProgramFramework.pdf>.

[18] Health Care Complaints Commission 2013, *Resolution Service*, NSW Government, Australia, viewed 15 August 2014, http://www.hccc.nsw.gov.au/About-Us/Organisational-Overview/Organisation-Overview/default.aspx.

[19] One example is the 'Toward Healing' program, the Australian Catholic Church's overarching response to dealing with sexual assault within the Church, whose procedures include referring matters to voluntary mediation "...where behaviour complained of could reasonably be considered to fall within the definition of abuse... but was not an alleged criminal offence, does not represent a serious breach of pastoral ethics and can properly be dealt with by correction and apology...", The National Committee for Professional Standards 2010*, Towards Healing, Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia January 2010*, Australian Catholic Bishops Conference and Catholic Religious Australia, viewed 15 August 2014, http://www.tjhcouncil.org.au/media/1002/towards-healing-2010-27032013-final-v2013.pdf.

In summary, the value of mediation lies more in its potential to achieve outcomes that have nothing to do with "settlement", and have everything to do with making good decisions and finding out what might be possible.

The Value in a Good Conversation

The practice of medicine is just as much about clear and appropriate communication as it is about science and the application of high level technical skills of surgeons, physician, technicians and scientists. Anyone who has any doubt about that truth need only look at the long line of cases such as *Canterbury v Spence,*[20] *Pearce v United Bristol Healthcare NHS Trust,*[21] *and Chester v Afshar.*[22] These cases demonstrate the tension between practising medicine with the highest technical skill and fairness to patients. It is little wonder that physicians are counselled to *"Listen up and Take your Communication Training Seriously".*[23] Indeed, what McAdoo concludes in his short article is that the time has come for physicians to learn from the experiences of mediators and embrace communication and conflict resolution skills as part of their training and practice, for very good therapeutic reasons.[24]

Effective practice of mediation is never value-neutral, focusing only on a financial settlement.

Williams points out that studies have indicated that patients generally sue for *"feeling as if their physician abandoned them, as if their physician was not being truthful with them, as if their concerns were not being addressed by their physician, or, as if their physician was trying to cover something up*".[25] Rabinovich-Einy argues that healthcare professionals engage in *"defensive communication"* as a result of their desire to *"obscure medical decisions and protect [themselves] from liability"*.[26] As such, effective communication in the aftermath of medical error could open up extraordinary possibilities, including discussion of some of the following:

- Movement from distributing blame towards collaboration, leading to:
    - Learning,
    - Healing, and
    - Closure;
- Everyone being heard and feeling heard;

[20] Canterbury v Spence (1972) 464 F 2d 772 (DC)
[21] Pearce v United Bristol Healthcare NHS Trust [1998] 48 BMLR 118
[22] Chester v Afshar [2004] UKHL 41.
[23] McAdoo, B 2008, 'Physicians: Listen Up and Take Your Communication Skills Training Seriously', *Hamline Journal of Public Law and Policy*, vol 29, Spring, pg. 287.
[24] Ibid.
[25] Williams, AG 2013, 'The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis"', *Stanford Law and Policy Review*, vol 23, pg 447.
[26] Rabinovich-Einy, O 2011, 'Escaping the Shadow of Malpractice Law' *Law and Contemporary Problems*, vol 74, pg 241.

- Effective decision-making about such issues as future treatment, appropriate compensation, and avoidance of future errors;
- Transparency and honesty;
- The future, for all those effected;
- Legitimacy,[27] that is what is an objective measure of what is right and fair;
- Relationships between all those affected;
- Interests and needs of all parties; and
- Options and ideas (creativity).

As Scott postulates, if parties engage openly with one another, they have the opportunity to discuss the elements of the dispute that are most important to them as an individual, rather than being confined to addressing only the facts relevant to establishing or dismissing liability.[28] Promoting information exchange also allows doctors and patients to better understand what went wrong. Surely understanding what went wrong, whether it be an error in communication or of technical execution, is valuable not only to the immediate parties, but to the profession and its patients.

If good conversations have such potential and mediators are experts at facilitating conversations, why would we not want to use them to extract these benefits? Are the skills of good conversation not valuable for lawyers and physicians?

I would argue that many of these benefits do not come from an adversarial or even a truth-seeking inquisitorial process, especially where one or all parties believe that they will be punished if they lose the contest or are found to have done wrong.

Right and wrong do come into the discussions in the mediation of a claim, though fault or otherwise may not necessarily be determinative of the outcome. Outcomes can be reached while the parties *"agree to disagree",* or leave the decision about right and wrong to someone else. Outcomes can be reached by collaboration.

If we wish to have these benefits (and I do not hear anyone say that we should not) then sometimes the only way of achieving them is to gently remove the lawyers' (figurative) boxing gloves and work together to find a solution, even if we disagree. Good decision-making in my view demands that we engage in the Good Conversation, whether or not we later decide to pursue the good defence or the good claim.

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[27] See Fisher, R, Ury, W & Patton, B 2012, *Getting to Yes: Negotiating Agreement Without Giving I*n, Third Edition, Random House Business Books, London .

[28] Scott, D 2012 'Bad Medicine and Worse Resolutions: Why the HSE Should Embrace Mediation as a Response to Medical Negligence Claims' *University College Dublin Law Review*, vol 12, pg. 89.

What can insurers and their clients do to make the most from the opportunity that mediation and the Good Conversation offers? Most of my “advice”, founded on 15 years as a mediator and 18 as an attorney, can be gleaned from my arguments above. So I will summarise how to make the most out of the chance to have a good mediated discussion:

1. Create a robust system of "triage" for claims, applying conflict mapping and management skills to seek to understand early on which cases will benefit from a good conversation, and when and with whom to have it. Triage of disputes needs the skills of lawyers and conflict management experts;

2. Choose a good mediator, not one who has the goal of the “kumbaya” conversation, nor one with a singular focus on settlement. Conversations can be robust, respectful and valuable with high quality and professional assistance. By way of example, retired judges have a tendency to address right and wrong well but ignore other more complex issues; psychologists tend to focus on the emotional needs of the parties. Expert mediators tend to be flexible about finding the best conversations to address the presenting issues;

3. Approach mediation as having the potential for more than a one dimensional march to settlement. Ask what are the communication and other needs of all concerned. Does the patient need to have their suffering acknowledged even if it is not caused by the fault of the medical professional? Can I better understand the needs of the patient, such as a desire to avoid similar events occurring to others, or special needs for treatment, security or just being heard?

4. Treat each case as it is – unique in a very complex environment. Ask what are the possible advantages of the good conversation and how can they be explored, and what are the advantages of the good defence;

5. Listening is the most important part of any good conversation. Experts’ reports and legal documents do not provide the opportunity to listen and be heard. From my experience, a willingness to hear "the other's" message, no matter how painful that might be, opens the possibility of being heard, even by our most strident critic or vociferous opponent;

6. Start with the story – there is so much to learn. The outcome will be achieved in good time and if we jump to decision-making without offering the chance of a good conversation we may be wasting an opportunity;

7. Plan your communication strategy. What do you want others to hear and how can it best be expressed to offer the highest chance of being received?

8. Know what it looks like to “not settle”. It is by comparison with the true risk and benefit of running a good defence that we ensure we do not pay too much or offer too little financially to resolve a case. Make sure before you mediate you know as precisely as possible the following:

    a. The time and effort needed to complete the good defence (my advice is to make your best estimate and add 50%),

b. The prospects of winning and losing. Be wary of self-serving or belief bias,[29]

c. The likely range of damages or compensation should the case be lost,

d. The likely impact on reputation if the case is being heard in public,

e. The costs in terms of money, time and stress in mounting the good defence,

f. The importance of having the issue determined by a judge, and

g. The appetite for risk of all those on "your side" who are impacted by the outcome;

9. Avoid taking the fight or argument into mediation. By all means be ready to discuss different case theories – this is how you will learn and understand not only what happened but also the strength and weakness of your case. Remember however that it is almost impossible to convince someone else invested in their own narrative that they are wrong. In all my years of dispute resolution I have very rarely experienced complete capitulation, even in the face of the most compelling and lucid argument.

10. Keep an open mind and look for creative options, ones that have low cost to you and high value to others.

11. Be ready to apologise when it is appropriate and respectfully disagree when it is not.

12. Prepare fully the issues of objective legitimacy, such as best practice, range of damages or compensation. Be ready with real and objective examples to illustrate your opinion and be prepared to listen to other examples that are outside your experience or knowledge.

13. Be prepared to have differences of recollection and emphasis, and different views of the law and its consequences. If you agreed you would not need to have litigation or mediation.

Conclusion

In Australia, there is a mature medicolegal environment. Good lawyers for both defendants and claimants contribute great value to the decision-making processes. They are acutely aware of the value and possibilities of both the good conversation AND the good claim or defence. They are able to collaborate to find the best process to resolve cases, and even to minimise the costs and expense of a trial. There is seldom a suggestion that participating in mediation is a sign of weakness, rather a willingness to explore its possibilities.

This environment can be created not by setting up a contest between settling and running cases, but rather by understanding the value of both.

With a better understanding of the risks and benefits of all processes, with proper triage and engagement, we can get the most value from all of them.

[29] See for instance Kahneman, D *Thinking Fast and Slow* 2011 New York: Farrar, Straus and Giroux

Annexure

Myths about Mediation

Myths about mediation that diminish its value in the eyes of consumers:

1. Mediation is value-neutral:

    - The truth is no one leaves their values and principles outside the mediator's door. Values are very much part of the decision-making environment.

2. Mediation is all about settlement:

    - See above. If a mediator thinks the process is only about settlement so as to manage a court docket or save money on legal fees, my advice is to get another mediator.

3. Mediation is a "legal" process:

    - While mediation often takes place inside a legal context, by and with lawyers, the outcomes are not always nor necessarily legal or even akin to what a court might decide. In mediation, there is the chance to ignore what might be the legal outcome, if that is in the interest of all concerned, or to find an outcome that a court could never countenance.

4. Mediation is not about justice:

    - See above re the law and values. No one will accept a settlement that is not fair to them.

5. Mediation is about managing case load of docket management:

    - If this is the focus of your mediation program, be careful and try to redirect the focus.

6. Plaintiffs and their lawyers take frivolous claims and that insurers take frivolous defences so why bother even talking:

    - Lawyers do not take frivolous claims or defences. They are far too important to waste their time in this way. That does not mean that they do not get it wrong some time.

7. Everyone must feel hard done by or unhappy for a mediation to reach a settlement:

    - Everyone must think that the outcome is better than the alternative to reach a settlement, and if settlement is better for you than the alternative course of action, why would you not be happy? Of course, we all want to get the most for ourselves and sometimes what is better than the alternative is not the most I could achieve if completely successful.

8. People settle unmeritorious cases because of mediation:

    - In my experience, this is simply not true. Would you settle an unmeritorious claim?

9. Mediation involves trickery:

    - You would not be tricked so why think of it that way? Use mediation as the chance to have the best exchange of information. There is no trick in that.

10. Mediation prevents people from having their say:

    - To the contrary. In mediation there are no laws of evidence – issues outside the legal world are valid and, if appropriate, all voices can be heard.

11. Mediation is adversarial or a contest:

    - The contest happens in court. At mediation we can collaborate even if the limit of that collaboration (and this is the minimum) is collaborating to find a resolution better for all than litigating any further.

12. Mediation is about compromise:

    - There is no law, no program, and no mediator who has the power to MAKE you compromise. Only compromise if it makes sense. When doing so, heed the advice of Abraham Lincoln.[30]

Stephen Lancken

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[30] "*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser---in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.*" The Collected Works of Abraham Lincoln edited by Roy P. Basler, Volume II, "Notes for a Law Lecture" (July 1, 1850), p. 81.