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# Mediation and the Psychologically Injured Plaintiff

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## Introduction

This work deals with the advantages and disadvantages of mediation of personal injury claims involving or comprised of psychological injuries. Because of this, it is principally, but not exclusively, concerned with workplace injuries and motor vehicle accidents. These are very commonly the subject of mediation initiatives, such as a recent Queensland Settlement Week<sup>1</sup> where they comprised 36% and 33% of cases respectively. Despite this, there is a relative dearth of empirical and anecdotal data concerning these claimants in Australian practitioner and academic journals. It is clear that all stakeholders in these claims recognise the need for faster and less expensive resolution of them<sup>2</sup>, although not all stakeholders have moved to embrace new alternative dispute resolution (ADR) initiatives<sup>3</sup>. This may be in part because personal injuries actions have not lent themselves to the requirements of classical notions of mediation as 'pure' interest-based bargaining, such as an ongoing relationship between the parties, scope for creative settlement options and the existence of multiple interests and issues<sup>4</sup>. Additionally, there may be a significant power imbalance between a plaintiff and an insurance company, which even a skilled mediator may find difficult to surmount. Finally, personal injuries mediations may suffer from a perception that a 'repeat defenders' legal representatives may form an affinity with mediators regularly used, eroding the perception of impartiality<sup>5</sup>.

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1 L Boule 'Testing the Mettle — Queensland's First Settlement Week' (1993) 1 *Australian Dispute Resolution Journal* 5.

2 C Dance 'ACDC Mediating Third Party Injury Claims' (1992) 7 *Law Society Journal* 65.

3 RK Witlin 'Workers Compensation Law: Mediation: So Misunderstood' (1991) Dec *Florida Bar Journal* 46.

4 *Supra* n.1 at 7.

5 C Chinkin and M Dewdney 'Settlement Week in New South Wales: An Evaluation' (1992) 3 *ADRJ* 93 at 118.

The peculiar difficulties that these claims impose on the 'interest-based' negotiation model of *Fisher and Ury*<sup>6</sup> are examined below in the context of the mediation process itself, following the style of Wolski's recent discussion<sup>7</sup>. There is evidence from the early experience of 'Settlement Week' mediations<sup>8</sup> conducted by various state law societies that personal injuries formed a disproportionately large share of claims unresolved long after the cause of action arose. Pleasingly, the resolution outcome rates of personal injuries mediation are well above other types of actions<sup>9</sup> and comparable with overseas mediation outcomes<sup>10</sup> in such actions. This rate differential may have arisen because of more timely 'presentation' of these cases by insurance companies when they may be more 'ripe' for mediation<sup>11</sup>. In 1991 in New South Wales, the Australian Commercial Disputes Centre assisted insurers and the NSW Motor Accidents Authority (established under the *Motor Accidents Act* 1988) to establish a voluntary Compulsory Third Party (CTP) Mediation Program run by private sector mediators, retained on a CTP Panel by the Centre<sup>12</sup>. Of perhaps more uncertain benefit to plaintiffs, it appears that the Queensland Litigation Reform Commission proposals will be allowed to go forward into statute, probably with a court-annexed mediation system incorporating cost penalties or of a compulsory character<sup>13, 14</sup> in both a requirement to mediate and selection of the mediators from court staff, eschewing mediators trained by the professional associations. In 1993, Mr Justice Pincus spoke in favour of the new proposals in these terms:

If the ADR proposals become law, it is likely that those solicitors who are presently doing some mediation work will have the opportunity of becoming court-appointed mediators which is, I suppose, a position of higher status ... The document which the Commission has prepared setting out the 'main points' of our proposal contemplates that the courts will control who the mediators are.<sup>15</sup>

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6 R Fisher and W Ury *Getting to Yes* 2nd edn Business Books Limited London 1981.

7 B Wolski 'The Role and Limitations of Fisher and Ury's Model of Interest-Based Negotiation in Mediation' (1994) 5 *ADRJ* 210.

8 B Sordo 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial' (1994) 5 *ADRJ* 62.

9 *Ibid.*

10 MM Lawonn 'Legislatively Mandated ADR in Colorado Workers Compensation' (1992) 21 *The Colorado Lawyer* 679 at 680; recording over 75% resolution of workers compensation claims in mediation.

11 C Chinkin and M Dewdney 'Settlement Week in New South Wales: An Evaluation' (1992) 3 *ADRJ* 93 at 118.

12 *Supra* n.2.

13 G L Davies Queensland Litigation Reform Commission *The Response of the Courts and Tribunals to the Challenges of ADR* First International Conference in Australia on Alternative Dispute Resolution 29 — 30 August 1992.

14 *Supra* n.10; noting evidence of about a 15% difference in successful mediation outcomes between compulsory and voluntary workers compensation mediation schemes.

15 CW Pincus Queensland Litigation Reform Commission 'Interview with Proctor' (1993) 5 *The Proctor* 7 at 8.

This present work arises from the view that psychologically injured plaintiffs may suffer severe impairments not as readily recognised as gross or deforming physical injuries. If not carefully considered by legal advisers, mediators and legislators, these impairments may adversely affect mediation outcomes with considerable personal, family and community cost. The Australian National Mental Health Statement of Rights and Responsibilities states:

Good mental health is a resource for everyday life. . . . It is the capacity of the individual and the group to interact effectively with the environment. To the individual, good mental health means happiness, competence, a sense of power over one's life, positive feelings of self esteem and capacities to love, work and play. Good mental health also allows individuals to deal appropriately with difficult life events.<sup>16</sup>

### 'Psychological Injuries' Defined

In this work, the term 'psychological injury' is used loosely. For an isolated claim of psychological injury to arise, there must generally be a definable psychiatric condition, although claims for 'pain and suffering' attendant upon concurrent physical injuries are generally made. Definable psychiatric conditions which mediators encounter in material prepared for litigation include Posttraumatic Stress Disorder, Acute Stress Disorder, Major Depressive Disorder, Generalised Anxiety Disorder, a variety of organic mental syndromes and in some cases, Psychoactive Substance Abuse and Dependence. Of these, Posttraumatic Stress Disorder is probably the most common and significant in personal injuries actions. Another, probably much rarer, category of plaintiff that mediators may encounter is a party claiming psychological injury without a diagnosable psychiatric condition or one who consciously exaggerates their symptoms for financial reward. In these circumstances mediation may be improperly agreed to or promoted by third party insurers in order to engage in a 'fishing expedition' to personally assess the plaintiff's qualities and disabilities or even to confront the plaintiff with covertly gathered evidence of his or her lack of impairment.

It is of note that *Fisher and Ury*<sup>17</sup> describe three categories of 'people problems': communication, perception and emotion problems. Additionally, mediator and party stereotypes of mental illness can pose problems in the course of mediation.<sup>18</sup> These problems may prove nearly overwhelming in dealing with psychologically injured plaintiffs, who may arrive at mediation with severe impairments of social, vocational and family functioning.

As an example of psychological injury, the diagnostic criteria for Posttraumatic Stress Disorder are detailed below.

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16 Australian Health Ministers' Conference *National Mental Health Statement of Rights and Responsibilities* (1991) Australian Government Publishing Service.

17 *Supra* n.6 at 22.

18 SM Retzinger 'Mental Illness and Labelling in Mediation' (1990) 8(2) *Mediation Quarterly* 151.

## Criteria for Posttraumatic Stress Disorder

1. The person has been exposed to a traumatic event in which both of the following were present:
  - (a) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
  - (b) the person's response involved intense fear, helplessness, or horror. Note: In children, this may be expressed instead by disorganized or agitated behaviour
2. The traumatic event is persistently reexperienced in one (or more) of the following ways:
  - (a) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. Note: In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
  - (b) recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.
  - (c) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). Note: In young children, trauma-specific reenactment may occur.
  - (d) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
  - (e) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
3. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
  - (a) efforts to avoid thoughts, feelings, or conversations associated with the trauma.
  - (b) efforts to avoid activities, places, or people that arouse recollections of the trauma.
  - (c) inability to recall an important aspect of the trauma.
  - (d) markedly diminished interest or participation in significant activities.
  - (e) feeling of detachment or estrangement from others.
  - (f) restricted range of affect (eg, unable to have loving feelings).
  - (g) sense of a foreshortened future (eg, does not expect to have a career, marriage, children, or a normal life span).
4. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
  - (a) difficulty falling or staying asleep.
  - (b) irritability or outbursts of anger.
  - (c) difficulty concentrating.
  - (d) hypervigilance.

- (e) exaggerated startle response.
5. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.
  6. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

## Advantages of Mediation

It has been stated<sup>19</sup> that formal mediation alters traditional personal injury settlement practices in the following manner:

### 1. Information

Mediation offers a party a quicker and cheaper way to learn the opponent's basic position and evaluate its underpinnings than through conventional discovery.

### 2. Communication

Mediation provides a vehicle for meaningful early and ongoing communication between the adversaries. Mediation offers the opportunity for genuine interest-centred communication, rather than the use of formal court documents such as interrogatories. This model appears to improve on conventional case development techniques which are geared toward trials which take place only in a minority of cases<sup>20</sup>. However, communication may be limited by inadequate mediation preparation<sup>21</sup> and information provision or review<sup>22</sup> placing issues unnecessarily in dispute (see below).

### 3. Case Development

Mediation creates incentives for both sides to investigate and face their own situations squarely early in the dispute. This can assist the lawyer's knowledge of the case, and assist the lawyer to feel more confident of the reasonableness of their client's negotiated outcome.

### 4. Frank Neutral Feedback

Mediation may interject into the settlement ritual the perspective of an impartial and able third-party to create a 'reality check' for parties and their lawyers, skewing positions back toward reason.

Mediators may validly describe themselves as impartial, neutral and relatively

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19 JF Henry 'ADR and Personal Injury Litigation' (1987) 4 *Trial* 73.

20 *Ibid* 73 at 76.

21 *Supra* n.10.

22 *Ibid* at 679.

objective about psychological issues relating to the factual matrix, causation and impairment about which the parties may be widely at odds prior to mediation.

Psychologically injured plaintiffs may particularly benefit from mediation because of its informal (and often less lengthy or stressful) nature, with reduced costs and increased certainty of outcome (perhaps enhancing resilience of plaintiffs in negotiation). In contrast to courts, timely breaks are readily available if the process of negotiating about anxiety-provoking events does become too debilitating. Finally, the process is confidential and the shame and guilt which many persons feel about their own injuries is not exposed to the scrutiny of their workmates, friends and family unless desired.

Finally, agreement may be established on factors which may not be relevant or admissible in court or tribunal proceedings.<sup>23</sup>

## Identifying Psychological Injuries Cases Suitable for Mediation

It appears that the following cases may be particularly susceptible to mediation. These involve<sup>24</sup>:

- lack of communication between parties
- lack of communication between lawyer and client
- questions of compensability
- (and perhaps) factual issues in dispute

Generally, injuries must have stabilised at the time of mediation. Psychiatric and psychological expert reports may fail to identify the current status of the injuries (or disorder) relative to the claimant's prognosis. This may be due to a variety of factors, including the brevity of time notice for examination or reports, or an absence of prognostic data relevant to Australian plaintiffs. It appears increasingly likely that solicitors will need to advise plaintiffs with psychological injury of the likelihood of compulsory or court-annexed mediation. However, there may be an professional obligation to discuss the availability of mediation in any event, according to the American Bar Association Commission on Professionalism<sup>25</sup>. This must entail a consideration of the costs, benefits and risks (fiscal and psychological) of the trial process to the injured plaintiff.

Additionally, in some jurisdictions, in the case of workplace injuries, employer companies may be signatories to pre-existing mediation schemes, such as the (United States) Centre for Public Resources Corporate Policy Statement on ADR<sup>26</sup>.

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<sup>23</sup> *Ibid* 679 at 680.

<sup>24</sup> *Supra* n.3 at 47.

<sup>25</sup> *Supra* n.19 at 74.

<sup>26</sup> *Ibid*.

## Personal Injuries Cases Not Suitable for Mediation

Mediation is probably not as useful or appropriate if there is a total contest of the plaintiffs claim, centred upon issues such as credibility of the claimant. Additionally, when the permanency of injury severity is in dispute, it may be better to employ a neutral third party expert evaluator prior to mediation. It has also been noted that mediation is less suited to situations of entrenched discrimination or power imbalances.<sup>27</sup> Persons with psychological injuries and mental illness may be particularly stigmatised or come from minority socio-cultural backgrounds perhaps making them both more susceptible to psychological injury (eg, immigrant blue-collar workers) and less aware and able to access resources to diminish their impairment. Ultimately, claimants should be assessed on a case-by-case basis prior to the mediation itself.

## Mediation Theory

Negotiation generally involves positional bargaining or interest-based bargaining. Negotiation authorities, such as *Fisher and Ury*<sup>28</sup>, have generally eschewed the approach of parties (or the mediator) to impose specific solutions, a technique typical of positional bargaining. The rationale for this is that in the process of maintaining successive positions, 'parties may become entrenched and may overlook or even conceal the reasons why they originally adopted those positions. Consequently, if an agreement is reached, it may not be reflective of the interests of either party.'<sup>29</sup>

The alternate view of interest-based negotiation rests upon several precepts of questionable applicability to 'third party insurer' and psychologically injured plaintiff mediation:

### 1. Separate the people from the problem<sup>30</sup>

The substantive problems in workplace litigation, may centre around longstanding conflict or pre-existing workplace stress. This stress may have been perceived or actually be a direct consequence of conflicting interpersonal styles or even premonitory vulnerability of one or both parties to emotional and functional decompensation in stressful settings. Additionally, impaired information processing abilities in organic and non-organic psychiatric disorders may severely limit the mediator's capacity to limit and define issues in a timely manner. Behavioural guidelines are an obviously important element of successful mediation. Generally interruption, recrimination and personal attacks by the parties on each other are not condoned. A joint commitment to these guidelines are sought. Despite this, flexibility in guideline application

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27 GR Clarke and IT Davies 'ADR-argument For and Against Use of the Mediation Process Particularly in Neighbourhood Disputes' (1991) 7 *Qld University of Technology Law Journal* 81 at 89.

28 *Supra* n.6

29 *Supra* n.7 at 211.

30 *Supra* n.6 at 11.

is also important. Where possible, the content of each party's statement and issues for negotiation are framed in language that is neutral, non-judgmental and mutually comprehensible to the parties. Commonalities are overtly identified in positive terms where appropriate (over-identification of commonalities may lead to the psychologically injured plaintiff believing that the mediator fails to appreciate the uniqueness of their current disability or is setting the scene to collude with the insurer). Mediators themselves should model clear communication separating desired or attributed behaviours from moral fault or lasting personality traits. Visual aids such as white boards are used to record the substance of the negotiation, provided the plaintiff does not have other organic injuries or light-sensitive post-injury headaches. Tables and seating should be pre-arranged by the mediator and enable the parties to work together side by side. Mediators should be mindful that psychologically injured plaintiffs can and do suffer from severe paroxysmal anxiety attacks ('panic attacks') and that room furniture should be arranged to allow a clear line of egress for the psychologically injured plaintiff. The room should be warm but adequately ventilated and be free of the likelihood of sudden interruption, because of the severe startle reaction these parties may manifest.

## 2. Focus on interests, not positions<sup>31</sup>

Interests of psychologically injured persons may extend far beyond monetary or rehabilitative considerations such as the need to 'tell the trauma story', or a wish to have a 'victim impact statement' heard. Because of this, the process of identifying and articulating the needs or interests of the psychologically injured plaintiffs may be particularly time consuming or difficult. Mediators may find that standard techniques of paraphrasing, reframing and summary may have to be repetitively employed. A prior knowledge of the emotional needs of this class of parties (trust, validation, security, and predicability), either through experience or research may be helpful to the mediator when building trust and rapport, and ultimately enhancing the disclosure of the parties' real interests.

Parties perceiving that their interests or other actual or potential members of their class have been discriminated against by previous offers of third party insurers or other defendants may wish for the publicity not only of a court decision, but a full hearing of the evidence. Recent controversy over sexual harassment of female members of the Armed Services in Australia and the United States provides an interesting example of this. Additionally, third party insurers may have an interest in foreclosing the issue to one of quantum, for which there are ready guidelines, in order to avoid the perception of having 'deep pockets' to financially provide for satisfaction of alternate 'interests' of injured plaintiffs. This may be particularly problematic in 'no fault' threshold or 'no fault' jurisdictions, such as in the United States<sup>32</sup>.

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<sup>31</sup> *Ibid.*

<sup>32</sup> MR Smith 'The 'Catch 22' of Underinsured Motorist Settlements' (1988) 17 *Tort and Insurance Law Reporter* 49.

### 3. Generate a variety of options for mutual gain

In personal injuries matters opportunities to develop options for shared interests may be very circumscribed, particularly when it is clear that there will not be an ongoing relationship between a third party insurer and the plaintiff. However, Wolski notes that opportunities for 'issue enlargement' in personal injuries may arise in avoiding the stress of court proceedings themselves. Indeed, there is some evidence that amongst injured plaintiffs with low self-esteem, going to court is perceived as a situation with 'high risk' outcomes, and to be avoided, even at the price of a lower quantum of damages<sup>33</sup>. In these circumstances, compromises in the face of what appears to be 'positional bargaining' may be preferable to continuing to look for an 'integrative' solution.

Importantly, the mediator should be prepared for 'hard bargaining'<sup>34</sup> techniques in these circumstances, mindful to dilute or delay the force of the defendant parties conduct and communication if it threatens to overwhelm a psychologically vulnerable plaintiff into capitulating in order to forestall further stress. Explicitly promoted goals, such as workplace rehabilitation, may not be a shared interest, but an effort by employer, third party insurer (to minimise claims for economic loss) or even perhaps government (to minimise dependency on the government welfare system). Wolski<sup>35</sup> describes an ideal setting for option generation by a psychologically-injured plaintiff: Creativity is fostered in a safe criticism-free environment. Accordingly, the mediator prevents parties from criticising each other's proposals and defers evaluation of proposals until the creative process is exhausted, in other words the act of inventing options is separated from the act of judging them. Ownership of particular options is prevented where possible by connecting components of each party's ideas.

### 4. Insist that the result be based on some objective standard<sup>36</sup>

Currently, fair and objective standards of outcome of litigation of personal injuries claims appear to centre largely upon monetary quantum. This can have the effect of narrowing the mode of resolution of interest-based bargaining to the payment of money. Even where rehabilitation programs can or have been provided, specific objective indicia of required intervention and likely outcome demonstrate considerable inter-rater variability. Objective standards should be both 'legitimate and practical'<sup>37</sup>. Mediators might refer to rule of law, precedent, community norm, the

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33 R Davis 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injuries Lawyers' (1994) 68 *Australian Law Journal* 734 at 748.

34 JJ White 'The Pros and Cons of "Getting to Yes"' (1984) 34 *Journal of Legal Education* 115 at 121 cited by B Wolski 'The Role and Limitations of Fisher and Ury's Model of Interest-based Negotiation in Mediation' (1994) 5 *ADRJ* 210 at 218.

35 *Supra* n.7 at 213.

36 *Supra* n.6 at 11.

37 *Ibid* at 62.

opinion of experts or market value by reference to which the conflict can be resolved. Having regard to socio-economic, language, ethnic and possible age and gender differences between the parties, the mediator should be wary of generating these 'standards' which may be of little day-to-day relevance to the psychologically injured plaintiff. Instead, deprived of workplace referents, the prevailing community standard may seem to the psychologically injured plaintiff to be their own (extended) family or ethnic support group, where psychic pain may be viewed in physical and other terms in non-western cultures<sup>38</sup>. The mediator should instead allow the parties to put forward their own standards which may be vigorously 'reality-tested' in caucus in the emotionally safer environment of one-to-one communication with the mediator. Where there have been ongoing issues which parties are unable to agree upon, these may be susceptible to a third party 'neutral' expert, according to the authors of a number of United States schemes<sup>39,40</sup>.

## Mediation Process

The process of mediation is dependent upon mediator strategies that embody the principles composed by *Fisher and Ury*, but are themselves be the source of difficulty for the psychologically-injured plaintiff.

### 1. Mediation Preparation

Where possible, it is desirable that parties be legally represented or cautioned against proceeding in the absence of legal counsel<sup>41</sup>. Questions of party competence to negotiate may be relevant in psychologically injured plaintiffs with concurrent organic brain damage and can be readily assessed by expert psychiatric or psychological appraisal as close as possible to the time of mediation<sup>42</sup>. Mediators themselves should consider the degree to which they consciously or unconsciously collude with the parties. Shared demographic backgrounds, the mediator's own life experience of injury or accidental bereavement should be considered before entering the mediation process. Mediators should also consider their own reactions to mentally ill persons, who may be seen as incompetent, violent, unpredictable or hopeless<sup>43</sup>. Costs of mediation may be shared between the parties, although in some jurisdictions third party insurers have tended to bear the costs of mediation wholly, except where liability is apportioned<sup>44</sup>. A standard mediation agreement should be employed,

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38 JU Ohaeri and OA Odejide 'Somatization Symptoms Among Patients Using Primary Health Care Facilities in A Rural Community in Nigeria' (1994) 151(5) *American Journal of Psychiatry* 728-31.

39 *Supra* n.10.

40 *Supra* n.19.

41 *Supra* n.2.

42 P Finucane, C Myser, and S Ticehurst ' "Is She Fit to Sign, Doctor?" — Practical Ethical Issues in Assessing the Competence of Elderly Patients' (1993) 159 *Medical Journal of Australia* 400.

43 SM Retzinger 'Mental Illness and Labelling in Mediation' (1990) 8(2) *Mediation Quarterly* 151 at 153.

44 *Supra* n.2.

although confidentiality may be more difficult to insure, especially in workplace psychological injury claims, where the claimant may share common interests or grievances about workplace stressors with other psychologically injured workers.

## 2. Mediator's opening statement

The mediator's opening speech provides an ideal opportunity to explain the mediator's role in the process and the procedure to be followed within the mediation. Personal contacts prior to the mediation should be as informal as possible, as the injured plaintiff may be anxious, depressed or ambivalent about powerful figures, such as a lawyer mediator. It is important for the mediator to establish a temporary bond with both parties, in order to foster trust and cooperation. The prior provision of written materials underlining the neutrality and impartiality of the mediator is very important. In particular, it is very important to reiterate to the plaintiff that the mediator is not a decision-maker. However, it may be necessary for the mediator to point out case strengths and weaknesses, suggest options, and make reference to applicable community standards, procedures or even case law or practice precedent<sup>45</sup>. Some plaintiffs with blue-collar, unskilled or welfare dependent socio-economic backgrounds may have an expectation of a high degree of structure with limited input required of them into the solutions developed. There is anecdotal evidence that workers compensation mediation participants prefer a mediator who actively tests the credibility and validity of the information and views presented and checks the reality of parties' positions.

They may react to their views being sought with anxious suspicion, fuelling persecutory concerns frequently present in this group of plaintiffs (eg being videotaped by private investigators) Such beliefs are grounded in substance. In 1993, the New South Wales compulsory third party insurance system recorded that investigation and legal expenses account for over 15% of costs (compared to an outlay of 2% of costs toward rehabilitation and 5% to modification and aids provision)<sup>46</sup>. In contrast in the Victorian no-fault system (up to a threshold level of 30% disability) before civil litigation may be initiated, investigation and legal costs accounted for only 3% of total costs of the compulsory third party insurance system.<sup>47</sup>

The mediator should also underline the availability of mediation breaks and should probably seek to implicitly or explicitly limit the duration of each mediation session, because of psychologically injured persons tendency to rapid fatigue and concentration difficulties. The experience of the voluntary CTP Mediation Program

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45 *Supra* n.10.

46 S Ferguson *The Compulsory Third Party Insurer's Perspective Under the Motor Accident Act (NSW) 1988* Conference: Rehabilitation and Mitigation of Damages *Motor Accident Insurance Act (Qld)* 15th October 1994.

47 B Kinlock *Motor Accident Insurance Act (Qld): 'No-Fault' and Common Law Benefits in Victoria — Rehabilitation Under the Transport Accident Act 1986* Conference: Rehabilitation and Mitigation of Damages *Motor Accident Insurance Act (Qld)* 15th October 1994.

conducted by the Australian Commercial Disputes Centre suggests that about two hours per mediation is required, depending on the complexity of the claim<sup>48</sup>. Mediators are generally trained to look beyond overt statements or behaviours ('positions') to underlying interests. For this reason, they may be advantaged when dealing with psychologically injured or mentally ill persons within the legal system. Mediators should also be sensitive to 'power imbalances' between parties; it may be especially important that the psychologically injured person feels 'heard', perhaps by being given the opportunity to speak first<sup>49</sup>.

## 2. Parties' statements

The explication by psychologically injured plaintiffs of their concerns may follow a variety of patterns. Many plaintiffs may deliver lengthy self-serving statements illustrative of the antipathy developed between the parties before, during and after the cause of action giving rise to the need for mediation. Another group of plaintiffs suffering post-traumatic stress disorders may react with minimisation of symptomatology and disability and anxious avoidance of verbal material that impliedly or explicitly evokes intrusive memories of the trauma with physiological arousal. These plaintiffs may present initially as emotionally constricted, ostensibly acquiescent individuals who demonstrate high levels of agitation as manifested by body movements, pitch and volume of speech and facial expression when distressing details of the accident are discussed. Such individuals are often highly suggestible, especially when remembering the trauma or during periods of relative 'sensory deprivation', such as protracted negotiation. They may have unrealistic ideas of their own level of causation ('guilt') of the trauma giving rise to the action. I believe that the mediator has an ethical duty to acquaint themselves with the likely symptomatology and mental state of these parties, especially under the stress of discord or protracted negotiation.

## 3. Identification of issues and agenda formation

During this component of mediation, the mediator identifies and summarises their interests, and then formulates those interests as issues or problem statements. The issues are listed in order for discussion.

Again, an adequate agenda for the psychologically-injured plaintiff should provide structured breaks with access to emotionally supportive family or friends. There should be a recognition of the hierarchical nature of the issues to be discussed. As in ordinary mediation, it may benefit the parties to firstly discuss points which can readily be agreed on, although this will vary with the factual matrix (eg admission of

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48 *Supra* n.2.

49 SM Retzinger 'Mental Illness and Labelling in Mediation' (1990) 8(2) *Mediation Quarterly* 151 at 156.

liability or agreement as to quantum of impairment).

Mediators possess particular advantages in gathering 'without prejudice' information which may be vital to a issue identification and a negotiated settlement. They may engage in authoritatively drawing attention to and restraining behaviour and talk likely to escalate conflict and psychological distress of the injured party or parties.

This focus on the mediation process may allow parties to work on less complex matters conjointly before addressing the principal substantive issues.

#### **4. Option generation**

In this part of the mediation the mediator assists the parties to work through their list of issues, generating multiple options and alternatives. The mediator should pay attention to and assist psychologically injured plaintiffs who do not appear to participate well in this stage of the process.

Individuals with post traumatic stress disorders may manifest cognitive constriction, with a foreshortened sense of their own future and difficulties in thinking outside of a narrow range of well-rehearsed and trusted planning strategies. Cognitive distortions are nearly universal amongst this group of plaintiffs. These 'thinking errors' include magnification of past errors, discounting positive contemporaneous situational attributes, catastrophising and 'fortune telling' (believing that the future will be predicated upon the mistakes of the past)

#### **5. Negotiation**

In this stage, parties are invited to select an outcome which appears to meet the interests of all parties. Abstractive abilities may be diminished in persons with head injuries and for the reasons noted above. Ability to appreciate the consequences of proposed actions or conduct may also impair decision-making in this group.

If possible, options should be not only committed to white board, but the psychologically injured plaintiff should be supplied with their own copy of these options, either by the mediator or their own legal or personal adviser if present. Psychological injuries may cause impaired attention and concentration and difficulties switching between cognitive tasks (such as possible sequelae of option selection) or impaired verbal short term memory. Some plaintiffs with associated head injuries may also have visual field deficits and difficulties with visual accommodation (focussing).

Although it is frequently suggested that using time limits to bring about a mediated settlement is acceptable, there are ethical constraints on a mediator apprised of the possibility of a psychologically injured parties tendency toward (faulty) cognitive foreclosure and suggestibility and need for time-consuming multiple modalities of information provision and frequent breaks (especially in discussing material associated with high emotional and physiological arousal).

Mediators should bear in mind that psychologically injured plaintiffs may have

pre-morbid personality or post-trauma behavioural attributes of impulsivity and disinhibition. Provision of an additional session may be a wiser and safer course for the mediator and more likely to result in mutually acceptable long-term solutions than expedient, pressured settlements.

## Future Directions

In the areas of workplace injury disputation, opportunities for mediation of claims may be diminished rather than increased in the future. The Commonwealth Industry Commission has recently released a draft report, narrowing rather than widening the scope of injured worker categories and interests and limiting resolution of claims to financial compensation via a lifetime pension<sup>50</sup>. Additionally, in this climate of government defined-plaintiff interests, it is proposed that there be criminal sanctions for unsafe work practices. For the Commission, the driving force appears to be that the slowness of common law disputes act as an impediment to people getting on with their lives. The experience of the various 'Settlement Week' programs suggest that expedited solutions are possible outside of an over-regulated statutory structure, which at best appears to propose a positional bargaining approach.

Similarly, the Queensland Law Society believes an employee's interests are best protected by the common law right to sue (and presumably mediate or informally negotiate, as in the majority of personal injury claims) for damages.

Successful common law claims restore the injured worker to her or his pre-accident condition whilst statutory workers compensation payments provide the basic safety net.<sup>51</sup>

The New South Wales Settlement Week program has given rise to suggestions that there be specialist training of mediators in personal injuries matters and the creation of a personal injuries mediators list<sup>52</sup>. Given the complexity of the matters raised in relation to psychological injuries, sub-specialist training should be made a matter of priority by the tertiary, professional and commercial mediator training organisations. The mediator who pioneered the Florida mediation program for workers' compensation in 1989 noted:

Clearly, mediation is an asset to the workers' compensation system. Those who have participated in the procedure have recognized it to be a valuable alternative dispute resolution tool. It is hoped that, through this article, the process will be better understood, so that it will be more widely utilized as an alternative to litigation.<sup>53</sup>

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50 H Fordham 'Putting the Workers Compensation Pieces Together' (1994) *Proctor* 14.

51 *Ibid* 14 at 15.

52 C Chinkin and M Dewdney 'Settlement Week in New South Wales: An Evaluation' (1992) 3 *ADRJ* 93 at 119.

53 *Supra* n.3 at 49.