
Aspects of Claims Handling

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- Manchester Concurrent Evidence Pilot
 - Professor Dame Hazel Genn
 - UCL Judicial Institute
 - January 2012



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- Concerns about the length and objectivity of experts reports has led to consideration of a practice in the Australian Courts, called Concurrent Evidence, colloquially referred to as “hot tubbing”.



Hot Tubbing

- The basic approach is for experts to prepare written reports which are then exchanged. The experts then prepare a Joint Statement incorporating a summary, and the parties produce an agreed agenda for the taking of concurrent evidence. At trial, the experts take their place together at the witness table.

Hot Tubbing

- The Judge chairs a “directed” discussion. The expert for each party is permitted to place his or her view on a particular issue. The experts are encouraged to ask and answer questions of each other. The advocates may also ask questions and the Judge will ensure that all of the experts have had an opportunity to fully explain their position.

Hot Tubbing

- As part of the Manchester Pilot, parties were invited to submit their experts to hot tubbing. It appears that 18 cases agreed to take part in the pilot, of those 15 subsequently settled before trial.
- Hot tubing was adopted in three cases.
- The report noted, that there was insufficient data to reach solid conclusions on the effectiveness of the procedure.
- The procedure is to be adopted from 1 April 2013.

Crux

- A vital or decisive stage, point, etc.

Crux

- Investigate the facts fully
- Evaluate the issues and evidence
- Set a specific long term claims handling plan

Crux

- Find a way into the maze (search for the crux of the case, the point or issue upon which the argument will turn)

Crux

- What do you want?
 - What is your aim/target;
 - What do you require to advance it;
 - Is it the final position or a stepping stone;
 - What do you do next;
 - When;
 - How;

Crux

- Liability is not a jigsaw puzzle, becoming clearer as each piece is revealed. More like a chemical equation, the final answer changing as each new element emerges.

Crux

- Preparation takes you to the top of the hill, from where you can see back over what has gone before with hindsight, and forward over what is to come with predictive facility.
- Preparation gives you cognisance, recognition if not quite pre-cognition.

Find the Crux (Point)

Sherlock Holmes and Doctor Watson are hunting the hound of the Baskervilles. They are tracking across country when night falls, they pitch their tent and go to sleep. In the middle of the night, Holmes wakes Watson. "What do you observe?" he asks.

Watson replies.

Horticulturally - I observe that we are on the moor.

Meteorologically - The clear sky tells me we will have a fine day.

Find The Crux (Point)

- Astrologically - By the position of the stars, I see we are in the northern hemisphere.
- Horologically - By the position of the moon, I see it is about 3: in the morning.

"Have I missed anything?"

"Yes, someone has stolen the tent."

Managing The Team

Set out your requirements

- Give specific instructions
- Outline the time frame
- Particularise reporting requirements

Managing the Team

The team should assist you to consider the claim by

- Identifying the claim's most important features.
- Crystallising the issues.
- Weighing all the considerations.
- Separating the heads of claim.
- Considering liability and contribution issues.
- Meeting with Counsel and experts.
- Bring forward ideas for the disposal of the claim.

Managing the Team

- Your expert will always let you down

Managing the Team

When in litigation, arbitration or adjudication

- The process
- Takes precedence over
- The principle

Managing The Team

Points of possible concern

- Creation of team structure without your knowledge.
- A team too large or too small, or of an inappropriate weight.
- Failure to advise upon strategy and tactics.
- Failure to discuss.
- Too heavy a reliance on counsel and experts.

Managing the Team

Dear Sir

A motion has been laid against an assignation and requiring an inhibition on debate, if necessary going on to poiding.

In view of events at tabling we shall crave protestation and a caution for expenses, which we shall follow by diligence.

More importantly, at the proof before answer, we shall press for assoilzie, without avizandum.

Managing the Team

Dear Sir

An application has been made against the disposal of land and requiring an order against sale at a preliminary issue, if necessary we shall proceed to an order for sale.

In view of events at the first hearing we shall request costs for the other parties' failure to appear, and provision for future costs, which we shall follow with recovery of money if appropriate.

More importantly, at the hearing of evidence and arguments on the law, we shall press for dismissal of the claim without the judge reserving the decision for consideration.



Negotiations

- You are negotiating your position with
 - The other side
 - The insured
 - Your solicitors
 - Those back at the office ? Need to prepare, so no nasty moments.
 - Reinsurers
 - Mediator

Negotiations

- **Remember**
- Negotiation is a vehicle, not an event (it exists to do, not to be)
- There is no format, there should be a planned structure
- Every point, issue or tactic may be a two edged weapon (it can be used against you as easily by you)
- Move the other side from their safe place, to a place which exposes their risk (nudge with questions, only drag with allegations if all else fails, unless you are playing the Mr Nice/Mr Nasty game)

Negotiations

- Divide the heads into hard and soft claims
- Require the claimants to build from the ground up (do not agree that you must justify slicing from the top down)
- Do not invest your manhood in the argument
- Give your opponent something he can describe as a success (if not a victory)
- Beware giving to the mediator your range of payment (the mediator will start with the claimant's bottom figure and your top figure, then attempting to draw the two together)

Negotiations

- This is an agenda for conflict
 - Help me with this...
 - What if...
 - (Agree with your opponent) yes but...
 - I agree, however...
 - Yes, but what you are really saying is...

Negotiations

- I need to explain the reason to pay, would you tell me what it is and I will write it down...
- What I think you are really saying/mean is...(we will accept/pay/contribute)
- I suppose if I ask you to contribute something, you would say no...
- This is my final offer...(never believe that, and certainly do not say it unless you absolutely mean it) (do not say it)
- Can only say it once

Differences between Negotiations and Mediation

Negotiations

Face to Face

You ask questions/make points

It is like a trial where you put your case

It is about law/fact/evidence

Mediation

Through the mediator

The mediator does so

It is like the Court of Appeal where you are questioned by the tribunal/mediator

It is based on but not about these, but about relationships/commerciality/added benefit

Differences between Negotiations and Mediation

Negotiations

It is about rights

It is about proof (liability and quantum)

Purpose payment of case immediately

Emphasises differences and argument

Mediation

It is about interest

No proof required

Flexible/structured settlements permitting non-monetary elements

Emphasises shared goal of settlement



Differences between Negotiations and Mediation

Negotiations

Predominately solicitor managed

Structured/restricted format

Play to win

Risk of continuing dispute & adverse result

Mediation

Client centred

Fluid ad hoc patterns

Play to settle

Aims for certainty of settlement

Mediation

Features of Mediation

- Mediator/facilitator/evaluator
- Neutrality of the mediator
- Mediator's authority
- A consensual approach
- An intention to settle

Mediation

- Since the mediator is attempting to achieve a compromise settlement the emphasis is upon commercial interests of the parties rather than on their rights and liabilities.
- Therefore, if it is in your interests to agree to a settlement or compromise, do so.

**Mediation is about
Interests not Rights**

What Mediation Does Not Mean

- Mediation does not mean no preparation (there is no substitute for genuine lack of preparation)
- Mediation does not mean no team (consideration should be given to whether solicitors and experts should be consulted before mediation entered into)
- Mediation does not mean no plan of campaign (consideration of the wishes and requirements of Insured/Insurer, and how to achieve them should be given)

Mediation

- Preparation
- Persuasion
- Persistence
- Flexibility
- Finality

Mediation



Mediation

- Solicitors as negotiators may be helpful; solicitors as solicitors add nothing; God will have to tell me what barristers do at mediations
- It's like buying a second hand Ford behind the pub on a Friday night

Negotiations

- If possible, give your opponents something they can sell to their own boss/client/insured/people as reasonable, if not quite successful.

Negotiations

- Why do I fail in negotiation?
- Failure to observe and listen
- The tendency to reject or ignore information
- Underestimating the other side.
- Overestimating your own side's arguments (experts, law, witnesses).

Negotiations

- How can I be a good negotiator?
- You need a talent – but not too much
- You must have a good plan
- You must practice
- You must be focused and persistent

Christmas Cracker Mottos

- Purchase finality
- Stretch to achieve settlement
- If we are still discussing this is 12 months time, you will wish you had done the deal available today
- Your expert will always let you down
- Do not invest your manhood in this
- No surprises – I can deal with a disaster, I can salvage something from the wreckage, I cannot deal with surprises

Christmas Cracker Mottos

- Head lines and bottom lines
- Solicitors are always preparing for the trial I want to avoid
- A bad settlement is better than good litigation
- Cases are rarely won in court, only lost
- Settlers bring express relief
- Solicitors, it is not your case
- Ask Counsel or solicitors, what you decide if you were trying this case today? Things may change, but what would you decide today?

Christmas Cracker Mottos

- Weakest ink – stronger than the strongest memory
- Be aware of and eschew, pompous prolixity
- 90% of the work, takes 90% of the time. The remaining 10%, takes the other 90% of the time.

Christmas Cracker Mottos

- There is no substitute, for genuine lack of preparation
- No preparation and you are busking
- When putting together the team, consider the kite and the anchor.
- It is about judgement, not necessarily expertise
- Don't do "Ya Boo" correspondence
- Remember the three keeps.
- Keep out of litigation; keep costs down; keep control.
- You are judged by the company you keep.