MEDIATION OF PERSONAL INJURY LITIGATION- WHY IT WORKS

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Introduction

Personal injury litigation encompasses any claim in which the claimant or plaintiff seeks damages for physical or mental injury as a result of the allegedly wrongful activities of the respondent or defendant. While such claims are usually made in negligence, there are also many contractual claims and actions for breach of statutory duty available to injured persons. Factual situations giving rise to such claims include motor vehicle accidents, occupier's liability, work related injuries, medical negligence and product liability claims.

Such litigation is and has been extremely common in many common law jurisdictions, including Australia. Because the author practices in that jurisdiction, many of the examples specifically mentioned in this paper are drawn from experience there. However, the philosophy which underlies much of what is said in this paper is common to any dispute wherever it arises, and many of the procedural issues (for example, the costs issues) are common to any common law jurisdiction. The paper is not intended as a guide only to those intending to mediate only in Australia. The issues raised here have a far more general application.

In New South Wales the damages which might be awarded by a judge or a jury can be very substantial. The largest verdicts are in the tens of millions of dollars by way of compensatory damages. Multimillion dollar verdicts are commonplace. Defendants are almost invariably represented by insurance companies. Some large corporations may be self-insured. Uninsured and impecunious defendants are rare but not unknown.

At the time of preparing this paper, current statistics were unavailable, but, as a guide in 2005, 1184 personal injury actions were commenced in the New South Wales Supreme Court and the Sydney Registry of the New South Wales District Court. Even after the tort law reforms enacted in every state of Australia after the Ipp Review (which had the effect of dramatically reducing the number of cases commenced) there is still a great deal of personal injury litigation conducted in Australia. In the last 10 years in Australia, mediation has become an overwhelmingly successful way of finalising personal injury litigation.

Challenges of Personal Injury Mediation

The notion of mediation of personal injury cases being successful is in some ways counter-intuitive. Laurence Boulle identifies in his work "Mediation – Principles Process Practice" (2nd edition) a number of characteristics of personal injury litigation which render it at face value unsuitable for mediation. This is specifically so if the mediator attempts to conduct the mediation utilising a purely or overwhelmingly facilitative model.

There is usually no scope in most such litigation for utilising the prospect of a continuing relationship as a basis for resolving a dispute. In much personal injury litigation the interests of the defendant/insurer are usually only financial and accordingly somewhat unilateral. An insurer is perceived as being only concerned with assessing the risk of losing, the potential damages which might be awarded to the plaintiff and the potential legal and other financial costs associated with any trial which might ensue.

There is, on paper at least, a complete inequality of bargaining power. The individual whose resources are relatively finite is usually taking on a large and experienced institutional player such as an insurance company whose resources are usually much greater than the plaintiff's.

In most such litigation there is relatively limited scope for flexibility about a range of outcomes. In most cases (but not all) the only solution which can be ultimately reached is a determination about money (whether the plaintiff succeeds, and if so, how much are his damages) and legal costs.

There is never any question of maintaining a relationship in the sense in which that might be an issue in the resolution of many commercial, family or domestic disputes. Thus the topics of discussion in nearly all such litigation revolves around only the size of the verdict given liability and damages issues and the question of the parties' legal costs.

It is rare in most personal injury mediations for the actual defendant to attend but it can and does happen more frequently in cases involving educational authorities, religious institutions and doctors and/or hospitals.

On the other hand, it is certainly not true to assume upon the assumption that the defendant's only interest is always concerned only with money and risk. The culture of mediation is very strong in Australia. The result is that insurers are most anxious to

achieve an early outcome to litigation rather than go through the delay and expense of a trial. Insurers are well aware that the longer cases go, the more expensive it will usually be for them in the event that a plaintiff succeeds. Because claims officers who actually attend mediations are under pressure generally to resolve cases early and will usually attend a mediation with sufficient money to offer to effect some sort of compromise, those claims officers and lawyers instructing them are subjected to considerable pressure to settle the case if the plaintiff can be persuaded by negotiation or otherwise to make an offer within the defendant's perception of the likely range of damages.

To suggest that all insurers are only interested in money and risk is overly simplistic. In the field of professional negligence actions against lawyers, doctors or other professionals, a number of other factors come into play. The issue of potential disciplinary proceedings or even criminal proceedings against the insured can be a factor, particularly if an insured professional gives evidence at the trial. Insurers cannot ignore such risks simply in pursuit of a financial outcome. Professional reputations are always at stake in such litigation, even if the individual defendant is successful. Even in the event of a successful outcome for a defendant/insured, the publicity resulting from a trial can be extremely damaging.

The same considerations apply in the case of personal injury litigation conducted against educational and religious authorities. While they are almost invariably insured rather than acting as self-insurers, litigation involving these bodies usually involves a large amount of input from both the insurer and the insured. In this context, issues of reputation, publicity and even political considerations are very much in the mind of anyone appearing in the interests of the defendant whether an insurer be directly involved or not.

While it is true that the defendant usually has far more resources to conduct litigation, in Australia a large percentage of personal injury litigation is conducted by plaintiffs' lawyers upon a "no-win-no fee" basis. This means that it is very unusual in such litigation for the plaintiff to be simply bled dry during the running of the case. Plaintiff lawyers tend to be astute and selective about cases they will take on. While there may be (and frequently are) sharp differences of opinion about the merits of particular cases, insurers recognise and to some extent welcome the fact that plaintiffs are more often than not represented by competent lawyers. These matters tend to lessen to some extent the theoretical problems resulting from an inequality of bargaining power.

It is often suggested that the prospects of a mediation being successful are dramatically enhanced by the presence of the actual parties involved in the original offending conduct or incident. In most cases, this is simply not true. For example, in a case involving a motor vehicle accident, the author has never experienced any expectation on the part of the plaintiff that the defendant personally attend, let alone apologise. That is not to say that the process of mediation is not greatly assisted by some form of acknowledgement and/or apology coming from those representing the defendant's interests. At the other extreme are cases involving allegations of sexual misconduct by persons in authority. In some cases, in order for a matter to resolve it is essential for psychological reasons that the perpetrator or some person from the institution of which he was a member or employee attend and acknowledge the plaintiff's grievance and feelings of hurt. In other cases involving similar factual scenarios the last thing the plaintiff wants is to be in the physical presence of such a person. Every case is different and it is up to the mediator to determine the best way to deal with each situation.

In some personal injury mediations there can be some options for a more flexible and varied result than simply payment of money. Undertakings about improving systems to prevent the tortious conduct being repeated can be remarkably effective. Other potential solutions are almost infinite depending upon the type of case and the insured involved. In a mediations conducted by the author, donations to charity or even gym memberships have been utilised as game breakers to resolve impasses to a final settlement.

Why Mediation of Personal Injury Cases Works

There is no difference in theory as to why mediation ought not be as effective in personal injury cases as any other type of case. In essence there are five reasons why mediation is so effective. The mediation process fulfils the following fundamental needs:-

(a) It is economical;
(b) It is fast;
(c) In most instances the parties perceive it to be fair;
(d) It minimises risk for the parties whether the risk be financial, cultural or risk of any other sort; and
(e) The whole process and the outcome is confidential unless the parties otherwise agree.

Many personal injury cases are extremely complex and protracted. The more complex trials can run for weeks or even months. Medical negligence trials in particular frequently take several weeks with enormous expense brought about a number of factors, including the necessity in some cases of having expert witnesses from all over the world seen in conference then attend the trial. This equates to such cases being extremely expensive to conduct. As many decisions in the High Court of Australia over the past few years clearly demonstrate, such cases throw up extremely difficult and complex legal issues, particularly in the areas of foreseeability, causation and the determination of the nature and extent of a duty of care.

Litigation in Australia involving large numbers of claimants arising from one tragic event usually end up with at least one extraordinarily complex piece of litigation for one or two of the original claimants followed by mediation of many later claims. Examples are the litigation resulting from the collision of the HMAS Voyager and the HMAS Melbourne in 1964, litigation arising from rail accidents and the litigation by asylum seekers against the Australian Government over the conduct of detention centres and the alleged wrongful incarceration of individuals in such centres.

The sinking of HMAS Voyager resulted in the Australian Navy's worst peacetime accident. 82 sailors on the Voyager were killed and there were a large number of claims by the survivors on the Voyager. A large number of sailors on the Melbourne also alleged that they suffered mental distress as result of the trauma of the accident. Up until 1992 all cases by the survivors were vigorously contested at all stages. According to a summary of that litigation in "*Mediation Principles, Process and Practice*" by Laurence Boule (2nd edition), in that year the Full Court of the Victorian Supreme Court made an award of damages to one of the survivors (*Commonwealth v Clark* (1993) Aust Torts Reporter 62,127). In the judgment in the Victorian Supreme Court one of the judges expressed displeasure at the delays in the Voyager litigation advising counsel for the Commonwealth that he believed the matters were suited to mediation. Most of the other 89 claims were mediated successfully. The total damages agreed to were $37 million and the government also paid legal costs amounting to $4.5 million. It was estimated that the mediations saved the court between 3 1/2 to 6 years of sitting time and between $2 million and $4 million in administrative costs and the parties more than $10.5 million in legal costs.

Nevertheless by the mid-2000s some 26 Supreme Court claims in Victoria, New South Wales and the ACT remained unresolved. I am informed by Mr Jeremy Gormly SC, Senior Counsel retained by the Commonwealth to assist in the final resolution of the

claims, that by the use of modified mediation process, 24 of the 26 claims were resolved saving more than the year of litigation and legal costs of up to $9 million. Most of the 26 claims had been in fact been listed for hearing at the time of the mediations. A number of the plaintiffs had already had hearings which were under appeal to a variety of appellate courts including the High Court of Australia. The total cost of settling all 24 actions which were resolved by mediation techniques was less than $1 million.

A complex personal injury case which takes several weeks or more to run will result in the costs of both parties in the preparation and conduct of the case being from several hundred thousand dollars up to $1 million or more. Almost all mediations are concluded within one day, with the total cost a small fraction of the cost of the trial.

In Australia, the plaintiff, even if he or she has assets, can be faced with financial ruin if the case is unsuccessful. The defendant is in the unfortunate situation where if it is successful, it cannot recoup the huge cost which has been expended on a trial from an impecunious plaintiff.

Mediations can be conducted at any time in proceedings or even before proceedings commence although this is unusual in larger cases. In any event, many cases can be mediated as soon as the plaintiff's claim is formulated and some expert evidence has been obtained from both sides. It is usually unnecessary and often undesirable to wait until the door of the court before thinking about mediation. Even if a mediation which is premature does not succeed in the resolution of a case, usually things will occur at the mediation which will shorten and simplify any future litigation which occurs. No case gets longer as a result of a mediation. Many extremely time-consuming and protracted pieces of litigation are either concluded in their entirety or are significantly shortened as a result of what occurs at the mediation.

Insurers like to conclude litigation as quickly as possible not only for the administrative reason that they are able to get claims off their books but for the very practical reason that they are aware that the longer cases go on the more expensive they usually become both in terms of the verdict and cost. Thus everybody has a vested interest in trying to get cases disposed of quickly. The courts do not always have the judicial facilities available to promptly dispose of cases and the push to mediation is in part driven by desire of everybody to simply get the dispute resolved.

A true mediation involves the parties making their own decision that they can live with. It is not a decision which is imposed upon them by an independent third party such as

a judge or an arbitrator. While the parties may not particularly like the agreement which they reach, in most cases they will be somewhat relieved in achieving a result which is certain. They will usually perceive the process to be fair even if the agreement which they have reached is not an easy one for them. In respect of this issue, much turns on the ability of the mediator to instil realistic notions into the minds of all parties. In order to achieve a result which the parties perceive to be fair, it is important that they be reminded that the outset that what is sought to be reached is a result with which they can live, not necessarily a result with which everyone is happy.

The relatively informal nature of mediation as opposed to court proceedings is more likely to lead parties to the view that because they are more intimately involved in the process, it is more likely to be fair. It is important that the mediator creates and maintains this perception in the minds of the parties as best he or she can. It is important in the opening session for the mediator to make perfectly clear to the parties that it is the mediation and it is the intention of the mediator only to become involved in procedural matters as and when required. An explanation of the process of reality testing, explaining that it does not mean that the mediator has taken one side over the other, is always of assistance. Telling the parties that there is no absolutely strict format for mediations and that it is their conduct during the course of the mediation which will determine how the mediator becomes involved also assists in the parties' perception that the process is fair.

There are many risks associated with litigation. There is a risk of losing the case with the immediate financial consequences of a substantial verdict or no verdict at all and costs ramifications. There is an enormous personal toll involved in litigation for everyone concerned, particularly the parties. The most common response to the question of why a case was settled is that a party "just wanted it over". A publicised "defeat" in court can also have significant personal and professional ramifications. There are always risks associated with the conduct of litigation, particularly if a party may have to disclose commercially sensitive or economically sensitive information. Plaintiffs are frequently subjected to close examination of their taxation and financial records. A consequence of that can be the imposition of a very large tax liability and/or prosecution at the hands of the financial authorities. Professionals can be subjected to disciplinary and/or criminal proceedings. Anyone who enters the witness box is at risk, if he or she is untruthful, of charges of perjury and/or contempt. This is not intended as a Draconian or comprehensive list of the dangers of litigation, but it does indicate that everyone involved is subject to risk of one sort or another which is best avoided.

Confidentiality is a major reason behind the popularity of mediation in most areas of litigation. Personal injury litigation is no different. While it is true that there are usually not the matters of commercial sensitivity which might be a factor in some commercial litigation, it is usual for everyone to find the publicity aspect unwelcome. Plaintiffs rightly regard the giving of evidence and perhaps the reporting of it in the press as humiliating and distressing, particularly when it concerns what will often be very personal aspects of their lives. Defendants who are professionals almost invariably dread the publicity. Unfortunately, the very making of allegations publicly and the reporting of those allegations can be extremely damaging to a professional's reputation. Insurers enjoy the lack of publicity because it is an unfortunate fact of this type of litigation that the publicising of one case may well be a trigger for others, particularly if there has been similar offending conduct by the same individual.

In the same context, litigation concerning the liability of products or corporations upon the basis that their products or services are allegedly defective raise similar issues. Often the reporting of the case involving an allegation, for example, that a particular restaurant was responsible for giving its customers food poisoning or that a particular machine or motor vehicle had an inherent dangerous defect, can be catastrophically damaging to the business even if the substance of the allegation is not proved in the litigation. In such cases, the defendant should be looking to resolve the case as early as possible on a confidential basis. Mediation provides this opportunity when litigation does not.

From the perspective of an educational authority or religious body, the issue of publicity and the undermining of confidence in the institution which the defendant represents are usually very significant factors. However badly some individuals have behaved, the institutions behind the defendant usually perform a great deal of good. The somewhat intensive media circus which often follows the conduct of the more lurid cases is not in the interests of anybody. The further harm which can be done to plaintiffs, even if successful in such cases can be great. While the day at a mediation is stressful in itself, it is significantly less so than the trauma of a trial and the intense questioning involved in the trial process. The conduct of mediation in a confidential setting is almost always desirable.

Where the government is a party to personal injury litigation (which in Australia is extremely common), issues of publicity become a factor with political ramifications which are exacerbated if elections are pending.

How to Best Ensure the Success of a Personal Injury Mediation

The first step in the process is for the parties to select an appropriate mediator. There is much support for the view that mediation should be left to mediators and judging should be left to the judges. There is a fundamental distinction between the role of the courts on the one hand and the provision of mediation services on another. Sir Laurence Street, who has been at the leading edge of the mediation revolution in Australia, has provided a paper entitled "*The Mediation Evolution – its Moral Validity and Social Origin"*, in which he espouses the view that it is wholly inappropriate for a Court to provide mediation services within their own institutions and fabric.

In "*Mediation Principles, Process and Practice*" by Laurence Boule (2nd edition) there is a detailed discussion about the qualities of a mediator. Such matters (adopting many of the characteristics referred to by Professor Boule) include the following:-

(a) The mediator must be trustworthy.

(b) The mediator must have empathic qualities, i.e. he or she must have the ability to listen to the grievances of both sides and leave them with the feeling that their complaints are being heard and acknowledged by him.

(c) He must have the capacity to be organised, calm and remain focussed in the face of whatever occurs during the mediation.

(d) The mediator must be creative. There may be more than one way of defining or redefining an issue in order to allow a solution to be taken.

(e) A good mediator will always be patient and be mindful of the fact that as long as people are talking, any problem, however large, remains capable of resolution. Some people take time to make a decision. Parties should be told that there is no immediate time constraint and they ought be aware that decisions made quickly can often be bad decisions.

(f) Mediation qualifications, experience and background in a particular field of discipline can be useful but are not essential. Knowledge of the subject matter of the debate, the forum and the personalities involved can all be of assistance.

(g) If there are particularly complex technical issues beyond what is encountered in normal day to day life of experienced practitioners, or there are particularly sensitive cultural issues, then it may be appropriate to consider whether co-mediators would be appropriate, one with expertise in

a scientific field or from a particular cultural background and one from another area such as a lawyer.

(h) It is important that the mediator be accountable. Professional lawyers are generally subject to disciplinary proceedings of their own Bar Association or Law Society whereas many other mediators may not be subject to such constraints.

Because most mediators in personal injury matters use a mediation model in such cases incorporating elements of an evaluative model, lawyers with experience in the field are usually engaged as mediators for the parties. While many mediators without specific expertise in the field often do an excellent job, the experience of the author is that there are a relatively small number of mediators who are retained by the parties in the majority of these disputes. Frequently the lawyers for the parties will normally choose the mediator, and presumably work on the basis that if some partly evaluative process is required, it can be an advantage if the mediator has expertise in personal injury litigation.

Having selected your mediator, the documentary preparation for a mediation is relatively simple. The mediator will send you a mediation agreement and a confidentiality undertaking. Copies of relevant pleadings, particulars and reports should be provided to the mediator. Such documents ought include statements of each party's case on liability and the salient experts reports dealing with that issue and sufficient particulars and expert reports to enable the mediator is to be familiar with the issues on damages and the quantification of that claim by the plaintiff. There may or may not be a preliminary conference or meeting. Sometimes that will take place by telephone, or it can be more formal.

When to mediate? This is a matter which can usually be well judged by lawyers experienced in these areas. From a purely practical point of view, even if one is to mediate at a time which might seem too early in the proceedings, then as long as the plaintiff is not emotionally traumatised by the experience, an early mediation will often be of some benefit, even if the case does not finally resolve. It will often narrow the issues and take away the need for a good deal of expensive evidence. In some cases an early mediation simply cannot be done - it is really a judgement call for the parties and their representatives.

Both sides must prepare position papers. A good position paper will succinctly outline the nature of the dispute, a summary of the evidence, each party's perception of the issues, the arguments in favour of its position and what it perceives to be the contrary arguments. Each side should include a summary of the evidence relating to damages and a schedule of damages which contains realistic figures in light of the evidence. Position papers which simply attack the position of the other side are never helpful.

As stated, the mediator may or may not require a joint conference. Because the litigants or at least their lawyers in such cases are usually experienced, joint conferences prior to the mediation are frequently dispensed with unless there is some particular complexity. It is the usual practice of the author to simply contact the parties by telephone on the first instance. This usually takes away the necessity for a joint conference.

As to who should be present at the mediation, both sides will almost invariably be represented by lawyers who will attend. Many lawyers are excellent problem solvers and understand that the mindset required to be successful in a mediation context is very different to the mindset required in litigation. From the plaintiff's side, the plaintiff will almost invariably attend in person unless he or she is a very small child or so disabled that he or she is unable to do so. Often a support person, a parent, close relative, spouse or friend will also be present. Usually the plaintiff, a parent or the spouse will have authority to negotiate a settlement. Sometimes, in the case of mentally disabled persons, it will be a representative of a statutory body (In New South Wales the Protective Commissioner). There must be a person present with sufficient authority to enable the mediation to meaningfully proceed.

For the defendant, there will almost invariably be one or two lawyers present, a representative of the insurance company and sometimes a representative from the insured. In personal injury mediations, it is not usual for the named defendant (if an individual) to be present. Again, it is contrary to the accepted tenets of mediation to note that provided that the defendant representatives present are able to properly acknowledge and if necessary apologise to the plaintiff, the absence of the named tortfeasor is not usually an impediment to settlement. There can be cases where the plaintiff will demand the actual perpetrator of the wrong to be present and there may be cases where for disciplinary or for reasons of criminal liability, that cannot occur. It is for the mediator to deal with those issues with the plaintiff.

It can also be an issue for the plaintiff lawyers when a representative of the defendant's insurer is not present. While in some cases there may be no good reason for this, in other cases it can be impractical because the insurer is in fact overseas or there are a large number of insurers covering a particular event that is the subject of a claim. The resolution of this issue is also a matter for the mediator. These matters may not seem particularly important but they have great psychological significance. It is very hard to persuade one side to negotiate fairly if they perceive that the other side is not acting in good faith. The absence of such representatives can be so construed. The fundamentally important issue is that whoever is there for an insurer or a defendant must have sufficient authority to settle the case in accordance with the client's ultimate instructions.

At the mediation itself, a good mediator will spend some time introducing himself or herself to the parties in an effort to ensure that they are as comfortable with him or her in the process as they can be in the circumstances. The importance of the existence of a rapport between the mediator and the parties cannot be overemphasised. Because of the role of most defendants (particularly insurers) in personal injury litigation, it is unwise to adhere to one specific model for the conduct of a personal injury mediation. For the same reason, utilising a purely facilitative model will render it difficult for the mediation to be effective in most personal injury cases. This is for the simple reason that relationships are not usually a factor in the way in which such parties approach litigation in general and mediation in particular. Likewise, while some mediators use an evaluative model, the experience of the writer is that a combination of models works best.

The classic mediation model - facilitative mediation - is directed, among other things, to maintaining relationships. Strict adherence to such a mediation model does not usually apply in insurance litigation because the interest of one side is completely unilateral, i.e. the insurer's interests are usually concerned only with the cost of the claim and risk. Usually (but not always) insurers have no interest in maintaining relationships at all. The author's experience is that the classic facilitative mediation model for such mediations usually needs some adaption, or the utilisation of a hybrid facilitative/evaluative model to be effective.

It is not a good idea in any mediation to go into it with a set plan and adhere to it religiously. Every mediation is different. All mediators have different personalities and ways of doing things, but many achieve good results by starting with a facilitative model

in a joint session, then see what the commencement of negotiations brings and deal with the balance of the mediation on a predominantly facilitative but partly and subtly evaluative manner.

In order to mediate effectively, representatives of the parties must bear in mind the importance of issues such as acknowledgement and apology in the minds of most plaintiffs. Likewise, in some types of litigation the parties must be mindful of the fact that the litigation concerns the defendant's professional standing and reputation among the public at large and his or her peers.

Particularly in cases involving tragic cases involving death, catastrophic injuries or devastating injuries to young children, feelings of being aggrieved and guilt are far more rife than they might be in what could be called *"normal"* personal injury litigation. Parties to such litigation will often have a strong psychological need to be heard and have their grievance understood. The strict nature of more formal litigation and its rules of evidence often leaves parties (who may be from the perspective of their lawyers and the judge) excellent witnesses or litigants as the case may be, intensely personally dissatisfied. Witnesses are simply not able to give their version of events as they may see it, but rather are required to respond to a specific series of questions in what may be a restrictive context. The result is that they may feel that they have failed to get their message across and harbour feelings of dissatisfaction. Such feelings can be a significant impediment to settlement.

On the other hand, an empathetic mediator who demonstrates some understanding about how a party really feels and acknowledges his or her concerns will greatly assist in having them come to a decision which will resolve the case. Court pleadings define issues and define solutions in terms of money, but often the needs of litigants can be quite different. In many cases, a plaintiff will be strongly motivated by feelings of grievance or in wanting to ensure that the offending conduct does not recur to the detriment of another person. Here issues of acknowledgement and apology will be foremost in the litigant's mind. For psychological reasons, much "conventional" litigation cannot be resolved until these needs of the litigant are met.

It is critically important that everyone appearing at the mediation has a sense of what these needs are because until they are met, many cases cannot be resolved. One technique which is often effective in resolving an impasse on the plaintiff's side in personal injury litigation is to simply ask what the plaintiff needs to be able to settle the

case. While the answer will usually include an element of money, there can be many other needs consistent with the concept of needing acknowledgement for the tragedy which has occurred.

Conclusion

When you arrive at the mediation, it is important that everyone be reasonable and maintain an open mind. Both parties should be prepared to realistically compromise but no-one should be asked to capitulate. It is rare for one side to be completely right and the other completely wrong. There are usually many sides to the same argument, and there are very rarely cases which cannot be won or lost. Remember, as Oscar Wilde said, “the truth is rarely pure and never simple”. Never forget that there is a lot to be said for the benefit to everyone in having the litigation come to an end. Finally, everyone should remind themselves that the most just and fair settlement may not please everyone (indeed it may please no-one) but it is the only way to eliminate the uncertainty of litigation.

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