

THE R3 MONTHLY



Introducing R3 Resolutions

In August 2019, I did either the bravest, or most stupid, thing of my professional career - after 25 years in private practice, I decided it was time to stop acting for one party of a dispute and turn my attention to working with all parties to facilitate a resolution.

R3 Resolutions offers a variety of services to facilitate the resolution of emotional and traumatic civil claims; with a particular focus on institutional abuse, medical negligence, personal injury and family provision claims.

Why did I do it ? - see page 2

tips and tricks

managing your client's settlement expectations starts at the beginning of the retainer - not at the beginning of the mediation.

If there are alternative ways to quantify a claim - prepare a schedule of damages for each alternative so your client can visualise it.

Why R3 Resolutions?

A few years ago I was involved in the mediation of a particularly emotional and traumatic institutional abuse claim. I worked very closely with my client, my client's insurer and the survivor's solicitor to ensure that a very trauma informed approach to the matter was adopted from day one; the investigations were very focused, the survivor's input was sought in relation to several aspects of how the examinations and mediation would be conducted and the time between commencement of the claim and mediation was very tight. The matter resolved quickly and in a manner that all parties were happy with.

But what really struck me was the contrast in the survivor before and after the mediation. At the beginning of the day the survivor presented as a fragile child trapped in a middle aged body. At the conclusion, the weight that had lifted off the survivor's shoulders was remarkable - she thanked me and said that it was the first time that she had felt that someone had really listened to her story. Since that conversation the idea for R3 Resolutions has been bubbling away ... culminating in the launch in August 2019.



"R3 Resolutions creates the right environment for claims to be resolved:

- *quicker and cheaper than litigation;*
- *in a way that addresses the real needs of the parties; and*
- *by providing a way forward for parties to start rebuilding the future they desire."*

Helping you get the most out of a mediation

"Preparation for a mediation is as important as preparing for trial. A lawyer should look beyond the legal issues and consider the dispute in a broader, practical and commercial context"

Law Council of Australia, Guidelines for Lawyers in Mediation, 2011

When I first started practising, mediation was another step in the adversarial process - an opportunity to gather information to be used against the other side in Court. It's far from that now - it is now recognised that a lawyer's role as an advocate, may also include appearing for their client in a non-adversarial setting. Mediation is complementary to litigation, and to adequately serve their client, lawyers must be able problem solve, be aware of non legal interests and negotiate. To ensure that is done properly, here are a few suggestions:

- Manage your client's expectations about the strengths and weaknesses of their position from the start of the matter. It prepares them for accepting alternative arguments on the day;
- Provide a written advice on quantum and liability well before the mediation;
- Serve all evidence and particulars of loss well before the mediation - defendants need time to get instructions from insurers and plaintiff's need time to digest advice;
- Think carefully about the mediator you retain - match their style and expertise with the dynamics of the parties and the issues in dispute;
- Get the tender bundle and position paper to the mediator well before the mediation - they need time to prepare;
- There is no place for toxic language in a position paper - you won't convince someone to give you anything if you start off by insulting them;
- Don't underestimate the utility of a pre-mediation conference, or at the very least, a phone call with the mediator - it starts building rapport and can iron out logistical barriers to settlement
- Encourage your clients to speak in the joint session, it may be their only time to say what they need to say.

***Click to download
the mediation
preparation
checklist***



We expand on these, and other, suggestions in our complementary hour CLE "getting the most out of a mediation"

How much pressure can a lawyer put on their client to settle at mediation?

It is not uncommon for information or evidence to come to light, during or immediately before, a mediation that causes a lawyer to change the advice they have previously given a client on prospects and strategy. Not all clients can digest the changes on the run - many have developed a certain narrative in relation to how a matter will be settled from which they cannot deviate. In such a situation the question becomes how much pressure can you put on them to settle when you consider settlement to be in their best interests? This was the issue in *Studer v Boettcher*.

In *Studer v Boettcher*, a client alleged that his solicitor was negligent in pressuring him into accepting an offer made at the conclusion of a lengthy mediation and which the client subsequently viewed as unfavourable. Prior to the mediation the solicitor had advised on an appropriate settlement range, however by the mediation evidence had come to light which caused the solicitor to give advice during the mediation that was "considerably more pessimistic". An element of pressure was put on the client to seriously consider the final offer made at the mediation. However, the Court dismissed the client's claim, finding that the solicitor, while exerting some pressure, did not possess any self interest in the persuasion and the client made the final decision to accept the offer.

"... The lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempted persuasion undertaken by the lawyer must be devoid of self-interest.

To minimise the chance of finding yourself in a similar situation:

- understand your client's personal and commercial (not just legal) drivers from day one and be sensitive to how developments in the litigation may be interpreted;
- make it clear in pre-mediation advices the factual material and assumptions upon which your advice is based;
- if you anticipate evidence may be served that will materially impact your advice, tell your client, in writing, ASAP; and
- when advising on any settlement offer ensure you outline all costs, risks and benefits of the offer (and keep a file note!).

What's coming up?

The next six months

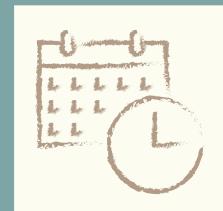
is looking to be an exciting time for R3. Many of you will have read that we were successful in obtaining a grant to run a pilot programme for a **chatbot** we have developed that minimises the trauma of compensation claims. **Please get in touch if you are interested in learning more or being part of the pilot programme.** We are particularly looking for an insurer, law firm and institution that could give feedback on how chatbots could be used to make the services they provide more agile, cost effective and trauma informed.

The next three months ...

It's all about getting those matters resolved before the end of the year. **We are available for half day and full day mediations** - making bookings via the R3 website booking page, or by contacting me on 0421 048 456 or by email jsomerville@r3resolutions.com.au

However, if you wish to make use of the downtime in January, we are also offering a **complementary one hour CLE** on "getting the most out of a mediation". Content covers ideal mediation preparations, ethical duties for lawyers in mediation, ways to make it easier for insurers to be ready to settle and a little of the neuroscience of conflict. Contact me on 0421 048 456 or by email jsomerville@r3resolutions.com.au to book in a CLE session for your team

Click the calendar to check availability and making a booking



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