

Gandalf and Prospero's second imaginary dialogue: insurers in mediation

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Scene setting

Recently, we have had cause to reflect upon how mediation works in helping to settle insurance claims. Interestingly, insurance was one of the sectors to take to mediation quite early on. Personal injury, professional negligence and clinical negligence are clearly suited to the process not least because of the people factor and yet mediation is not used to promote settlement nearly as often as it might be. However, all areas of human endeavour in which insurance is a factor can benefit from using mediation and the earlier a mediator is involved, the better.

The reflection was prompted in the first instance by a series of comments made by insurers at different times and in different circumstances over the last few weeks. The first, by a claims manager of a very successful group, well regarded for their service and focus on relationships, and who still found it difficult to see the benefits of principled negotiation: 'I open the file and start the [claims] process.' This brought to mind 'top letter' or 'get the file off my desk' syndrome, and I wondered why mediation was not a routine part of their claims process with claims managers taking the initiative, *especially* when they are, as usually is the case, defendants.

The second, from a hitherto 'serial mediation user' and very senior in his influential insurance group who said: 'I am tired of mediations where the lawyers and the mediator huddle together and decide what I will do next.' This brought to mind how frequently insurers can feel remote from the mediation process and consequently, the primary dispute.

The third, from another large insurer: 'We are designing a system for fast tracking mediation which allows me to see at every stage how we are managing the costs of mediation.' We strongly endorse the value of using mediation right from the very start of the claims process; an approach we have long thought of as an obvious step and not just in insurance claims. At the same time we have *some* reservations about placing the mediation process within a fundamentally transactional system of dispute resolution.

These comments are three of many in recent months

and they illustrate perceptions that still have currency despite years of experience and promotion of mediation. They raise other points which are important in this discussion: the effect of conditional fee arrangements (CFAs) in increasing the complexity of the dispute landscape by making the costs the primary issue and introducing an extra party (the lawyer) to the dispute, and the perception by insurers that insurance disputes are transactional in nature which undermines the potential of interest-based negotiation (mediation) as a means of settling disputes. We thought we might ask Prospero and Gandalf for their views on these points!

Prospero: It seems our mediator friends have another interesting topic for us to debate, Gandalf.

Gandalf: Indeed! The recurring theme about why mediation is not being used as much as it might be and the conundrum of using mediation in assisting the effective settlement of insurance claims. Might it have something to do with assumptions about interest-based negotiation only being relevant when there are non-monetary issues on the table, I wonder?

Prospero: Well, you can understand it when you are working from the point of view of the defendant in a claim. Settling for the least amount is going to be a reasonable goal, is it not? And surely you can see that will depend upon the merits of the claim. What else but money is on the table from the insurer's point of view?

Gandalf: That assumes that all the claimant ever needs is money. Is it possible that the claimant's emotional needs get lost in the claims process and that the value of the claim is inflated to compensate? I would think it not unusual that claimants in cases where the defendant is insured, for example in personal injury cases and professional negligence, are likely to be people who will feel a strong sense of being aggrieved by or resentful of the treatment handed out by

people they thought of as trusted professionals. When first assessing the claim, that resentment is likely to cause them to inflate the value of their alleged loss to compensate in some way. Pushed on by the refusal to pay out or a low offer, claimants may even 'live their claim' in order to prove to the defendants how damaged they have been by the event and that makes any rehabilitation a much longer prospect. At some point and precisely because the defendant is insured, a major dose of reality will come in, often through a mediator, when they realise that the defendant is in a strong position to take the case to trial simply because of the insurance cover. Having inflated the claim, and in some cases encouraged by their lawyer who may have taken the case on a CFA, everyone is on a hamster wheel!

Prospero: **So what are you saying?**

Gandalf: **Simply that the assumption that money is the only thing on the table is probably unhelpful to all the parties in reaching an early settlement. The skill, whether through negotiation or mediation, is to craft a total package that will bring the matter to an end.**

Prospero: **So what else do you think is on the table?**

Gandalf: **Anger. Boredom. Loss of face. Frustration. Fear. Loss of business. The needs of 'spectre' parties. Pride. Performance targets. They are usually somewhere in the mix. Where there are insurers in the frame as paying parties they need to pay attention to these factors since each is likely to have a 'figure' attached to it.**

Prospero: **I think that might be a difficult message for many despite the overwhelming evidence that emotions play a significant role in negotiation.**

Gandalf: **Indeed!**

Prospero: **There will be those who will argue that personal injury and professional negligence are very different from, say, a maritime or construction claim.**

Gandalf: **How so?**

Prospero: **Well, I imagine that many would say that they are just about the money! I take your point, though. You said something about 'spectre' parties. What do you mean?**

Gandalf: **I am referring to people who have an interest or a say in the deal who are not immediately connected with the primary dispute. This may be people in the room and it may be others that are not present. I had in mind CFAs themselves when I said that, but it is likely to be a factor in any situation where the defendant's liability is covered by**

insurance.

Prospero: **How do you see that affecting the negotiations at mediation?**

Gandalf: **It is possible that insurers don't feel the need to engage with the claimant until the negotiations about the numbers start. A good mediator will spend time helping the parties identify the zone of possible agreement and so negotiations might come quite late in the day after a good deal of work on underlying needs. This gives the mediator a certain challenge about keeping the insurer engaged, especially if the view is that they are only here to sign off the number. Then there is the challenge about costs!**

Prospero: **Ah yes! How many mediations have faltered at the point where the likely costs exceed the claim or when the existence or details of a CFA emerge?**

Gandalf: **CFAs undoubtedly add a very difficult dynamic to the negotiation and effectively make the lawyer a party to the dispute. Will the lawyer be prepared to compromise on her success fee?**

Prospero: **In the current economic climate it might be reasonable to assume that there will be more CFAs and that they might appear in cases which previously would never have entertained them. Surely it is just a commercial approach on the part of lawyers and frequently to win clients away from the competition.**

Gandalf: **Precisely my point! What does their general commercial success have to do with the primary dispute and looking after their clients?**

Prospero: **I have heard of several cases where the defendants were also involved with CFAs.**

Gandalf: **Have you heard of any that have involved CFAs on both sides?**

Prospero: **Not yet, but once spoken...**

Gandalf: **I do think it is a real concern for our mediator friends and for the parties. It really raises the question of using mediation earlier to avoid the costs getting to that point. I suspect that this is one of the reasons why insurers and parties feel remote from the dispute and possibly why mediators might end up huddled in the corner with the lawyers! This point is even more relevant for defendants with a less than robust defence!**

Prospero: **You will have a job persuading defendants to take the initiative, you know.**

Gandalf: **Paradoxically, that is precisely what might bring about a reasonable settlement. Early reality testing and a well thought-out negotiation strategy can put a weak defence**

in a much better position, don't you think? If you get to anchor the expectations of the claimant early on with well thought-out reasoning then you might avoid a number of issues that make claims expensive! Costs and 'bunkering' come to mind!

Prospero: **Ah! The antidote to the 'top letter syndrome.'**

Gandalf: **When the tactic is to ignore or string out the claim in the hope of wearing the claimant down it is bound to be more expensive one way or another. Even if the approach just raises the resentment level on the other side it will surely be a tougher settlement?**

Prospero: **I think we might need to be more specific about alternatives.**

Gandalf: **OK. What if insurers took a more collaborative approach? What if they prepared for negotiating the claim in the same way as our mediators prepared for mediation? Looking for common ground, seeking out the underlying needs, building rapport to enhance the relationships even though the relationships are unlikely to be ongoing – we build short-term relationships all the time, paying attention to underlying assumptions and committing to finding an early resolution. That might suggest direct contact with the claimant at some point. I sense that 'opening the file and starting the process' is a kind of automatic pilot that might be successful a lot of the time, but might also lead to unconscious habits and attitudes, provoking entrenchment on the part of the claimant and undermining what everyone says they want – settlement.**

Prospero: **Surely many will feel that this is a lot of effort and hardly an efficient approach if you have tens if not hundreds of claims on the go?**

Gandalf: **Granted, it is a longer game plan and it will depend on whether you have a bigger picture in mind for the business than just minimum payout. How else might insurers differentiate themselves in a hugely competitive market unless they have a name for prompt settlement that isn't just a financial marker for payout no questions asked/don't pay. How valuable is a reputation for engagement and efficiency?**

Prospero: **If you are suggesting a longer game plan then do you consider the appointment of a mediator right from the word 'go' part of this approach?**

Gandalf: **Now there's a thought! Especially if you have difficulties in persuading your claims managers that they should learn new negotiation skills in order to engage with the claimant!**

Notes

* Amanda Bucklow is a senior commercial mediator based in London with expertise in a wide range of commercial matters, public sector disputes and disputes involving regulated industries. She is a pioneer in expanding the use of mediation skills outside the mediation room and in using mediation for disputes previously considered not suitable for mediation. Further details can be found at www.amandabucklow.co.uk and www.blog.amandabucklow.co.uk.

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