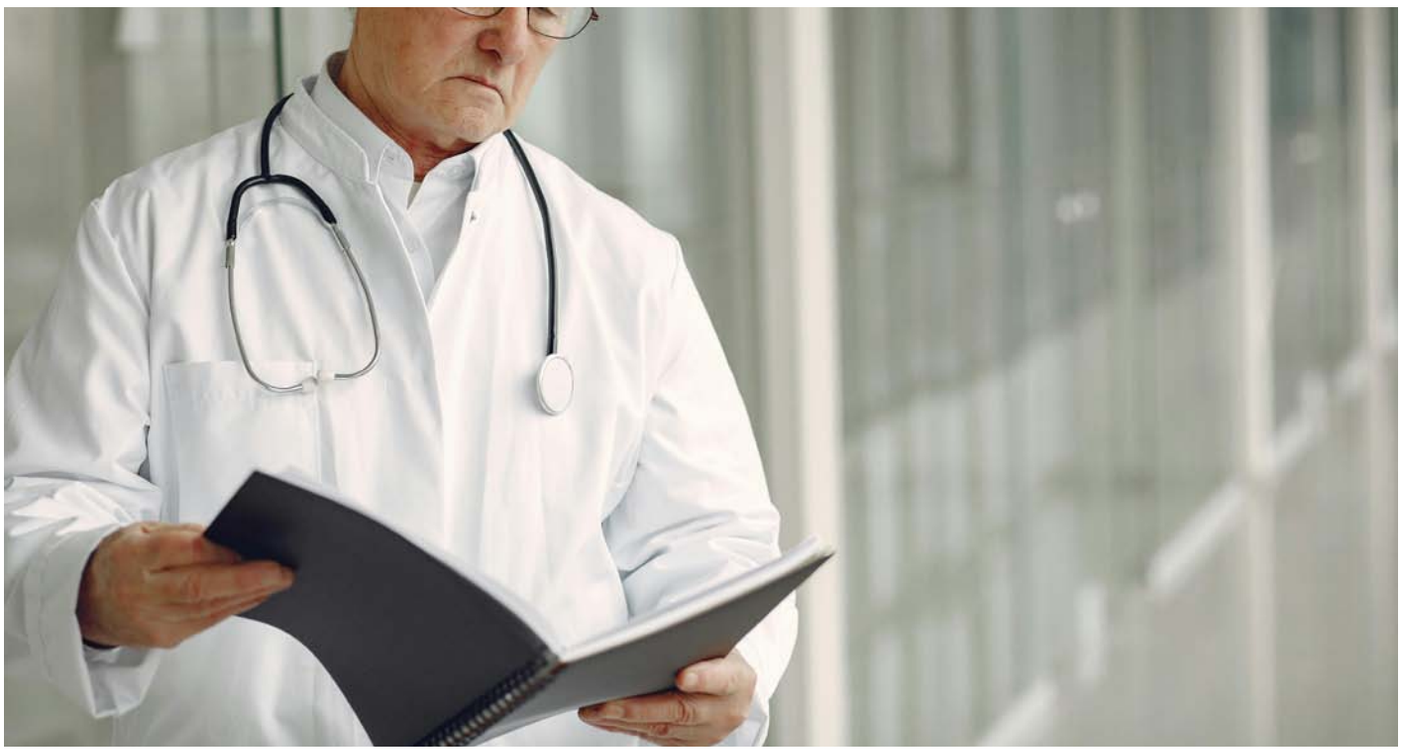

A MODEL MEDIATION?

by **LES MORISON SC**, Johannesburg Bar

The surgeon used a mode of entry generally accepted in the practice of general surgery. His insurance cover was for general surgery. When he had entered the patient's body, he knew that he might have to perform vascular surgery or more general surgery to address the patient's complaint. He was not covered by his insurers for vascular surgery. Whilst going in, he nicked a major blood vessel. The patient suffered a massive bleed on the table. It is a tragic irony of medicine that when tissue that has been starved of blood is re-supplied with blood, the blood itself can act like a poison. It is called a reperfusion injury. The patient died. Her children sued the surgeon.

He referred the claim to his insurers. They cancelled his policy and refunded the premiums. The insurer did this because the doctor was not covered for vascular surgery. The premium that he paid monthly to his insurers covered him for general surgery only. He was contemplating suing his insurers. They had not covered him for something that had gone wrong during the mode of entry which was general surgery, and he was covered for general surgery.

No, the insurers said, you intended to do vascular surgery if it became necessary and therefore the procedure was not covered. The surgeon and the insurance company went to mediation. The children who had sued the surgeon were not represented in the mediation. It seemed as if the dispute would have to go to trial. Medical experts on both sides would have to testify about the nature of the procedures used. Lawyers would argue over the interpretation of the policy. Finally, a judge would bring down the axe of the decision either in favour of the insurer or the surgeon. In the meantime, the children's litigation was continuing and putting pressure on both of them. The mediation seemed doomed.

The mediator had been trained by Conflict Dynamics. One of the soft skills that he had been trained in was to make sure that parties to the mediation were properly hosted. They needed to be made comfortable with proper supplies of food, beverages, cold drinks, water, know where the garages were, where the conveniences were and what the schedule of the day comprised. The parties had had their introductory session with the mediator and their joint session. The insurer represented by its Chief Legal Officer spoke for the specialist insurer in the medical claims industry. The surgeon spoke for himself. Separate sessions were initiated in strict confidentiality. The mediator sat with the surgeon and his legal team and explored the surgeon's situation. Then he went to the insurer and its legal team and explored the insurer's situation. He went back to the surgeon and explored more. Then he went back to the insurer and explored more. Throughout he tried to build a rapport with each client. The legal teams were not there as representatives but as advisors. The mediator avoided any attempt to evaluate or adjudicate the case. He listened and asked open-ended questions. He allowed the issues to be broadened as the parties required. He did not try and confine them to a documented case. He allowed the exploration of their positions to be wide-ranging. When the question arose about the prospects of success, he referred it to the clients' legal advisors and asked them to advise their clients. They played a constructive and supportive role, but they were not there to represent the clients who were the primary answerers of the mediator's questions.

The mediator opened each session emphasising the confidentiality of the communications in that meeting and explained that he would only communicate information to the other team if given an express mandate to communicate something, and he avoided taking notes until it came to write down what he would communicate to the other side, and then he did so with great precision. But he did not allow his notetaking to interrupt or interfere with the intent, listening and concentration as he tried to understand the real interests of each side, not their positions. Their positions were both of them that they were right and were entitled to hold their positions. The interests that the mediator was exploring did not consider the rightness or wrongness of each party's position. He was trained to investigate what they needed, what they would want in order to settle the matter. This was the one interest that was common to both. They both wanted the dispute over. They both wanted a settlement agreement drawn up then and there that could stop the dispute escalating. How to get there would become the subject of the mediation later in the day. What else they both needed from one another and what they could give to one another remained to be explored.

At mid-morning when it seemed that there was little progress, sandwiches were served. The mediator was in one of the meetings and shared the sandwiches. The insurance broker who was present for the doctor started talking more openly as the food made people more comfortable. "The real problem here," he said to the room generally, "is that now that this surgeon has had an insurance policy cancelled or voided, he cannot get insurance cover from any other insurer except at a very high premium." The broker explained that if the surgeon had to pay the higher premium to get insurance cover it would put enormous financial pressure on him. "He can only practice as a surgeon in hospitals. Private hospitals won't let a surgeon practice unless he has insurance cover. So, this claim has stopped this surgeon from being able to practice in private hospitals."

"What was that?" asked the mediator, suddenly realising that *the interests* of the surgeon, (as opposed to his *position*), had been revealed. "Yes," said the broker, "he's a young man with young children and he needs to practice in private hospitals. He is highly qualified and is now qualified as a vascular surgeon too. But he can't practice with this situation where his insurer has cancelled/voided his policy and he can't get insurance anywhere else. He needs his insurance cover to be able to practice in private hospitals."

"Can I tell the insurers that?" asked the mediator. He took a detailed instruction on what he could convey to the insurer in a handwritten note and went across to the insurance company's representatives in the other room. As he spoke to them, he could see the lights coming on in the eyes of the other team. They were on home ground now; their job was to protect and promote the business of the insurance company and there were seeds of possibility beginning to take root. The mediator explored the possibilities of the insurer providing a letter confirming that there was uncertainty about the nature of the procedure used that had ultimately caused the patient to die, and that this was the reason for the claim having been refused. The mediator thought that such a letter might help other insurers assess the risk of this surgeon differently, and be prepared to give him cover at a less than the exorbitant rate he had previously been quoted. He left them with the task of considering how that might be achieved and went back to the surgeon's team. He explained that he was trying to get a letter from the insurer that would help the doctor get insurance from other insurance companies. Then one of the doctor's team said: "But why doesn't the insurer just give him new cover? Why must we go to another insurance company. We were happy with this insurance company. We understand that there is an insoluble problem that has arisen over this one case, but we had a good relationship, and we could get cover from them again, surely, if they accept that."

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With another carefully written instruction as to what the doctor was proposing on confidential terms the mediator went back to the other room and asked the insurer's team if they would consider letting the doctor deal with the claim of the children with his own legal team, not require the insurer to cover him for that claim by the children but give him cover going forward so that he could at least pick up his practice again, go back to private hospitals and carry on practising as a surgeon. The insurer's team said they would investigate it and whether it would be necessary to load the premium with additional value to provide for increased risk and to discuss it telephonically with their actuaries.

The mediator went back to the doctor's team who expressed the view that the claim of the children could be settled and a figure substantially lower than the original claim which the insurer thought it might have to pay. The doctor's legal team were confident that they could defend the doctor against the charge of negligence but that they could also settle with the children at a figure that was acceptable to the doctor, provided he had an income going forward.

The mediator went back to the room of the insurer's team, and they confirmed that they could offer the doctor cover at a market rate. The mediator picked up a pen and said: "Right, let's write this down." And he wrote: "1. Doctor will apply for cover to insurer. 2. Insurer will provide cover 'at market rates' to the doctor. 3. If the doctor accepts the quote the insurer will provide cover. 4. The doctor will deal with the claim of the children at his own expense. 5. This settlement settles all claims of either party on a full and final settlement basis. 6. Each party will pay their own costs of the mediation."

The authorised signatories for each party were present at the mediation, as this had been part of the planning for the mediation (that they should have people in the mediation who were authorised to sign then and there and make decisions). Within the month the settlement agreement had been implemented, the doctor has cover again and is practising. The children are being settled and the insurer has an old client at a new premium back on its books. A medical negligence trial was averted, and the mediator was paid his day fee, half each by the doctor and the insurer. A