Quake recovery faults show mediation scheme needed

Mark Kelly

For some Cantabrians, this will be their sixth winter in a cracked and warped home. Their sixth winter waiting to resolve disputes with EQC or an insurer. Their sixth winter of discontent.

Sometimes that discontent will become anger, often directed at those who work for EQC or an insurer. But those people face challenges too – from budgets, over-claiming, and over-work. And some of them have not had their homes fixed either. Everyone is frustrated. It should not be this hard. It should not be taking this long.

Unsurprisingly, the frustration has generated a wave of complaints and litigation. EQC has fielded some 20,000 complaints. The Insurance and Savings Ombudsman has dealt with over 1500 complaints against earthquake insurers. Over 430 earthquake cases have been filed in the Christchurch High Court, 61% of that court's civil caseload. An extra judge was added last year to help with the work.

Most Canterbury earthquake disputes are eventually settled. And some are settled by mediation. Mediation is a facilitated negotiation process, guided by a neutral mediator. The mediator does not determine the dispute but rather helps the parties to find a deal. EQC has a complaints mediation service that is independently run by the Arbitrators' and Mediators' Institute of New Zealand. Many earthquake disputes are privately mediated.

But mediation should have been used more often, and earlier, to resolve Canterbury earthquake disputes. It is a sophisticated commercial dispute resolution process that is proven to settle cases and to save time and money. It is not holding hands and Kumbaya.

More than half of New Zealand commercial mediators see over 90% of their cases settled. US Department of Justice records for its 2012 litigation showed that mediation-like processes saved it over 1516 months of litigation time (that is, over 100 years) that year.

A study of mediated EU commercial cases found that even those that did not settle at mediation were shorter and less costly to the courts and the disputants. Many courts around the world have mediation schemes for civil cases, including England's Court of Appeal.

Mediation also provides an opportunity for catharsis. Often, mediation will be the only time that litigants get to tell their story, and express their feelings, to the other side. In earthquake insurance disputes I have mediated, it has been visibly important to give the homeowner the chance to tell their insurer how stressful the whole experience has been for them. And, having done so, the homeowner is then better able to turn and address settlement.

In the US, natural disasters, particularly hurricanes, have caused mass claims against insurers. Since Hurricane Andrew in 1992, individual states, working in conjunction with insurers and mediation bodies, have reacted to natural disasters with dedicated mediation schemes. Such schemes were set up in the aftermath of Hurricanes Katrina and Rita, and Storm Sandy. Common "ground rule" features of such schemes have included:

- they are for residential claims only;
- they are optional for the insured, but mandatory for the insurer;
- the insurer must make the insured aware of the mediation option; and
- the insurer must bear the costs of the mediation.

These US schemes have been successful, in that settlement rates are high, and mediations are convened relatively quickly. For Hurricane Katrina, settlement rates of 82% and 75% were recorded in Mississippi and Louisiana respectively, from 17,000 cases mediated within three years of the hurricane.

If there is one thing that everyone can agree about the Canterbury earthquakes, it is that we could have done better, that it should not have been this hard, and taken this long, to get insurance disputes resolved.

The sad reality is that, one day we will face another significant natural disaster. We should plan for this. In my view, New Zealand should create a template natural disaster mediation scheme, ready to go, for insurance disputes arising out of future natural disasters. Such a scheme should be agreed upon in advance by key stakeholders – government, insurers, local bodies and consumer groups, with input from a body like AMINZ.

There is much that we can learn from the US experience, and others, about how to develop such a scheme. Important issues to address will include:

- the applicability of the "ground rule" features of the US schemes;
- how such a scheme can address the psychological trauma that a disaster can cause to its victims, and its effect on decision-making. There are various options for this, including: specific training for mediators and insurer representatives; allowing cool-off periods in relation to proposed settlements; and victim support;
- managing power imbalance issues. Insurers are inevitably better resourced, and more experienced, litigators than homeowners. Ensuring homeowners have ready access to good legal and expert advice can help the balance here; and
- possibilities for neutral expert input. Many Canterbury earthquake insurance disputes arose because of differences in opinion between experts on what work is necessary. It may be possible to get beyond this, by setting up a single, entirely independent body of experts, to feed neutral analysis into disputes that both parties can rely on.

A template natural disaster mediation scheme that addresses these issues will help us to get future natural disaster insurance disputes settled fairly, and quickly, so that, after our next natural disaster, there will, hopefully, be fewer winters of discontent

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SIXTH YEAR: Some Cantabrians are still waiting for their disputes to be settled so repairs can be made to be their cracked and warped homes