

## **Mass Mediation in Disasters – Mitigating the Inherent Risks**

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### **Abstract**

*Disasters in general render victims vulnerable, especially at the hands of insurance representatives. Given the mental distress that the victims are already reeling under, among other factors, and the power that insurance companies exercise during this time, aggravates this issue. Often litigation is resorted to, but to no avail, given the inherent pitfalls of the mechanism. Mediation in such scenarios is seen as an effective remedy to resolve disputed insurance claims. In fact, the success of mediation during multiple disasters over the past few decades have proved its strength. While mediation is the best alternative, it suffers from certain risks. The aim of this paper is to therefore evaluate the special risks posed in such mass mediation. This paper will first introduce the concept of how mediation comes into play post disasters and why it is seen as the best system to resolve disputed insurance claims. It will subsequently look at some of the factors, both internal and external that pose challenges to this mechanism in the context of a post-disaster set up. This paper will subsequently analyze the different cases where mediation was used to settle the insurance claims and success of the respective programs. Lastly, this paper will then look at the implications for system designers and mediators, and finally conclude with recommendations for the furtherance of mass mediation.*

**Keywords:** Mass Mediation; Natural Disasters; Alternate Dispute Resolution; Implication

### **Post-Disaster Action**

Lessons learnt from the recent disasters show that the immediate course of action post disaster should be the 3 R's i.e. restoration, rebuilding and resurrection within the affected community.<sup>4</sup> The use of alternate dispute resolution has become more popular in the recent years with thousands of conflicts occurring overnight due to disasters, both natural and manmade.<sup>5</sup> Out of the several alternate dispute resolutions, mediation is the most preferred option to settle mass disaster occurrences due to its efficiency and detail to each individual claim.<sup>6</sup> It provides an open environment wherein both the parties have something to gain,

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<sup>4</sup> Mel Rubin, 'Disaster Mediation: Lessons in Conflict Coordination and Collaboration' (2008) 9 Cardozo Journal of Conflict Resolution, 351.

<sup>5</sup> Cindy Fazzi, 'Disaster when it Strikes, ADR can come to Rescue in Resolving Mass Tort Claims' (1998) 53 Dispute Resolution Journal.

<sup>6</sup> American Bar Association, Disaster Relief Programs <https://www.adr.org/DisasterReliefPrograms> Accessed 8 December 2022.

notwithstanding the obvious delays and financial constraints inherent in other modes such as litigation. Mass mediation has been used previously in the occurrences of Hurricane Katrina and Hurricane Rita disasters.

Mediation provides an opportunity for autonomy, empowerment and transformation as against the helplessness and disenfranchisement experienced through litigation.<sup>7</sup> This paper intends to evaluate the risks inherent in mass mediations in situations of disaster and thereafter proceeds to provide solutions with the aim of overcoming the said risks. This paper will address the possibility of a power imbalance created due to the differing parties' experience, education, and individual situation leading to an increase in the possibility of coercion and lack of informed consent. Several external factors such as cultural, political and economic, affect the distribution of power at the bargaining table.<sup>8</sup> Safeguards, which would protect the process integrity, decrease the imbalance of power between the bargaining parties and increase the awareness of the mediator to the special risks posed by mass disaster situations can be introduced to increase the viability of mediation.<sup>9</sup>

### **Mass Disaster Mediation**

Disaster, whether natural or other, leave hundreds or thousands at the mercy of insurance claims, each with its own individual dimensions. Owing to the difference in claim amount asked and claim amount awarded, results in a dispute. In such a scenario, litigation is far from an ideal remedy, especially for someone who has just suffered the blow of a disaster. Delays in litigation, further exacerbated by insurance representatives' tactics, huge costs along with already existing trauma are few of the reasons why litigation is not sought after. Alternative Dispute Resolution mechanisms, thus, provide a quick and effective remedy against such disputes. Dispute resolution professionals bring to the table skills of deep listening, empathy, validation and respect for human dignity.<sup>10</sup> These skills are necessary in a set up where people have suffered the loss of life and/or property and are in the process of dealing with emotional shock, and thus, find themselves in a spot wherein another person (say an insurance representative) is in position to take undue advantage of these factors.

Another benefit of such processes would be an expedite claims process with the insurance companies and their risk assessment being able to get claims off their books at the earliest. There is a reason why mediation is rather sought after amongst other alternatives. First, mediation provides an informal set up wherein parties are free to go beyond the rules, and the parties are therefore, able to generate solutions that cater to their needs.<sup>11</sup> Secondly, given the exorbitant delays in litigation, mediation reduces the time, especially in such cases where

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<sup>7</sup> Nadja Alexander, 'Four Mediation Stories from Across the Globe' (2010) 74(4) Rabel Journal of Comparative and International Law, 6.

<sup>8</sup> Phillip H Gulliver, *Disputes and Negotiations: A Cross Cultural Perspective* (New York Academic Press 1979)

<sup>9</sup> Paul Ernst Wehr, *Conflict Regulation* (Routledge, 2020).

<sup>10</sup> Cynthia Mazur, 'Working Towards Critical Mass, FEMA, ADR and Disasters' (2006) 13(1) Dispute Resolution Journal, 9.

<sup>11</sup> Robert A Baruch Bush & Joseph P Fogler, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27(1) Ohio State Journal on Dispute Resolution, 1.

rapid solutions and therefore rapid rebuilding and rehabilitation is the need of the hour.<sup>12</sup> A person struggling to find a roof over their head that they lost to a disaster would appreciate quicker relief against insurance claim disputes, as opposed to long waiting periods that are characteristic of litigation.<sup>13</sup> Secondly given the power imbalance present during litigation, can further erode the faith of litigants in truly getting justice.

Overall mediation is much more conducive to social harmony as it focuses on party agreements thereby avoiding formal adjudication as to labelling the parties as right and wrong.<sup>14</sup>

### **Earliest Attempts At Mass Mediation**

The earliest attempt at mass litigation was witnessed in lawsuits (tort litigation) against the use of Agent Orange by Viet Nam Veterans<sup>15</sup> who numbered between two to three million (apart from claimant families). It is then that Kenneth R Feinberg – now known as “one of the best known figures in conflict resolution” owing to the sheer number of mass mediations he conducted subsequently – was called to mediate these cases. Discovering the untapped potential of mediation and its ability to release the courts of the massive burden that comes in the aftermath of disasters, mediation was acknowledged as the best alternative to litigation.<sup>16</sup> Given the huge proportions of damage that disasters inflict, it comes as no surprise that courts, in the event of litigation would be bogged with a slew of cases, which can otherwise be resolved through mediation.

### **The Work Of The American Arbitration Association**

American Arbitration Association or AAA offers dissatisfied claimants to file their dispute, post which mediation process commences.<sup>17</sup> Now there are two outcomes of this: one where the settlement occurs, or second where there is an impasse leading to Arbitration or Litigation. It must be mentioned that the success figures of AAA are staggering and therefore reaffirm the hope of ADR mechanisms.

On August 24, 1992 Southern Florida experienced a mass disaster, named Hurricane Andrew, which damaged an estimate of \$30 billion while leaving 30 dead and 250,000 homeless. In such a situation a claims resolution program titled American Arbitration Association (AAA) was established by the Department of Insurance, Florida, to cover up the numerous pending claims. The AAA processed 2400 claims with 92% of them being settled within a year (American Arbitration Association; Mississippi Insurance Department).

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<sup>12</sup> David L Lane, ‘The Storm is just beginning when the hurricane finally ends: Applicability of Mediation to Settlement of Insurance Claims in Mass Disasters’ (2009) 3, American Journal of Mediation, 51.

<sup>13</sup> Linda Baron, ‘Disaster Basics: The Life Cycle of a Disaster and the Role of Conflict Resolution Professionals’ (2008) 9 Cardozo Journal of Conflict Resolution 301.

<sup>14</sup> Shahla F Ali, ‘Mass Claims Mediation in China’ (2016) 10(2) The Journal of Comparative Law, 147.

<sup>15</sup> Peter H Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Court* (Belknap Press of the Harvard University Press 1998).

<sup>16</sup> Kenneth R Feinberg, *Who Gets What? Fair Compensation After Tragedy and Financial Upheaval* (Public Affairs: Perseus Book Group 2012)

<sup>17</sup> American Arbitration Association, Disaster Relief Programs, <https://www.adr.org/DisasterReliefPrograms> Accessed 8 December 2022.

The work done by the AAA has been used as a model in the post 1994 California Northridge earthquake and the post Hurricane Iniki dispute process. The success of the AAA and the other models built around it led to the formation of permanent insurance mediation programs to be established in the cities of Florida, New York and California. Similarly, in the aftermath of Hurricane Katrina and Rita, there was a settlement rate of 74 per cent and 82 percent respectively.<sup>18</sup> The settlement rate in the aftermath of Hurricane Sandy was also high.<sup>19</sup>

The AAA has participated in numerous ADR initiatives and has shown tremendous progress. There is a need to value such programs and initiatives as they pose as an alternative to litigation which helps disaster victims to cope with their post-disaster life and avoid the long time-taking and stressful litigation process. That being said, the system faces some inherent pitfalls<sup>20</sup> as well be discussed below.

## **Factors Affecting Mass Mediation**

### **External Factors**

#### **Imbalance Of Bargaining Power**

Power is mostly seen through economic or gendered lens, which is just two of the many factor that encompass power. Diane Neumann has listed ten factors, that comprise of “Belief System, Personality of the Individual, Self-Esteem, Gender, Selfishness, Force (willingness to use coercion or threats), Income, Knowledge (the possession of information), Status or age and Education.”<sup>21</sup> Joan B Kelly has similarly listed factors including “history and dynamics of disputant relationship, personality and character traits, cognitive style and capabilities, knowledge base, economic self-sufficiency, gender and age differences, cultural and societal stereotypes and training and institutionalized hierarchies.”<sup>22</sup> Of course, as argued, these are power dynamics are fluid, thus ever changing.<sup>23</sup> The argument herein rests on the imbalance of power between the two parties i.e. the insurance claimant and the insurance representative, especially in a post disaster set up owing the factors listed above.

Relatively unsophisticated victims are often left to negotiate with highly savvy insurance representatives. The difference in bargaining power between the two creates a proverbial Lion’s Den for victims.<sup>24</sup>

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<sup>18</sup> Maria Volpe, ‘Post Disaster ADR responses: Promises and Challenges’ (2015) 26(1) Fordham Environmental Law Review 95.

<sup>19</sup> Alexandra Rindenow, ‘Providing Certainty in an Uncertain Time: How Alternative Dispute Resolution Can Help Natural Disaster Victims Rebuild’ (2022) Cardozo Journal of Conflict Resolution Blog <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1028&context=cjcr-blog> accessed 8 December 2022.

<sup>20</sup> Mel Rubin, ‘Disaster Mediation: Lessons in Conflict Coordination and Collaboration,’ (2008) 9 Cardozo Journal of Conflict Resolution, 351.

<sup>21</sup> Diane Neumann, ‘How Mediation can Effectively Address the Male-Female Power Imbalance in Divorce,’ (1992) 9(3) Mediation Quarterly 227.

<sup>22</sup> Joan B. Kelly, ‘Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention,’ (1995) 13(2) Mediation Quarterly 85.

<sup>23</sup> Amrita Narine, ‘Power Imbalances in Mediation,’ (1995) Conflict Resolution, 85.

<sup>24</sup> Elizabeth Baker Muriel, Mass Disaster Mediation: Innovative, ADR or a Lion’s Den,’ (2007) 7(3) Pepperdine Dispute Resolution Law Journal, 401.

To add insult to injury, the fact that a mass mediation program session lasts for not more than two hours adds time pressure for the people. Emphasis on speed and efficiency has the tendency of overwhelming the already overwhelmed individuals and thus they may end up settling for a smaller end of the bargain. Another risk for the insureds is regarding the problem of proof as they may have lost their documentary evidence stating their ownership rights and the property value.<sup>25</sup> A combination of these factors create the perfect imbalance between the insurer and the insured.<sup>26</sup> Due to these issues, there is a higher chance of facing inadequate compensation.

### **Fewer Incentive for the Insurers**

There is a clear evidence for the insurer to lean in favour of litigation as opposed to mediation, owing to certain factors. For the insurer there is less incentive to bargain in mediation, while the insured has a higher risk in litigation, creating an asymmetry amongst the parties. Additionally, the insurer employ tactics to extend the litigation process as per their will. The reason is simple - engaging in mediation would make them pay the claims while they may not even have to pay if the litigation resolves in their favor.<sup>27</sup> Compared to mediation, litigation process gives them a better probability and also the opportunity to hold on to the funds for longer. The litigation process could also vary the claim amount that needs to be paid as there would be problems such as providing evidence. Hence, for the insurers the litigation process seems more beneficial unless the settlement amount in the mediation process is substantially low. Such an imbalance with regards to incentives gives the insurers a considerable power advantage in the mediation process. A way to address the power imbalance would be by regulatory representatives or volunteer attorneys being available prior to the mediation to provide information in a variety of forms, such as videos, written information and personal counselling.

While both the hurricanes affected different areas, the mediation programs for both the mass mediations have the same structure, the same administration through the AAA, but have different legal and political environments around it. These different environments will likely produce widely different outcomes in the mediation process. Both Louisiana and Mississippi do not have freely accessible programs for the public to educate the participants to the mediation proceedings and requirements nor do these participants know what to expect from such conflict resolution processes. Educating the insureds would help solve this. For this the Bar Association or Law Schools could form cooperative programs or seminars and may provide free representation or assistance as well. The participants to the mediation process should be educated regarding the entire process which would enable them to participate in the process better and establish a more conducive atmosphere for the process leading to a higher settlement rate and greater party satisfaction.

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<sup>25</sup> Russ Bleemer, 'Insurance Issues Mobilize the ADR Community in the wake of the Gulf Coast Hurricanes,' (2005) 23(10) Alternatives to High Cost of Litigation, 171.

<sup>26</sup> Mel Rubin, 'Disaster Mediation: Lessons in Conflict Coordination and Collaboration,' (2008) 9 Cardozo Journal of Conflict Resolution, 351.

<sup>27</sup> H Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustments* (2<sup>nd</sup> edn, Routledge 1980).

## **Internal Factors**

The cognitive thought process of an individual is given little attention in the literature concerning alternate dispute resolution. The relation between the psychological stability of an individual and a mass disaster, and the impact on his/her decision-making capacity is rather even less focused.

## **Signs Of Impaired Capacity**

A research study has propounded the need for social networks and support for communities, families and individuals during Hurricanes Katrina and Rita.<sup>28</sup> The loss of community led to the loss of methods to cope with the traumatic effects leading to more tension and panic.

Generally, a response, in the short-term, to such disasters would consist of recurring memory phases causing psychological distress, trauma, feeling of detachment, outbursts, etc.<sup>29</sup> Such disasters deal such a sudden and severe shock that it is tough for the survivor's response mechanism to cope with it effectively. Termed the "disaster syndrome", Anthony Wallace propounds that individuals face "intense anxiety, confusion, and absence of emotion, despondency, inhibition of activity, docility, indecisiveness, and lack of responsiveness."<sup>30</sup>

While a lot of the individuals would eventually overcome these symptoms and bring their life back to normalcy, this is not generally the case for communities at large affected by such disasters. In such circumstances there is no method or structure to help mediate and cope with the short-term distress. This distress is further intensified by settlement attempts where all the victims are compacted in a small highly stressful environment. The long-term effects include anxiousness, fright, apathy, despair, panic attacks, anger, delusions, etc. It also has an impact on the inter-personal relationships.

With such emotions rampant and a count of thousands of coverage disputes, insurance companies take the spotlight with these thousands of claims to be covered. In the mediation context, all of these stressors need to be acknowledged and handled with care to ensure that the victims can participate.

## **Decision-Making Capacities And Cognitive Abilities**

The mediator, as an outsider, may not be able to fully appreciate the disaster's effects on the residents, the cognitive mind sets of the victims and their trauma as disasters affect people differently, physically, emotionally and psychologically.

Firstly, to ensure the credibility of the program the administrator must be neutral and all the stakeholders in the program must have confidence in him/her. Neutrality must be both real and perceived. A continuous monitoring of this would ensure this. Another problem that mediators have to be conscious about is that due to the emotional vulnerability the impaired

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<sup>28</sup> Robert J. Ursano, et. al., 'The Impact of Disasters and Their Aftermath on Mental Health,' (2006) 8(1) Primary Care Companion to the Journal of Clinical Psychiatry, 4.

<sup>29</sup> Michael A Crabbs and Edward Heffron, 'Loss associated with a natural disaster,' (1981) 59(6) Personnel & Guidance Journal, 378

<sup>30</sup> Anthony FC Wallace, *Tornado in Worcester: An Exploratory Study of Individual and Community Behaviour in an Extreme Situation* (Washington, National Academy of Sciences, National Research Council 1956)

party may start becoming dependent on the mediator's judgement. While being neutral, the mediator should acknowledge the mental state of the victims and have compassion. Neutrality is of the essence to ensure the aggrieved victims that the person would play the role of an independent arbiter. Even a slightly perceived prejudice by either of the stakeholders must be examined and corrected where warranted.

Time pressure also impacts decision-making capacity. Generally, mediations only last an hour or a few, and it is seen that this time crunch leads to a decrease in the performance as there is too much information to process within such a limited time schedule.<sup>31</sup> This time crunch makes mediators filter through information or focus on only a few criteria making the decision-making accuracy decline.<sup>32</sup> Such time pressures may also lead to lower demands, faster concessions and faster agreements. Research studies show that when both the parties have equal pressure the tendency for settlement was higher and the number of failed negotiations leading to trials was higher.<sup>33</sup> However, the opposite of it, an asymmetric pressure, led to a higher chance of lower settled outcomes. The insurance company in fact saves money by not reaching an agreement.

### **Confidentiality**

Constant media coverage and can often defeat the very notion of confidentiality. Thus, during a natural disaster it is almost impossible to maintain confidentiality. Families, neighborhoods, communities and many others are involved in this. When the relevancy and practicality of enforcing confidentiality is considered in combination with the power-imbalance issues then the very foundations of mediation may need to be rethought when applied to the extreme conditions of post-disaster mediation.

### **Case Studies**

The main features of mediation include 1) Communication and trust between the parties, 2) Introduction of third parties to the conflict resolution dynamics and 3) Transformation of destructive conflict to a constructive resolution of the problem.<sup>34</sup> Traditionally, mediation program can be divided into two primary categories- Evaluative or Directive and Facilitative mediation. These have been defined broadly on the role played by the mediator throughout the settlement process. In Evaluative mediation, the mediator is required a more active role in assisting the parties to reach their goals.<sup>35</sup> The mediators help in chalking out the underlying substance and cause of dispute to guide parties in a reasonable direction and it is thus essential for him to have substantial experience in the subject matter. While in Facilitative mediation it is presumed that parties are intelligent, able to work with their counterparts and

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<sup>31</sup> Peter Wright, 'The Harassed Decision Maker: Time Pressures, Distractions, and the Use of Evidence,' (1974) 59(5) Journal of Applied Psychology 555.

<sup>32</sup> Irving Janis & Leon Mann, *Decision Making: A Psychological analysis of Conflict, Choice and Commitment* (New York Free Press 1977)

<sup>33</sup> Dean G Pruitt, *Negotiation Behavior* (Academic Press 1981).

<sup>34</sup> Jose Pascal da Rocha, 'The Changing Nature of International Mediation,' (2019) 10(1) Global Policy, 110.

<sup>35</sup> Kenneth M Roberts, 'Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement,' (2007) 39(1) Loyola University Chicago Law Journal, 187.

capable of understanding their situations better than the mediator and thus mediators are expected to merely guide and facilitate the discussion.<sup>36</sup>

While doing a case study we shall be covering the following aspects namely the structure of the program devised, the key features which set it apart from other programs, its shortcomings and lessons learnt for future programs. We shall also be examining the role played by the mediators in the various programs to analyze which type of mediation is best suited for natural disaster management.

### **9/11 Victim Compensation Fund (VCF)**

Although Victim Compensation Fund or VCF was not a mediation program, it was an enacted by the Congress as a no-fault alternative to tort litigation. Under the Air Transportation Safety and System Stabilization Act, the government established this compensation scheme under the guidance of Kenneth R Fienberg, a highly experienced mediator (the Special Master). VCF was setup in the aftermath of September 11 attacks, to compensate for economic and non-economic loss to the victims and the families of the deceased (Rudes 2014). One of the main features of this scheme, often referred to as the double-edged sword, was that one could opt for either compensation under this scheme or the right to pursue litigation. Thus, Fienberg has rightly called it a ‘classic trade-off between rolling the dice in the court and going for the proverbial pot of gold.’<sup>37</sup>

With a huge success rate of up to 97% eligible survivors opting for this scheme, one distinctive feature of this fund was the simple eligibility criteria. Fienberg divided the compensation on namely two heads, economic and non-economic. The latter of the two, a one-of-a-kind classification in itself, included compensation for the pain and suffering of each victim and was especially praised as a symbolism of respect for all victims. The Special Master was further successful in strategizing a range of potential claimants based on age, size of family, recent past earnings, prospective earning capability etc.<sup>38</sup>

Even though VCF was seen as a triumph by the government it was not short of problems. One of the main drawbacks of this fund was the lack of accountability and sense of injustice felt by the victims. By foregoing their right to sue, the victims thought that they had taken an easy bargain and were not at ease with the fact. The victims also felt that the government had capitalized on their emotionally vulnerable state and immediate need for money and thus were skeptical regarding the transparency of the system. Regardless of its drawbacks one of the most important lesson for all future mediations is the sensitivity with which the whole process was handled.<sup>39</sup> This went a long way in ensuring trust between the victims and the mediator, acknowledging the sentiments and needs of the survivors and maintaining balance of power between both the sides.

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<sup>36</sup> Dorcas Quek Anderson, ‘Facilitative Versus Evaluative Mediation: Is There Necessarily a Dichotomy?’ (2013) 66 Asian Journal on Mediation, 66.

<sup>37</sup> Gillian K Hadfield, ‘Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund,’ (2008) 42(3) Law & Society Review, 645.

<sup>38</sup> Robert L. Rabin, ‘The September 11<sup>th</sup> Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?’ (2003) 53(2) De Paul Law Review, 769.

<sup>39</sup> Eliot Rudes, Disasters, Victim Compensation, and Alternative Dispute Resolution,’ (2014) 7 The American Journal of Mediation.

## **San Diego Wildfires**

In 2007, more than 5,000 lawsuits were filed against San Diego Gas & Electric following a series of wildfires that engulfed San Diego County in California, where faulty power lines were blamed for some of the fires. The Federal Emergency Management Agency (FEMA) contracted with private ADR provider JAMS Inc. to set up a Neutral Review Program to settle all the claims. This program involved establishing a panel of former judges and attorneys to review all the file claims and issue recommendations to FEMA regarding the payments to be made.<sup>40</sup> This program was considered a huge success with a staggering settlement rate of 98% and recovery amounting to more than \$800M.

Some of the main features that contributed to the success were the impeccable case management system, open communication amongst the parties and power and authority given to the mediators. Everything was including a timeline for meeting various targets was maintained in a comprehensive Google spreadsheet which was made available to the parties at all times.<sup>41</sup> This ensured transparency and hands on inclusion of the parties in facilitating open communication with the court. Another key feature of the program was the relatively free hand given to the mediators in deciding issues including determining which cases were more suitable for binding mediation, the power to make minor compromises, deciding on the damages and what each side could give up etc.<sup>42</sup> One of the key takeaways from the program was the open communication and the upper hand of mediators which further helped in instilling trust and confidence amongst all parties which ultimately helped in reducing the power imbalance.

## **Hurricane Sandy**

By the time Super storm Sandy hit insurance mediation practices were more than twenty years in the making, so the stakes were already high as to the formation of a low-cost easy access forum to resolve claim disputes.<sup>43</sup> The government sponsored mediation program was divided into heads, the New York and the New Jersey program which was administered by the American Arbitration Association (AAA). The main highlights of the program were the proper training and recruitment process and the constructive time frame for the whole process. In recruiting neutrals, the Sandy Panel drew attorneys from the court's mediation and arbitration panels, the private bar, law schools and bar associations. With the admission of a staggering number of ninety-six mediators and fifty-one arbitrators, the neutrals attended a mandatory full day training program offered by the court.<sup>44</sup>

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<sup>40</sup> Kimberly Taylor, 'Alternative Options for Resolution of Property and Casualty Claims Arising Out of Natural Disasters,' (2018) 5(2) Texas A&M Journal of Property Law, 193.

<sup>41</sup> John T Pardun, 'How ADR Can be Used to Resolve Mass Disaster and Insurance Claims,' (2013), 6(23) International In-House Counsel Journal.

<sup>42</sup> Henry Meier, 'Neutrals Create Streamlined Process for Resolving Natural Disaster Cases' *Los Angeles Daily Journal* (15 March 2013).

<sup>43</sup> Maria Volpe, Post Disaster ADR Responses: Promises and Challenges,' (2015) 26(1) Fordham Environmental Law Review, 95.

<sup>44</sup> Stacy L. La Scale & Lawrence W. Pollock, ADR Seen as a Valuable Tool to Address Natural and Weather-Related Disaster Claims' (*JAMS ADR Insights* 9 January 2018) <https://www.jamsadr.com/blog/2018/adr-seen-as-a-valuable-tool-to-address-natural-and-weather-related-disaster-claims> accessed 8 December 2022.

One of the notable features of the program included a constructive time frame. From scheduling mediation sessions within a one hundred and seventeen days from the filing to collecting all exhibits and key documents from parties fourteen days before the mediation every step throughout the mediation framework was systematically organized. Despite a modest 64% settlement rate, this program was considered a learning experience than a resounding success.<sup>45</sup> The program was mainly criticized for power imbalance and vulnerability of the policy-holders. Kramer observed that each mediation session was limited to two hours which further limited the scope of issues and prevented mediators from ‘enlarging the pie’.<sup>46</sup> One of the solutions of this can be following the three mediation formats namely 1. “Periodic”: sessions held at regular intervals. 2. “Marathon”: a single session lasting until parties come to an agreement. 3. “Crisis”: a single session of short duration dealing only with the crisis issue/s as adopted by the Newcastle and Region Renewal Coordination Unit (RCU) New Zealand.

As seen from the above case studies, programs involving open communication between the parties and active participation from the mediators was more successful as an alternative dispute resolution process. Because of the emotional vulnerability of the policy-holders (i.e. insurers) and lack of special knowledge in case of insurance claims the programs in which the mediators were able to guide the parties and build confidence and trust between the parties through their special expertise in the subject matter were considered more successful. One of the main drawbacks regarding power imbalance can also be diminished by communicating, empathizing and empowering with knowledge. New Jersey State Bar Associations (NJSBA) mass disaster response program following Hurricane Sandy was one such initiative where voluntary attorneys provided information to the victims, answered legal questions and advised them regarding important matters. ‘Listening to the city’ another such project was introduced following 9/11 where citizens were promoted to share their ideas about rebuilding their communities with policy makers, key decision-makers, and other interested parties.<sup>47</sup> Thus, directive mediation is a better suited option for mass mediation in natural disaster cases as due to inherent difficulties including potential power imbalances and emotional vulnerability parties are not in a position to take control of the process and thus a specialized neutral third party can go a long way in ensuring a fair and reasonable outcome.

### **Implications For System Designers And Mediators**

Individual and collective traumas create a cognitive barrier in the minds of people. Mass mediation system designers should be cognizant of the same and ensure that psychological factors are taken into account during such mediation processes. A fair and competent decision-making process needs to be designed, taking into account external considerations.

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<sup>45</sup> Dan Wade, Storm Sandy Mediation Program: A Learning Experience (*United Policyholders* 24 March 2014) [Storm Sandy Mediation Program: A Learning Experience - United Policyholders \(uphelp.org\)](#) accessed 8 December 2022.

<sup>46</sup> Freya McKechnie, Dispute Resolution Following Natural Disasters (Ministry of Business, Innovation & Employment 2018)

<sup>47</sup> Linda Baron, ‘Disaster Basics: The Lifecycle of a disaster and the Role of Conflict Resolution Professionals,’ (2008) 9 Cardozo Journal of Conflict Resolution, 301.

Designing a process which is an alternative to litigation and taking into account the several external factors while also trying to clear claims quickly is a difficult task. However, if this is the only consideration then the outcome process would still be unfair. Andrew Scherer designed a “five-part test for equitable process”<sup>48</sup> which includes:

- (1) “Representation Equity: Do both the sides have balanced representation? A disparity in the relative experience of the parties in the mediation process creates a representation gap which leads to unfairness.
- (2) Knowledge Equity: Are all participants, including the mediator, balanced with regard to their knowledge of the process and the subject of the dispute, and the law?
- (3) Language Equity: Does everyone have adequate skills in spoken and written English to understand what occurs in the mediation process? There may be a gap in understanding what is occurring during the process.
- (4) Social Power Equity: An imbalance in social power generally leads to results by the parties at the table which may not be truly consensual.
- (5) Political Equity: The relative political power of the parties does generally lead to an imbalance in the process as well. This should be considered as well during the process design.”

The mediators need to understand the complexities that may plague each individual participant to the mediation process. The mediation process needs to be ensured that the victim does not feel further victimized. If they leave the process feeling victimized, then the design fails.

A mediator should be cognizant of the participants and their cognitive abilities impaired by trauma. It is difficult to recognize when someone’s individual decision-making capacity has been impaired and so the mediator may require special training in such a context. They should be able to know the consequences that would ensue if an impeded judgement is given. The consequences on giving such a judgement is significant. Duress is a standard seen and recognized as a way to invalidate a contract, as this is seen as a lack of consent. Considering thousands of individuals are vulnerable to the distress then this would become problematic. They should be able to consider all existing options to help him/her face any situation that may occur. They need to be well prepared for any range of emotions.

The professionals should receive adequate training with the requisite experience before working in the mediation program. They should use pre-mediation conferences with the parties, particularly the policyholder, who may be nervous. Also, the regulatory representative or attorney could be invited to participate in the mediation or be available by telephone to answer questions as they arise. Further, pre and post mediation questionnaire, concerning the faith of the parties in the program, parties’ outlook towards the outcome and overall satisfaction with the mediator as well as the program could help mediators gauge the strength of the said program and accordingly improvise subsequent programs.<sup>49</sup>

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<sup>48</sup> Elizabeth Baker Murrill, ‘Mass Disaster Mediation: Innovative ADR, or a lion’s den?’ (2007) 7(3) Pepperdine Dispute Resolution Law Journal, 401.

<sup>49</sup> Patricia L Franz, ‘Habits of a Highly Effective Transformative Mediation Program’ (1998) 13(3) Ohio State Journal on Dispute Resolution, 1039.

## **Conclusion**

The effects of mass disasters such as Hurricane Katrina has shown the catastrophe created by such disasters and the long-term and short-term effects on the decision-making abilities of the victims. System designers need to ensure that the process remains fair and balanced power structure is maintained during the entire process. System designers have to ensure some form of specific and special training programs for mediators and also some form of training and advocacy assistance being provided to the victims. It is pertinent for them to be sensitized to the potential and effects of an impeded judgement caused when a participant is under stress.

Mass Mediation is indeed the future of all mass claim situations whether natural or man-made. Two things which are key for the success of these programs are; firstly, proper training and selection of the mediators so as to be able to handle all kinds of emotionally charged situations and resonate with the victims so as to gain their confidence. Secondly, a mutual level of cooperation and understanding from both the parties towards using ADR for solving their dispute. A positive result of mass mediation programs is that they settle a large number of claims; however, this should not be the measure of success. The satisfaction of the parties and self-determination are also at the core of the process. The process should contribute to the recovery of the individual and community as well.