Dr Grant and his underpants

A model mediation
## Dr Grant and his underpants Contents

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Dr Grant and his underpants Teacher notes

About these materials

Dr Grant and his underpants is a fully scripted model mediation for classroom use. The script is based on the South Australian case Grant v Australian Knitting Mills Limited and Another [1935] HCA 66; (1935) 54 CLR 49. Details of the original case are set out in the section entitled ‘The real case and its outcome’, following the mediation script. The script is also accompanied by explanatory notes, suggested student activities and a list of useful internet sites.

This resource is designed to show students, in a practical and entertaining way, the procedure for the mediation of a dispute. It also demonstrates the effectiveness of mediation as a method of dispute resolution.

The resource is intended for VCE students. It may also be suitable for use at other year levels, with relevant tasks adapted to suit students’ abilities.

Curriculum links

VCE Legal Studies

Unit 2 Area of study 2: Civil law in action
Unit 4 Area of study 1: Criminal cases and civil disputes
Unit 4 Area of study 2: Court processes and procedures

Dr Grant and his underpants and accompanying notes, references and tasks will assist students to:

• demonstrate knowledge of mediation as an alternative method of dispute resolution;
• evaluate the strengths and weaknesses of mediation;
• identify the relationship between mediation and other dispute resolution procedures; and
• evaluate the contribution of mediation to the effectiveness of the legal system.
Dr Grant and his underpants Teacher notes

Using the model mediation

The mediation script can be used to introduce students to the process of mediation as an effective means of dispute resolution.

Before using the script in class, you may wish to:

- Familiarise students with the law of manufacturers’ liability as it was developing in the 1930s. Introduce students to the ‘no contract, no remedy’ principle, which dominated the law of manufacturers’ liability prior to Donoghue v Stevenson (1932) AC 562; then give a brief outline of the impact of the House of Lords’ decision on that principle. Providing this background information is not essential, but it will help students to gain an appreciation of the broader context of the dispute.

- Arrange for students to view Working It Out Through Mediation, a video produced by the Victoria Law Foundation in conjunction with the Victorian Civil and Administrative Tribunal (VCAT). The video can be purchased through the Australian Book Group (Phone 03 5625 4290, www.australianbookgroup.com.au) or can be viewed online via the VCAT website: www.vcat.vic.gov.au

- Obtain copies of the VCAT brochure Your Guide to Mediation. Separate versions for each of the VCAT Lists that make mediation available are on the VCAT website.

Allow the students playing roles in the mediation time to familiarise themselves with the characters involved in the story.

To give added realism to the presentation, you may wish to set up the classroom to look like a hearing room, with desks joined to form a single table, and encourage the use of appropriate clothing and props. Provide a whiteboard and marker pens for the mediation activity.
Using the student activities

The real case and its outcome
The mediation script is based on a real case: *Grant v Australian Knitting Mills and Another* [1935] HCA 66; (1935) 54 CLR 49, the facts of which are outlined in this section, which directly follows the script. If you decide to provide this background information to students, it is preferable to do so after they have enacted the mediation script. This will enable students to appreciate the contrast between mediation and trial outcomes, without prejudicing their assessment of mediation as a means of resolving disputes.

Research and discussion activities
These activities can be used in the following ways:
• Answers to the questions can be discussed as a class or in small groups.
• Students can write brief answers in their notebooks.
• Students can write extended answers where questions require more in-depth answers.

Preparation
Before undertaking the research and discussion activities, students will need to understand the differences between ‘negotiation’, ‘mediation’, ‘facilitation’, ‘conciliation’, ‘arbitration’ and ‘adjudication’. Students will also need to understand the difference between civil dispute resolution by courts and resolution by alternative processes.

Follow-up
Some tasks may lead to further discussion, for example:
• Activity 3: discussion of methods of dispute resolution where people may be concerned for their safety or where the dispute may involve a breach of criminal law.
• Activity 6: discussion of the Australian Industrial Relations Commission and its role in dispute resolution.

Internet sites
You may wish to add to the list of websites, which follows the script, or provide other useful resource material.
Dr Grant and his underpants

Mediation set-up

Exit to ‘break out’ rooms
Scene
Mediation Room

Cast
The mediator

Dr Henry Grant

Chris Martin, managing director of Chris Martin & Company Limited

Alex Vassiliou, company secretary, Australian Knitting Mills Limited

Truong Nguyen, Dr Grant’s solicitor

Anna Rossi, Chris Martin’s solicitor

Terry Smith, Alex Vassiliou’s solicitor

Mediator

Good morning. In a few minutes you are going to see the dispute resolution process of mediation in action. It is a process which, if the parties are willing, can be used to attempt to resolve all sorts of disputes – indeed, even some which could not be resolved through the conventional court or tribunal systems. It is a process by which an independent mediator helps disputing parties to try to arrive at an agreed resolution of their dispute.

Mediation offers the disputing parties the opportunity to achieve a practical solution to their dispute without the cost, time and personal and financial stress associated with court procedures. It is a flexible and informal approach to settling disputes and gives the parties an opportunity to have their say and to agree on an acceptable solution to their dispute.

It must be emphasised that the mediator does not make a decision for the parties. As I have said, he or she will guide the parties through the mediation process, ensuring that everyone involved has a fair say and that no one unfairly dominates the process. The impartial mediator will assist the parties to develop options and possible approaches to resolving the dispute.

All parties will be given an opportunity to talk about their concerns. This is designed to help identify the issues in dispute.

The mediator will then explore options with the parties in an attempt to reach a negotiated settlement. It is not the mediator’s role to give the parties legal or expert advice and, as I have said, the mediator will not impose a solution on the parties. There will be a settlement of the dispute at mediation only if the parties agree.
Those attending the mediation may be as few as the mediator and the parties involved. Today we have three parties: Dr Grant, who bought some underwear which he claims was the cause of a very unpleasant experience; Chris Martin & Co., from whom the underwear was purchased; and Australian Knitting Mills, who manufactured the items in question. Dr Grant is accompanied by his solicitor, Truong Nguyen; Chris Martin is accompanied by solicitor Anna Rossi; and the Company Secretary of Australian Knitting Mills, Alex Vassiliou, is accompanied by solicitor Terry Smith.

It is preferable not to have too many people attending the mediation. It is the mediator’s role to ensure that nobody is disadvantaged in the mediation process, so some limit may have to be placed on the number of people in the mediation room. The mediator has the final say on who may attend and will ensure that no party is disadvantaged if he or she is not legally represented. Parties may be assisted by a lawyer or another representative or a support person of their choice.

The parties to today’s dispute have already been advised to set aside the whole day for the mediation. All parties have been asked to prepare an opening statement summarising their views on the issues in dispute and setting out how they would like to see the dispute resolved. They have been asked to bring any important papers with them and to be prepared to discuss the issues frankly.

Mediations will only work if parties are prepared to listen to what everyone else has to say and to consider different points of view and options for a solution, and to make some compromises to reach a settlement.

At some stage in the process, the mediator may wish to talk to the parties in private to clarify points or to discuss settlement options and possible hearing outcomes. Private sessions are confidential and the mediator will not disclose anything said by a party without that party’s consent. Parties may ask to talk to the mediator privately and confidentially at any time.

At the end of the mediation, parties should be prepared to sign a written settlement agreement if the matter is resolved.

We are now going to travel back to August, 1932, where we find the parties to today’s dispute ready to attempt a resolution by mediation.
Dr Henry Grant, Chris Martin, Alex Vassiliou, Truong Nguyen, Anna Rossi and Terry Smith enter the mediation room.

Mediator

Good morning. My name is _____________, and I am your mediator this morning. I must remind you that I’m not here to take sides – I’m here to try to help you to find a satisfactory resolution and, if necessary, assist in writing an agreement. Feel free to speak, but do let the other party finish first, and remember that everything said in this room is confidential, which means that any statements made here cannot be used against the other party if the complaint is unresolved.

Let’s start with the introductions. By the way, is everyone happy with using first names?

(The mediator proceeds to introduce the parties or allow the parties to introduce themselves.)

Now that we know who everyone is, I’m going to ask each of you to tell your version of the events that led to the dispute, one at a time.

Please listen very carefully to the other party and the concerns being expressed.

I’d like everyone to be careful not to interrupt at this stage, even though undoubtedly you will see things differently. If you want to respond to any particular matters raised, I suggest you make a note for yourself, as you will have an opportunity later to raise issues.

Please also let me know if you need a break and we will ensure that this occurs at an appropriate time.

After that we will clarify the key issues by discussing any points of difference. We will then begin to try to identify the elements that may enable you to successfully negotiate a settlement. It may be useful at some stage for me to meet with each party privately, and if that happens I will ask the other parties to leave the room for a short while.

Now, I wonder if we can begin by hearing from you, Henry, as the person who initiated the complaint.

Dr Grant

Thank you. I must say, from the outset, that I expect these people to pay substantial compensation for all the harm they have caused. Before this happened, I was a strapping athlete – now I am an old man. (He sobs.)

Mediator

Are you all right to go on, Henry?

Dr Grant

(Composing himself, he takes a deep breath) Yes, I think so. On 3 June 1931, I went into Chris Martin’s city store in Adelaide to buy some long woollen underwear. I’m a medical practitioner and I do quite a few house calls each week. It can get very chilly around the suburbs in winter so
I wanted underwear that would keep out the cold because sometimes I have to leave the car a fair distance from some of the houses I visit.

The shop assistant at Chris Martin’s recommended ‘Golden Fleece’ underwear made by Australian Knitting Mills in Melbourne. On his recommendation, I bought two sets: two singlets and two pairs of underpants.

Alex Vassiliou  ‘Golden Fleece’ is our best product.

Dr Grant  It didn’t do me much good!

Mediator  Go on, please, Henry.

Dr Grant  Well, I didn’t wear the underwear for a while. (He looks at his notes.) It was 28 June, a Sunday. I was going to spend most of the day outdoors so I opened one of the packets and put on the singlet and underpants. That night I felt a bit itchy around the ankles, but the next day I was in agony.

Chris Martin  You probably picked up something in the bush.

Dr Grant  Definitely not. It was the underwear. When I got up in the morning, I had red welts on both ankles about two and a half inches long by about one and a half inches wide, and the itch was unbearable.

Chris Martin  Did you get any treatment?

Mediator  Let me remind you of the rules of this process, Chris. Henry has the opportunity to tell his side of the events. You will have your chance in a moment, so please let him have his say.

Chris Martin  Yes, sorry.

Dr Grant  Look! I’m a doctor. I used a topical treatment. I put calamine lotion on the lesions but it didn’t do much good. I’m afraid I disobeyed the cardinal rule of itches and scratched until both ankles bled.

Chris Martin  See, it was your own fault.

Mediator  Chris, please.

(Chris Martin becomes agitated, starts shuffling papers as if to pack up.)

Chris Martin  Look, I think this is a complete waste of time. He’s just told us he scratched himself till he bled. Obviously he had some sort of condition, aggravated it himself and is trying to shift the blame onto us. (Standing up as if to leave.) My solicitor reckons he has no chance so I might as well go back to the shop.

(Anna Rossi tries to calm Chris down.)

Mediator  Chris, please. Of course you can leave if you wish, but I would like to talk to you first. This is the best opportunity that all parties have to come to a sensible settlement and I think your solicitor would agree with me.
Dr Grant and his underpants: Script

Anna Rossi       Yes, I do. Chris, I think we should hear what Henry has to say.

Chris Martin     *(Holding up his hands)* Okay, okay.

Dr Grant         I did not actually think it was the underwear that was causing the problem at first, but the following Sunday, 5 July, I put the second set of underwear on and sent the first set off to be washed.

Chris Martin     Don’t tell me you only change your undies once a week?

Mediator         Chris.

*(Chris Martin sits with hands over mouth.)*

Dr Grant         The following Sunday I changed again. *(Glares at Chris Martin)*

I put on the first set, the ones that had been washed, and sent the second set off to be washed. The next Sunday, that was 12 July, I changed again, not really thinking that the underwear was at fault. The next day, Monday 13 July, I was in real trouble so I rang a colleague of mine, a dermatologist, Dr Upton. He saw me straight away.

I mentioned the underwear and he told me to get rid of it. I took both sets back to Chris Martin’s and told the manager that they had given me dermatitis.

The skin lesions just got worse and worse. Dr Upton confined me to bed on 21 July and I was virtually unable to do anything for the next seventeen weeks; the rash became generalised and very acute.

*(Chris Martin starts rummaging in a briefcase and passing papers to Anna Rossi, causing a distraction.)*

Mediator         Chris and Anna, if there is something you need to discuss, we can take a break at this point. It is very important that we all hear what Henry has to say.

Chris Martin     Sorry, no, we don’t need a break. We can sort it out later.

Anna Rossi       Sorry.

Mediator         Go on, Henry.

Dr Grant         By mid-October my condition had begun to improve and I went to New Zealand in November and stayed with friends while I was recuperating.

I came back to Adelaide in February and resumed practice. That was the first time I had been able to work since the previous July. I am not a rich man, so seven months off work caused real difficulties.

Unfortunately, I had a relapse in March and my condition was so serious that Dr Upton admitted me to hospital where I remained until July. I am much better now but still not completely cured. All told, I was unable to work for a year and was very, very sick. The pain was extreme and, at one point, Dr Upton and his colleague, Dr de Crespigyn, thought that I might die. I am afraid you have no idea the agony I was in.
(He looks at each of the others in turn.)

Mediator  Thank you, Henry. Now, Alex, could you tell your story as if you were the first speaker. You don’t need to respond to what Henry has said, although you can if you wish.

Alex Vassiliou  I would like to point out from the beginning that we don’t dispute for a moment that Henry bought and wore our ‘Golden Fleece’ underwear. Nor do we dispute that he broke out in a very nasty rash, but we do not accept that the rash was caused by our product. In the past six years we have manufactured 4,737,600 of these garments, which we have sold to clothing stores all round Australia, and I have no recollection of any complaints being made about any of them. Believe me, if complaints had been made, I would have heard about them.

We use six different processes in the manufacture of our garments and these processes are carefully managed to ensure that no harmful substances are left in the material.

The first I heard about Henry and his problem was on 22 July last year, when I received a package from Chris Martin & Co containing the two sets of underwear which Henry had bought. I called in Joe Alenson, the head of our underwear department, and told him to have them examined by Herb Davies, the company's chemist.

Dr Grant  And what did he discover?

Alex Vassiliou  Well, he examined one of the singlets but could not find anything dangerous. According to his notes, which I have with me, he found the wool to be slightly alkaline with small traces of sulphates and chlorides, but no arsenic or other chemical was present.

Dr Grant  I find that very hard to believe.

Alex Vassiliou  You don’t have to take his word for it. After he had done his own tests, Herb took one of the singlets and one pair of underpants to Dr Heber Green at the University of Melbourne who agreed with Herb’s findings. Another chemist, Dr Susan Anderson, had a look at the underwear as well.

Dr Grant  What did she have to say?

Alex Vassiliou  Much the same as the other two. I just want to repeat that Australian Knitting Mills is in no way to blame for Henry’s unfortunate condition.

(He starts scratching his arm, realises what he is doing and stops, looking embarrassed.)

Mediator  Perhaps we could now hear …

Dr Grant  Look, I just want to make it clear that I didn’t have any skin problems before I wore this company’s underwear. My doctor can vouch for that. Australian Knitting Mills and their damned products have ruined my life! They nearly killed me!
Mediator All right, Henry. We can take up some of these issues later but it would be good if Chris gave us the retailer’s version of events.

Chris Martin Thanks. As you know, Chris Martin & Co is a large, general retailer. We sell a wide range of clothing and purchase stock from overseas as well as locally.

Henry came into our store on 3 June last year and asked to see some woollen underwear. He was shown a British brand but was concerned about the price. The shop assistant then showed him the ’Golden Fleece’ brand manufactured by Australian Knitting Mills. He asked if it was good quality, given that it was cheaper than the British product. He was assured that it was and he bought two sets.

I’m very sorry that Henry has been ill but it must be understood that all we did was sell the stuff. We bought it from Australian Knitting Mills who made the fabric as well as the clothing. We received the singlets and underpants in packs of eighteen. All we do is put it on the shelf, so we can’t be held to blame if, and I emphasise if, it hadn’t been manufactured safely.

(He smiles at Alex Vassiliou.)

Mediator While you have been presenting each side of the issue, I’ve been jotting down what seem to me to be the key points of the issues that you’ve raised. It would be good if we could all agree on what are the key issues. Let me know if I have got something wrong or if anything needs to be added.

[These can be put on a whiteboard or listed verbally.]

I shall start with the issues from Henry’s point of view. He bought the Australian Knitting Mills underwear from Chris Martin’s, relying on their advice as to quality. He contracted a serious skin condition which he claims was caused by the underwear.

Alex Vassiliou No way!

Mediator Australian Knitting Mills concedes that Henry wore their product but asserts that the underwear could not have harmed him.

Alex Vassiliou That’s absolutely right.

Mediator And Chris Martin concedes that Henry bought the underwear, made by Australian Knitting Mills, from their Adelaide store, but they did nothing other than sell the product and could not have known if it contained anything harmful – and, indeed, were entitled to assume that it did not.

Chris Martin Well, I guess that sets it out pretty clearly, but I’m certain that my company did nothing wrong.

(He and Anna Rossi nod in agreement.)
Alex Vassiliou: Yes, that pretty well covers it, but I am equally adamant that ‘Golden Fleece’ didn’t harm him. It must have been caused by the soap he uses. Either that or he has some skin disease he hasn’t told us about.

Dr Grant: That is absolute nonsense. I told you that my doctors can verify that there was nothing wrong with my skin and now look at me!

(He starts to unbutton his shirt.)

Truong Nguyen: (Stopping him) That won’t be necessary, Henry. I have their letters with me.

Alex Vassiliou: I have had just about enough of this. (Aggressively) What’s it going to cost for you to just … go away?

Dr Grant: Well, given the hell you people have put me through, I think $10,000 from Australian Knitting Mills would be appropriate, and a lifetime supply of that best British underwear, which I should have bought in the first place, from Chris Martin.

Chris Martin: You’ve got to be joking!

Alex Vassiliou: That’s utterly outrageous!

(They both talk to their solicitors.)

Mediator: Well, it seems that we have at least agreed on the issues. At this point I think that it would be useful if we met privately. You will remember that in my opening statement I mentioned that at times during the mediation I may ask to speak to each party in private. Each party will be given approximately the same time to speak with me in private. Anything said in these sessions is in confidence and I won’t raise it in discussion with the other party without your permission. Do you have any questions about the private sessions?

(The parties look at their solicitors, then shake their heads.)

Mediator: Fine. Let’s start with Chris.

Henry and Alex, you may like to take this opportunity to have some refreshments and use the bathroom. During this time you might like to write down some points that you would like to discuss when we meet privately.

(Dr Grant and Alex Vassiliou leave, accompanied by their solicitors.)

Mediator: I remind you, Chris, that anything said in these private sessions is confidential and cannot be relayed to the other parties without your express approval.

Chris Martin: Yes, I understand that.

(Anna Rossi agrees.)

Mediator: Henry has made it pretty clear that he expects some substantial compensation from your company and from Australian Knitting Mills. How do you respond to that?
Dr Grant and his underpants: Script

Chris Martin  
Look, I feel sorry for the poor bloke. He has obviously had a pretty rough trot but my company did nothing to harm him. All we did was sell the stuff. He wore the undies for a week, for Christ’s sake! It’s his own fault.

(Anna calms Chris down.)

Yeah, yeah, I know. Anna tells me we have a problem under some legislation.

Anna Rossi  

Chris Martin  
Yeah. Under the Sale of Goods Act, so we might be in a bit of bother if we fought it in court. But a lifetime’s supply of Prince Albert long johns – you’ve got to be kidding.

Mediator  
What sort of an offer would you be prepared to make?

Chris Martin  
Well, Anna and I have talked it over and we reckon we’d come at £100 and six pairs of Prince Alberts.

Mediator  
Do you want me to tell Henry that?

(Chris Martin and Anna Rossi confer.)

Chris Martin  
Not just yet. Can we have a few more minutes to discuss it?

Mediator  
Certainly. You two go to the discussion room and I will have a chat with Alex next.

(Chris Martin and Anna Rossi leave. Mediator makes notes and Alex and Terry enter.)

I guess you have had time to consider what Henry has had to say. How do you feel about the situation?

Alex Vassiliou  
Quite frankly, pretty angry about it. I think this bloke is taking us for a ride. He’s got some skin condition, buys our product and reckons he can make patsies of us and get a huge payout. Well, I’m not having any of it!

Mediator  
Has Terry given you any advice on this?

Alex Vassiliou  
Yes. We talked about some English case …

Terry Smith  
Scottish case, Alex.

Alex Vassiliou  
Oh well, no matter. Some Scottish case about a snail in a drink bottle, and Terry said that the principle could be applied as widely as Henry’s claim. Could be applied, mind you.

Terry Smith  
Yes, there’s no guarantee that the local courts would go that way, but they might, and if Australian Knitting Mills were held liable, you could face substantial damages, given the extent of Dr Grant’s injuries and time off work.

You have to remember, Alex, that the scientific testing we did, whilst not conclusive, did show that the sulphites may not have been completely rinsed out of the garments when they were manufactured.

Mediator  
In the light of that advice, Alex, are you prepared to make Henry some sort of offer?
Alex Vassiliou: There are a couple of things I would like to discuss with Terry before I answer that.

Mediator: Fine. Perhaps you two might like to slip out and have a cup of tea or coffee and I will call you in a few minutes.

(Alex and Terry leave. Mediator makes some more notes. Henry and Truong enter.)

Mediator: Henry, I have had private sessions with Chris and Alex and will meet them both again in a few minutes. Before I do that, there are a couple of things I would like to ask you.

Dr Grant: Certainly. They know what I want to settle this. I hope you have advised them to cough up.

Mediator: No. Henry, I can’t do that. If an offer is made and I am directed to advise you of it I will do so. I can’t advise them to make an offer, nor can I advise you to accept it if one is made.

Dr Grant: Yes, I understand that.

Mediator: Would you consider accepting an offer if one were made – even if it wasn’t £10,000 and all that underwear?

Dr Grant: (Chuckling) Yes, I may have been a bit over the top there. (Becoming serious) But Truong has advised me that, if we went to court, I could win because of some fairly compelling overseas decisions which might well be applied here.

Truong Nguyen: Yes, that’s right. You might be aware of Justice Cardozo’s judgment in McPherson v Buick Corporation in the United States and, more recently, the House of Lords’ decision in Donoghue v Stevenson. The principles of both cases are very similar and could well be followed here.

Mediator: Yes, I have heard of both cases. But, Henry, you have to consider whether you would rather go to court or resolve this here.

Dr Grant: Oh, I want to resolve it here. I have spent enough money already. No offence, Truong, but I want this over and done with. That’s why I agreed to mediation. I am certainly prepared to consider a reasonable offer.

Mediator: Well, on that basis, I will talk to Chris and Alex again and see what emerges. I suggest you go back to the discussion room and I will call you shortly.

(Henry and Truong leave. Mediator makes more notes. There is a knock at the door and Chris Martin appears.)

Mediator: Yes, Chris.

Chris Martin: Alex and I have had some discussions with our solicitors and we wondered if we could see you together.

Mediator: Yes, that’s fine. Come in.

(Chris Martin, Alex Vassiliou, Anna Rossi and Terry Smith enter and sit down.)

What was it that you wanted to discuss?
Alex Vassiliou  We still reckon Henry had a pre-existing skin condition that has caused the whole problem. Did he admit that to you?

Mediator  Now, Alex. I have told you I cannot disclose anything said in a private discussion.

Alex Vassiliou  Okay, it was worth a try.

Chris Martin  Alex and I have gone over everything that’s been said and we have taken on board the legal position our solicitors have explained to us, and we want to get this settled today.

(Alex Vassiliou nods in agreement.)

We are prepared to make an offer and we want you to take it to Dr. Grant.

Alex Vassiliou  Yes. We want to offer him £500. Will you see if he is prepared to accept that?

Mediator  Yes, I will.

Alex Vassiliou  Do you want us to wait outside?

Mediator  Yes, please. You might ask Henry to come in now.

(They leave and Dr Grant enters.)

Mediator  Well, I have an offer for you to consider. Alex and Chris are prepared to offer £500. Will you accept that?

Dr Grant  My advice is that I could get quite a lot of compensation if I went to court but, then again, I could lose. But £500 is not enough. I would accept £750 and six sets of Prince Albert underwear – and a written apology. I just need some proof that they accept responsibility for the suffering they have caused me.

Mediator  Very well. I shall take that to them. Please wait outside and we shall see if we are getting close to a resolution. Let me check what you’re asking: £750, six sets of British underwear and a written apology.

Dr. Grant  Yes, that’s right.

(He leaves. A few moments later Chris Martin, Alex Vassiliou and their solicitors enter.)

Mediator  Please sit down. Henry has heard your offer but he will not accept £500.

(Chris Martin and Alex Vassiliou shake their heads and mutter negatively.)

He has asked me to advise you that he will accept £750 and six sets of Prince Albert underwear and a written apology. Do you want time to consider his offer?

(The four talk briefly.)

Alex Vassiliou  No. We thought he would push it a bit and that is pretty much where we thought it was going. We’re not happy about it but we’ll agree to that in order to draw this whole business to a conclusion.

Mediator  Are you certain you agree on that?
Chris Martin: Yes. We’ll agree to that but no more.

Mediator: In that case I shall call Henry in and we can then have an agreement drawn up.

(Mediator goes to door.)

Henry, would you come in, please?

(Henry and Truong enter.)

Henry, I have told Chris and Alex that you would accept £750, six sets of underwear and a written apology. They agree to that and are prepared to formalise that in an agreement. Are you willing to do that?

Dr Grant: Yes, I am, and I’m glad it is all over. Thank you.

(They all shake hands.)

Mediator: And that, ladies and gentlemen, is how the dispute settled. The law of negligence in general and manufacturer’s liability in particular developed because someone was prepared to take a matter from the Supreme Court of South Australia to the High Court and all the way to the Privy Council in London. Our Dr Grant, however, had a happier and more peaceful life because he settled his own dispute with a minimum of fuss and expense and with his dignity intact.

Australian Knitting Mills Limited, sufficiently chastened by the harm done to Dr Grant, managed to stay out of court until the company was sold to Holeproof on April Fools Day, 1955. If you travel by train from Flinders Street to Richmond, keep an eye out on the left hand side, where Australian Knitting Mills’ warehouse can still be seen.

John Martin & Co. Ltd (the company’s real name) lasted rather longer, supplying underwear and other goods to the people of Adelaide until 1981, when the company was taken over by Parfit Investments.

Our Dr Grant went on to scratch out a living as a suburban GP. He gave the six sets of Prince Albert undies to his cousin, Hamish, for Christmas and wore silk boxer shorts for the rest of his long and happy life.

END
Dr Grant and his underpants

The real case and its outcome

The mediation script is based on a real case: *Grant v Australian Knitting Mills and Another* [1935] HCA 66; (1935) 54 CLR 49.

In this case, action was brought by Dr Grant in the Supreme Court of South Australia, claiming damages on the ground that he had contracted dermatitis because of the improper condition of underwear purchased on 3 June 1931 from John Martin & Co. Ltd and manufactured by Australian Knitting Mills Ltd. The case was tried before Sir George Murray, Chief Justice of South Australia, and ran for 21 days. Murray found for Dr Grant against both John Martin and Australian Knitting Mills.

The action against John Martin & Co. Ltd had been brought in contract, and Sir George held that there had been a breach on the part of John Martin & Co. of the condition that the underwear was reasonably fit for the purpose required.

In dealing with the negligence action against Australian Knitting Mills, Sir George held that the underwear was supplied in the form it was intended to reach the ultimate purchaser, who would have no possibility of intermediate examination, and that the manufacturer failed to take reasonable care in the preparation of the garments, resulting in the injury caused to Dr Grant. Sir George awarded Dr Grant 2450 [worth about $170,000 in 2007] against the two defendants. The case began in the South Australian Supreme Court on 8 November and ran until 22 December 1932, and returned on 17 February 1933 for judgment, a total of 21 days. There was a later, brief, hearing relating to costs. Unfortunately for Dr Grant the matter did not end there. Australian Knitting Mills and John Martin & Co. lodged an appeal in the High Court of Australia against Sir George Murray’s findings.

Four judges of the High Court, sitting in Melbourne, heard submissions over six days from 13 to 20 June 1933, and the judgment was delivered in Sydney on 18 August.

In a judgment running to 63 pages of the 1933 volume of Commonwealth Law Reports, three of the four High Court justices explained their finding that the evidence failed to support Dr Grant’s claim against both Australian Knitting Mills and John Martin & Co. Although Justice Evatt agreed with Sir George’s findings, the decision of the Supreme Court of South Australia was reversed. Things were looking grim for Dr Grant.

In 1933, it was still possible to appeal decisions of the High Court of Australia to the Privy Council in London. In fact, matters from the State Supreme Courts could go on appeal from the High Court to the Privy Council until 1975. On 21 October 1935, four years and four months after Dr Grant had made his fateful purchase at John Martin’s, five Law Lords, seated in the magnificent Privy Council chamber in Downing Street, brought an end to the tale of Dr Grant and his troublesome underwear.
In a clear and concise judgment of just 11 pages, their Lordships accepted that the disease suffered by Dr Grant was of external origin and that the evidence pointed strongly in favour of Dr Grant’s case.

Their Lordships concluded that the disease contracted and the damage suffered by Dr Grant were caused by the defective condition of the underwear which John Martin & Co. sold to him and which Australian Knitting Mills made and distributed for retail sale. Their Lordships were not satisfied that the Chief Justice of South Australia was wrong and found no adequate reason to upset the judgment he had made.

In the quaint wording of Privy Council judgments, their Lordships concluded by saying that they would ‘humbly so advise His Majesty’ that the judgment of the Chief Justice was right in the result and should be restored against both John Martin & Co. and Australian Knitting Mills. Dr Grant won his final appeal and received his award of damages.

How much simpler (and cheaper) it would have been if this dispute could have been solved in some other way – perhaps by mediation.
Dr Grant and his underpants

Research and discussion activities

A list of website addresses follows these activities, which you may find helpful when conducting your research.

1  ‘Mediation is informal and the process is controlled by the parties.’ Discuss this statement, indicating the advantages of resolving a dispute by mediation.

2  ‘Mediation is not a viable method of dispute resolution unless all parties are willing to participate in it.’ Discuss this statement.

3  Using examples, explain the kinds of disputes that may not be appropriate for resolution by mediation.

4  What is mediation? Why might this be an effective way of resolving a dispute? Write a short story illustrating such a dispute and showing its effective resolution.

5  Outline the role of a mediator.

6  Explain the differences between mediation and arbitration. Use examples to illustrate your response.

7  Log onto the Department of Justice website (www.justice.vic.gov.au). Click on the Disputeinfo link then click on the Dispute Settlement Centre Victoria link (located under ‘Related pages’) to undertake the following tasks:
   a What kinds of disputes can the Centre assist with?
   b What other services does the Centre offer?
   c Click on the Dispute Settlement Centre of Victoria’s Information Kit link (located under ‘Related pages’) and then click on the link to the information kit to launch the pdf file in a new browser window. Read the case study at the end of the information kit. What are the advantages of resolving this particular dispute by mediation? Explain your answer carefully.
Dr Grant and his underpants
Useful internet sites

**Victorian Civil and Administrative Tribunal**
www.vcat.vic.gov.au
VCAT uses mediation as a means of attempting to resolve a wide variety of disputes. This website has information about each of the VCAT Lists and its procedures.

**Telecommunications Industry Ombudsman**
www.tio.com.au
This website provides information about the services provided by the TIO and its methods of dispute resolution.

**Financial Ombudsman Service**
www.fos.org.au
This website displays information about the FOS and its procedures for dispute resolution.

**Victorian Courts and Tribunals**
www.courts.vic.gov.au
This website has links to all Victorian courts and tribunals.

**Victorian Department of Justice**
www.justice.vic.gov.au
This is a very useful website for students, which contains current information about the delivery of justice in Victoria and about changes and proposed changes in the law.

**Victoria Law Foundation**
www.victorialawfoundation.org.au
This website provides access to a wide range of teacher and student resources for VCE Legal Studies and VELS Civics and Citizenship, and lists all of the Foundation’s publications.

**Fair Work Australia**
www.fwa.gov.au
Fair Work Australia is the national workplace relations tribunal. Of particular interest to students is information about its role in assisting employers and employees in resolving industrial disputes.
Contributors

About Victoria Law Foundation
Victoria Law Foundation helps Victorians understand the law and their legal system. We are a not-for-profit organisation funded by the Legal Services Board Public Purpose Fund. The Foundation funds and generates innovative projects, including plain-language publications that promote community understanding of the law and the legal system. Wherever possible, publications are made available at no cost to schools and community organisations.

The Foundation also organises the annual Law Week in May, which features a number of activities for schools. For more information visit www.victorialawfoundation.org.au/law-week

About the Author
David Thomson, MA, LLB, Dip LS, Dip Fam Law, DipT, FACE, has been a teacher of VCE English and Legal Studies at Caulfield Grammar School since 1980 and Teacher-in-Residence at the Victoria Law Foundation since 2005. He has contributed to the production of a wide range of resources for Australian students.
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