OTLA LONG TERM DISABILITY CONFERENCE: SLAYING THE LTD DRAGON

MEDIATION STRATEGIES: BRIEF, PREPARATION, OPENING AND TAX

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INTRODUCTION

Over 20 years ago, in response to an inefficient civil justice system, escalating legal fees, and long and excessive delays to reach trial, the concept of alternative dispute resolution was born. Instead of litigating matters, with its inherent uncertainty and runaway costs, a new approach was conceived. Building upon innovations undertaken in the United States, mediations of disputes were slowly introduced in the Province of Ontario. What was initially an exception has evolved into an accepted, admired, and, indeed celebrated feature of contemporary litigation in the Province of Ontario. Indeed, mediation is mandatory in Toronto, Ottawa and Windsor.

Most cases today are mediated; very few cases make their way to trial. Indeed, some are decrying the lack of civil trials, a worrisome trend, which will ultimately erode the role of the trial advocate. Trials will not disappear, however, because mandatory mediation occasionally results in perfunctory attendances by the parties and often prior to the action being set down for trial, thereby creating little incentive for insurers to settle. Nonetheless, more often than not, mediation is increasingly chosen by litigants as a way to resolve obdurate disputes, and accordingly, it is incumbent upon counsel to appreciate the significance of mediation and how an effective mediation can result in the

dispute being resolved in an efficient, cost-effective way which benefits not only the client but the administration of justice.

Preparing for Mediation in Long-Term Disability Claims

Historically, insurers terminated or denied disability claims with confidence that very few people would challenge the decision by commencing a lawsuit. Times have changed, and disability litigation is now a fertile area of law and, in my experience, has grown significantly over the past 20 years. Claims against disability carriers for non-payment of disability benefits are now commonplace. There are hundreds of thousands of Canadians suffering every day from chronic pain, chronic fatigue, and fibromyalgia and mental illness, who often find themselves in disputes with their disability insurers. Disability carriers and their medical advisors, without oversimplifying, have not readily accepted the legitimacy of claims for disability benefits. Therefore, a lawsuit is commenced.

After the action is commenced and pleadings are exchanged, a strategic decision needs to be made as to whether to mediate before the examinations for discovery have been conducted. Today, it is quite common for the disability carrier to approach the plaintiff's lawyer with a request for an early mediation. The issue is whether the case should be mediated before the claims representative is examined for discovery. Early mediation favours your client, who is often without funds, in desperate financial straits, depressed, and desirous of resolving the matter. Should the case be mediated at this early juncture?

The answer depends, to a large extent, on your client's financial position and the strength of your medical evidence. In my view, mediation without discovery gives the insurer an added advantage. The insurer has an opportunity to have a face-to-face meeting with your client and make offers of settlement which, given the urgency of your client's financial situation is often tempting, despite the fact that it may often come at a discount which is not otherwise fair or reasonable. It is beyond the scope of this paper to provide some tactics and strategic advice with respect to when to mediate, except to the following: if the matter is to be mediated early, I would do so only if the examinations for discovery have already been scheduled and a Notice of Examination delivered. In the event that the mediation is unsuccessful, the insurer then knows that its claims handler will be subject to comprehensive scrutiny of its actions and decisions in adjudicating the file, and a searching and thorough cross-examination.

Preparation for mediation, like that for trial, begins as soon as the lawyer is retained. Obtaining a complete picture of the client's pre-accident medical condition, including obtaining a copy of all clinical notes and records, employment documentation, and a list of your client's family and friends is essential to understanding the extent of your client's disability. By having a thorough grounding in your client's case, i.e., to understand the nuances of the case, including the pre-existing problems, and how they will impact on disability, you can best represent your client at trial.

Do not attempt mediation at all unless you are in receipt of a copy of the decoded OHIP summary as far back as it is available and a copy of all clinical notes and records, because the last thing you want to occur is to be surprised at the mediation by the

defendants already having more information with respect to your client's case than you do.

In addition, you will want to have some compelling medical evidence supporting your client's disability claim if you go to mediation before discovery. A supportive report from a credible treating physician is critical. In my experience, unless you have good medical support, including a vocational expert, mediation at an early stage is likely ill-advised.

Finally, you will want to ensure that you have carefully reviewed the insurer's file including the claims handler's notes, to identify examples of bad faith to support an argument for aggravated or punitive damages.

Once the decision is made to mediate, a Mediation Summary, similar to the document enclosed with this material, must be delivered. The Mediation Summary should highlight the strengths of your client's case, discuss and rebut the weaknesses which are already known to the insurer, and outline what the insurer is obligated to pay. Written advocacy, whether you mediate before or after the examinations for discovery, is critical, not only in long-term disability claims but in all cases. You put your best foot forward in your Mediation Summary and, more often than not, it will assist in the resolution of the case. If the case does not settle, you remain possessed of a Mediation Summary which can be readily converted to a Pre-Trial Conference Memorandum.

Briefing the Client

Answering the expectations of the client is critical in a long-term disability claim. It is advisable to meet with your client a few days or a week prior to the mediation, so that

the client is prepared and briefed with respect to the process, understands what to expect, and is in full agreement with your approach to resolving the litigation. At our firm, before the mediation briefing session, we provide the client with correspondence, outlining the significance and purpose of the mediation process, what it entails, what to expect, and the likely duration of the process. During the mediation briefing, we indicate the following:

1. mediation is, in essence, a glorified settlement conference, with the aid of a mediator, wherein an attempt is made to resolve the case;
2. present at the mediation will be the defence counsel and the representative from the insurer, who will be the decision-maker;
3. we, as your counsel, will be presenting a short summary, outlining the salient features of your case, to be followed by you and your family member, providing a short synopsis of how you have been affected as a result of your disability and how the non-payment of disability benefits has wreaked havoc on your life;
4. after our presentation has been concluded, the defence counsel will make a brief presentation, outlining the strengths of the insurer's cases;
5. we will then provide any rebuttal in response to their representation; and
6. thereafter, we will separate into our own rooms, where we will meet with the mediator privately.

During the course of our briefing, we discuss the range within which the case should be settled. We will have a calculation prepared by an accountant, outlining the present value of the benefits. We will discuss with the client as to whether the benefits are taxable or non-taxable and explain and discuss the pros and cons of the present value.

The clients will be given a copy of the accounting documentation together with a copy of our Mediation Summary, the defendant's Mediation Summary, and the insurer's Mediation Summary.

During the briefing, we will explain what "present value" is and the discount rate, in the simplest terms possible. We give to the client an example such as the following: the client is 40 years of age and is entitled to $2,000.00 per month or $24,000.00 per year until age 65 and, on a straight line, the value of the benefits would be approximately $600,000.00, however, with present value, using discount rates, because of inflation, it would be worth another number. We would say that the insurance company is under no obligation to cash out the claim and they can put the client back on claim. The client will be asked whether he or she wishes a "divorce" from the insurance company or whether they wish to be put back on claim with full payment of arrears. More often than not, the client wishes a divorce from the intrusive, stressful, and dispiriting interaction with the claims handler. Our clients want nothing more than to get on with their lives, free of the daily irritation of dealing with the insurance company. During our briefing, we explain that the insurance company will likely be advocating for a higher discount rate and the client will have to make a careful decision, based on our advice, as to whether to accept any "cash-out" or "lump-sum" settlement, understanding the full ramifications of the settlement, i.e., that arrears would be taxable and, generally, all future benefits would be non-taxable.

In addition, during the briefing we prepare our clients about the issue of CPP disability benefits. Most group disability policies require that an insured apply for CPP disability benefits, which is a direct offset from the disability benefit. Moreover, many polices

contain a provision permitting the insurer to notionally deduct CPP if the insured has recourse to apply. Notwithstanding that the test for disability in the CPP legislation differs from that set out in most group polices, the insurer will argue that if your client qualifies for disability, then surely she will qualify for CPP. Therefore, on any cash out, the insurer will be looking to maximize the amount by which to reduce the lump sum payment on account of CPP disability benefits. A thorough discussion with the client is critical, depending on the status of the client's application for CPP disability benefits. The client should understand your strategy about negotiating the CPP deduction. Ideally, the goal should be to obtain a reasonable lump sum for your client with only a nominal reduction for CPP, while still preserving your client's right to apply for and receive CPP disability benefits.

The Opening

During the opening statement, it is absolutely critical to be forthright as possible, not to exaggerate your points, not to belittle the defence position, and to carefully, thoroughly, and objectively outline the strengths of your case and acknowledge the weaknesses of your case and how they can be surmounted, and why the case ought to be settled.

The alternative to not negotiating a settlement is to proceed to conduct the examinations for discovery if you are mediating early. Emphasize during the opening that at discovery, the claims handler will have to:

- produce manuals and internal e-mails;
- explain the bases upon which he/she arrived at the decision to deny benefits;
- disclose his/her training, education and experience including the courses the claims handler took;
- account for why medical reports were not read, considered, and analyzed, and why the treating doctor was not contacted to determine whether the plaintiff was fit to return to work, and
- answer a host of other questions which would not place the insurer's policies, procedures, and employees in the most favourable light.

The risk to the insurer is to undergo an embarrassing discovery and to face the recognition that their behaviour, if ultimately placed under a microscope and scrutinized by a judge, would result in negative publicity being attracted to their client, if the matter is not resolved.

Additionally, during the opening statement, plaintiff's counsel should carefully critique the defence expert, who is more often than not, their in-house medical advisor or a physician on contract to the insurer, who is a so-called preferred provider, who is neither independent nor fair-minded but simply works for the insurer in evaluating files. The opinion of such an individual is hardly the basis upon which to render a decision which could forever alter the life of the claimant and his or her family.

The Day of the Mediation

Mediations must be civil affairs, despite the bitter acrimony that your client has towards the insurer, counsel must be careful not to allow the anger he feels for his clients' condition and situation to intrude on effective advocacy. Passion and eloquence are fine. Anger and outrage are simply neither effective nor appropriate and will most certainly alienate not only the mediator but also opposing counsel and the insurer's representative. Counsel must carefully, cogently, and thoroughly outline the strengths of their client's case and the strong treating doctors' reports, bolstered by the thoroughness and objectivity of an experienced vocational expert, to explain why the insurer will lose and will lose badly at trial. Counsel must remain objective and dispassionate.

The threat of extra contractual damages, aggravated or punitive damages, is the "elephant in the room" in every mediation. The insurers know that their often miserable treatment of their insureds will result in a stern and severe rebuke which a rational insurer most surely wishes to avoid. The contemptible behaviour by the insurer is an important lever to use at the mediation, i.e., a lever to result in a higher lump-sum payment, as the insurer is not attending the mediation to pay aggravated or punitive damages and fair and reasonable costs.

In the Mediation Summary, and, indeed, at the mediation, the glaring examples of bad faith and the financial devastation which the client has undergone should be highlighted. Many clients find themselves to have been broken financially and emotionally. Their savings have been exhausted, loans have been contracted, and what they had hoped to

have been a comfortable retirement is now fraught with uncertainty. They are in pain and are experiencing depression and never-ending anxiety. These points must be continually stressed at the mediation.

Our clients are briefed in advance that that we will obtain written instructions with respect to every offer of settlement. In addition, during each round of negotiation, we thoroughly explain our negotiating strategy. In our view, it is important for the client to be a willing and active participate during the mediation process. They should buy in not only to the discussions during the mediation but they should be active participants in the resolution of their own disputes. Our practice is to have our client engage in "participatory mediation", a process in which our client is an active participant in the mediation and is being apprised and included at every stage. This approach results in a settlement which meets our client's needs and expectations and encourages support for the administration of justice and the mediation process and, more often than not, results in the dissipation and the dissolution of the acrimony, anger, and bitterness, (somewhat akin to the air escaping a balloon) to the palpable relief of our client.

Respect During the Mediation Process

Despite the ire that one may feel towards the insurer for its callous disregard for your client, its refusal to accept your client's treating doctors, their utter refusal to read and heed updated documentation which has been provided to it from time to time, the insurer is attending the mediation with a view to resolving the case. Counsel and the insurer must be treated with respect. Civility is not only required but, today, it is an indispensable tool of advocacy.

Tax Consequences

At times, tax consequences cause great concern to litigants. Those who have paid for the disability policy create no cause for concern or alarm. The benefits are non-taxable. Where the employer has paid for the benefit as an incident of employment, the benefits are taxable. Arrears of benefits negotiated at the mediation are, indeed, taxable, however, future benefits, according to the Supreme Court of Canada in *Tsiaprailis v. Canada*, [2005] 1 S.C.R. 113, 2005 SCC 8 are not taxable. It is important to keep the distinction in mind because, when one settles one's client's case, the client will be given a T4A by the insurer for the arrears of disability payments that are subject to tax. Therefore, it is important that the Direction to settle should indicate that the amount which the client will ultimately net will be affected by tax consequences and that the client should consult with his or her tax advisor following the settlement to ascertain the best mode in which to minimize the quantum of taxation, by either putting the arrears into an RRSP or taking advantage of any other provisions of the *Income Tax Act* to achieve tax savings.

In most cases, the insurer will agree to also provide your client with T1198 forms which will enable your client to spread the arrears over more than one tax year in order to minimize the tax consequences. It is important to be familiar with these concepts to be in the best position to assist your client.

Concluding the Mediation

Assuming a successful outcome, Minutes of Settlement will be signed which clearly set out the terms of the settlement, including the amount of the settlement that is to be allocated to arrears and therefore subject to tax if the matter is settling on the basis of a

lump sum settlement. Copies ought to be given to your client along with a copy of the settlement direction and full and final release. Insurers will generally insist on their own form of full and final release and usually have it ready to be signed at the mediation.

It is a trope that, at the end of a mediation, all parties shake hands, however, this is an important acknowledgement that, whether the case settles or not, the parties accept the legitimacy not only of the justice system but of the attempt, in good faith, to resolve the dispute.

Mediation Strategies OTLA Speech dated January 17, 2013