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MEDIATING AND SETTLING CLAIMS FOR DAMAGES

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Mediations:

"Happy are they who maintain justice and do righteousness at all times" psalm 106:3

Mediation is the most effective means of resolving a dispute and enjoys wide popularity among the Bench, the Bar and litigants. The long delays and costs which are part and parcel of litigation are avoided by a successful mediation. What follows below are some observations and comments formed over the course of my experience in mediating cases.

Up until 1990, mediation was an exotic and rare adjunct to litigation. There were no mediation courses to speak of in Ontario and few lawyers were skilled in mediation techniques. Learning from the American experience and concerned about the rising costs of claims, the insurance industry and the Plaintiff's Bar embraced mediation as a new way of resolving claims and as a way to ease the stress and strain of litigation. In recent years, the quality of advocacy, written and oral, has increased substantially. But effective mediation can only be accomplished if the parties, both the insurance company and the plaintiff's counsel, are prepared for the process.

Preparing for Mediation

Preparation, preparation and more preparation is indispensable for an effective mediation. It is advisable to meet with your clients about one week before the scheduled mediation to review the mediation summary, to discuss strategy and to give your client an assessment of the value of his or her claim. In my experience, mediations are not successful when clients have unrealistic expectations, expectations removed from the reality of the litigation.

During the mediation briefing, it is helpful to review with your client what the mediation process is all about. In our office, the client is advised of the date of the mediation months before. Each client is provided with a written summary describing the mediation process, how long the mediation will take or the length of the mediation and what to expect during the mediation. We also let our client know that there will be lulls during the course of the day and we encourage them to bring books, magazines or "downtime" material to keep them occupied.

During the mediation briefing, we review with our clients how damages are calculated by the courts. We discuss the "cap" on general damages and the principles involved in assessing claims for future economic loss (loss of income; loss of earning capacity; loss of competitive advantage). We also discuss the strengths and weaknesses of their case and stress upon them that a mediation is about compromise and, that if they want to persuade the other side that they are wrong, the mediation will not succeed. We also review with the client what he or she will be asked at the mediation.

In most cases, it is important for the insurance adjuster to meet the client. Mediation is sometimes the only time when the insurance adjuster, or claims examiner, has an opportunity to meet the plaintiff. It is important to humanize the plaintiff. It is also important that the plaintiff express to the claims examiner or adjuster, what he or she has endured as a result of the accident.

How to Best Present Your Case

Some lawyers prefer audiovisual presentations. I do not. My approach to mediation is to ensure that there is a well written mediation summary containing an overview of my client's injuries, with a concise discussion of the issues of liability and damages and

liberal use of excerpts from the medical and expert reports. Our brief also contains up-to-date medical reports from treating physicians and from the medical legal experts that we have obtained to proffer opinions about our client's prognosis. Frequently we include reports from future care costs consultants on housekeeping and home maintenance issues as well as the actuarial or accounting information. A well prepared mediation brief allows the insurer and its counsel to understand our theory of the case and the support for our theory and thereby to appreciate the strengths of our case. We also attend mediations with extra copies of the mediation summary, in the event that defence counsel has not provided a copy to his or her client and accounting documentation.

Advocacy at the Mediation

Our approach to advocacy on mediation has evolved over time. In the early stages of mediation, the opening statements were much longer and more involved. Today we rely more on our written advocacy and less on opening statements to achieve the desired result. Because mediations today frequently involve multi parties and exigencies of mediation do not allow for lengthy opening statements, our approach is to concentrate on the highlights of our case, particularly the strengths of our case, and outline the weaknesses of the opposing case. We generally try and proceed to the offer stage early on. Mediations frequently are ending at 5:00, 6:00 and 7:00 p.m. For that reason, it is felt advisable and indeed, sensible, to truncate the opening statement and proceed to negotiate settlement as promptly as possible.

Ian Gold, I am sure, will provide his own comments on the use of Power Point or demonstrative aids on mediations and on lengthy opening statements. I must say that demonstrative aids that are used on mediations, generally consist of photographs of scarring, or of the aftermath of the accident, and "day in the life films" in cases of catastrophically brain injured individuals.

The Offers to Settle

Most cases settle at mediation. Those cases that do not settle at mediation, generally result in either plaintiff or defence counsel serving an Offer to Settle. Obviously, a strategically crafted Offer to Settle, submitted by the defence, will sometimes result in a later settlement. Because litigation is so expensive, the cost consequence is the most important reason to submit an Offer to Settle, properly crafted, to achieve the strategic objective of ending the litigation. However, simply to mirror an offer that was submitted at the mediation, which was rejected by plaintiff's counsel, will not create an undue risk to the plaintiff. Plaintiff's counsel with confidence and understanding of his/her claim will not be swayed by an Offer to Settle which was rejected. However, an Offer to Settle for more than what was offered at the mediation, but less than the plaintiff's last demand, could help to achieve settlement.

From the plaintiff's perspective, a good tactic following an unsuccessful mediation, is for the plaintiff to submit his/her own Offer to Settle, together with a Request to Admit. Particularly when the Offer to Settle and the Request to Admit are served at least one month before trial, defence counsel will or should re-examine his/her case and this may very well result in the case being settled.

When Cases Do Not Settle at Mediation

Each of us knows why mediations do not always result in resolution of the claim. From the plaintiff's perspective, cases remain unresolved because of the following factors:

1. Neither the defence counsel, nor the adjuster, have properly reserved or assessed the plaintiff's case;

2. The claims' examiner or adjuster does not come to mediation armed with sufficient settlement authority. In order to prevent this from occurring we generally ask the mediator to ensure, before the mediation begins, that defence counsel and the adjuster have come with sufficient settlement authority;
3. Defence counsel has not properly prepared his/her case by ensuring that they have conducted defence medicals. This is a rare occurrence, but on cases which we know will be mediated, we invite defence counsel to arrange their defence medical examinations well in advance so that, by the time the mediation takes place, they will have sufficient information to properly assess the claim;

4. There is antagonism between defence counsel and plaintiff's counsel and/or between plaintiff's counsel and the insurance representative;

It is wise policy to check ones' ego at the door and not to allow any personal conflicts to impede resolution of the claim. Our goal is to achieve the best result for our clients and personality difficulties, and clashes have no place on a mediation.

Conclusion

Mediations are a wonderful technique for resolving disputes. They have unclogged the Courts, reduced the cost of litigation and, when properly prepared for, result in a timely resolution of claims.