EFFECTIVE STRATEGIES FOR MEDIATING TORT CLAIMS

10 IMPORTANT ISSUES TO CONSIDER

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INTRODUCTION

In her book, *The New Lawyer, How Settlement is Transforming the Practice of Law*, Dr. Julie Macfarlane, notes the following:

> **A 98% civil settlement rate and the increasing use of negotiation, mediation, and collaboration in resolving lawsuits have dramatically altered the role of the lawyer. The traditional conception of lawyer as "rights warrior" no longer satisfies client expectations, which center on value for money and practical problem solving rather than on expensive legal argument and arcane procedures.**

This observation rings particularly true in the area of tort claims where mediation has become an established procedure and is increasingly the event that parties rely upon to resolve lawsuits. To be successful in today's litigation environment, a lawyer must be as equally effective at mediation as in the court room. This paper outlines 10 important issues to consider in developing effective strategies for mediating tort claims. It is meant to be read in conjunction with the Ontario Bar Association program "*The Great Debates in Insurance Law: Effective Settlement Strategies at Mediation*" presented by Richard Rose, Len Kunka, Anna Petronio and Jim Davidson and moderated by Pat Brown.

1. WHEN SHOULD PARTIES MEDIATE

Many mediators and lawyers believe that mediation should take place at the earliest opportunity. While, this may be the case in other areas of law such as Family Law or

where there may be a continuing relationship between the parties, this may not always be true in tort cases.

The timing of a tort mediation is important. All parties need time to develop their cases and their respective positions. Mediating before discovery or before the production of important documents will likely limit a party's ability to properly evaluate their case or assess their risk. In many cases, the exchange of expert reports is necessary. Typically, the parties need to know what their respective cases will look like at trial. In addition, clients need to be ready and willing to settle. While there is no hard and fast rule about when a case should be mediated, the vast majority of tort cases in Ontario are typically mediated somewhere between discovery and pre-trial. This timing strikes a balance that allows for the development of the case to the point where lawyers and clients are comfortable mediating and yet still well before the increased costs associated with trial preparation.

2. WHAT TO LOOK FOR IN A MEDIATOR

Generally speaking, there are two types of mediators: Evaluative mediators and Facilitative mediators.

Evaluative mediators try to guide the parties to a resolution that the mediator views as appropriate under the circumstances. Former judges are often evaluative mediators as they rely on their own experience to assess the case and the relative strengths and weaknesses of each party's position.

By contrast, facilitative mediators are third parties neutrals who assist with the communication process but don't impart their own views into the process.

In Ontario, most tort claims are mediated by facilitative mediators. Any expression of opinion or suggestion is usually made informally or at the request of a party.

Key considerations for choosing an appropriate mediator often include the following:

(a) Look for a mediator who is persistent. A common complaint is mediators give up too easy or simply shuttle offers back and forth between caucus breakout rooms. A good mediator should be passionate about settling each and every case.

(b) A good mediator should be flexible in their approach. While many mediations follow a typical format, there may be certain cases where a different format is required. A good mediator should be able to accommodate the parties and not be overly rigid when it comes to process.

(c) Consider whether it is necessary for a mediator to have knowledge and expertise in the subject matter. Insurance claims, particularly motor vehicle litigation and accident benefit claims, often involve complicated legislative provisions. Most experienced lawyers would agree that for such cases, a mediator with a background and expertise in this area is essential.

(d) There are times when the dynamics of a case require an experienced mediator. For example, in multi-party litigation, disputes between multiple co-defendants can often derail a mediation. In such cases, it is useful to engage

a mediator who has a successful track record in resolving multi-party disputes.

(e) A difficult client can also create complications at mediation. In such circumstances, lawyers often look to mediators to assist in managing a client's needs and expectations. In such cases, it is useful to engage a mediator who not only has experience and knowledge of the subject matter but also a sufficiently strong presence to command the necessary trust and respect that a difficult client may require.

3. LATE REPORTS AND NEW EVIDENCE

The delivery of late expert reports and new evidence can often derail a mediation before it even begins. In most tort cases, the defendants are insured. Accordingly, defence counsel report to insurance adjusters. Insurance adjusters often must report to their supervisors. A good defence lawyer will provide his or her insurance adjuster with all the information necessary for the mediation as well as an assessment of the case well prior to the mediation. In most cases, the insurance adjuster will review the file with his or her supervisor to ensure that there is appropriate authority to settle at the mediation. Therefore, the late delivery of reports and new evidence which will likely alter the defence assessment of the case should be delivered before these meetings take place. It is very difficult to reassess the case and obtain appropriate approval on a last minute basis.

In addition, expert reports may require responses. If this is the case, it may take several weeks if not months to obtain a date for a responding expert. If counsel anticipates that their expert reports will require responses, then the delivery of such reports should provide ample time for that purpose.

The actual mediation brief itself usually should be delivered no later than one week before the mediation, provided that all important information (expert reports, etc.) has been previously served.

Notwithstanding the best intentions of even the most organized lawyers, there are times when reports and new evidence will be delivered late and just prior to a mediation. In such situations, lawyers should carefully consider whether or not the mediation can continue. In many cases, the mediation can still be very productive and need not be aborted. Strategies dealing with the late delivery of reports and new information include the following:

- Consider whether a responding report will even be necessary or will the report be dealt with at trial by way of cross-examination. If so, there is really no need to abort the mediation. This is particularly true of economic loss reports.

- Will responding reports be predictable in any event. If so, then counsel can simply take the position at mediation that they will get responding reports that will, in all likelihood, contradict the opposing party's expert's opinion and/or provide opinions supporting that party's position. Negotiations can continue based on such assumptions.

- Can the mediation still be productive insofar as it can set the stage for future settlement. If this is the case, then it is likely worthwhile for all parties to continue with the mediation.

The circumstances in which a mediation needs to be aborted due to the late delivery of reports and new evidence are often rare. In most cases, it is likely more productive to continue with the mediation that to adjourn.

4. MEDIATION BRIEFS

The exchange of mediation briefs is essential. The briefs will typically provide the mediator with the information that is required to manage the mediation process. In addition, mediation briefs often organize the evidence so that it can be easily reviewed and referred to by parties and clients. The briefs also give insight into each party's view of the case, their expectations and what issues are truly in dispute.

The content of the mediation brief is very important. All mediators will agree that the best mediation briefs are succinct, organized and include those documents that are important to the case. The following is a list of issues to consider when preparing a mediation brief.

- Keep the brief short
- Keep quotes and references from reports and documents brief.
- Always include as attachments those documents referred to as being important.

- Highlight any areas or issues which are not in dispute.
- Outline those areas that are in dispute and will likely prove to be barriers to settlement at mediation.
- Ensure statements are accurate and backed up by evidence.
- Avoid hyperbole and personal attacks.

5. PREPARATION

Like all aspects of litigation, preparation is the key to success. This includes both preparing for the actual mediation process and also preparing your client.

Preparing The Client

From the plaintiff's point of view, it is important to explain and review the process so that the plaintiff knows what to expect. This is particularly true if personal attacks on the plaintiff are anticipated. Counsel should decide before hand if they want their client to speak and prepare accordingly.

It is also useful to discuss the consequences of accepting and rejecting offers as well as what settlement might look like after fees and disbursements are taken into consideration before the actual mediation. This helps to avoid dealing with such issues during the often stressful mediation process.

From the defendant's point of view, it is important to discuss the likely value of any potential settlement and to ensure that there will be proper authority at mediation. This often requires an exchange of information well in advance of the mediation. It is also important for defence counsel to calculate the anticipated amounts of pre-judgment interest as well as costs, HST and disbursements. It is not unusual for interest and costs to increase settlement by a substantial amount. An adjuster who is surprised by this at mediation was likely insufficiently prepared by their lawyer.

Preparing For Mediation

Counsel should never underestimate the time required to properly prepare for mediation. Often preparation starts as soon as the mediation is scheduled which may be many months in advance. At this point, it is important to determine what evidence will be required such as expert reports, transcripts, witness statements etc. Waiting too late to obtain such evidence will often undermine the mediation.

Briefs should be delivered no later than one week before mediation, provided expert reports and other important information have already been served sufficiently ahead of time. This allows opposing counsel to send a copy to their respective clients and to respond to any new or unanticipated issues.

It is also important to have a detailed knowledge of the evidence important to each side's position. Nothing looks worse than a lawyer who clearly doesn't know his or her own case. This also allows for a lawyer to be flexible and responsive at mediation in the face of any new issues or dynamics that might arise. Opening statements, as will be discussed in more detail below, should be prepared ahead of time and should be

dynamic as opposed to rigid. The opening statement should be prepared so as to augment the brief and not simply repeat it.

Litigation is a competitive environment. Impressions are important. A lawyer who comes across as organized and prepared and ready for trial can often influence the outcome of a mediation in favour of his or her client.

6. OPENING STATEMENTS

In most tort mediations, an opening statement or presentation is appropriate and useful. The opening statement can often further refine a party's position and focus the mediation appropriately. On occasion, opening statements may not be necessary or appropriate. These circumstances are typically rare. However, there are times where clients, depending on the nature of the tort, may be overly emotional or the parties are overly acrimonious. If it is felt that an opening session will do more harm than good then consideration should be given to avoid the opening session altogether.

Multiple parties can also give rise to excessively long opening sessions which are sometimes best avoided. Certainly, relying on the mediator's guidance and discretion is important when deciding whether or not to provide opening statements.

There is no right or wrong way in which to conduct an opening statement. Most mediators would agree that excessively long opening statements are counter productive. Similarly, overly aggressive or inflammatory opening statements can often have a negative impact. Visual aids and power point presentations can be useful

particularly in demonstrating what evidence will be seen by a jury at trial. However, such presentation should be appropriate to the nature and size of the case, particularly when the power point presentation itself will be claimed as a disbursement in the lawsuit.

7. SHOULD CLIENTS SPEAK IN THE OPENING SESSION

Another issue is whether or not clients should speak in the opening session. The decision to have a client speak at mediation often comes down to whether or not that client will make a good impression on the other side. Opposing counsel will often want to hear what a particular party has to say so they and their own client can assess that party as a witness. A client, who will likely come across poorly at mediation, runs the risk of doing more harm than good. Counsel should never feel obligated or pressured to have their clients speak if it is against their better judgment.

8. EXPERTS AND WITNESSES AT MEDIATION

There are occasions when non-parties attend at the mediation. This can be a friend or family member, a witness or one of the party's experts. The real consideration is whether or not the presence of such an individual will undermine the process. Certainly, advance warning should be given to the mediator and to the other parties regarding the attendance of a non-party at mediation.

The role of an expert, however, can often be useful. This is particularly the case where complicated engineering or accounting issues are in dispute.

Recently, there has been greater acceptance of having all parties bring their experts to meditations where the subject matter of the dispute will clearly require expert evidence at trial. On occasion, experts are asked to sit down amongst themselves to discuss the issue to see if they can arrive at any form of consensus. This procedure is referred to as “hot tubbing”. While this procedure can often be very useful, it is necessary to organize it well in advance. Such a procedure can also dramatically add to the time and cost of a mediation.

9. DISPUTES BETWEEN DEFENDANTS

In many cases, liability disputes exist between defendants. The inability to resolve these disputes can prohibit making an offer to the plaintiff as there will be no funding formula in place to fund the offer should it be accepted. Many mediations have failed based on the liability disputes between co-defendants. Where such a dynamic exists, it is imperative that the mediator be given advance warning either through the mediation briefs or by the parties. Often, more breakout rooms will be required.

It is often useful for defendants in such situations to discuss the issue of liability prior to attending at the mediation. Even if an agreement on liability cannot be reached, it can at least set the ground work for agreement at mediation. It will also identify the true nature

of the dispute and each defendant's position. Waiting until mediation to discuss liability is often too late.

10. SETTLEMENT TERMS

Tort mediations in Ontario often involve similar settlement terms which have been developed through convention. This is often the expectation of the parties and is unspoken. As such, it is imperative that a party who requires unconventional settlement terms advise the other parties early in the mediation or even before the mediation. Such terms can include requiring signed releases prior to issuing cheques. The requirement for individuals not in attendance at the mediation to approve the settlement or unusually long waiting times to deliver settlement funds, etc.

Excessive disbursements can also derail a mediation very late in the process. It is always useful to deliver a complete and accurate list of disbursements either prior to the mediation or early on in the mediation. This is particularly true if disbursements are higher than the opposing parties anticipate.

Typically, the parties require Minutes of Settlement and/or a Full and Final Release to evidence the settlement. These documents are required in almost every case and it is therefore a good practice to prepare these documents in advance and have them ready at the mediation. The mediation process can be long and tiring. Having to spend the final hour writing out the terms of the settlement or waiting for releases to be faxed from the various offices is something that can be easily avoided.

CONCLUSION

In Ontario, tort mediations have become an established procedure within the civil litigation process. In fact, many cases settle at mediation making mediation one of the more important procedures, if not the most important. As civil trials become increasingly rare, It is now essential that lawyers develop the knowledge, expertise and skills required to successfully advocate on behalf of their client at mediation.

The following articles and publications were relied upon in preparing this paper:

1. “20 Tips for a Successful Mediation”, Nancy Maisano, Maisano Mediation, LLC.
2. “A Mediator’s Tips For A Successful Mediation”, John F. Curren, Q.C., Mediator and Arbitrator, Calgary, Alberta.
3. T*he New Lawyer, How Settlement Is Transforming the Practice of Law*, Dr. Julie Macfarlane.

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