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Barristers & Solicitors

SETTLEMENTS IN NON MOTOR VEHICLE PERSONAL INJURY CASES

By Loretta P. Merritt

This paper will address some of the issues particular to the settlement of non-motor vehicle personal injury cases including slip and fall, products liability, medical malpractice and civil sexual assault cases.

1. PRE-SETTLEMENT OR MEDIATION CONSIDERATIONS

Proper preparation for settlement or mediation includes both preparing the case and preparing the client. There must be a plan. Counsel must know the facts and law and identify what issues and problems the case presents. As well, Counsel must determine the client's needs and what the client actually wants. For example, in civil sexual abuse cases the client's goals of being heard, acknowledged, holding the Defendants to account, justice, closure and healing may be as important or more important than the amount of the settlement. There may be non-monetary things like that can be obtained via a settlement such as an apology or an assurance and information about steps that have been taken to prevent similar incidents in the future. It is critically important to have these conversations with the client well in advance of approaching settlement.

Before entering into settlement discussions, Plaintiff's counsel puts a lot of effort into building the damages case for presentation at mediation or in settlement discussions. Usually a copy of the settlement or mediation brief is given to the client. Doing so is a good first step, but unfortunately sometimes the preparation of the client ends there. Instead, use the mediation brief

as a starting point for discussion. Your client must have sufficient information and understanding of the law, the risks and the defendant's position to participate intelligently in the settlement process, to make decisions and provide instructions. If not, the risk is an unhappy client at best and a Law Society complaint or solicitor's negligence action at worst.

The Rules of Professional Conduct[1] dictate that a lawyer should provide competent representation including the required level of legal knowledge, skill, thoroughness and preparation reasonably necessary for the task at hand. In order to properly and competently represent a client in settlement discussions or mediation, plaintiff's counsel must know the real "judgment value" of the Plaintiff's case. It is important that the lawyer also have a realistic idea of the "best case" scenario, "worst case" scenario and "likely" scenario should the matter proceed to trial. It is critically important that all of these scenarios be discussed with the client. In non- motor vehicle personal injury cases, in addition to assessing damages, Plaintiff's counsel will also need to have a hard look at the liability risks. For example, in a historical sexual abuse case, an expert may be needed on the standard of care of the Children's Aid Society, or in a slip and fall case, a human factors expert may be needed. Counsel must discuss this expert evidence and liability issues and risks with the client and explain how they will impact settlement negotiations.

In a non- motor vehicle personal injury case there may be judgment enforcement issues which will have to be canvassed in advance of any settlement discussions. In some cases, a settlement may be based more on a defendants "ability to pay" than on a true assessment of the likely outcome at trial. These issues should be researched and discussed with the client in advance of any settlement discussions or mediation.

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[1] Rule 2.01(1) of the Rules of Professional Conduct

It is important to manage the client's expectations and explain that a settlement represents a compromise. A happy client is one whose lawyer has met, and preferably exceeded, his or her expectations. The client must know that where there are significant liability issues, there will be a significant "liability discount" taken on any damages assessment. It is also critically important to prepare the client regarding the issue of costs. The client should know what to reasonably expect the defendant to pay for costs as well as what the actual lawyer's fees might be.

Plaintiff's counsel must evaluate the case, look at the costs of further proceedings and evaluate the possible outcomes so that a cost benefit and risk reward analysis can be done with the client's full participation. Plaintiff's counsel must also discuss with the client the emotional costs of a trial and the positive impact on life planning and the certainty that a settlement provides.

It is important for counsel to educate the client not only about the case, but the mediation process as well. It is the lawyer's job to help the client set reasonable expectations regarding the process. Counsel should ensure that the client is willing and able to listen to the defence perspective as well as the mediator's views of the case. The client must be informed that the mediator is not a decision maker, the process is informal and flexible, and above all that it is confidential and without prejudice. The client should be told that he or she will not "testify" but there may be an exchange of information. Counsel should advise the client that rarely does one side persuade the other that their position is "wrong".

Counsel should consider discussing potential "hot points" with opposing counsel and/or the mediator so that tensions can be tempered and the day managed with the clients in control. There is nothing wrong with contacting defence counsel and/or the mediator in advance of a mediation to give them a "heads up" about issues that may come up during the mediation. Advance discussions about the format of the mediation may be useful as well.

Counsel must decide whether to discuss settlement with opposing counsel in advance of mediation. Mediator Vance Cooper[2] make a strong case for pre-mediation settlement discussions. On the other hand, a mediated settlement may be perceived as more just because of the mediators' neutrality. In non-motor vehicle cases especially, it is important to consider what approach will work best with the particular client. For example, some clients may enjoy the back and forth of a tough negotiation while others may not have the stomach for it.

2. PRE-MEDIATION MEETING WITH THE CLIENT

A meeting with the client before a mediation takes place is a good idea. During this meeting, the client should be told about the mediator and his or her particular style. Also, if the client has not already met defence counsel at the discovery some basic information about defence counsel and his or her style is helpful. If you don't know the mediator or have never seen defence counsel at a mediation ask your colleagues. An overview of the process and what is to be expected will help prepare the client and make him or her more comfortable. Discuss opening statements and whether the client will speak at the mediation, advise the client to keep an open mind, discuss the negotiating process and "give and take" of the process. Encourage the client not to be discouraged by the bargaining process. Talk about confidentiality and the fact that a confidentiality agreement will be signed. Finally, explain to the client that at mediation there is no "winner" and that the best settlements leave both sides equally unhappy.

3. MISTAKES LAWYERS MAKE AT SETTLEMENT CONFERENCE AND MEDIATIONS

(a) Failing to communicate a willingness and ability to go to trial

Counsel loses significant leverage if the other side knows he or she is unwilling or unable to go to trial. Obviously, this reputation is something that has to be cultivated over the a course of a

[2] Why people do not negotiate in advance of mediation by Vance H. Cooper.

career as opposed to at any particular mediation. However, good preparation and knowledge of the case will demonstrate that a lawyer is on his or her way to being able to try the case. On the other hand, table thumping and bravado is not usually effective.

(b) Ineffective Opening Statements

Plaintiff's counsel should give careful thought to contents of the opening statement and, in some cases, whether an opening statement is appropriate or necessary at all. Counsel must know the purpose of his or her opening statement. The opening statement is not the time to rehash what has been spelled out in the mediation brief. There are different types of opening statements that can be given. For example, if it is important to persuade the other side that counsel is willing and able to try the case, it may make sense to make an opening statement which is like a jury opening. On the other hand in a case where there is significant acrimony, it may be better not to have any opening statement. In some mediations, it is best the parties never see each other at all. Whatever decisions counsel make in this regard should be reviewed with the client first so that the client knows what to expect.

(c) Not Preparing the Client to make a Statement

Often in personal injury cases and particularly in some types of non-motor vehicle cases, the client will want to "have their say". Some clients need to "vent" while others actually have important messages for the defendant and the defence counsel to hear. In some cases, the client makes an excellent witness and therefore counsel will want the opposing party/decision maker to "see" the client first hand. It should be discussed with the client well in advance whether the client is going to make a statement and if so, the contents of the statement should be reviewed with counsel.

(d) Mediation without Necessary Parties

If there is a spouse or other important person with whom the plaintiff will want to consult before providing settlement instructions, it is important that such person attend the mediation.

(e) Trying to Settle Too Early or Too Late in the Case

Every case is different, but Plaintiff's counsel must consider whether there is sufficient information for both sides to adequately assess both their own as well as the opposing parties case. If it is too early and not enough information is available, settlement discussions will likely to go nowhere and frustrate the client. On the other hand if you wait too long, the legal fees incurred may present a barrier to settlement. Careful consideration should be given to when a case is "ripe" for settlement. A good practice is to speak with opposing counsel at the outset of the file and determine what information needs to be exchanged prior to meaningful settlement discussions (documentary productions, examinations for discovery etc.).

(f) Carving a Bottom Line in Stone

In my experience it is best not to set out a "hard and fast" bottom line with the client before settlement discussions or mediation. If a bottom line is set in advance it can be very difficult to settle a case below that bottom line even if new information is revealed, circumstances change or the difference between the offer and the bottom line is insignificant. The client may feel as though he or she has "lost" if they go below their bottom line.

(g) Failing to Involve the Client in the Process

As counsel, it is sometimes easy to forget that the mediation process is stressful and unfamiliar to clients. We can easily fall into conversations with the mediator or other side using jargon such as "all in", "plus, plus", "PJI" and other terms that are unfamiliar to the client. It is important to step back and ensure that the client is following the process, and understands what is happening as

you go along. A client who feels alienated and confused is more likely to be unhappy with the result as well as the process.

4. PRACTICAL MATTERS

Deductions

In non-motor vehicle personal injury cases, there is obviously no threshold, no deductible and the deductions under the *Insurance Act* do not apply. However, counsel should be aware of the common law regarding the deductibility of benefits. The collateral benefits rule basically provides that if a plaintiff does not sustain a loss (*e.g.* because the employer continued to pay his or her salary while the employee was away from work), then no claim for the loss can be made. However if a client has contributed to the premiums for a benefits as is often the case with long term disability insurance, then the plaintiff's benefit is not to be deducted from the tort damages.[3] Counsel should review this law carefully before settling a non-motor vehicle personal injury case where the Plaintiff has received benefits.

OHIP

In all non-motor vehicle personal injury cases, OHIP's subrogated claim must be pursued. The *Health Insurance Act*[4] provides that OHIP is subrogated to the rights of the insured person to recover for the cost of past and future insured services where the services relate to injuries resulting from the negligence or other wrongful act or omission of another person. The Act provides that the Plaintiff must include a claim on behalf of OHIP in such proceeding. There is an exception for motor vehicle accidents, however this exception does not apply with respect to non-motor vehicle personal injury actions such as medical malpractice, slip and fall or sexual

[3] Sylvester v. British Columbia (1995), 125 D.L.R. 4th 541, Ratych v. Bloomer, [1990] 1 S.C.R. 940, Sills v. Children's Aid Society of the City of Bellville, [1990] O.J. No. 2841and related cases.
[4] R.S.O. 1990, c. H.6

assault claims. The Act also provides that no release or settlement of a claim for damages for personal injuries is binding on the Plan unless the General Manager has approved the release or the settlement. Therefore, if Plaintiff's counsel has forgotten to pursue a claim for OHIP, same can still be pursued not withstanding that a settlement has been achieved or a release signed. As a practical matter, most times Defence counsel will raise the OHIP issue if Plaintiff's counsel does not. Obviously, a defendant is interested in knowing their total exposure when a settlement is reached.

Confidentiality Agreements

In motor vehicle cases, a release typically contains a standard provision requiring the parties to keep the details of the settlement confidential. However in some non-motor vehicle cases, (e. g. sexual abuse cases), defendants may ask for much broader confidentiality agreements. Some agreements go so far as to prevent the Plaintiff from ever discussing or disclosing their abuse. Such agreements are offensive in a sexual abuse context where secrecy and shame are part of the injury. Having to maintain silence in return in return for a payment can have very negative consequences on an abuse survivor.

Obviously, the terms of a confidentiality agreement can be negotiated. An abuse survivor may not object to agreeing to keep the amount of the monetary payment confidential, but he or she must give very careful thought before agreeing to keep the details of the abuse confidential. In some cases, the survivor may, at a future time, wish to speak publically in order to help other abuse victims. In this context, disclosing the particular identity of the perpetrator or the institution with which he or she is affiliated may not be important issues, however, when speaking with family members, counselors or close personal friends, providing all the details of the settlement may be important. In any case where a confidentially agreement is requested, it

must be carefully reviewed and explained to the client to ensure that he or she fully understands its implications. The issue of confidentiality agreements should be discussed with the client prior to going into any settlement discussions or mediation.

ODSP and Ontario Works

In non-motor vehicle cases where there are no Accident Benefits, and may be no other sources of income, an injured person may well have to resort to government assistance such as ODSP or Ontario Works. Counsel must make such inquires and determine if the Plaintiff has received such benefits and signed a subrogation agreement. Counsel must consider and discuss with the client the repayment obligations and any potential exceptions (*e.g.* $100,000. 00 for pain and suffering exemption for ODSP and $25,000. 00 for pain and suffering exemption for Ontario Works).

Conclusion

While many of the same considerations apply in non-motor vehicle settlements as apply in any settlement, there are some nuances with these cases. In any case, it is always a best practice to confirm settlement advice and instructions in writing, particularly where the client is refusing counsel's advice.

Any enquiries arising out of this article should be directed to Loretta P. Merritt at (416) 777-5404. The issues raised in this release by Torkin Manes LLP are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.