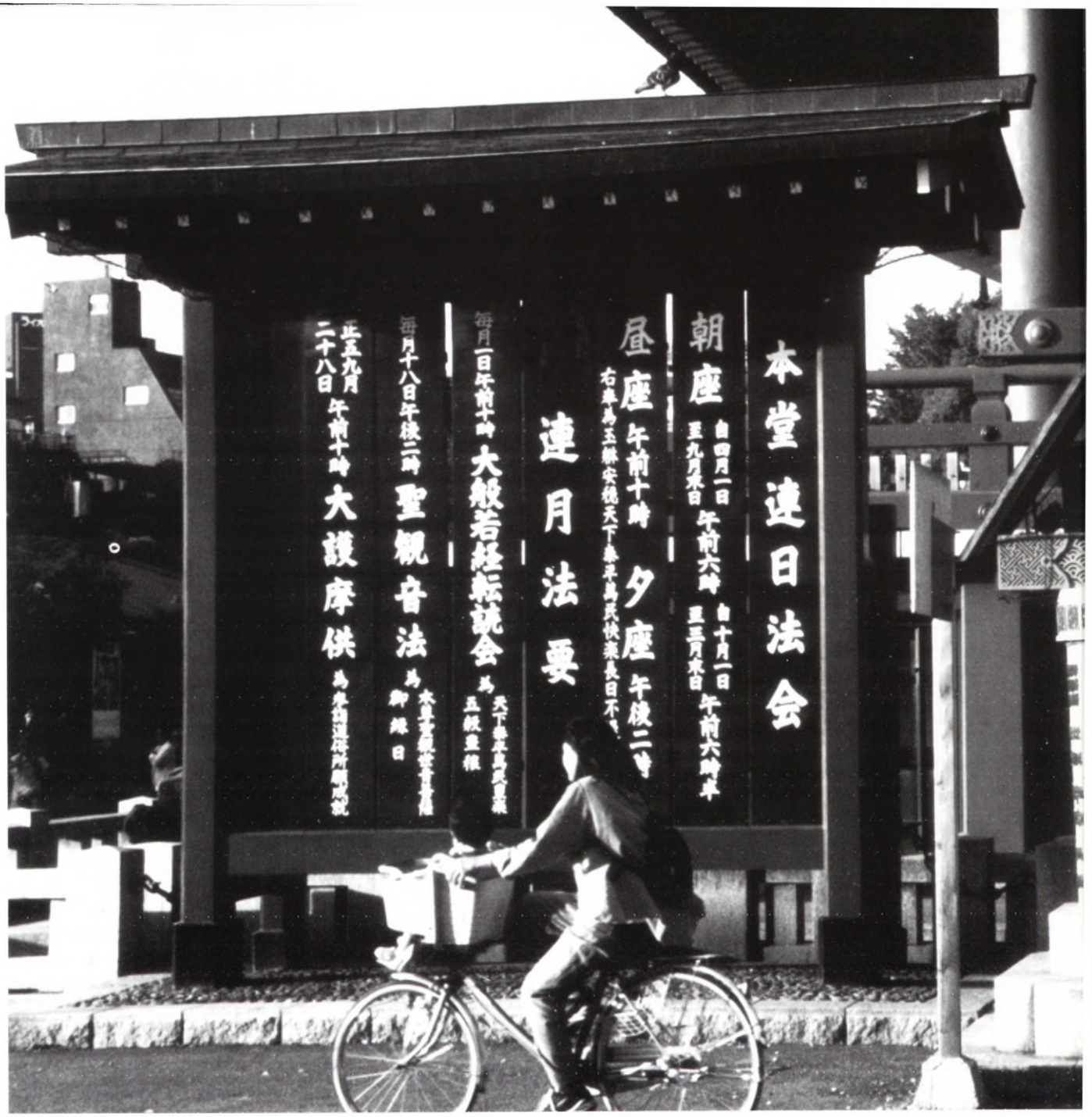

The defence view:
Negotiating personal injury claims

The negotiating battlefield looks different from the ramparts of the respondents' redoubt

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THIS ARTICLE CONSIDERS THE NEGOTIATION and settlement process from the respondent's point of view, thereby offering insights to plaintiff lawyers on how to improve their negotiation strategies.

Legendary negotiator Herb Cohen tells of his first international negotiating assignment. On behalf of clients he went to Tokyo for two weeks. He was collected at the airport by underlings in a corporate limo who offered to transport him back to the airport for his return home. He showed them his ticket so they could make the flight.

He spent the next eleven days being entertained at dinner, touring the country, even taking an English language course in Zen - anything but talking business. On day twelve negotiations began but finished early for golf. Another early finish the following day, for the farewell dinner. Negotiations began in earnest on the fourteenth day, continued in the limousine en route to the airport and concluded at the terminal.

No prizes for guessing the outcome: Herb got hammered. The incident illustrates the power of a deadline, one of the crucial components in all negotiations.

With input from distinguished defendant practitioners, this article examines general negotiating principles, identifies the flaws that rile respondents and delay or diminish settlements and, finally, points the way to prompt and satisfactory outcomes.

Key elements in negotiations

Knowing your opponent's time needs can be the key to successful negotiating. If a car dealer needs to sell 30 units a month to qualify for a bonus and you're customer number 30 - and it's the 31st of the month - you can name you own price, if you know his or her time needs.

Time is generally on the defence side and plaintiff lawyers must exercise fine judgement in presenting their client's position. On the one hand, you want to personalise the plaintiff's case; on the other, admitting the claimant is likely to lose the family home if the case doesn't settle soon is to play into your opponent's hands. ▶

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"Knowing your opponent's time needs can be the key to successful negotiating."

Ron Goldberg (not his real name: "my clients would shoot me") is the Workers Compensation partner of a substantial Sydney firm with 30 years in the trenches. He says "Defendant solicitors who have been around the block a few times can look a Plaintiff in the eye and tell within a tight range how much they'll be willing to settle for, right now".

Conversely, insurers will sometimes need, for internal purposes, to finalise a number of cases by a particular date. At such times, generous settlements can be won. Knowledge of the other party's time needs is the key.

Closely related to time, the element of reward and punishment also lies with respondents: "Take my offer or I'll see you in court" may mean "I'll see you in 12 months time". Twelve more months of a complaining plaintiff, extra billables and worse, no income, can be a powerful inducement to settle. Smaller firms know this pressure all too well.

How to resist? There is only one way according to Geoff Provis, partner at Gadens, Melbourne and Chair of the Law Institute Accident Compensation Committee. " Call their bluff. It's a question of bottle, as Terry said to Arthur".

That's the element of risk taking - an element you must employ while negotiating. Mr Provis says "People agree to settle because each side thinks they have got something better than a court would award."

No one wants to subject their fate to the whims of the court, but if your cause is just and strapped up with strong evidence, the risk of failure is reduced and worth the gamble.

Some years ago in Sydney's old-money bastion of Bellevue Hill, a curious householder accosted two men carrying rare Oriental rugs from her neighbour's house. Pointing to their van, sign-written "Carpet Specialists" the men explained they were taking the neighbour's rugs for cleaning. Eyeing the van and their matching overalls, the woman was satisfied. "How much do you charge?" she asked.

Happy with the quote, she asked if they could clean her equally expensive rugs. The men agreed, rolled her rugs up, carried them to the van and were never seen again.

That's the element of legitimacy at work. You'll be most familiar with it in the form of medical reports. Beware - false legitimacy goes all too often unchallenged. Medicos who comment on suitable occupations for injured plaintiffs, unless they have vocational qualifications and wide workplace experience, are outside their sphere of competence and sitting ducks for rebuttal from a vocational expert.

If your opponent sees your client as a statistic, your chances of obtaining a fair settlement are much reduced. Each case is unique and involves the element of personality.

In *Dr Zhivago*, Lara became "a nameless number on a list that was mislaid". There is a tendency to depersonalise personal injury cases, due perhaps to a heavy case-load or desire for efficiency. This is of great benefit to defendants.

Purely statistical analysis of future loss reinforces the anonymity of the plaintiff. The capacity of an injured person to participate in employment is strongly influenced by a dozen personal factors, of which level of impairment and education are the most important. Competent reporting will take into account such highly personal variables as the prognosis for degenerative change, local employment factors and competition for suitable occupations, transport access and family circumstances. Language skills have highly significant influence on employment prospects.

A defendant needs to be convinced of the genuineness of the claim, to witness the Plaintiff's reality through his or her eyes.

"Information that is withheld or that has gaps will set defence nostrils aquiver."

Defendant solicitors are highly sensitised to certain tell-tale signs. Information that is withheld or that has gaps will set defence nostrils aquiver.

Tax returns and group certificates are convincing proof of pre-injury earnings; their absence is highly suspicious. A series of tax returns over several years, but with one or more missing, may point to a period off work due to injury, of which the present claim represents an aggravation or a re-run: two for the price of one! Similarly, missing medical reports or failure to disclose full medical history will invite close scrutiny.

"Withholding material is the single greatest impediment to settlement", says Mr Provis.

In such cases, respondents will quickly resort to surveillance. This happens more than may be realised, as video evidence is often withheld pending its possible unveiling in court, with fatal effects on the plaintiff's credibility.

"You're often torn between hitting them with the video early on to try to get the Plaintiff to take a reasonable position, or holding off and keeping your powder dry. That way you give the Plaintiff no opportunity to concoct stories about good days and bad days, or how long he [or she] was in bed after that ▶

Respondent's red rags

Defendants agree there is little contention in open and shut cases of temporary or obviously permanent and total loss of earning capacity. Cases of partial incapacity, however, can lead to heavy-duty arm wrestling, as the future vocational outcome is, by definition, uncertain.

Notwithstanding the positions taken by many plaintiffs, cases of total loss of earning capacity are rare. Statistical research from The WorkCase Tables shows that, even in cases of profound injury, the average Australian will meet the Australian Bureau of Statistics' definition of "employment" for 25% of their remaining years to age 65.

Respondents expect virtually all injury claims to be exaggerated and consider this consistent with the interests of the client and the duty of the solicitor. It's part of the game.

Geoff Provis says "There's an amount of BS in every case. That's expected and it's the duty of the Plaintiff's solicitor to maximise the outcome".

"Plaintiffs must be flexible," says Ron Goldberg. "They should be prepared to negotiate 25%-30% of a claim to settle it".

There is another category of claim, however, that defendants see as absurd and provocative, like a red rag to a bull. Dodgy claims are a surprisingly high proportion, around 20% of the total according to Graeme Taves, Insurance Partner at Hunt and Hunt, Brisbane and prominent member of four insurance-related legal committees. He cites unrealistic expectations as a big rut on the road to settlement.

"Excessive claims force people into corners" he says. "Some cases get bogged down because, early in the piece, the plaintiff gets a number in his [or her] head that's too high. Often it's the plaintiff's solicitor who put it there. Then you have to spend a lot of time explaining to the solicitor how to convince their client to accept a realistic settlement".

game of touch football" says Geoff Provis "I prefer to hold back and call the Plaintiff's bluff, knowing it's up my sleeve".

Pointers to prompt settlements

At WorkCase, our vocational experts and forensic accountants spend considerable time face to face with plaintiffs. Before finalising a report, claimants are informed of its contents - except dollar amounts.

Claim quantum is extremely sensitive information. How you present the calculated amount to the different parties is critical. Unless you are especially fond of subjecting yourself to what Mr Taves calls "the dictatorial attitude of judges", you will tell your client that calculated quantum is an opening offer. You will explain that the expert's calculations take no account of the full extent of potential loss and will be negotiated down. "Low balling" your client can save you a lot of problems and make you a hero when you better their expectations.

This brings us to the solid core, the very foundation of a claim: quality of information.

Insurers have available to them a wealth of data relating to claims experience. They require this information so that adequate reserves can be set aside to cover likely settlement costs. Brett Ward, Director of KPMG Actuaries, Sydney, says literally dozens of variables can be factored in to predict claim outcomes: "Everything from ethnicity to agent of injury".

What this means is that, for insurers and their solicitors, your client is a number, and he or she should do as expected and settle in the ordained range. Information is power: it takes a skilful practitioner to break the defence out of this mould.

Says Mr Goldberg "One look at a claim and you can tell if the solicitor knows what they are doing and frankly, many don't.

"Anyone can make an allegation. But to back it up with properly presented evidence is another thing. I am constantly amazed by how poorly some claims are presented. Arguments for total incapacity that are patently untrue; out-of-date rates of pay, or assisted rates of half the real rate; or whole heads of damages, particularly *G v K*, completely overlooked.

"Even specious claims - which by definition include all claims for future loss of earnings - that are well argued and supported will get up. Good expert evidence is very hard to counter. A well-analysed case, properly supported by experts, means you are going to have to take the claim quantum seriously because the chances are a judge is going to wear it."

Respondents are unanimous that cases supported with quality expert opinion settle promptly. The ability of vocational experts to pinpoint future work outcomes is now at a very high level. Expert opinion combining objective statistical analysis and subjective knowledge of the plaintiff's vocational assets (language, transferable skills) and situation (local employment opportunities, family support) provides a sound basis for future loss.

Claims for X% of lifetime earnings or $Y "cushion" against future unemployment are simplistic guesswork and destined for the "discount heavily" pile on the respondent's desk.

"Speculative issues such as earning capacity need to be well supported", says Geoff Provis. "You can't argue when confronted with people who have genuinely tried to pick themselves back up after injury. Those are the cases that settle early and favourably for the plaintiff."

According to Mr Traves "A vocational expert's report can be of untold value. It can clarify, or solidify, some of the issues. If the plaintiff, according to the expert, can only work part-time, then you must accept it. There's no doubt that in cases of future, partial loss of earning capacity, such expert reports are of intrinsic evidentiary value".

His view is echoed by Ron Goldberg. "Well put together expert reports make all the difference. They can shift the claim up by several notches".

Mr Provis says "In partials and unusual cases you've got to get expert opinion if you want to influence a judge or jury. A strong case is one where the claim is realistic, the facts tenable and the evidence thorough. That's the case that settles quickly".

"A realistic offer early on, even if it's at the upper end of the likely range and provided it's well supported, will be settled inside six months", according to Mr Taves.

Defendants recoil from claims that are extreme, are presented in an amateurish style, where evidence contains gaps or is not supported by expert opinion.

Understanding and deploying the essential elements in negotiation, taking care not to antagonise respondents and supporting assertions with expert evidence constitutes a high professional standard. These skills produce fairer, quicker results. PL