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Making the most of mediation

Over 99% of claims for damages for personal injury in Queensland settle before trial. In 2003, there were less than 200 personal injury cases heard to judgment before the District and Supreme Courts. And this trend is likely to continue.

You can be confident that when you open a new file, the claim is likely to settle by negotiation, not by the traditional court battle and ensuing judgment. The main goal in the current climate is not to persuade a court of the merit of your client's case, but to persuade the defendant.

Mediation is one of the most common environments in which a settlement is reached. The process is better for the client. The results are faster and cheaper.

Most senior practitioners have been attending mediations or settlement conferences, in one form or another, for many years. And many senior practitioners treat mediation as simply turning up and seeing what the opposition is willing to offer.

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Several years ago, I was involved in an APLA seminar on mediation and negotiation. I asked a senior practitioner whether he would be attending. His response was that he did not need to learn about mediation because he had been doing it for years. I'm sure he had been, and probably badly.

One of the problems with mediation in personal injury cases is that the assessment of the likely quantum of damages is not an exact art. There is always a range of damages a judge might award. And the plaintiff's lawyer tries to settle the case within the range, hopefully toward the top.

But we must be acutely aware that there is never any objective assessment of the quality of the settlement we have achieved. Is it too low? Would another practitioner have achieved a better result? Would another approach have achieved a better outcome? What was it that made the insurer dig in its heels?

The absence of any form of objective assessment of your performance at a mediation means that we need to be constantly reviewing our skills to ensure we are achieving the best results possible for our clients. We can only do this by continuing to learn, listening to the ideas of others and assessing them for our own benefit.

So I approached one of Queensland's highly skilled and leading mediators, Peter Munro, for his ideas on how a lawyer might maximise the benefits of mediation in a personal injury claim. Here are some of Peter's thoughts.

BE PREPARED

Undoubtedly, the key for success in mediation is having all of the material available and provided to the other side well before the mediation. There is nothing better designed to ensure that the mediation fails than the late delivery of an updated Statement of Loss and Damage which substantially alters the claim for economic loss, or the late delivery of a medical report substantially altering the assessment of damages.

Equally, the insurer is unlikely to be persuaded if submissions are made at the mediation that an expert's report will be obtained if the matter doesn't settle to evidence that the stairs were faulty or the tiles were slippery or that the system of work was deficient. The insurers will simply not settle on the basis of prospective evidence.

In essence, it is best to assume that one should treat the mediation almost as if one was preparing for trial, at least insofar as the documentary material that is available. ▶

It is also necessary to ensure that the defendant insurer has the material well prior to the trial. Insurers obtain advices from their lawyers for the purposes of mediation, have authority limits to their claims officers, have committees within their organisations which assess the approach to be taken at mediations. Late delivery of material can often cause difficulties in obtaining appropriate advice to be given, and will ultimately jeopardise success in the mediation.

BE OPEN

The mediation will probably be the first opportunity the insurer and its legal representatives will have to meet the plaintiff face-to-face. Whether this is a compulsory conference run as mediation, or a mediation in an action already commenced, the insurer is always keen to 'size up' the plaintiff.

Unless there are very good reasons not to do so, the best weapon in the plaintiff's arsenal at mediation is undoubtedly the plaintiff themself. Often the mental picture which the defendant insurer has formed based upon the medical reports and other material can be completely changed if the insurer has an opportunity to see the plaintiff answer questions and assess the way in which they are likely to present if the matter were to proceed to trial.

Certainly, the degree of questioning should not traverse into the area of cross-examination. However, vigorous questioning by a defendant can often give the plaintiff's legal advisors a much clearer insight into the likely areas of vulnerability in the plaintiff's case and the extent of the defendant's evidence if the matter were to proceed to trial.

BE FLEXIBLE

It is often the case that at mediation the plaintiff will hear for the first time evidence not previously disclosed for a variety of reasons. Often the defendant has embarked upon a wide-ranging search of the plaintiff's medical history using Notices of Non-Party Discovery.

Material is often made available by the defendant at the mediation, and depending upon the content of that material, the plaintiff should always remain flexible to changing their approach towards the ultimate outcome of the case. If, for instance, a long history of a pre-existing back condition is made known to the plaintiff, which was previously unknown to the plaintiff's legal advisors, then obviously the ultimate outcome of the case will be affected, and this should be taken into account.

Because of the requirement in compulsory third party, workers compensation and public liability matters in Queensland for compulsory disclosure prior to the compulsory conference, it is less likely these days that liability evidence is not disclosed prior to the mediation. However, if such evidence is made available, then the plaintiff needs to remain somewhat flexible.

While everyone has a preconceived view of what the ultimate outcome of the mediation ought likely to be, that view should not remain so inflexible that it stymies the outcome, if for some good reason material becomes available at the mediation which suggests an alternative outcome is more likely.

BE PATIENT

The plaintiff can never know what is happening on the other side of the mediation; what is going through the minds of the insurer's representatives and its legal advisors. The impact of the opening statements, and of any questioning of the plaintiff, can often change the insurer's preconceived view of the outcome of the case.

The defendant is unlikely to show its hand to suggest that it is substantially changed in its view, and the plaintiff needs to be patient in the progressive bargain mediation to allow a change of expectation on the defendant's side.

While there is always some anxiety on both sides of the mediation to conclude the process as quickly as possible, it is often the case that some time is necessary in order to change expectations and allow a move from what were firmly held positions at the start of the mediation.

Patience is also particularly necessary in circumstances where there are a multitude of defendants with issues between themselves. Often the mediation must be one where first the defendants are mediated and the plaintiff is not involved. The plaintiff must be prepared to wait to enable the defendants to sort out their various issues before the plaintiff can be engaged in the mediation.

BE FOCUSED

Ultimately, mediation cannot be used to compromise issues of fact. It is most unlikely that by sheer force of argument, one side will convince the other of their particular view in relation to a disputed set of facts. All that can be done in the mediation is to put the version upon which the plaintiff relies and indicate to the defendant why it is that that version is likely to be accepted.

Once that is done, usually in the opening statements, the plaintiff's focus must then turn to simply the quantum of the compromise. Much time can be lost in the mediation in attempting to resolve issues of fact when ultimately the outcome must be determined by the sum of money the defendant insurer is prepared to pay. It is important to ensure that the plaintiff is ultimately focused upon obtaining the insurer's best offer at the mediation and then deciding whether to accept that offer or proceed otherwise. PL