



MILD HEAD INJURY AND PSYCHOLOGICAL DISABILITY CLAIMS:

HOW TO GET THEM SETTLED AND KEEP THEM SETTLED

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Where have all the trials gone? They've gone to mediation, of course. Trial skills are still invaluable, and the odd case actually does see the inside of a courtroom. However, the vast majority of cases are moving through the mediation process, either by choice or by force. In order to effectively advocate on behalf of your mild Head Injury or Psychological disability client (hereafter referred to as "HIP" client), you must be very familiar with the various systems of mediation and how to best use each system to your client's advantage. And of course, once you get a case settled, you must try to keep it settled.

MEDIATION

Ten years ago, "mediation" had only one meaning. It was a rarely used method of settling large cases, where you felt that your adversary was either too stubborn, or too thick, to settle the case without assistance. The insurance bar was still relatively small and cordial, and cases were often settled after two or three medical reports over a cup of coffee, or perhaps immediately following discoveries. Times have certainly changed.

Today, when one speaks of “mediation” in the auto insurance context, it could mean one of four things:

- a mediation at the Financial Services Commission of Ontario (“FSCO”) pursuant to §280 of the *Insurance Act*;
- a mandatory mediation pursuant to Rule 24.1 of the Rules of Civil Procedure;
- a private, voluntary mediation; or
- a mediation pursuant to § 258.6 of the *Insurance Act*.

These four types of mediations are used in different ways, and for different purposes, by counsel. The efficacy of these different mediations varies significantly in the context of the HIP claim. This paper will review each of these types of mediations, their effectiveness, and some tactical points to consider.

FSCO MEDIATIONS

Mediations at FSCO are a statutory creation, governed by § 280 of the *Insurance Act*. They deal only with disputes between an injured person and their own insurance company regarding statutory accident benefits. Before commencing litigation or arbitration proceedings against an insurer, the injured person must refer the issues in dispute to a FSCO mediation (*Insurance Act*, § 281(2)). Failing to go through this process first will prevent you from pursuing the claims entirely.

The Statistics

FSCO keeps detailed statistics regarding the percentage of mediations that result in full settlement, partial settlement or no settlement at all, under each of the three no-fault regimes. These statistics are further broken down by the format of the mediation (face to face or telephone). Although it is usually difficult to draw any real conclusions from simple statistics, some interesting trends can be seen. The figures quoted in this paper are based on FSCO statistics that we have reviewed, and are not “official” FSCO statistics.

Bill 59 cases are far more likely to be fully settled (i.e. mediation issues resolved, not necessarily a full and final settlement) at a FSCO mediation. While 54% of Bill 59 cases are fully settled, only 41% of Bill 164 and 39% of OMPP cases are fully settled. There are, arguably, a number of reasons for these figures. Bill 59 is much more restrictive in the types of benefits that are available to claimants, and there are fewer issues to argue about than there were under previous legislation. The treatment plan/DAC process can create an uphill battle, especially for unrepresented victims, resulting in more compromise of treatment claims. The test for the non-earner benefit has been made so onerous, that very few accident victims bother to seriously dispute an insurer’s decision to not pay. It is apparent that, given the test change for IRBs after two years, the 10 year cap and the \$100,000.00 limit on non-catastrophic med/rehab claims, it is easier to arrive at a full and final settlement under Bill 59 than it was under Bill 164. One should also consider the statistic that full settlements of Bill 164 claims have decreased steadily since 1997, as claims now under review only deal with the victims still needing treatment, or entitled to LECBs 4+ years post accident. These significant cases are more difficult to settle at

a FSCO mediation. There does seem to be a recent trend of a higher percentage of OMPP cases settling, probably as a result of most insurers' desire to close these old files.

Somewhat surprisingly, there is not a large disparity between the percentage of telephone mediations that fail (24%) and the percentage of face to face mediations that fail (21%). In our office, if we believe that a mediation may result in a sensible settlement, we will request that it take place face to face. It is often more difficult for the insurer to look an injured victim in the eye and say "no". Conversely, if we believe that there is little chance for success, we would not waste the time in traveling to the FSCO office.

issue in dispute in respect of the insured person's entitlement to statutory accident benefits" (emphasis added). Jurisdiction should almost never be an issue, and counsel should refuse to allow the Commission to dictate which benefits will be subject to mediation.

A number of mediations at FSCO are conducted by unrepresented insureds. Understandably, the older the case, the more likely that the victim will have counsel representing him or her at the mediation. However, over the last few years, the total percentage of victims who have counsel file for mediation on their behalf has remained relatively steady at around 80%. One-fifth of all accident victims apply for mediation, and likely attend, without the assistance of a lawyer. One can empathize with the average lay person who has to read any one of the *Schedules* in order to prepare for a mediation.

Given that this type of mediation is unavoidable, counsel should consider how to use this procedure to the best interest of your HIP clients. Although you always have to watch the

limitation period, it is advisable to wait and lump as many issues as possible into each application for mediation. FSCO mediations of HIP claims are unlikely to result in a full and final settlement. Several applications for mediation result in several failed mediations and increased costs to your client. Further, the HIP client will likely feel an extreme level of stress and anxiety before, during and after each mediation. If necessary, advise the mediator and the insurer's representative that the client cannot participate as a result of their mental or psychological problems. Although it is important for the client to be available by phone for instructions, even this minimal level of participation can be extremely stressful for the HIP client. Don't expose this type of client to this process more than is absolutely necessary.

On the issue of costs, we routinely insist on some contribution towards costs at the completion of a relatively successful mediation. The quantum requested or paid is usually relatively modest, but will be based on the actions of the insurer leading up to the denial of benefits as well as the relative strength of each side's arguments. In the end, our position is very simple; pay some reasonable costs now, or pay much higher costs and the \$3,000.00 filing fee later. When an insurer recognizes that they do not have a strong case, they will usually pay some costs.

Briefing the HIP client for a FSCO mediation is crucial, especially if the client is to be in attendance. The HIP client has likely never been through anything like a FSCO mediation.

The process should be explained in detail. The identity and role of the players should be made very clear. Expectation management at this stage is imperative. Tell the client what you realistically hope to accomplish, and what the subsequent course of action will be if the

mediation fails. Tell the client to not become confrontational with the insurer's representative. If there are problems with parts of the case, tell them so. There is nothing worse than having your HIP client hear the weaknesses in the case for the first time from the mediator or the insurance company.

It is also important to brief your client with respect to their interaction with the insurer's representative at the mediation. This will often be the first direct communication between your client and the insurer's representative since you were retained, and the impression that your client makes at the mediation will often be a lasting one. While we usually advise our HIP clients to say very little at a mediation (it is not an examination for discovery for the insurer), there are often questions that you can anticipate allowing your client to answer. "How has your condition changed since the treatment was stopped?" or "What is it about your job that you can't do?" are standard questions that you can brief your client on. They are also questions that will bring out a fair amount of genuine emotion from the HIP client, hopefully impressing upon the insurer's representative the severity of the situation. Alternatively, the briefing session may show you that your client is not capable, either emotionally or cognitively, of answering such questions. Better to find this out before, rather than during, the mediation.

The Verdict on FSCO Mediations

The level of satisfaction with the process is dependent upon a number of factors, many of which you have no control over (e.g. the identity of the mediator, the insurer's representative, the arguments over FSCO's jurisdiction, the relative merits of the claim at issue, the technical

lack of the entitlement to costs, etc.). The statistics would indicate that at least 75% of cases are partially (whatever that really means) or fully settled at mediation, and given that it is a mandatory procedure, the settlement figures should be considered a success.

MANDATORY MEDIATION

This new form of mediation, pursuant to Rule 24.1 of the Rules of Civil Procedure, was introduced on January 4, 1999. It is applicable only to case managed actions, which includes some cases in the City of Toronto. Presently in Toronto, 25% of all eligible actions and applications are chosen for case management under Rule 77. While Rule 24.1.17 states that the Rule will be revoked on July 4, 2001, all indications are that mandatory mediation will continue indefinitely.

The Procedure

In order to understand the mandatory mediation process, you must first understand the case management process. Under Rule 77, plaintiffs' counsel must choose a track (fast track or standard track) and indicate that choice on the notice of commencement of proceeding. The fast track is not appropriate for most HIP claims, unless you are trying to quickly litigate your client's entitlement to a specific benefit. Simplified procedure actions (Rule 76) automatically proceed on the fast track, so be prepared to move quickly if you choose this procedure. The claim is issued and then served in the usual manner. However, one must remember that, although you technically have six months in which to serve the claim, it will be dismissed by the

registrar 180 days after the date of issue if no defence is filed. It is up to the plaintiff's counsel (!) to ensure that the defence gets filed in time.

In all actions, once the first defence is filed, Rule 24.1 kicks in. A defence includes a notice of defence, notice of intent to defend or a statement of defence. Where there are multiple defendants, you must encourage all of the defendants to deliver a statement of defence as soon as the first defence is filed. Case management does not permit the usual indulgences.

According to Rule 24.1.09, the mandatory mediation must take place within 90 days after the first defence is filed, but this can be extended a further 60 days if the consent of the parties is filed with the mediation co-ordinator (Rule 24.1.09(3)).

The parties can choose the mediator, as long as the identity of the mediator and the date of the scheduled mediation are provided to the mediation co-ordinator within 30 days after the filing of the first defence (Rule 24.1.09(5)). If the parties do not do so, a mediator will be assigned from the mediation roster (Rule 24.1.09(6)), and that mediator will fix a date for the mandatory mediation.

If a party fails to file a statement of issues (Rule 24.1.10) or fails to attend the mediation (Rule 24.1.12), the mediator must file a certificate of non-compliance. Non-attendance will force an immediate case conference, where a case management judge or master may establish a timetable, dismiss the action or strike the defence, award costs, or make any other order that is just (Rule 24.1.13).

It is important to remember that the timeline set out in Rule 77 continues to run during the mandatory mediation procedure.

The Statistics

Because mandatory mediation is a pilot project, the government is keeping some statistics. The statistics available are not detailed. There is no way of knowing if auto insurance related claims settle at the same rate as other actions, although one would think that it is unlikely. The statistics referred to here are current to May 1, 2000.

Out of interest, there are a total of 324 roster mediators in Toronto and Ottawa. Apparently, 191 applications to become roster mediators have been rejected.

A roster mediator was selected by the parties in 1,868 cases, a non-roster mediator was selected by the parties in only 136 cases and a roster mediator was assigned in 1,636 cases. A full 45% of the litigants left the choice of mediator to the luck of the draw.

Most importantly, out of a reported 1,780 mediations, 40% settled, 17% were partially settled and 43% failed. This would be an astoundingly high percentage of settlements if the figures only reflected auto insurance claims, however we doubt that this is the case.

After timing considerations are dealt with, the identity of the mediator is the next issue. It is surprising that 45% of counsel allow a mediator to be chosen at random. Even if you believe this process is a waste of time, at least waste your time with a mediator who knows this area of the law. On the other hand, if you hope to accomplish something, choose someone who can help you. The roster is full of mediators who are well experienced in the HIP claim. Further,

the parties can agree on a non-roster mediator, although they would not bound by the maximum rates set out in Ontario Regulation 451/98 (\$600.00 plus G.S.T. for two parties, \$675.00 plus G.S.T. for three parties, etc.). The mandatory mediation is likely to be more stressful than a FSCO mediation for your HIP client, making the choice of mediator that much more important.

Briefing your HIP client for the mandatory mediation is even more important than briefing them for the FSCO mediation. Although many of the comments in respect of FSCO mediations apply here, there are several differences. For one, it can take longer. HIP clients often lose their concentration and become overwhelmed during lengthy meetings, and they should be encouraged to take breaks or do whatever it takes to keep their energy up. Counsel are rarely involved at FSCO mediations on behalf of insurers (about 12%), but a lawyer will always be representing the defendant at a mandatory mediation. Your HIP client should be briefed about the infamous opening statement, so that the “we-don’t-mean-to-hurt-your-feelings-but-we-don’t-believe-a-word-you-say” style does not catch them off guard. The HIP client can lose their faith in the process at this early stage if they are not forewarned about what is likely to be said about them at the mandatory mediation.

The Verdict on Mandatory Mediation

The term “mandatory mediation” is something of an oxymoron. The whole idea behind mediation is to get willing parties together, under terms that they agree upon, to try and settle a case. This notwithstanding, mandatory mediation has been very successful. Sharing the cost of

a \$700.00 mediation and taking the time to prepare for and attend the three hour session is not a bad investment if there is a 40% chance of settling the claim before examinations for discovery. However, in our opinion, the percentage of HIP claims that settle at a mandatory mediation is far less than 40%. The two main reasons for this are the nature of the claims and the lack of knowledge of the system.

Ask most plaintiff's counsel and they will tell you that mandatory mediation doesn't work for HIP cases. "There are too many unknowns at that early stage to try and settle." "There isn't enough time to get clinical notes and records, medical-legal reports, accounting reports, a future care cost analysis, etc." "It just adds unnecessary costs to the legal proceeding." These statements are valid in many cases. Clearly, HIP claims do not easily lend themselves to early resolution.

The fact is that this mediation system is extremely flexible, but very often misunderstood. If counsel used the system to their advantage, it is likely that the rate of settlement would increase significantly. For example, although the time frame set out by the Rule does not contemplate the average HIP claim, Rule 24.1.09(2) states that the court can extend the time frame (without any outside limit), considering the number of parties, the complexity of the issues and whether the mediation will be more likely to succeed if it is postponed to allow the parties to acquire more information. These are the very factors that are often cited by counsel in criticizing mandatory mediation for HIP claims. Since a timetable outside of the default Rule 77 timeline will have to be set in almost every HIP claim, why not set the timetable very early in the

litigation and ask that the mandatory mediation be delayed for six months or a year, or until after examinations for discovery? Alternatively, it could be postponed to allow sufficient time for the parties to complete documentary discovery and conduct medical-legal examinations. The options are wide open (within reason), but only if counsel take the time to consider the options early in the case. If you wait, a mediator will be assigned, a date will be chosen and an opportunity to successfully use this process will inevitably be lost.

Even if you can't get the case settled at the mandatory mediation, all is not lost. Good defence counsel will have already started to form their theory of the case by the time that they attend the mandatory mediation. Although you likely won't see all of their cards, you should be able to get a feeling for their area of focus. Are they raising causation as a serious issue in the psychological disability claim? Pre-accident clinical notes and records, a report from the pre- and post-accident family doctor and some statements from lay witnesses may put this issue to rest at a later date. In the mild head injury claim, are they focusing on the fact that there is no objective evidence of head injury? If so, be prepared the next time you meet, perhaps by consulting a neuroradiologist about the types of scans that might be performed to document a head injury. Use the process to learn if the defence has surveillance or investigation that might affect the claim. The more you learn about your opponent's case, the better the chance that you will understand your own case.

Finally, use the process to determine if there is one or two important pieces of evidence that might allow you to bridge the gap and get the case settled. Employment records that show

good attendance pre-accident and regular absences post-accident might convince the defence to pay a fair amount for the potential future loss of income. If possible, keep the settlement process alive.

Mandatory mediation is not going to disappear. Take the time to learn about the process to make it more useful for you and your HIP client.

PRIVATE MEDIATIONS

In the not too distant past, people went to trial without attempting private mediation and ADR Chambers was a mere twinkle in Brian Wheatly's eye. Today, it is very rare to see a case go to trial without at least one, if not more, attempts at private mediation. Given the cost of litigating the HIP claim, both financial and emotional for the client, it is almost always worth the time and effort.

Private mediators do not, to our knowledge, publish their settlement statistics. Many of the top mediators in the personal injury field boast of settlement rates in excess of 90%. If one includes cases that actually settle at the mediation and those that settle following, but arguably as a result of, the mediation, those statistics are close to being accurate.

Make sure that you are well prepared for the private mediation. Since the parties have full control over the process, there is no excuse for attending without all of the necessary documents, expert reports, witness statements, etc. Contact the structure broker in advance, if appropriate, and have him or her available by telephone.

Choose your mediator wisely. Consider not only the issues in dispute (tort vs. accident benefits), but the personalities involved. If your client has unrealistic expectations, you might want to use a retired judge who can throw the weight of the bench behind his or her assessment. If the insurance adjuster is the problem, use a judge or defence lawyer, who they will trust as a mediator. For the psychological disability cases, sometimes the conciliatory mediators will ensure that the day is not overly stressful for your client.

The earlier comments about briefing your client and learning about your opponent's case obviously apply to the private mediation. You should also spend some time briefing your client about how the case might be settled. If you don't believe that you can get the case settled, you shouldn't have agreed to the private mediation in the first place, and you should advise your client accordingly. Explain that the idea of mediation is reasonable compromise. Neither party should be ecstatic about the settlement, but neither party should be overly unhappy either.

Compromise is the key, and your HIP client must be advised to put aside all of the hard feelings that they have inevitably developed over the course of the litigation, in the interest of compromise. Discuss a bottom line, or at least a range, so that your client has confidence in the process, and reasonable expectations. During the negotiations, involve your client in the decision making process. When the first defence offer is made, ask your client for instructions to reject the offer (if appropriate) instead of simply giving the counteroffer to the mediator.

Make sure that your client is comfortable with the counteroffer that you are proposing. Ask your client if they have any questions as the day goes on. Encourage breaks, fresh air and food

in order to keep them energized. The HIP client has likely felt like a passenger with little control during the whole litigation process. Giving them a level of involvement, especially at this crucial point in the case, will provide them a sense of ownership in the process, and result in a greater level of satisfaction with their counsel. Once you get close to a settlement, get instructions, in writing, from your client. Those instructions should, whenever possible, set out your fees, disbursements, G.S.T., and any other accounts that will come out of the settlement monies (treatment providers, for example), the amount each FLA claimant will receive and the bottom line total that your client will receive after all of the other amounts are deducted. At the end of a long day, your HIP client is likely to be very tired and prone to confusion. If you make it clear, they will be more comfortable with the result and there will be little room for disagreement between you and your client at a later date.

Finally, whatever you do, do not let anyone leave until minutes of settlement are prepared and signed. Cover everything, including the right to structure, the identity of the structure broker and any assignment fees (where appropriate), the date by which all funds are to be received by plaintiff's counsel, dismissal orders, disbursements, etc. There is nothing worse than spending a whole day hammering out a deal, only to find out later that the parties disagree about the exact terms.

The Verdict on Private Mediations

Private mediation is a must in most cases that have not been settled in the late stages of the litigation. However, it is not for every case. If as plaintiff's counsel you wish to seriously

pursue a punitive damage claim, don't bother mediating. Although anything is possible, we have yet to hear about an insurer who voluntarily paid punitive damages. You may have an HIP client with extremely unreasonable expectations about the value of the case. While most psychological disability clients would prefer to avoid the emotional cost of a trial, many mild head injury victims want the opportunity to "tell it to the judge". If the parties have been on different planets in previous settlement discussions, sometimes mediation can be a waste of time.

Generally, with the right mediator, private mediations are often successful for both sides, and have become a process that is highly regarded as being very useful.

§ 258.6 MEDIATIONS

This type of mediation was created as part of the *Automobile Insurance Rate Stability Act* (Bill 59), and is only available in tort claims arising from motor vehicle accidents occurring on or after November 1, 1996.

At the request of either the injured person or the defendant's insurance company, both parties must attend the mediation. It can be requested any time after the § 258.3 notice letter is received by the insurer, either before or after the litigation is commenced. In accordance with § 3 of Ontario Regulation 461/96, if the parties cannot agree on the identity of the mediator, they each nominate a person and the two persons named decide on the identity of the mediator. If the parties are unable to agree upon a date, it must take place within 14 days after the

mediator is appointed (whoever drafted the regulation has obviously not tried to book a mediation recently). Importantly, the defendant's insurer must pay for the expenses.

The Verdict on § 258.6 Mediations

In almost four years since Bill 59 has been in place, our office has yet to use § 258.6. In fact, we have yet to hear of anyone that has used § 258.6. One can imagine that it might be useful for the plaintiff to force a mediation of a fatality claim before an action is commenced, in order to get the case resolved early and not have the client relive painful memories during the litigation. However, this provision seems to have little use in the HIP case. The one exception may be where the parties have agreed to mediate but, for whatever reason, the insurer is refusing to pay the cost of the mediation. A quick reference to § 3(6) of Ontario Regulation 461/96 should solve that problem.

SETTLEMENT

Once you get a case settled, there is nothing more important for both parties than keeping it settled. While the law regarding tort settlements has not changed in recent memory (and will not be addressed in this paper), the law regarding the settlement of accident benefit claims has significantly developed over the last year. All counsel should be mindful of the *Opoku v. Pal* decision (Court File no. 98-CV-145301CM and Court of Appeal Docket C32296) when settling accident benefit claims. That case refers directly to the settlement regulation under the Statutory Accident Benefits Schedule (SABS).

Any settlement that purports to finally dispose of a claim for one or more benefits under the SABS is subject to the conditions set out in § 9.1 of Regulation 664, R.R.O. 1990, as amended by Ontario Regulation 780/93 (“the settlement regulation”). Where such a settlement is proposed, the insurer must, before the settlement is actually entered into, provide a description of the benefits available, a description of the impact of the settlement, a statement that the insured can rescind the settlement within 2 business days and a statement advising the person to consider seeking independent legal, financial and medical advice. Finally, where the settlement provides for a lump sum payment (and they almost always do), the insurer must provide an estimate of the “commuted value of the benefit and an explanation of how the insurer determined the commuted value” (settlement regulation, § 9.1(2) paragraph 5).

Opoku v. Pal

In the *Opoku* case, the plaintiff was rendered a quadriplegic when he was run down by the defendant, Pal. Since the victim did not have insurance of his own, Pal’s insurer was also responsible to pay accident benefits.

After negotiations, counsel for Mr. Opoku and the insurer agreed to settle all tort and accident benefit claims for one lump sum. There was no specific breakdown between the tort and accident benefit settlements.

The insurer forwarded the accident benefits settlement documentation, and Mr. Opoku signed it. Being concerned that the settlement was not sufficient, Mr. Opoku decided to revoke the settlement 4 days later, outside of the 2 day cooling off period. As a result, the insurer brought

a motion for Judgement in accordance with the terms of the settlement. On behalf of the plaintiff, we took the position that the insurer had not complied with the settlement regulation, and more specifically the commuted value requirements (CVR), and therefore Mr. Opoku was entitled to rescind the settlement pursuant to § 9.1 (4) of the settlement regulation. The insurer had not made any effort to provide a “commuted” value, but instead set out the maximum dollar amounts available to Mr. Opoku under the policy.

In the first instance, Mr. Justice Spiegel determined that, in order to comply with the CVR, the insurer should have provided:

- a) Mr. Opoku’s life expectancy;
- b) The appropriate discount rate in respect of each of the periodic benefits;
- c) The insurer’s assumptions concerning the rate at which the med/rehab benefits would be paid over the course of Mr. Opoku’s life; and
- d) The insurer’s assumptions concerning the rate at which the attendant care benefits would be paid over the course of Mr. Opoku’s life.

Justice Spiegel found that, since the insurer did not comply with the CVR, Mr. Opoku was entitled to rescind the settlement and proceed with the action. While the motion involved several other arguments, these are the key findings that affect the settlement of accident benefit claims.

On appeal, the Court of Appeal affirmed Justice Spiegel's decision regarding the CVR requirements. The Court did comment that an insurer is not required to resist settlement until all possible information is available to assist them in the CVR calculations. So long as the insurer makes an assessment in good faith based on the information available to it, and provides the factual assumptions relied on to comply with the CVR, the insurer will have complied with the settlement regulation.

The Verdict on Settlements

Although insurers have complained that the *Opoku* decision makes it more difficult to settle claims, the fact is that a binding settlement is easily reached as long as both sides are mindful of the CVR. It is not just insurers who should be concerned with binding settlements; plaintiff's counsel will have a difficult time settling cases in the future if their (former) clients are routinely rescinding settlements entered into by that lawyer. Especially when settling the HIP claim, it is important to make the settlement agreement as clear as possible for your client. They should know about the future benefits that they are giving up and the real value of the available benefits over their life expectancy. Take the time to explain it to them, and allow them to ask questions. In the end, they will feel that a just result has been obtained instead of relying blindly upon the judgment of their counsel.

CONCLUSION

Given the cost of litigation, fewer and fewer cases are making their way to trial. At the same time, more and more cases are making their way through some form of mediation. While good counsel will not allow their robes to gather dust, the focus today should be on effective mediation skills. As with any other area of the law, information and preparation are your greatest allies. Know the system and how to use it. Know the mediators and their strengths and weaknesses. Know your client and their expectations. Most importantly, know your case, your opponent's case, and the applicable law. The statistics show that, if you know all of these things, your mild head injury or psychological disability case will settle, and will stay settled.