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LATE SUMMER 2018 – MEDIATION NEWSLETTER

THE COSTS OF REFUSING MEDIATION

A recent Ontario decision demonstrates why refusing to participate in mediation in a civil proceeding, where mediation is not mandatory, can be expensive in the end. *Canfield v. Brockville Ontario Speedway*, 2018 ONSC 3288, is a decision of Mew J. respecting costs following a seven-day jury trial in Belleville of a (non-MVA) personal injury matter. Liability and damages were in issue. After the jury found that the plaintiff was 25% contributorily negligent, damages were assessed at $212,000 including interest. The plaintiff sought costs on a partial indemnity basis of $269,371 plus tax. The defendant argued that $150,000 inclusive of HST was appropriate.

In his reasons, the judge considered the various criteria and general principles relevant to the fixing of costs, including, among other things, that "the outcome achieved by the plaintiff was significantly better than the last offer of the defendant, which was little more than a nuisance offer" and "the refusal of the defendant, or more specifically, the defendant's insurer, to participate in mediation" on two occasions.

Mew J. wrote that "[in] situations where participation in mediation is mandatory, a failure to mediate may be relevant" and "[u]nlike actions commenced in Toronto, Ottawa or Essex County, actions brought in Belleville are not subject to the mandatory mediation provisions of rule 24.1 of the Rules of Civil Procedure. There is, accordingly, no requirement that a party mediate."

The judge agreed with an earlier decision in *David* v. *Transamerica Life Canada*, (2016) 131 O.R. (3d) 314 in that "a refusal to participate in mediation is a factor that the court can properly consider in determining whether the party has engaged in unreasonable conduct that has caused unnecessary costs to be incurred and that warrants rebuke by means of a costs sanction. This determination requires a case-by-case analysis".
After reviewing English case law Mew J. held that "[t]he present case is not one of those circumstances where a plaintiff was trying to shake down an insurer by demanding mediation of a wholly unmeritorious case. To the contrary, it is a case where the insurer took a tough and uncompromising stance. That, of course, is a defendant's prerogative. Defendants do not have to settle. But if reasonable opportunities to mediate are spurned, that can be a relevant factor when fixing costs. It was, in my view, unreasonable for the insurer to decline mediation in this case. That should be reflected in the disposition of costs. Had a mediation occurred in 2015 or even in 2017, substantial costs would have been avoided…the defendant's refusal to mediate is a relevant factor [in assessing costs]. That refusal was unreasonable. It deprived the parties of an opportunity to settle the case without the necessity for a trial. As a result, instead of adjusting the plaintiff's claim for costs downward by $80,000, I have made the adjustment a little under $60,000 and have therefore concluded that an appropriate award of costs in this case is $210,000 plus applicable taxes."

In the end, the defendant insurer's refusal to mediate cost it approximately $20,000. Had the mediation resulted in a settlement, the overall savings would have likely been far in excess of that amount. Even if the mediation had

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not resulted in a settlement, the estimated mediation expense for both sides, mediator and lawyer fees included, would, in most cases, have been a fraction of the financial penalty for not mediating.

Takeaway:

Treat All Mediation As If It Is Mandatory

In light of *Canfield*, even if mediation is not, technically, mandatory in the jurisdiction where the action is commenced, the potential costs consequences of refusing to mediate in Ontario mean that it would be wise to treat mediation as mandatory, as a practical matter. After all,

• In almost every dispute, the merits are always in issue.

• Other forms of ADR or settlement are not normally attempted (save for an exchange of offers, and even that is not always the case until much closer to trial).

• The costs of mediation are rarely disproportionately high.

• Delay is almost never a factor as it is difficult to conceive how a single day mediation could delay a proceeding that normally takes years to wind its way to trial.

• Pre-judging the prospect of success (if success is to be judged only by a full settlement – which is not always the case) is virtually impossible in any event: All experienced lawyers, mediators, insurance adjusters, and other professionals who are regularly involved in litigation, can attest to the settlement of cases, after some hours of mediation, which they never thought could settle when they first arrived. This is the nature of the mediation process. As well, often a case that does not settle on the day of mediation will settle soon afterwards.

Instead, the comments of Price J. in *David*, with which Mew J. explicitly agreed in *Canfield*, constitute the best reason to mediate – and why, except for the rarest of disputes, refusing to mediate is a poor litigation strategy:

"In cases where each of the parties has an arguable case, and each faces a risk of loss in the proceeding, mediation can offer a reasonable prospect of settlement."

This is enough.

-Mitchell Rose, mediator

For one more takeaway, please click here for the full article or visit sgrllp.com/blog

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