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- ✦ Economic Loss and Retirement Age: The Truth Behind the Numbers
- ✦ Mediation and Personal Injury Cases: Where Do We Go From Here?

THE BEARD WINTER DEFENDER

Economic Loss and Retirement Age: The Truth Behind the Numbers

By: Cary N. Schneider

If you are like me, you undoubtedly are frustrated when counsel for the Plaintiff states that 50 year old Mrs. Smith, who was employed as a packer on the assembly line pre-accident, would have worked until the age of 65 if not for the accident. Similarly, I find it exasperating when I receive a report from an orthopaedic surgeon who comes to the conclusion that Mr. Jones's degenerative back problems will force him to retire from his job as a truck driver at the age of 60 as opposed to 65. Without fail, the Plaintiff will have provided oral evidence at the discovery that he or she would have worked until the standard age of retirement of 65, (if not longer), but for the accident.

However, if we take a step back for a moment and look at the statistics, we would see that the actual "standard" retirement age is appreciably less than 65. The use of certain basic statistics in future economic loss cases is one easy, neutral, and impressive way of debunking certain myths and lowering loss of income exposure. The sheer fact of the matter is that the median retirement age since the 1980's has dropped rather than increased. One would have expected that with greater health and financial obligations that people would be working longer than the prior generation. In fact, the opposite is true.

According to Statistics Canada, the average age of retirement in the mid-1980's was 65 but this has consistently been reduced and in the year 2005 it is now 61 years old. The average age of retirement for men in 2005 is 62.6 years and for women it is 60 years old. The statistics reveal that 76% of all males and 82% of all females retire before the age of 65.

There is also a significant difference between public sector employees, and self-employed individuals in terms of their work life expectancy. Public sector employees, (i.e. health care, education, government, and social assistance), have an average retirement age of 58.7 while as those who work for themselves retire at somewhere between 64.3-66. This would be very helpful evidence to use to cross-examine a nurse who alleges that she would have worked until the age of 65 and would lend credence to the argument of a self-employed small retail store owner who provided the same answer.

It is also important to note that people with higher levels of education are more likely to retire three years earlier than those with eight years of education or less. The average retirement age for men with 0-8 years of education was 61.8 and for women it was 60. Conversely, in the same years the average retirement age for men with a university degree it was 59.8 while as for a women it was 56.3. Similarly, the more money you make, the more likely you are likely to retire early. According to Statistics Canada the following was found to be true (1994 study):

| Income | Male | Female |
|---------------------|------|--------|
| Less than \$20,000 | 62.6 | 59.4 |
| \$20,000 - \$39,000 | 61.9 | 57.6 |
| \$40,000 - \$59,999 | 59.9 | 58.7 |
| \$60,000 - \$79,999 | 62.8 | 52.9 |
| \$80,000 and over | 61.2 | 56.8 |

Below is a selection of the occupation classifications and their median retirement age as compiled by Statistics Canada:

| Job Title | Retirement Age |
|---|----------------|
| Management, and Administration | 64.7 |
| Professional, Scientific, and Technical | 63.2 |
| Accommodation and Food Services | 62.9 |
| Construction | 62.3 |
| Trade | 62.3 |
| Sales and Service | 61.8 |
| Manufacturing | 61.6 |
| Transportation and Warehousing | 60.9 |
| Health Care and Social Assistance | 60.2 |
| Finance, Insurance, Real Estate and Leasing | 59.6 |
| Information, Culture and Recreation | 59.2 |
| Public Administration | 58.4 |
| Education Services | 57.3 |

Certainly the compilation of job classifications is an inexact science and one can make the argument that certain job classifications fall



THE TRUTH BEHIND THE NUMBERS (CONTINUED)

under different headings and that this particular claimant would have worked longer than the norm. Although we must assess the particulars of each case on its own, the statistics do not lie. Mrs. Smith the packer, likely would have retired between 60-61, while as Mr. Jones the truck driver would likely have retired at approximately 60-62.

Statistics Canada adds teeth to various arguments that we have used peripherally to assess economic loss claims. Other examples include: (1) The availability of a company pension plan or early retirement packages is an incentive for early retirement as it provides for financial security; (2) Widowed and single men and women work longer than people in relationships and; (3) People in poor health do retire earlier than people in good health.

Statistics may be boring and tedious; but they are cheap, impressive, and effective. By use of these statistics you have now reduced the value of Mrs. Smith's future economic loss claim by as much as 33% by simply using the average retirement age for a woman as a starting point. In Mr. Jones' case, you have neutralized the opinion of the orthopaedic surgeon as the statistics show that the Plaintiff would have been retired at the time of the deterioration of his degenerative condition in any event. The use of uncontroverted statistics will likely surprise an unsuspecting counsel and put him on the defensive. Once you have achieved this, you will have set the stage for a favourable resolution.



Cary N. Schneider is an associate at Beard Winter who specializes in accident benefit and tort defence claims. He focuses on being effective and efficient in his law practice with the goal of achieving excellent results for his clients in a timely matter. For more information please visit <http://www.beardwinter.com/people/profile.asp?259>

Mediation and Personal Injury Cases: Where Do We Go From Here?

Paul M. Iacono

It has been at least seventeen years since I first thought about using mediation as a way of resolving personal injury lawsuits. It was early 1990 and we knew that because of the pending OMPP legislation, we were going to have a verbal threshold by statute as well as compulsory mediation, under what was then the new insurance legislation.

We started learning about the process, taking courses, and adapting both our advocacy skills and our adversarial styles to a new process. Looking back after seventeen years, we have come a very long way. Today, in the Province of Ontario, a personal injury case that is litigated to a verdict, is the exception. Approximately 1.5% of all personal injury cases that are launched make it through the litigation process to verdict. A small percentage is discontinued and the balance, something like 95%, are simply settled outright or mediated.

Over the course of time, we have learned a great deal about the process and we have made it better, more user-friendly, and we have ultimately increased public confidence; not only in the mediation process but more importantly in civil justice, as well as the legal profession itself. Clients leave the mediation with the feeling that they have been well-served by their legal advisors. On the other hand, the litigation process to the "civilians" is costly, incomprehensible, and unpredictable.

I intend to spend some time discussing what we have accomplished in terms of skill levels, presentation factors, advocacy, and negotiating styles, after which I will deal with some suggestions, criticisms and current thinking with regard to the evolution of ADR and the mediation process.

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CORRECTION

Please be advised that the August, 2007 article, "What Every Tort Adjuster Should Know About an Accident Benefits File", contained a typographical error. IRB entitlement changes to the "Any Occupation" test after 104 weeks, not 104 days.

We apologize for any confusion.

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The Presentation Of The Documents – Best Practices

As counsel representing a client at mediation your goal in preparing the mediation memo is to have it set out the issues in a clear, concise way so that the mediator can use that document as a road map which will enable him or her to traverse the dispute. In this regard, using numbered paragraphs is very helpful and makes reference to them in an opening statement easy to follow. There is definitely a trend to keeping the mediation memos shorter and this is good. If you do quote from any expert's report in your mediation memo, that report should be appended to the memo as an exhibit. It is not necessary to send the mediator every piece of paper that you have accumulated in the file. If there are extensive medicals, you can provide an executive summary of those documents in addition to the memo and exhibits. The memo is your first opportunity to convince your opponent that your arguments are sound and will carry the day. It is also important to persuade the mediator that your theory of the case is compelling so that in caucus your arguments will be reinforced.

A narrative style of memo is the easiest to read, and it is a style that I personally prefer. Using bullet points in certain kinds of cases can have a kind of "shock" value. It creates an impression that you are very confident in your case and certainly tightens the focus on the issues. It means that the mediator has to work harder to find out what the case is really about and that may be a risk.

Preparation of the Client

It is obvious that counsel have become better at preparing their clients for mediation. As a mediator, when I am making opening remarks, it is obvious from the body language of the plaintiffs that what I am telling them they have heard before. As part of the preparation process plaintiff's counsel have become better at managing their clients' expectations. They are obviously educating their clients to different negotiating strategies and are actually spending time indicating what first, second and third offers might be during the negotiating process. Defence counsel are anticipating where plaintiff's opening offer will be and preparing their clients, by discussing possible responses and negotiating strategies.

Opening Statements

I am happy to say that counsel have come to recognize that opening statements require special treatment. The plaintiff's lawyer is not opening to a jury. Counsel is speaking to an experienced claim professional and a colleague at the Bar. Logical arguments based on factual evidence and exhibits are the most persuasive. Arguments based solely on sympathy are offensive in this setting.

Defendants have now got over their various reactions to what I describe as the "power point presentation". They are either fighting fire with fire, and using their own presentations or they are educating

their clients on how to deal with them. I think that part of this is that plaintiff's counsel are focusing more on evidence in these presentations. Using video clips of key witnesses is very persuasive.

I do want to comment on something that I would describe as a disturbing trend on the part of defendants. During their opening statements they may have one good argument which affects dramatically the plaintiff's ability to recover anything. Ignoring the realistic chances of their success with this argument, they attempt to bully the plaintiff into an inadequate settlement. They then proceed to protract the negotiations, in the hope that the plaintiff will simply give up and simply walk away with a low amount. Then, at the end of the day, these same lawyers, after ranting and raving for hours, will finally themselves give in and turn over hundreds of thousands of dollars in what turns out to be an appropriate settlement. This results in a loss of credibility. Plaintiff's counsel who watch such a scenario, will simply file it away and on the next occasion when that defence lawyer appears, will simply ignore everything he or she says and simply wait until that particular lawyer becomes reasonable.

As I have said many times before, although mediation is supposed to be non-adversarial, there is still a place for good advocacy. There is no substitute for solid, logical arguments based on the facts of the case and the available evidence. Any good lawyer can make out a convincing case, by using available evidence and demonstrating how that evidence will prove the theory of the case.

It is better to speak without notes but not everyone can pull this off. It is always better that opening statements be directed to the clients whom counsel are trying to persuade. This should be done without putting the spotlight on these people; by making a remark like, "I am going to address these arguments to you, Mr. Defendant Representative, because it is the only chance I'm going to get to speak to you." This is superfluous and undermines any attempt to establish empathy, with the opposing party. It is probably worse when a plaintiff is addressed in this fashion. Being "civilians" who are new to the process, they are always very nervous. This approach only increases the tension for them because it puts them in the spotlight.

I am aware of a trend that is very prevalent at the moment, particularly in commercial mediations, and that is, counsel are dispensing with an opening statement. There is quite a difference between a commercial dispute and a personal injury lawsuit. Most commercial disputes have concrete contractual issues. In personal injury litigation there is a lot of "grey". In lawsuits where the issues are crystallized, sometimes making opening statements merely entrenches the parties in their positions and makes compromise harder. In these kinds of cases the issues are more about legal principles and their interpretation. The analysis that takes place in terms of risk is very different than in a personal injury case where credibility and witness presentation are the foundation of every lawsuit.

A personal injury lawsuit is about persuasion; which litigant has the best evidence, and the opening statement helps put this in context. The opening statement is the best place to anticipate your opponent's arguments and deal with them. It is a crucial time in which counsel can deal with and acknowledge the problems in his or her case and negate the opponent's arguments. In any personal injury lawsuit the opening statement is the cornerstone of each litigant's position. There is no doubt; it is the most important part of the session.

Participation By The Client

If the Plaintiff is a good witness, counsel should let the Plaintiff say a few words at the mediation or – at the very least – answer a few well-chosen questions. In any personal injury lawsuit the credibility of the Plaintiff and the manner in which the Plaintiff presents his or her case is of crucial importance. The claims person should see that aspect. It is a major strength for a Plaintiff.

If the Plaintiff is not a good witness, counsel can risk a carefully-orchestrated question and answer session. Similarly, from a defence point of view, a few carefully-chosen words from an insurance representative can be very persuasive. Not everyone can pull this off but there are many claims people who are good at it and should be encouraged to participate in the opening statement. It simply puts a human face on the insurance company. It can be very persuasive.

Selection of the Mediator

There is, indeed, a process for selecting a mediator for a particular case. Mediators have different styles. Sometimes counsel need a mediator who is an interventionist and who will make it clear to the parties which side of the issue he or she supports and will very persuasively try to get one or the other lawyers to go there.

Sometimes, counsel, are very concerned as to how their clients will be handled at the mediation and they require a mediator who can establish empathy with people and guide them through the process.

Many lawyers, who use mediators regularly and often, sometimes express the view that it should be easier to find mediators and have them qualified. While it might be a good idea to have mediators regulated and standards set, probably the marketplace has a way of sorting that all out. If someone is not a good mediator, word gets around quite quickly.

Are There Too Many Mediations?

It has been said that we are mediating too much. This is a two-pronged argument. Firstly, we mediate under FSCO and then we mediate under the Rules of Civil Procedure during the litigation. Sometimes, while the lawsuit is making its way to the courthouse, we mediate more than once.

In the City of Toronto, where counsel work under the 'Practice Direction,' the mediation is designed to take place just before the pre-trial conference. It is assumed that once counsel has set the action down for trial, all the issues have crystallized; all of the productions have been exchanged and counsel are ready to conclude settlement. If a personal injury case is mediated at a time when each disputant has all they need to make educated decisions about the case, there is a 99% chance that the case will settle. If a private mediation fails, it is because one of the parties to the process has not prepared properly. Either they do not have sufficient information, or they do not have a thorough understanding of the case. The case comes to mediation too soon and fails. It is not unusual for those kinds of cases to be mediated a second time and they will ultimately resolve. In mediation, timing is everything. The lesson is hold the mediation at the right time all other things being equal the case will settle. Make sure your opponent has all of the productions well in advance of the session. Last minute document delivery is a recipe for failure.

Are we mediating too much in the sense that too few cases are being tried? Is our jurisprudence suffering? For me, these questions are easily answered: it is "no". Our jurisprudence is not suffering. In the insurance/personal injury sector new issues are constantly surfacing. Issues that counsel feel very strongly about occur on a regular basis. These cases need to be litigated and they are being litigated. As long as we are still trying less than 2% of all personal injury cases that are launched, and that percentage really has not altered significantly in the last fifteen years, we will always have enough lawsuits to justify the evolution of our jurisprudence. The other consideration is of course that the number of lawsuits being issued increases every year, as our society becomes more litigation conscious. As long as this trend continues we will always have enough cases being litigated so that our jurisprudence will evolve as it always has.

At any mediation, even those that fail, something is always accomplished. At the very least, issues and theories about opposing counsel's case are exchanged, understood and highlighted.

There are times, though, when mediation should not even be attempted: those cases where legal issues are the entire basis of the dispute. Those cases where direction is required from the Court of Appeal on matters of coverage, procedure or novel damage claims. When the outcome of a case hinges on liability and the result is all or nothing; or where there are significant credibility issues affecting damages; those cases must be taken to verdict.

Counsel in those cases, even under the Practice Direction should be able to seek an Order from a Case Management Judge (Master) dispensing with mediation.

Negotiating Styles and Managing Clients' Expectations

Given all of the mediations that I have seen, I am absolutely convinced that the best approach to negotiating settlement of a

personal injury case is a principled approach. If plaintiff's counsel starts off by presenting a settlement proposal that is logical and well-reasoned and represents a "best-case scenario" and is prepared to concede at the outset that the chances of that scenario being achieved are not likely, and that compromise is on the agenda, that is a mediation that gets off to a good start. It makes it easy for defence counsel to respond in the same way. Following this, what usually happens is a series of compromising steps that lead to a successful resolution.

If, counsel, have had settlement discussions prior to the mediation or if there have been offers exchanged, that is where the negotiations should start. The one and only exception to this rule is if something has dramatically changed in the lawsuit since those discussions took place. If, in fact, that has occurred and the case is a completely different one now, that should either be spelled out by counsel in a letter prior to the mediation or dealt with specifically in the mediation memo. If you are going to deviate from your last stated negotiating position, this must be made clear well in advance of the start of the mediation.

At mediation when counsel start the negotiations with a position that is completely unachievable by any stretch of the imagination, it simply invites a response from the defence of a similar type of proposal. These kinds of mediations are long and tedious and generally result in a most unprincipled approach and the mediation turns into "a day at the Kensington Market".

In our jurisdiction currently, we have evolved a style of negotiating where, as offers are being exchanged, they are presented by the mediator. This has often been described as "shuttle diplomacy". In some mediations I have seen counsel make these proposals to the other side and they are very effective, especially when they are principled and supported by logic. They are extremely persuasive. It is a good practice.

One of the downsides for shuttle diplomacy is that it permits defence counsel to make preposterous arguments. They know that the mediator is going to be presenting these theories to the plaintiff and the plaintiff's counsel and not themselves. In my view, this is not good practice and simply prolongs the mediation.

Sometimes defence counsel, have one very good argument; it may be a novel argument but it affects dramatically the plaintiff's right to recover. Counsel will sometimes present this theory in a way that appears to be uncompromising and the mediation will proceed on the basis that defence counsel is insisting on a huge discount. If the plaintiff has the patience to outlast this kind of negotiation, it usually

happens that the defence will surrender hundreds of thousands of dollars at the end of the day. This is not a good negotiating style and plaintiff's counsel will remember this tactic and it will never, ever succeed again. If you have a good argument, take a reasonable position on a risk-based analysis and look for a discount that is appropriate. There is no point in overstating your case.

Good counsel, have evolved a practice which has now become standard in their mediation preparation to sit down with a client and talk about negotiating goals. This is the most important part of managing a client's expectations of what will happen at the mediation. Counsel will discuss with their client the implications of a best case scenario and the importance of compromise and will establish a target as their negotiating goal. It is important that the client buys into this: both the plaintiff and the insurance representative. There is no point in starting down a negotiating road to a destination that is unreachable.

Sometimes I have been made aware by defence counsel, after they have had this discussion with their client, that there may be some authority problems. A good mediator can manage these issues. I am never upset when I hear this. Sometimes counsel, need help from the mediator in managing their client's expectations. Never be afraid to ask for help. A good mediator has usually had lots of experience in dealing with this problem and can make appropriate suggestions and can deal with the client suitably to overcome this hurdle. Be realistic in your negotiating targets. No one has a crystal ball and these cases are often settled within ranges. Know what those ranges are.

Summary and Conclusion

We have come a long way in the last seventeen years but we can never be satisfied with what we have accomplished. There is always room for improvement. I would hope that some of the basic suggestions that I have made in these remarks will assist you in thinking creatively on your way to discovering the next level.



Paul practises in insurance, tort and personal injury litigation. He is certified by the Law Society as a specialist in civil litigation.

He is a member of the Ontario Insurance Commission (Advisory Board), Arbitration and Mediation Institute of Ontario, Canadian Bar Association - Civil Litigation & Insurance Sections and the Toronto Lawyers Association. In addition Paul is an Honourary Member of the Ontario Insurance Adjusters Association of Ontario.

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