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The Cost Consequences of Failing to Mediate

I asked my non-lawyer wife what her interpretation of "mediation" meant. After looking at me for a few seconds to determine if this was a trick question, she responded that "it is a joint decision by both sides to come together in order to reach a compromise". To me, that sounds like a pretty straight-forward and accurate interpretation of a rather simple word. As with many things, the world of insurance has re-defined and complicated the meaning of a "mediation". In particular, the Ontario Court of Appeal decision of *Keam v. Caddey* (2010) has essentially compelled insurance companies to attend at a mediation whether they like it or not; as well as foot the entire bill. There are severe cost consequences if they fail to do so.

This case only addresses the obligation to mediate personal injury matters involving tort defendants; whose principles are insurance companies. In the accident benefits world, there is already a statutory obligation under the *Insurance Act* to mediate each claim for benefits prior to an Arbitration or Statement of Claim being commenced.

The Facts

The facts of this case are quite straightforward. In this case the Plaintiff requested on two occasions that the tort defendant attend at a mediation. The defendant refused by asserting that the Plaintiff's injuries did not cross the threshold and they were accordingly not offering any money to settle. Shortly before trial the Defendant changed their position somewhat and offered to settle for $17,500.00 plus costs, disbursements, and PJI (plus, plus). The Plaintiff responded with an offer to settle for $205,000.00 plus, plus. The case did not settle, and following an 11 day trial a verdict came back finding the Plaintiff entitled to $78,700.00 plus, plus.

Following trial, counsel for the Plaintiff sought substantial indemnity costs on account of the failure of the defendant to proceed to a mediation as per section 258.6 (1) of the *Insurance Act*. The trial judge declined to rule in the Plaintiff's favour. He found that the insurer's decision not to mediate could not be characterized as malevolent. The insurer's position that the damages would not meet the threshold, and therefore mediation would be futile, was a legitimate position to take and did not warrant the imposition of substantial indemnity costs.

Accordingly, the Judge agreed with my wife's interpretation. Both sides need to make the joint decision to proceed to a mediation. If the insurer had a legitimate reason to not attend at a mediation, it was not forced to go. If it did not want to reach a compromise, no one could force them to sit down with the Plaintiff.

The Plaintiff appealed.

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Your comments are appreciated and if there are any commercial or insurance related topics that you would be interested in reading about, please feel free to email us and we will certainly explore the possibility of writing an article. Contact: defender@beardwinter.com

Cost Consequences of an Insurer's Failure to Participate in Mediation

The Court of Appeal agreed with the trial judge that there is no basis for an award of substantial indemnity costs. Instead, they created a new heading of costs which is entitled "Cost Consequences of an Insurer's Failure to Participate in Mediation".

As per Section 258.6(1) of the *Insurance Act*:

> (1)"A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect of the claim on behalf of an insured or that receives a notice under clause 258.3(1)(b) in respect of the claim shall, on the request of either of them, participate in a mediation of the claim in accordance with the procedures prescribed by the regulations.
>
> (2) In an action in respect of the claim a person's failure to comply with this section shall be considered by the court in awarding costs.
>
> Section 3 of O.Reg 461/96 provides that the defendant's insurer is to pay the fees and expenses of the mediator.

In the *Keam v. Caddey* case, the Court of Appeal found that there are no exceptions to the obligation to attend at a mediation and that the insurer has no option whether or not to attend. The refusal to participate in a mediation constituted a breach of the insurer's statutory obligation.

The Court of Appeal stated that where a claim is settled prior to trial, there is no mechanism for any consequences for the breach of this statutory obligation. However, if a trial does proceed, then the trial judge is required to consider the appropriate cost consequences of the insurer's actions. Indeed, the Court of Appeal even went further to suggest that even if the Defendant is wholly successful at trial and the Plaintiff's claim is dismissed, the trial judge may deprive the winning Defendant of all or part of its costs that would normally follow the event. The failure to attend at a mediation is considered to be a "remedial penalty" as it is to provide a "meaningful consequence to an insurer that elects not to comply".

In this case, the Plaintiff's partial indemnity costs were fixed at $110,000.00 and an additional $40,000.00 in costs (36% of the legal costs) for the insurer's failure to mediate to reflect the "censure of the court".

The Court of Appeal's interpretation of a mediation does not seem to jive with my wife's belief that this should be a joint decision of both parties to find common ground.

Consequences Of The Decision

If either the claimant or the insurance company unilaterally requests that a mediation be conducted, then both parties must attend. And, the insurance company is required to pay the entire costs of the mediation. As such, if the Plaintiff simply wants to force an insurer to come to the table for a fishing expedition, they now have the means to do so without any costs consequences if the mediation fails.

The Court of Appeal has now ordered that Trial Judges must take into consideration an insurer's failure to participate in mediation with respect to an award of costs. Even further, if an insurer wins outright at trial, it may be deprived of all or some of its costs of success for a failure to participate in a mediation. Accordingly, if an insurer feels that it has a very strong case and wants to proceed to trial, they may face the prospect of winning their case but being deprived of their entitlement to costs. So, an insurer has to spend money on their lawyer, and the mediator, to preserve perhaps their costs of winning at trial.

In Toronto, Ottawa, and Windsor the requirement to mediate is an obligation for all parties in litigation; not just insurance companies. However, the Rules are a little more balanced. In these mandatory mediation realms, each of the parties is responsible for their own share of the mediation, the costs of a mediation are reasonable (use of a roster mediator), and the obligation is only to attend for three hours.

It is not clear if the *Keam v. Caddey* decision trumps the requirements of mandatory mediation. If a claimant requests that a mediation proceed under the *Insurance Act* as opposed to the mandatory mediation rules; which system takes precedence? I would hazard to speculate that the specific obligations under the *Insurance Act* (as now supported by the Court of Appeal) would take priority over the more general *Rules of Civil Procedure* (mandatory mediation).

What is also not clear is the obligations under the *Insurance Act* for mediation. Can the claimant require the mediation to be a full day as opposed to a half day? Is there an obligation on the insurer to pay for an expensive mediator as opposed to a roster mandatory mediator rate? Since the Plaintiff is not paying for the mediation, are they entitled to only agree to use the most expensive mediators? In cases in which the insurer simply wants to attend

at a mediation for the purpose of complying with this statutory obligation, I would recommend agreeing to proceed to a half day mediation with a cheaper but reasonable/knowledgeable mediator. There is no obligation to purchase a Cadillac when a Ford will do.

There is no discussion from the Court of Appeal as to the substance of the mediation; only that one takes place. One of the fundamental tenants of a mediation is that it be confidential: what happens in the mediation, stays in the mediation. So, if an insurer attends at a mediation and says that it will not be paying any money and walks-out, there is nothing in this case to say there is anything wrong with this approach.

Conclusion

The Court of Appeal reasoned that "another effect of requiring insurers to attend mediation is to prevent them from playing hardball without first participating in serious settlement endeavours, including through the mediation process". The push in insurance litigation by the Courts is for the parties to resolve matters by themselves via a mediation at the insurer's expense. I am a big proponent of the mediation process and believe that it is a successful venture for the most part. I do not think it is necessary in all files, nor do I believe it fair that the insurer is obligated to pay for the full cost of same if it fails. The Plaintiff should attend at the mediation on a good faith basis and know that if the matter does not resolve that he shares in that burden. Interestingly, the concept of mutual agreement and sharing the cost are not considered as factors in the definition of a mediation by the Court of Appeal.

The next time that my wife sits me down and tells me that we are pursuing some further home renovations at my expense; I will know that a "mediation" has taken place.

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