Redefining and Revisiting Success at Mediation: “The Times They Are a-Changin'"

By Vance Cooper, Cooper Mediation Inc.

Come gather 'round people wherever you roam

And admit that the waters around you have grown

And accept it that soon you'll be drenched to the bone

If your time to you is worth savin'

Then you better start swimmin' or you'll sink like a stone,

For the times, they are a-changin'

Bob Dylan wrote this song in the fall of 1963 as a deliberate attempt to create an anthem of change. These words were true then and they are true now - particularly when it comes to mediating personal injury claims.

All too frequently, I attend mediations and I am asked by one side or the other or both to “work your magic”. At the risk of causing irreparable harm to my reputation and with thanks to the writers of Star Trek: The Original Series, “*I’m a mediator, not a magician*”. These words were originally spoken by Dr. Bones McCoy to Captain Kirk or others as, “*I'm a doctor, not a [moon shuttle conductor / bricklayer / psychiatrist / mechanic / engineer / scientist / physicist / escalator / magician / miracle worker / flesh peddler / veterinarian*]”.

It is my theory that neither magic acts nor miracles occur at mediation. Magic acts and miracles certainly don't happen as a result of the actions of any one person including the mediator. A productive mediation is the result of efforts made early and often by all concerned. I will demonstrate my theory by working through a typical personal injury claim in chronological order. I will focus on the roles played by plaintiff counsel [PC], defence counsel [DC] and the insurance claims professional [ICP] with some guest appearances by others who play a role in the evolution and assessment of a personal injury claim.

It is also my theory that all those involved in personal injury claims and litigation exist in an ecosystem such that there is a symbiotic relationship between and amongst the participants. If there are no meritorious claims worthy of settlement or likely to succeed at trial, there are no plaintiff lawyers to advance such claims. If there are no meritorious claims worthy of being advanced, there is no need for insurance claims professionals to evaluate claims and there is no need for defence counsel to defend claims. The key factor is for all those involved in the ecosystem to have a better understanding of what constitutes a meritorious claim and how each of the participants can do their respective jobs, look out for their respective clients or interests and coexist.

CAUTION:

For some of you, there will be nothing new for you as you read further. Consider this paper an affirmation of what you already do in your professional lives. For others,

perhaps new to the field or newer to your profession, please consider this paper from the perspective of lessons I have learned, for better or worse, while practising in the field of personal injury and insurance law as PC, DC and as a mediator.

1. Be Selective About The Cases You Accept

PC must accept retainers from clients carefully and cautiously. There was a time when insurers would, almost without exception, pay something to obtain a release and dismissal order. Those times are not these times. PC should do their due diligence as soon as possible. If you are accepting a retainer from client with a chronic pain claim, it is essential that you obtain pre-accident clinical notes and records, a decoded OHIP summary, work records, employment files and income tax returns. The time to obtain these documents is not in satisfaction of undertakings but, rather, before the claim is issued and certainly before money is spent obtaining the reports of experts.

2. Constantly Re-Evaluate Your Client's Claim

PC must remain in contact with their client. If the client has made a medical recovery and/or returned to work, the client's life will be better but their claim has great difficulties. The sooner that you appreciate these facts, the sooner you can give advice to your client and make a sensible business decision. On the other hand, if your client has ongoing impairments and difficulties but is not pursuing treatment, this situation can be identified and remedied. Complaints of pain to friends and family, in the absence of evidence of recorded complaints to healthcare professionals and pursuit of appropriate treatment and mitigation efforts, are highly unlikely to persuade anyone at mediation or

at trial.

3. Speak to One Another – Chapter 1

The ICP should contact PC on receipt of a demand letter. This is a perfect opportunity to explain the “facts of life” applicable to the claim from the perspective of the particular insurer involved in the matter. Some insurers have a reputation, whether right or wrong, of being particularly aggressive when it comes to claims arising from motor vehicle accidents. This may be due to the so-called “threshold” or the statutory deductible or both. I submit that there is no harm in sharing the insurer’s early or preliminary view of the claim or alerting PC of the challenges or obstacles which the plaintiff will have to overcome.

The ICP can get PC to focus on the underlying facts and evidence as distinct from reports from experts. If the plaintiff has a good work history and has made earnest efforts to return to work without success, this should factor into the assessment of even the harshest insurer. Similarly, if the plaintiff has a relatively clean pre-accident health history before the accident and has sought out considerable treatment after the accident, particularly if recommended by treating healthcare professionals, this evidence cannot be ignored.

The ICP can encourage PC to gather documentary evidence which will assist the ICP in assessing the claim, setting reserves and, ultimately, obtaining settlement authority.

4. Speak to One Another – Chapter 2

DC, upon being retained, should speak with the ICP to get an understanding as to how the ICP and insurer currently view the claim and how the ICP wishes the claim to be defended going forward. If the insurer has no appetite for settlement at this stage, having regard for what it knows or doesn't know about the claim, there is no reason for DC to try to engage PC in settlement discussions. On the other hand, if the insurer is in the dark, from an evidentiary perspective, and if the insurer might be willing to engage in early resolution, DC should engage PC in appropriate documentary production with a view toward considering settlement discussions in advance of examinations for discovery or mediation.

5. Speak to One Another – Chapter 3

DC, once properly up to speed on the claim and properly briefed by the ICP, should speak with PC. If this is a claim that can be resolved sooner than later, don't wait. If this is a claim which DC have been instructed not to settle, for one reason or another, I suggest that it is incumbent on DC to bring this situation to the attention of PC [obviously, without breaching any sort of solicitor client communication between DC and the ICP].

In other words, if the ICP and insurer are taking an aggressive approach on the verbal threshold and/or deductible, I cannot understand why there is any harm in bring this situation to the attention of PC. The position can be explained along with an explanation as to the kind of evidence which may cause the ICP and insurer to revisit their analysis.

It is a rare day when medical, care cost or accounting experts will cause the ICP and insurer to materially change their view of the claim.

6. Judicious Use of Experts

As I have already mentioned, reports of experts, in and of themselves, are highly unlikely to cause a material change in the evaluation of a personal injury claim. If the plaintiff sees a psychiatrist or psychologist for purposes of a medicolegal assessment in the absence of documented complaints to healthcare professionals and/or treatment by appropriately trained healthcare professionals, the report of the expert is unlikely to be given much weight, if any, by the ICP or insurer. That is not to say that the expert's evidence will or will not be accepted at trial; as a mediator, I am not in any sort of position to predict that result. However, I am in a perfect position to comment on the type and quality of evidence which appears to motivate settlement behaviour at mediation. PC should contact DC to find out if experts' reports are required for mediation. Some insurers seem to require at least one expert's report to address the verbal threshold. Other insurers seem prepared to evaluate the claim without reports from experts as they know what the plaintiff reports will say and they know what the defence reports will say. Money that would otherwise be spent addressing these disbursements can be devoted to resolving the claim.

I have mixed feelings when it comes to reports from experts in future care and accounting. PC have explained to me that they obtain reports from experts in these

fields so that they can demonstrate to their clients that PC have done their due diligence and so that the plaintiff understands the potential full value of the claim as they proceed with the negotiation. On the other hand, I have seen plaintiffs become attached to those opinions [which makes negotiations at mediation problematic]. I have also seen insurers attend mediation with all inclusive authority [such that they borrow from money that would otherwise be offered for claims to larger than expected assessable disbursements].

I don't know if there is a right answer to the judicious use of experts. At minimum, I suggest that PC give advance notice to DC of the quantity and nature of experts retained in the matter and the anticipated costs associated with their reports as soon as possible. This can allow DC to consult with the ICP, before reports have been obtained and money spent, to try to anticipate potential problems in this regard and work around them. It is too late once the reports have been obtained and produced in advance of or for purposes of the mediation and ongoing litigation.

7. Experts - Tell Them What They Need to Know; Not What They Want To Hear

Much has been written about the role of experts in modern day litigation. This paper is not intended to address the substantive and technical requirements of expert evidence in a civil action. My request is that neither PC nor DC should retain an expert in advance of and for mediation if that opinion is plain and obvious. I need not insult the usual suspects who line up on one side or the other of chronic pain and other so-called

invisible injuries [physical or mental or both]. My point is that money spent on these experts in advance of mediation is wasted. If the matter cannot be resolved at mediation such that experts are required in advance of a pretrial conference and pursuant to the Rules of Civil Procedure, then spend the money at that time.

On a separate but related note, experts do no favours for their instructing client when they express an opinion favourable to their instructing client which they cannot defend at trial. In my former life as counsel, both defending claims and acting for plaintiffs, I have had meetings with experts while preparing cases for trial. I have had many experts acknowledge the weakness of their opinions, their willingness to agree to the opposing theory if properly cross-examined at trial or their overall reluctance to attend court and give evidence in accord with a report which they wrote largely for the audience who retained them rather than as a true independent expert to assist the court.

At the risk of sounding naïve, if PC or DC retain real experts, with excellent credentials and true independence, PC and DC will be better able to advise their respective clients where they stand and what is more or less likely to be the result after a trial.

8. Keep Your Eye on The Prize

It may be trite or obvious but PC and DC have clients to serve. For the plaintiff, no one is able to change history or restore health - not at mediation and not after a trial. The claim is about monetary compensation. If production of multiple experts' reports is likely to materially improve the plaintiff's monetary recovery, then PC should proceed in this fashion. If, however, the net result is to divert money that would otherwise be received

by the plaintiff to a stable of experts, PC should avoid expenditures in this regard unless absolutely necessary.

Insurers are in the business of making profits. If a claim can and should be resolved at an early stage and at a relatively modest cost, DC should proceed in this direction as soon as possible. Insurers do not want to receive a lengthy written summary of each piece of paper produced in the matter. They do not want DC to conduct lengthy examinations for discovery where any and every question is asked, regardless of its import and impact on the evaluation of the claim. DC should focus on the information and documentation which is likely to have a material impact on the evaluation and assessment of the claim and on the ability of DC to defend the claim at trial.

9. Mediation Requires Application of The “Work Backwards” Principle

I have been criticized, fairly and properly, for being somewhat obsessive when it comes to planning. For me, planning starts with the end game or objective and then requires reverse engineering or working backwards so that all of the necessary steps to be taken can be incorporated into the plan or time budget. In the context of a civil lawsuit, would describe this as “litigation logistics”.

As a starting place, the mediator’s cancellation policy should be ascertained before the mediation is booked. PC and/or DC likely have a number of things to do in advance of the mediation, with a view toward making the mediation most productive. If those things can’t realistically be done before cancellation fees are in play, then either a later date with the same mediator or the same date with another mediator [with a lesser time for no

cost cancellation] should be sought.

At the risk of inserting the financial interests of mediators into the mix, most mediators are not prepared to accept cancellations at any time without the payment of some sort of cancellation fee. Full-time mediators do not have law practices to fall back upon. If the request for cancellation arises from late service of an expert's report, the situation can be avoided if care, thought and effort were expended at the time the mediation was booked. Moreover, late experts reports from PC are highly unlikely to impact on insurer reserves or authority and late expert reports or late disclosure of surveillance from DC are similarly unlikely to materially impact on expectation management from the plaintiff's perspective.

I am a strong proponent that there should be direct discussions between PC and DC [please refer to items 3, 4 and 5, above] about the mediation. This should include generating a list of mutually acceptable mediators and establishing a realistic timeline for the mediation. DC can inform PC as to whether experts reports are likely to be necessary or beneficial from the insurer perspective. PC can inform DC as to the quantity and type of experts intended to be retained. DC can emphasize those outstanding undertakings given at examinations for discovery which are likely to be critical to evaluation, analysis and authority [as compared to other undertakings which may be less important]. DC can advise PC whether defence medical assessments are likely to take place in advance of or after the mediation.

Direct discussions between counsel may lead to settlement discussions or may shine a

bright light on impediments to settle. These discussions may move the parties to retain a less expensive mediator, if the mediation is expected to be a rite of passage or if the mediation is happening at a relatively early stage in the litigation, or to retain a more expensive mediator who may have a particular skill set necessary to deal with a challenging legal issue or one or more challenging personalities, environments, etc. Mediators are not “one-size-fits-all”. Thought and care should be taken retain a mediator appropriate for the nature and size of the claim and the qualities of the individuals involved in the claim.

10. Mediation - An Exercise In Informed Decision-Making

As I have already admitted, I am not a magician or miracle worker. I facilitate a discussion of the issues and the facts and evidence underpinning the issues. I facilitate risk analysis. Above all else, I am an advocate for and proponent of informed decision-making. If the participants at mediation make an informed decision to resolve the dispute, I have done my job. If the participants at mediation have made an informed decision not to settle the dispute at the time of the mediation [due to timing] or not at the price demanded or offered [due to the evaluation of the claim and risk analysis], I have done my job.

Consequently, it is very important that DC present the reasoning behind their anticipated negotiation path in a clear, understandable and digestible format for the plaintiff. It is

important for me to be certain that the plaintiff has heard and understood the facts, evidence, analysis and theory advanced by DC.

It is similarly very important that PC explain to the ICP why the court [judge, jury or both] will warm up to the theory of the claim advanced by PC and why PC has the skills and abilities to achieve a certain result at trial and why the plaintiff has the intestinal fortitude and commitment to see things through to completion. It is important for me to be certain that the ICP has fairly and objectively listened to the plaintiff, if he or she has chosen to speak, observed the plaintiff and understands the theory of the case as advanced by PC.

If the plaintiff and ICP, as decision-makers, have all of the facts, evidence, legal and risk analysis in front of them and have fairly and realistically performed their evaluation, they are in a position to make informed decisions and I have done my job.

Conclusion

I suppose the simplest conclusion to draw from the foregoing is the need for better communications amongst all people involved in the personal injury ecosystem. If there is a better understanding of:

- the strengths and weaknesses of a claim or of a defence,
- risk analysis from both sides, and
- the motivations and constraints affecting decision-making

mediation will provide all concerned with the best opportunity for resolution.If a

negotiated resolution is not a likely attainable result, better communications before and at mediation will help to minimize the costs and efforts expended in advance of and at mediation while still giving the decision-makers the greatest opportunity to make an informed and sensible decision.

ABOUT THE AUTHOR

Vance Cooper of Cooper Mediation Inc. is principal of Cooper Mediation Inc. Vance devotes 100% of his professional time to mediating and arbitrating primarily personal injury and insurance cases. He serves as an arbitrator in loss transfer and priority disputes under the *Insurance Act*.