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Simplified Procedure Under Rule 76 of the Rules of Civil Procedure - Implications and Considerations for Mediation

By Vance Cooper

Ontario has recently made some significant changes to the simplified procedure under Rule 76 of the Rules of Civil Procedure. Effective January 1, 2020, the monetary jurisdiction for actions under the simplified procedure has increased from $100,000 to $200,000. Perhaps more consequential, the parties to a "new" simplified procedure action cannot deliver a jury notice unless this occurred prior to January 1, 2020. The combination of these factors should make simplified procedure actions more attractive to those litigating personal injury claims of modest value. However, while the changes may be seductive, they are not simple. It will be challenging for counsel to litigate matters within the new relatively tight timelines, and especially within a very different and time-rigid trial format.

There are many helpful and informative resources that discuss the changes to the simplified procedure, so I will list a few you may want to read rather than duplicating their content in this blog:

1. *Fact Sheet: Simplified Procedure* (Ministry of the Attorney General; January 2020)

2. *Tips for navigating the new Simplified Procedure* (Juda Strawczynski and Audrey P. Ramsay; OBA seminar presented January 15, 2020)

3. *Simplified Procedure - A New Hope* (Adam Wagman and Victoria Yang; OBA seminar presented January 15, 2020) [pdf]

4. *Simplified Procedure Regime Gets And Overhaul: Staying Ahead of the Changes* (Audrey P. Ramsay; OBA seminar presented January 15, 2020) [pdf]

Instead, I want to use this blog to discuss how mediation may be different under the changes to the simplified procedure. I will also offer suggestions for how counsel and their clients may want to utilize mediation to maximum advantage.

Is Mediation Necessary? If so, when?

Mediation is still mandatory for all actions commenced in Toronto, Ottawa and Windsor. Additionally, in an action arising out of a motor vehicle accident, mediation can be required anywhere in Ontario pursuant to section 258.6 of the *Insurance Act* by either the plaintiff or defendant.

Ontario Regulation 461/96 provides:

3. (1) If a request for mediation is made under subsection 258.6 (1) of the Act, the plaintiff and the defendant's insurer shall, within 10 days after the request is made, agree on and appoint a person to be the mediator.

(2) If the plaintiff and the defendant's insurer are unable to agree on the appointment of a mediator, each of them shall, within 10 days after the request is made, name a person to participate in the mediator's appointment, and the two persons named shall together appoint a person to be the mediator.

(3) The mediation shall begin on a date agreed to by the plaintiff and the defendant's insurer or, if they are unable to agree on a date, within 14 days after the mediator is appointed.

(4) The mediator may adjourn the mediation, with or without conditions,

(a) if the plaintiff or the defendant's insurer is represented in the mediation and the representative is not authorized to bind the person he or she represents; or

(b) the plaintiff or defendant is not present at the mediation.

(5) The mediator shall give the plaintiff and the defendant's insurer a written report identifying the issues that were settled and the issues that remain in dispute.

(6) The defendant's insurer shall pay all reasonable fees and expenses of the mediator.

Rule 76.08 provides:

Within 60 days after the filing of the first statement of defence or notice of intent to defend, the parties shall, in a meeting or telephone call, consider whether,

(a) all documents relevant to any matter in issue have been disclosed; and

(b) settlement of any or all issues is possible.

This settlement discussion provides an excellent opportunity to timetable and streamline the litigation by resolving or narrowing some issues. Production requests can be exchanged. More importantly, the ambit of production can be narrowed. Examinations for discovery and the mediation itself can be scheduled. Mutually convenient dates for mediation and one or more mutually acceptable mediators can be identified. At minimum, this provides an opportunity for counsel involved in the litigation to actually speak and listen to each other. Good counsel will pick up cues and clues as to where the litigation may be heading and what can be done to resolve the matter or best prepare it for trial.

When time is of the essence, it may also be worthwhile to take advantage of case management services. Please recall that Cooper Mediation offers case-managed mediation as an adjunct to mediations conducted by mediators at the firm. For further details in this regard, please review

our blog of July 31, 2019: Case Managed Mediation: A Complimentary Service To Get You Case Ready For Mediation.

Rule 76.09 provides:

Despite rule 48.02 (how action set down for trial), the plaintiff shall, within 180 days after the first statement of defence or notice of intent to defend is filed, set the action down for trial by serving a notice of readiness for pre-trial conference (Form 76C) on every party to the action and any counterclaim, crossclaim or third party claim and forthwith filing the notice with proof of service.

(2) If the plaintiff does not act under subrule (1), any other party may do so. This mandatory requirement means examinations for discovery and mandatory or voluntary mediations must be completed within 180 days of the first notice of intent to defend or statement of defence.

Practice tip: In cases where 180 days is not sufficient time to accomplish what is necessary before delivering a notice of readiness for the pre-trial conference, counsel may wish to cooperate by timing delivery of a notice of intent to defend or statement of defence. Counsel for the plaintiff can provide an undertaking not to note the defendant in default despite the defendant not delivering their pleading as required under the Rules. Counsel for the defendant can provide an undertaking to deliver a statement of defence by a certain date. This co-ordination will provide the parties and their counsel with some additional time before they are required to move the action forward.

The court's expectation is that pre-trial conferences will be held within 180 days of delivery of a notice of readiness for pre-trial conference. Given the requirements and responsibilities imposed on counsel leading to and at the pre-trial conference, the mediation should be more meaningful.

In personal injury actions, it is not uncommon for insurers and self-insured entities to attend mediation without reports from experts. This is likely a cost-saving measure as a significant percentage of personal injury claims will be resolved at mediation. Given the tighter timelines and trial management requirements under simplified procedure, we believe that the parties will be more prepared at mediation. Consequently, the case as presented at mediation will bear a closer resemblance to the case that will be presented at trial. Under the ordinary procedure, actions which are mediated in Toronto are often 2-3 years from trial. The presentation and appearance of those cases at mediation is dramatically different from their presentation and appearance in the shadow of an impending trial.

Practice tip: Given the limited recovery for costs ($50,000 plus HST; apparently unaffected by offers to settle under Rule 49), counsel must work effectively and efficiently. If you represent a plaintiff who has already undergone an examination for discovery in advance of mediation, you will have begun to prepare the plaintiff's affidavit for purposes of the summary trial under simplified procedure. Keeping in mind tactical considerations, consider including the affidavit as part of your mediation memorandum. The same considerations would apply to a defendant if some aspect of liability is going to be contested at the summary trial. Focus on marshaling the documentary evidence to support the theory of your claim or defence.

Practice tip: There is arguably no place for the traditional hired gun expert seen frequently on both sides of a case pending under the ordinary procedure. The justification for such experts is usually their skill as a witness before a jury. Judges at a summary trial will not be easily impressed. Retain experts who will truly assist the court and impress the court with their expertise and neutrality.

Rule 76.10 provides that the registrar will give at least 45 days' notice of the pretrial conference. Counsel are required to agree to a trial management plan at least 30 days in advance of the pretrial conference. Mediation, to the extent that it does not produce resolution, provides an excellent opportunity to start working on the trial management plan.

Rule 76.11 provides that the registrar will put the action on the appropriate trial list immediately following completion of the pretrial conference. We believe that regional senior judges throughout Ontario will allocate meaningful judicial resources to ensure that summary trials take place within approximately six months of the pre-trial conference. Indeed, some judicial centres have made serious headway in addressing the perceived backlog of pending civil actions. Central East has dealt with every matter, jury or non-jury, listed for trial during the past two and perhaps three sittings dating back to November 2018 despite the priority placed on criminal cases (*R. v. Jordan*) and family matters. It is our understanding that the backlog may be greater for matters awaiting pre-trial conference. The courts are considering initiatives that may address this bottleneck in the litigation process.

Simplified procedure and summary trial without a jury is not a panacea. Plaintiffs cannot and should not expect insurers to lavish them with compensation if the underlying case is suspect or lacks merit. Counsel must carefully vet claims before they are commenced. The mere fact that the trial is proceeding without a jury does not mean that a judge will award compensation where the facts, the law or both do not lead inexorably to this conclusion. Judges do not want to embarrass themselves with a judgment that stands as an outlier or to be reversed by the Court of Appeal. However, judges are aware of the deductible and vanishing deductible applicable to motor vehicle accident cases in Ontario. One can expect their judgments to be crafted to achieve the result intended. The same could not be said of juries.

Simplified procedure generally, and summary trials specifically, require brevity, focus and efficiency.

This same approach should be applied to mediation memoranda and the documents delivered with the mediation memoranda. If you cannot distill the theory, facts, evidence and law applicable to your case to something in the order of 10 pages or less, you will be hard pressed to complete your summary trial in the 2.5 days available to you (assuming that the other party is entitled to 2.5 days). Do not reproduce voluminous pages of clinical notes and records from physicians or page upon page of hospital records or treatment records. If there is a particular note or record that truly matters, copy and paste it directly into the memorandum or attach it to the memorandum.

In the words of Justice Todd Archibald, the new simplified procedure is a brave new world reserved only for the brave. Approach the changes with earnest and eager enthusiasm, modify

and tailor your litigation practices and processes to meet the needs and demands of the new summary trial, and get the most from mediation

ABOUT THE AUTHOR

Vance Cooper 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 party disputes under the *Insurance Act*.

Vance can be reached at vance@coopermediation.ca or (647) 777-4011.

To schedule a mediation with Vance, visit: http://coopermediation.ca/vances-online-calendar/.

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