

Ontario Bar Association | Motor Vehicle Tort Litigation: Critical Updates | October 22, 2019

Overcoming Obstacles at and Beyond



STACEY L. STEVENS, *Partner*
416-868-3186 | 647-291-7359 (Cell)
1-888-223-0448
sstevens@thomsonrogers.com

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Getting the Parties to the Table

- Rule 75.1 Rules of Civil Procedure
- 2586(1) Insurance Act
- *Thomson v. Portelance*



"Maybe you should reconsider those place cards."

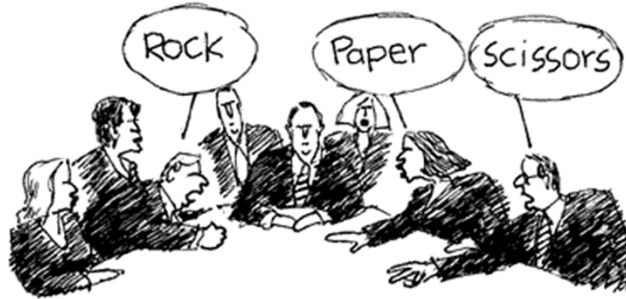
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Getting the Parties to the Table

- Rule 75.1 Rules of Civil Procedure
 - Mandatory Mediation in Windsor, Toronto, Ottawa
- 258.6(1) Insurance Act
- *Thomson v. Portelance*
 - Pre-discovery mediation
 - A party cannot delay the scheduling of a mediation until completion of a specific event in the process
 - Obligation on the other side to conduct the mediation within the timeframe set out in s. 258.6(1)

Choosing the Right Mediator



Janseson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate

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Choosing the Right Mediator

- Mediation is only as effective as its mediator
 - Knowledge, experience and approach
- Cheaper is not always better
- Chose a mediator that “fits” your case
- 12 – 15 months in advance
- Schedule enough time

Be Prepared

- Serve your reports early
- Analyse any changes in your case that may impact your ability to negotiate a successful resolution



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- Serve your reports early
- Analyse any changes in your case that may impact your ability to negotiate a successful resolution
 - Production of surveillance
 - Change in the economic circumstances of the Plaintiff
 - SABS claim
 - 4 CAT determination
 - 4 Settlement

Invite All Relevant Parties



Doesn't mediation require a medium?

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Invite All Relevant Parties

- SABS Adjuster
- LTD Insurer
- Companion Actions
- OHIP

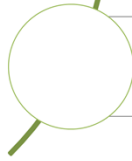
Identify Your Goals



Is the case ready to be settled?



What can I learn about the other side's case?



What can I learn about my case?

Identify Your Goals

The Mediation Memo

- Ensure the other side understands the theory of your case

- Avoid putting forward new theories at the midnight hour

- Be issue focused

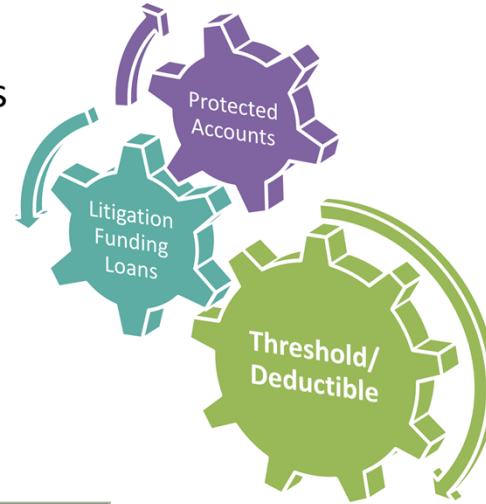
- Arm the mediator with the facts and evidence that s/he can use in the other room

The Mediation Memo

- Ensure the other side understands the theory of your case
- Avoid putting forward new theories at the midnight hour
- Be issue focused
 - Highlight what is in agreement
 - Elaborate only on what you perceive the key issues between the parties
 - Do not include lengthy verbatim quotes
- Arm the mediator with the facts and evidence that s/he can use in the other room

Client Expectation Management

Plaintiffs often have unrealistic expectations of the value of their case.



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Client Expectation Management

Plaintiffs often have unrealistic expectations of the value of their case

- Threshold / Deductible
- Litigation Funding Loans
- Protected Accounts
- Settlement Authority - *I need to talk to my*

Use the Mediator to Your Advantage



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Use the Mediator to Your Advantage

- Pre-Mediation Conference Call

Your Opening Statement



The mediator had them all tethered for their own safety during their inflated opening statements.

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Your Opening Statement

- Emphasize your strengths and acknowledge your weaknesses
- Identify points in common
- Make concessions
- Avoid threats, posturing and hostility
- Use of case law
- Client participation
 - Active listening – giving the other person the experience of being heard

Offers



Giraffe mediator breaks ice with lame joke.

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Offers

- Making the first offer
- Avoid pulling numbers out of the air

Post Mediation



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Post Mediation

- Work with what you have learned about your case
- Set a timetable / Goals going forward
- Continued involvement by the Mediator

Responsibility

The mediator is responsible for the process.

The participants are responsible for the solution.



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THANK YOU

Please feel free to call or email with questions.

STACEY L. STEVENS, *Partner*
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1-888-223-0448
sstevens@thomsonrogers.com

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TF: 1.888.223.0448 T: 416.868.3100 www.thomsonrogers.com