

## **NEGOTIATION AND SETTLEMENT TECHNIQUES DURING TRIAL**

It is trite, but none the less true, that success at anything during trial is highly dependent on preparation.

In the first place, it is preparation that leads to the confidence required to take correct settlement positions before and during trial. I would also note that I am directing my thoughts to plaintiffs' counsel, not defence.

While I will not distinguish between jury and non-jury trials, it is a given that the former is less predictable and creates more fertile circumstances for settlement, before or during trial.

The obvious first step is to determine timing. When should settlement be broached with defence counsel?

For example, if the plaintiff will be a strong witness, which of course should have been determined during one's preparation of that witness before trial, you may decide to raise the issue of settlement at some point after your client's testimony.

If on the other hand, the plaintiff is anticipated to be a weak witness; your best strategy is to bolster the plaintiff's evidence with lay witnesses and experts prior

to the plaintiff's testimony. The law is unclear as to whether doing so will be met with a sustainable objection.<sup>1</sup>

If however you can do so, it may be wise to broach settlement before the plaintiff testifies. There is no magic formula, but it is a decision usually based on equal parts, gut instinct, and of course preparation, so that you have a clear understanding of the road that lies ahead in the trial.

It also obviously requires an objective evaluation of what has, or has not, been accomplished in the courtroom, up to that point and what is likely to occur thereafter.

## **WHAT PRESSURE IS THERE ON ALL DEFENCE COUNSEL AND HOW DO WE RATCHET IT UP?**

Speaking from experience as a defence lawyer for 33 years, no matter how successful one's career has been, defence counsel always worry about achieving a result that will not endanger their relationship with a client who provides a good deal of work to their firm.

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<sup>1</sup> Mizzi v. DeBartok, 9 O.R. (3d) 383 (Ont. Gen. div. May 11, 1992)  
Terris v. Crossman, 129 Nfld. & P.E.I.R. 181, 402 A.P.R. 181, aff'd 129 Nfld. & P.E.I.R. 181, 402 A.P.R. 181, leave to appeal to S.C.C. refused by 206 N.R. 160 (note), 464 A.P.R. 360 (note)  
Streisfield v. Goodman [2001] O.J. No. 3314 aff'd [2004] O.J. No. 1992, 8 E.T.R. (3d) 130 (Ont. C.A. May 14 2004) leave to appeal to S.C.C. refused by 204 O.A.C. 396 (note), 336 N.R. 195 (note), (S.C.C. Jan 06, 2005)

Obviously, however, a well conceived offer, served prior to trial, to settle is critical. I strongly suggest this requires that you consider putting in an offer low enough to cause the defendant concern, but high enough to meet with the approval of your client for settlement purposes.

Too often counsel fail to apply this same test to “offers” as they do when discussing settlement with their client. I refer of course to the definition of a good settlement being one in which the plaintiff feels they accepted too little, and the defendant feels that they have paid too much.

In short, I usually select a position which I know the defendant would not pay before the offer expired at the commencement of trial. Once the first witness begins testimony, the defendant is locked in on the offer.

Keep in mind, that in the appropriate major injury case, the other pressure point is the policy limits of the defendant. Work out scenarios on economic loss, both income and health care, which could go over limits and present defence counsel with a legitimate concern that their policy limits could be expanded if you achieve the verdict you are after.

Again, gauge the position of your opponent, vis-à-vis his client. As an example, whenever I see adjusters or claims people sitting in on trials, I presume there is

either a lack of confidence in their defence counsel, or a legitimate concern about their case and if not, both issues.

### **MID-TRIAL PRE-TRIALS**

This will generally be useful where defence counsel is inexperienced and will rely heavily on what a trial Judge has to say, in advising their client. I should add that it is rare indeed for a mid-trial not to occur at the request of the trial Judge during any trial.

Keep in mind, the one thing the mid-trial Judge cannot gauge is credibility. If it is an issue, the mid-trial Judge will obviously say that the opinion they render is predicated on the fact that the plaintiff will be believed. I have never known there to be communication between the trial Judge and the mid-trial pre-trial Judge, at least nobody has ever let on that there was any. Therefore, the mid-trial Judge will be in the dark on the issue of credibility, one must presume.

However, credibility will be a minor issue in the case of objective injury, especially when it does not negate the essential elements of your case. Those elements of course include a good work history and ample medical evidence that the plaintiff cannot continue to be employed.

Another area where great concern can be evoked in defence counsel, and the insurer, as to where the case is going, is the use of demonstrative evidence.

In my experience, juries react in an obvious fashion to this evidence and oftentimes, trial is the first time the insurer will see the demonstrative evidence and indeed I often find defence counsel have paid little attention to it either, before trial.

After obtaining the permission of the trial Judge, use the demonstrative evidence in your opening so that it will be part of the decision-making process of defence counsel, should the best opportunity to settle arise after the plaintiff testifies, but before the experts who will be using demonstrative evidence have entered the witness box.

Another decision to make regarding mid-trial pre-trials is whether to insist that the decision maker at the insurance company be present. The plaintiff will certainly be available and I have little hesitation in having my clients sit in, in the appropriate situation. You would be amazed at how effective advice from a Judge delivered directly to the insurer can be. I emphasize requesting that a decision maker, as opposed to the adjuster be there, so that the Judge's words are not filtered in any way.

It will also enable you to flush out the reasoning of the insurer so that it can be dealt with in the mid-trial. I had a brain injury case where all experts agreed that the plaintiff would never work and needed round the clock attendant care.

Nevertheless, we were millions of dollars apart in our discussions. The Claims

Manager who attended, said that unfortunately his son had been born with brain damage and, that he and his wife had looked after their son without assistance of personal support workers and that they were now, in his late teens, putting him into a home.

The obvious response to that is, you cannot impose that criteria in a situation where there are millions of dollars available from the at-fault motorist in a personal injury case.

The Claims Manager also proposed support workers that would cost \$130,000.00 a year as opposed to the \$270,000.00, which our life care plan had submitted as reasonable.

It turned out that the proposal the insurer was using, involved women who were given two year visas, from Eastern Europe, to work here as personal support workers obviously much more cheaply than the local people would, but they would only have two year visas and therefore this brain injured plaintiff would have to re-interview three attendant care workers every two years, and never have the opportunity to form any relationship with one of them since everybody would leave after two years.

Upon hearing this position, the mid-trial Judge made it clear to the Claims Manager that his notions were totally incorrect and the case settled.

## **SOME CLOSING THOUGHTS**

It goes I hope without saying, that you must maintain a collegial, trusting and cordial relationship with defence counsel. As I always tell my clients, people will help those they like and will do little, or nothing, for those who antagonize them.

Perhaps, you should approach counsel to have dinner, or a drink after Court, or on a weekend. Avoid lunches during trial, because they are obviously rushed, and counsel are often worried about sending the wrong message to their client who may see the two of you together and draw the wrong conclusion.

Keep in mind, as well, that insurers abhor uncertainty and will always seriously consider a reasonable proposal to settle. Reasonableness is of course, context sensitive, as outlined above, but as plaintiff's counsel, you can have a great impact on the perception of your opponent.

Do not squander your opportunity to bring about a settlement during trial. Do not assume you can continue to press settlement offers after your first effort in that it may be seen as a sign of desperation and weakness if you do so. So, make sure the timing is as correct as can be because you probably only have this one opportunity.

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