Beware Unreasonable Refusal to Mediate!

Kluwer Mediation Blog
June 6, 2018

Rick Weiler (Weiler ADR Inc.)

Please refer to this post as: Rick Weiler, 'Beware Unreasonable Refusal to Mediate!', Kluwer Mediation Blog, June 6 2018, http://mediationblog.kluwerarbitration.com/2018/06/06/beware-unreasonable-refusal-mediate/

The recent cost decision of Justice Graeme Mew in Canfield v. Brockville Ontario Speedway, 2018 ONSC 3288 (CanLII) provides an instructive review of the principles the Court will consider when weighing the cost consequences to an unsuccessful party of unreasonably refusing to participate in a mediation.

The case involved whether an automobile race track was liable to a spectator who fell while jumping away to avoid a race car that had come from the track and was making its way to an overflow pit area. No contact was made between the vehicle and the plaintiff.

The jury assessed the plaintiff's damages, exclusive of interest and before adjustment for contributory negligence, as follows:

1.	Loss of past income	$ 217,600
2.	Loss of future income	149,000
3.	General damages	60,000
	Total:	**$ 257,000**

(all figures Canadian dollars)

These were precisely the amounts suggested to the jury by plaintiff's counsel in his closing statement. However, the jury found the plaintiff to have been 25% contributorily negligent. As a result, the total amount recovered by him was $190,750 ($212,000 including interest).

The usual rule in Ontario is that costs follow the event. This is subject to the overarching discretion of the court to determine by whom and to what extent costs should be paid: *Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 131(1).

Justice Mew reviewed a number of factors to be taken into account when setting costs but of importance for our purposes are his comments regarding the defendant's refusal to participate in mediation. I set those comments out in full.

"Failure to Mediate

[41] The plaintiff argues that the refusal of the defendant, or more specifically, the defendant's insurer, to participate in mediation, should be a factor in determining costs. Mr. Bonn [plaintiff's counsel] argues that this case would likely have settled with the assistance of a skillful mediator, thereby avoiding significant costs. He points to various exchanges that occurred between counsel on the subject of mediation. In April 2015, Mr. Bonn wrote to Mr. Swindley [defence counsel] to confirm a telephone conversation in which the latter had advised that the defendant and its insurer were not willing to engage in a mediation settlement process. This was following delivery by the plaintiff of its offer to settle of $300,000.

[42] In July 2017, the plaintiff suggested mediation again. The availability of a number of mediators was provided. No mediation resulted.

[43] In situations where participation in mediation is mandatory, a failure to mediate may be relevant. For example, section 258.6(2) of the *Insurance Act,* R.S.O. 1990, c.I.8, provides that a person's failure to comply with the mediation requirements of the Act "shall be considered by the court in awarding costs". In *Williston v. Gabriele* (2013), 2013 ONCA 296 (CanLII), 115 O.R. (3d) 144 (C.A.), at para. 25, it was held that where a party repeatedly requested mediation and the insurer never agreed to participate, despite its statutory obligation to do so, "an augmented costs award was warranted".

[44] Unlike actions commenced in Toronto, Ottawa or Essex County, actions brought in Belleville are not subject to the mandatory mediation provisions of rule 24.1 of the *Rules of Civil Procedure*. There is, accordingly, no requirement that a party mediate.

[45] In *Baldwin v. Daubney,* (2006) 2006 CanLII 33317 (ON SC), 21 B.L.R. (4th) 232 (Ont. S.C.J.), at para. 12, Spence J. declined to consider a refusal to mediate as a factor in the exercise of his costs discretion:

The plaintiffs say that the defendants refused the request of the plaintiffs to mediate and thereby caused the motion to proceed with its attendant costs, which a successful mediation would have avoided. The defendants say they considered they had a good defence and were not obliged to mediate. Mediation is most likely to be successful where each party considers it has something material to gain from a settlement and appreciates that to achieve a settlement it will need to accept a compromise of its position. Where one litigant is confident that its position will succeed in court, it has little reason to take part in a process that would yield it a lesser result and it is not bound to do so. Indeed, to take part in a mediation in such circumstances could simply prolong the process and add to the cost.

[46] However, in *David v. Transamerica Life Canada,* (2016) 131 O.R. (3d) 314, at para. 97, Price J. took a different approach, saying this concerning the costs consequences of an insurer's refusal to participate in a mediation over disputed insurance proceeds:

In cases where each of the parties has an arguable case, and each faces a risk of loss in the proceeding, mediation can offer a reasonable prospect of settlement. In such cases, a refusal to participate in mediation is a factor that the court can properly consider in determining whether the party has engaged in unreasonable conduct that has caused unnecessary costs to be incurred and that warrants rebuke by means of a costs sanction. This determination requires a case-by-case analysis.

[47] I agree with Price J.

[48] Following the initial costs hearing, I provided counsel with the opportunity to comment on the practice that has developed in England and Wales which, while not binding on a court in Ontario, is nevertheless worthy of consideration given some the similarities in practice and procedure between the jurisdictions and, in particular, what in England and Wales is called the "overriding objective" of the rules which is to enable the court to deal with cases justly and at proportionate cost, which can be compared with the general principle in rule 1.04 of the *Rules of Civil Procedure* that the rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits and, that in applying the rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues and to the amount involved in the proceeding.

[49] The position in England and Wales is conveniently summarised by Professor Zuckerman (Adrian Zuckerman, *Zuckerman on Civil Procedure, 3ed* (London): Sweet & Maxwell, 2013 at p.1335) as follows:

The court may take the view that had the parties engaged in ADR, the dispute would have settled without proceedings and therefore disallow all or some of the costs of the party who declined ADR even if that party was successful. Experience shows, as Brooke L.J. explained in Dunnett v Railtrack Plc [2002 EWCA Civ 303, [2002] 2 All E.R. 850 at para. 14], that:

When the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live.

[50] Professor Zuckerman does, however, go on to note, again, consistent with the sentiments expressed by Price J. in *David v. Transamerica:*

The Court of Appeal has accepted, however, that not all disputes are suitable for mediation and that a refusal of mediation may well be justified. It was held [in] Halsey v Milton Keynes General NHS Capital Trust; Steel v Joy, [2004 EWCA Civ. 576, [2004], 1 W.L.R. 3002] that before making an adverse costs award for a refusal to participate in mediation the court must consider whether the refusal was justified. Depriving a successful party of his costs is justified only if the unsuccessful party shows that the successful party acted unreasonably in refusing to agree to ADR. The reasonableness of ADR refusal, Dyson L.J. explained, must be judged by reference to all of the circumstance [sic.], including the following: (i) the nature of the dispute; (ii) the merits of the case (the factor that a party reasonably believes that he has a strong case is relevant to the question of whether he has acted reasonably in refusing ADR); (iii) whether other methods of settlement have been attempted; (iv) whether the costs of the ADR would be disproportionately high; (v) delay in suggesting mediation which may have the effect of delaying the trial of the action; and (vi) whether the mediation had a reasonable prospect of success.

[51] The court in *Halsey* was concerned that plaintiffs should not be able to use the threat of a costs sanction to extract a settlement from defendants even when the claim was without merit.

[52] The defendant in the present case maintains the position, which it argues is consistent with the English practice and with *David v. Transamerica*, that it genuinely believed it had a strong position on liability and, hence, that its refusal to participate in mediation was not unreasonable.

[53] I disagree. Although juries are not required to give detailed reasons, the jury in this case did provide the following particulars in response to the question of whether the Brockville Ontario Speedway had breached its legal duty to take such care as in all the circumstances of the case was reasonable to see that Mr. Canfield was reasonably safe while on its racetrack premises:

Staff at the west gate did not advise patrons of the overflow pit.

There was [sic] no signs to warn patrons of the overflow pit or the movement of sprint cars in the public area.

The potential existed to require an overflow pit as the number of sprint cars attending races is not known. Therefore a protocol should have been in place for establishing the overflow pit.

We feel it is reasonable that sprint cars be pushed by an ATV when proceeding into, or through, a public area on the grounds.

It would be reasonable for all sprint cars to stop at the pit gate before proceeding.

It would have been reasonable to expect that sprint car traffic and pedestrian traffic be separated to the overflow pit.

[54] With the respect to the contributory negligence of Mr. Canfield, the particulars provided by the jury were:

Mr. Canfield had a responsible to be aware of his surroundings while walking through the grounds, particularly as he is familiar with race tracks and was a race car owner.

Through inattention, Mr. Canfield failed to heed the warnings of track staff at the pit gate.

[55] Not only were these findings that it was open to the jury to make based on the evidence at trial, but more importantly, they underscore that neither side had such a strong position on liability that it would have been reasonable to decline an offer to mediate. Although, in *Halsey,* Dyson L.J. stressed that the court should be sensitive to the fact that large organisations are vulnerable to pressure from plaintiffs who, having weak cases, invite mediation as a tactical ploy, the converse also applies. Courts should be aware that insurers, who are in the business of litigating, can, and do, take hardball positions against economically more vulnerable opponents.

[56] The present case is not one of those circumstances where a plaintiff was trying to shake down an insurer by demanding mediation of a wholly unmeritorious case. To the contrary, it is a case where the insurer took a tough and uncompromising stance. That, of course, is a defendant's prerogative. Defendants do not have to settle. But if reasonable opportunities to mediate are spurned, that can be a relevant factor when fixing costs.

[57] **It was, in my view, unreasonable for the insurer to decline mediation in this case. That should be reflected in the disposition of costs. Had a mediation occurred in 2015 or even in 2017, substantial costs would have been avoided."** (emphasis added)

The plaintiff claimed $269,371 (plus HST) for costs. Weighing all of the relevant factors, other than the refusal to mediate, Justice Mew would have reduced this claim by 30%. However he adjusted this reduction to 22% in light of the defendant's unreasonable failure to mitigate. That refusal cost the defendant an additional $20,000 in this case.

The decision is notable, in part, because it is a decision of a highly respected judge, Graeme Mew, with a strong background and experience in ADR.

The decision is also notable because it is the final chapter in the final trial of well-known and highly respected plaintiff counsel, George Bonn who has indicated he is retiring from trial practice after 45 years at the Ontario Bar. I had the pleasure of mediating with George a number of times over the years and wish him much joy in his retirement.