TIMING IS EVERYTHING – SETTLING AFTER DISCOVERIES
LESSONS FROM ONTARIO

by Judith A. Hull

As litigators, we love the process of building the theory of the case, marshalling the evidence, and strategizing to achieve the best outcome for our client. We go to discoveries, hear the evidence of the parties, draw up a trial action plan, and then come back to the office and while our clerks are going crazy completing undertakings requests for the next six or more months, that energy that we had at the discovery slowly fades as we get pulled into other cases. It is easy to get bogged down in the minutiae of documentary production and scheduling expert assessments that we can easily lose the thread of the story.

If we prepared for discoveries the way we prepared for trial – having our expert reports ready, will say statements from lay witnesses available, quantification of pecuniary losses calculated – we would have an excellent opportunity to resolve the case. The Defendant's lawyer has to report to his or her insurer following the discoveries. With all or the majority of the evidence available, this will provide for appropriate and accurate reporting. It will also provide an impetus to settle the claim, well in advance of trial, before incurring more costs.

This paper has been set out as the top ten reasons or considerations for settling after discovery, based on the Ontario experience. While most of it is apparent, it never hurts to state the obvious!

REASON #10 - DUTY TO SETTLE

We have a professional and ethical duty to pursue settlement on behalf of our clients. Rule 3.2-4 of the Rules of Professional Conduct (Ontario) states:

> 3.2-4 A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

The commentary under this Rule adds that it is important to consider the use of alternative dispute resolution (ADR), instructing that when appropriate, the lawyer should inform the client of ADR options and take steps to pursue those options if so instructed. [1]

The duty, therefore, is to make reasonable efforts to settle, "and to create the right environment for settlement to occur (i.e., through mediation or negotiation)."[2] This goes beyond just "*jumping through the hoops".* While there may be court imposed, mandatory, or contractual mediation requirements in a given case depending on the jurisdiction and type of case, the Rules of Professional Conduct actually require, in mandatory language, that we have a duty to advise and encourage our clients to

[1] The wording is similar in the Atlantic Provinces' law societies' various Codes of Professional Conduct: Nova Scotia Barristers' Society Code of Professional Conduct, Rule 3.2-4; the Law Society of Newfoundland and Labrador Code of Professional Conduct, Rule 3.2-4; Law Society of New Brunswick, Rule 3.2-4; Law Society of Prince Edward Island, Code of Professional Conduct, Rule 3.2-4

[2] Mitchell Rose, "'Secret' Tools and Traps to Keep in Mind in Settlement Negotiations", Canadian Lawyer Magazine, February 27, 2017; http://www.canadianlawyermag.com/article/secret-tools-and-traps-to-keep-in-mind-in-settlement-negotiations-3551/#

compromise or settle. Fortunately this professional obligation works on both sides of the fence, whether representing plaintiffs or defendants.

Members of the Ontario Trial Lawyers Association also have a voluntary Code of Conduct, known simply as The OTLA Code, which is attached as Appendix A to this paper. Although the Code is voluntary, the principles in the Code augment the Rules of Professional Conduct. The Code requires that:

- Once retained, members advance claims in a manner and within a timeframe that is consistent with their clients' interests. Members endeavour to achieve the most cost-effective, expeditious and just resolution of claims and encourage sensible settlement and compromise or trial as the clients' interest dictates.[3]

- Members cooperate reasonably with courts and tribunals to streamline the adjudicative process, narrow the issues in dispute, and avoid unnecessary cost and delay, while advancing the proper interests of their clients. [4]

- The members also agree to reasonably cooperate with other participants in the civil justice system to facilitate an organized, efficient and effective process for the resolution of claims. [5]

The OTLA Code touches on a number of the reasons why consideration of settlement after discoveries might be appropriate. These will be discussed further, below.

REASON #9 – STATUTORY OBLIGATIONS UNDER THE *INSURANCE ACT*

[3] Article 2, Relationship with Clients, p. 14
[4] Article 3, Relationship with the Courts and Tribunals, p.16
[5] Article 5, Relationship with Others, p.19

In motor vehicle litigation, which is always complex with the ever-increasing deductibles (see Reason #5 below) and densely worded verbal threshold, the Ontario legislation actually encourages settlement. Section 258.5(1) of the *Insurance Act*[6] places an obligation on the insurer defending a claim for personal injury or death arising out of an automobile accident, to attempt to settle the claim as expeditiously as possible. Section 258.5(2) requires, where the insurer admits liability or all *or part* of a claim for income loss, that the insurer shall make advance payments to the claimant pending determination of the amount owing. The insurer's failure to comply with these requirements shall be considered by the court in awarding costs.[7]

Section 258.6 of the *Insurance Act* encourages involvement in mediation:

> 258.6 (1) A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect of the claim on behalf of an insured or that receives a notice under clause 258.3 (1)(b) in respect of the claim shall, on the request of either of them, participate in a mediation of the claim in accordance with the procedures prescribed by the regulations.[8]

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[6] *Insurance Act,* R.S.O. 1990, c.I.8 as amended

[7] Section 258.5(5) of the *Insurance Act.*

[8] Section 3 of O.Reg. 461/96: *Court Proceedings For Automobile Accidents That Occur On or After November 1, 1996,* under the *Insurance Act, R.S.O. 1990, c.I.8,* states:

> 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 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.

(2) In an action in respect of the claim, a person's failure to comply with this section shall be considered by the court in awarding costs.

These sections, particularly the mediation requirement, have been considered by the courts on a number of occasions. In 2010, in the decision *Keam v. Caddey,* 2010 ONCA 565, the Ontario Court of Appeal awarded $40,000 of additional costs to the plaintiff after the insurer twice refused to participate in mediation prior to trial. The defendants' insurer did not respond to the first request for mediation. To the second request they responded by taking the position that they were not required to participate in mediation as the plaintiff's injuries did not meet the threshold under the *Insurance Act.* Shortly before the trial, the defendant served an offer which acknowledged the plaintiff would meet the threshold. The plaintiff did not accept the offer and went on to trial successfully. The plaintiff sought substantial indemnity costs as a remedy for the insurer's failure to participate in mediation. The trial judge found that the refusal was a "genuine available position" and therefore did not attract the costs consequences under s.258.6(2) of the Act. The plaintiff appealed. The Court of Appeal emphasized that

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(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.

s.258.6(1) of the Act makes participating in mediation mandatory when requested. The Court held that there "can be no legitimate reason to refuse to participate because to elect not to participate constitutes a breach of the insurer's statutory obligation."[9] When an insurer breaches s.258.6(1), s.258.6(2) requires the trial judge to ascertain the appropriate remedial costs penalty in the circumstances. As the insurer in this case (Aviva) twice refused to participate in mediation, a significant remedial penalty was required.

The motion decision by Mr. Justice Firestone in *Thomson v. Portelance et al.*[10] deals with the timing of when these *Insurance Act* mediations are scheduled. This motion arose following the defendants' refusal to schedule a mediation until *after* the discoveries were concluded. The plaintiff, however, wished to schedule the mediation prior to the discoveries in order to set the action down for trial as soon as possible in order to advance the litigation expeditiously.[11] Mr. Justice Firestone held that the sections of the Act and Regulations, when read together,

> …confirm that once a party requests that a mediation be scheduled, the other party cannot delay the scheduling of the mediation until the completion of a specific event in the litigation process. This includes the completion of discoveries. The appointment of a mediator and scheduling of a mediation is no way contingent on the completion of discovery.[12]

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[9] *Keam v. Caddey,* at para. 22
[10] *Thomson v. Portelance et al.* 2018 ONSC 1278 (2018/02/23)
[11] Note that in addition to the Insurance Act mediation obligation, Toronto is a jurisdiction where mediation in all civil litigation is mandatory. Paragraph 57 of the Toronto Consolidated Practice Direction, effective May 1, 2017, states that an action cannot be set down for trial until the mediation has taken place.
[12] *Thomson v. Portelance, supra, at para. 11.*

The decision does not address the utility of a pre-discovery mediation. Certainly, to make a pre-discovery mediation successful, documentary production in advance would have to be complete; however, the thread that ties the plaintiff's story together – the evidence given at discovery – will be missing.

The duty imposed on the insurer to settle expeditiously does not mean that an insurer cannot play hardball. The obligation imposed is to attempt to settle; it is not a requirement to pay compensation. In *Lakew v. Munro,* 2014 ONSC 7316, the defendant insurer agreed to participate in mediation, but offered only a dismissal without costs. The matter went to trial. The jury found that the motor vehicle collision did not cause any of the plaintiff's injuries. In the context of the costs decision, the plaintiff argued for cost consequences against the defendant for failing to attempt to settle as expeditiously as possible.[13] Mr. Justice Firestone, in his very detailed analysis, stated that "while it is clear the defendant was playing 'hardball,' I do not find that the defendant was in breach of s.258.6(1) of the *Insurance Act."*[14] The facts demonstrated that the defendant's counsel executed a mediation agreement, attended with full authority to settle, made an opening statement, which was consistent with the position that it maintained throughout the course of the litigation, and offered to settle the action by way of a dismissal without costs.[15] Firestone J. held:

> [69] In my view it cannot be said that the defendant failed to participate or meaningfully participate in the mediation on the basis that nothing other than a

[13] See para. 29
[14] At para.66
[15] at para. 68

> dismissal without costs was offered, which is in effect the offer contained in the defendant's offer to settled dated December 2, 2010. The defendant was entitled to maintain that position and would be ultimately bound by the same cost principles applicable to the plaintiff depending on the result at trial.
>
> [70] Section 258.6(1) of the *Insurance Act* does not mandate that a certain sum of monetary compensation be offered at mediation in order to comply with the section. The section does require that the defendant attend at mediation and enter into meaningful discussions regarding the basis of their position on liability and damages. On the evidence before me, with respect it cannot be said that the mediation was a "sham", as the plaintiff contends.

In *Ross v. Bacchus*, 2015 ONCA 347, the Ontario Court of Appeal reversed the trial judge's award of $60,000 of remedial costs against the insurer for failing to comply with its obligations under the *Insurance Act.* The Court of Appeal confirmed that insurers are entitled to vigorously defend cases, including taking cases to trial. Taking a strong position going into mediation does not preclude meaningful participation in mediation.[16] Importantly, the defendant had made a settlement offer which was not revoked before trial. The Court of Appeal, therefore, found that the record did not support the trial judge's findings that the insurer failed to attempt to settle the claim expeditiously and that its participation in the mediation was a "sham".[17] The provisions in the *Insurance Act* which impose an obligation to participate in mediation and to attempt to settle the claim as expeditiously as possible do not prevent the insurer from assuming the risk of both a higher damage award at trial and the imposition of

[16] At para. 48
[17] At para. 5

substantial indemnity costs.[18] Importantly, the Court of Appeal did hold that the impugned sections of the Insurance Act reflect a "clear expression of the Legislature's intention to promote the early and expeditious settlement of claims arising out of motor vehicle accidents".[19]

To prove that an insurer has breached its statutory obligations, evidence must be tendered. This poses a challenge as mediations are confidential, as emphasized by the Supreme Court of Canada in the decision of *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35. Justice Doherty, writing for the Court of Appeal in the *Ross* decision, acknowledged the evidentiary challenge but did not address it.

Fortunately, in 2016, the issue came before the court in *Dimopoulos v. Mustafa*, 2016 ONSC 4119. In this decision the plaintiff asked the court to lift the veil of mediation privilege. The court held:

> In this instance, by suggesting that the defendant's mediation brief failed to attempt to effect a settlement, the plaintiff put into question the *bona fides* of the mediation process. In light of such an allegation, even though the preservation of confidentiality of the mediation ought to be the court's point of departure, in circumstances where the only way to evaluate the allegation is to look behind the process then it is appropriate to admit the evidence in question. I echo the concerns outlined in *Marshall v Ensil Canada Ltd.* 2005 CarswellOnt 803 at para.22 that a mediation brief and evidence concerning the mediation ought to be admitted only "in rare cases where the importance of considering the evidence outweighs the importance of preserving confidentiality." This case reflects such a

[18] At para. 51
[19] At para. 41

> rare case, and in any event the request is only with respect to the mediation brief and not the full contents of the mediation.[20]

Upon review of the defendant's brief, the court found that the insurer had, in fact, participated meaningfully:

> Whether or not the court ultimately agreed with the defendant's assessment is immaterial to the court's assessment of the defendant's *bona fides* approach to the mediation. The mediation brief reflected a meaningful participation in the process by the defendant. Even if a settlement of the claim was not forthcoming, it enabled the plaintiff to obtain an understanding of the defendant's position and the reasons for that position. That outcome, while obviously not optimal for the plaintiff, was nonetheless meaningful as it allowed the plaintiff to review his risks and trial strategy and approach. The defendant came to the mediation and explained the reasons for which it concluded that the claim would not succeed. Accordingly, I am unable to agree with the plaintiff's contention that the defendant's conduct in the mediation was contrary to the requirements of s.258.6 of the *Insurance Act,* such that it ought to attract punitive cost sanctions against the defendant.[21]

These decisions are instructive because they tell us that the parties have obligations to take a hard look at our respective cases, whether acting for the plaintiff or defendant. It is not enough for the plaintiff to cry foul if the defendant has assessed the case as threshold-defensible. In fairness to the plaintiff who may not meet the threshold, it is best to get that advice out to the plaintiff early, with the risks explained, so that appropriate decisions can be made.

REASON #8 – NARROWING THE ISSUES

[20] At para. 32
[21] At para 34

It becomes too easy to think of settlement negotiations as simply the dollar value that it will take to resolve a claim. Settlement negotiations are much broader than this. There are goals in any case that our clients want us to achieve. In his excellent article about settlement conferences, Mr. Justice Wilkinson reminds the reader that

> …thinking about what you would like to achieve **means** working out which issues might be capable of resolution and what it could take to solve the entire case. ***Counsel should ask themselves such questions virtually from the moment they agree to represent a party in the litigation!"***[22]

While the issues are always before counsel (or should be), they are in clear view immediately following discoveries. Not only are the damages and losses issues crystalized, issues of credibility have also now entered the fray in a meaningful way, with the parties' sworn evidence.

Settlement negotiations following discovery are useful not only to attempt to obtain resolution, but may prove to be a critical step in narrowing the issues. Perhaps damages can be agreed upon, with only a trial on liability. Perhaps the plaintiff's case can be resolved, with an ongoing liability and apportionment dispute between the various defendants. Perhaps liability can be resolved, with only damages to be determined. Perhaps the evidentiary foundation for an income loss claim was not made, and that issue can be taken off the table. There are any number of ways that issues in litigation can be streamlined through a negotiation process. Often when the

[22] The Honourable Mr. Justice John Wilkins, "The Meaningful Settlement Conference in a Modern World", The Litigator, April 2013, p. 10

parties are agreeable to discussing some of the issues, the conciliatory approach can pave the way for all of the issues to be resolved.

REASON #7 – RULE 48 DISMISSALS

Since January 2015, the new Rule 48 is in effect.[23] Essentially, the rule states that registrars will dismiss, without notice, five-year-old actions that have not been set down for trial**.** Although this may seem like a long time, claims that are shelved after discovery can pose risks:

> The best strategy to pre-empt last minute catastrophes is to move files along in a timely manner. The longer a file drags on, the more likely expert reports will need to be updated, which can double the disbursements and eat into the client's take-home amount. Work-in-progress also accumulates, usually without any increase in the final settlement. Witnesses may forget details as time passes, hurting the prospect of a fair trial. In automobile cases, the new section 258.3(8.1) of the *Insurance Act* effectively draws down the five percent pre-judgment interest rate in favour of prevailing economic rates, thereby eliminating a traditional benefit to clients for biding their time. And haven't we all seen this – the longer litigation goes on, the more anxious clients become.[24]

The plaintiff bears primary responsibility for the conduct of the action and this Rule underscores that. As plaintiffs' counsel, if we are prepared to discuss settlement post-discovery, this will keep the action moving, which will help to avoid the E&O risks associated with Rule 48 dismissals.

REASON #6 – COST OF LITIGATION LOANS

Litigation loans are the new reality in the world of personal injury litigation. The perfect storm of drastically reduced accident benefits and systemic delays means that

[23] Rule 48, Rules of Civil Procedure, R.R.O. 1990, Reg. 194
[24] Ian Hu, "Cost of Delaying Files: Rule 48 Past and Future", The Litigator, December 2015, p. 55

plaintiffs often cannot pay their bills, or afford treatment. Litigation loans often are required to fill that gap. It is good that this relief is available when absolutely needed; however, a litigation loan that cannot be paid off for years while settlement and trial dates are delayed, can itself can become a barrier to settlement due to the high interest rates these loans attract.

On the positive side, loans buy time in the litigation and keep the client from accepting a low-ball offer. By taking out such a loan to use for treatment or retraining, the client demonstrates that she is mitigating her losses.[25] Whether you can claim the interest on these loans as part of the litigation is beyond the scope of this paper, but suffice it to say that the law is not settled in this regard.

The important point is that the interest rates are high and delays in settlement can make the amounts repayable unmanageably large. If a plaintiff is successful in claiming the interest costs in the litigation, that is great, but if unsuccessful, you will have a very unhappy client. Knowing that there is a litigation loan to the plaintiff for some reason is another good reason to facilitate settlement negotiations early.

[25] Brian Cameron, "Litigation Loans are Here to Stay – Dealing with the Costs and Consequences", the Litigator, September 2014, p.60

REASON #5 – ANNUAL INCREASE OF THE DEDUCTIBLE & MONETARY THRESHOLD and PRE vs. POST TRIAL LOSS CALCULATIONS

These issues again are applicable in auto cases in Ontario. Aside from the burdensome verbal threshold that plaintiffs have to meet in order to be compensated for pain and suffering or health care expenses, there is a monetary threshold and a statutory deductible to deal with as well.

The statutory deductible for non-pecuniary general damages claims is now tied to inflation, meaning every year it increases.[26] The longer you wait, the more the insurer gets to withhold from the non-pecuniary general damages claim. In 2017 it was $37,385.17; in 2018, it is $37,983.33. This does NOT mean that if you were in an automobile accident in 2017, the applicable deductible is $37,385.17 and if you were injured in 2018, your deductible is $37,983.33. The deductible is tied to when the case is settled.[27] In other words, a $50,000 non-pecuniary general damages claim would net the client (before paying her legal fees account) $12,614.83 in 2017 or $12,016.67 in 2018.

It is, therefore, imperative that counsel work swiftly to settle a plaintiff's claim because every year the claim is not settled, the plaintiff loses more money. While I am not aware of any E&O claims or complaints to the Law Society against any members, it

[26] Confirmed in the decisions of *Cobb v. Long Estate* 2017 ONCA 717 and *Hinds v. Metrolinx* 2017 ONSC 6619.
[27] *A.B. v. White* 2018 ONSC 2151

would not be difficult to imagine such a complaint if plaintiff's counsel had the opportunity to settle a claim early but failed to avail him or herself of that chance, thus depriving the plaintiff part of his or her compensation.

Likewise, there are statutory deductibles in *Family Law Act* claims which are also tied to inflation. Each claimant must face a deductible that is currently $18,991.67 before a penny of compensatory damages is paid. As these claims are often nominal, delays can erode what small compensation the family members might otherwise obtain.[28]

In addition to the deductibles, there is the "vanishing deductible" or what the Financial Services Commission of Ontario calls the "monetary threshold". Pursuant to s.267.5(8.3) of the *Insurance Act,* deductibles do not apply for non-pecuniary losses that are valued at higher than a defined amount, which again is tied to inflation. That amount in 2017 was $124,616.21 and in 2018 it jumped a staggering $2000 to $126,610.07. This means that every year that passes, your client will have a higher hurdle to jump to surpass a damages assessment that will not attract the deductible.

Some things are best seen to be believed. Imagine your client is awarded $125,000.00 for pain and suffering damages. Here is why timing is crucial:

[28] Fortunately in fatality claims, the deductibles do not apply.

YEAR	**2017**	**2018**
NON-PEC. DAMAGES	$125,000.00	$125,000.00
MONETARY THRESHOLD	$124,616.21	$126,610.07
DEDUCTIBLE	$0.00	$37,983.33
NET AWARD TO CLIENT	**$125,000.00**	**$87,016.67**

in 2017, a non-pecuniary damages award of $125,000 would remain $125,000; the same $125,000 award in 2018 would not surpass the $126,610.07 threshold, and would therefore attract the $37,983.33 deductible, thus reducing the $125,000 award to $87,016.67. This is a staggering difference that would have a profound impact on your client. It does not pay to wait.

Similarly, for *Family Law Act* claimants, the monetary threshold in 2017 was $62,307.59 and in 2018 climbed to $63,304.51. The longer you wait, the higher the hurdle for your plaintiffs.

On the issue of economic losses, in auto cases, the plaintiff is only entitled to 70% of her gross income losses prior to trial. Future income loss awards *can be* 100% of gross losses; in other words, they are 100% of gross income losses that you can prove, less whatever contingencies might be applied. The real issue here is the

difference in the pre- and post- trial calculations. The longer you wait to get to trial, the longer the plaintiff who cannot work must endure the 70% recovery model. Leaving aside the issue of available trial dates (see Reason #2 for further elaboration), delaying resolution does not do your client any favours where the economic losses are concerned. "The longer the delay, the less the insurer has to pay."[29]

REASON #4 – REDUCTION OF AVAILABLE BENEFITS

This is predominantly an issue in motor vehicle litigation. The Statutory Accident Benefits Schedule is increasingly eroded. Medical and rehabilitation benefits have seen drastic cuts. In September 2010, the benefit amount for non-catastrophic claims was reduced to $50,000 from $100,000. The nasty Minor Injury Guideline was also introduced, capping benefits for medical and rehabilitation at $3,500 for accident victims with minor injuries. In June 2016, the non-catastrophic limits for medical and rehabilitation benefits were combined with non-catastrophic attendant care, for a total available of $65,000. Increasingly, accident victims are using their full medical and rehabilitation benefits and effectively "running out" of money for treatment. Plaintiffs can sue for health care expenses against the at-fault driver, provided their impairments meet the verbal threshold.[30]

[29] Michelle Jorge and Al Alilovic, "Surviving in the World of *R. v. Jordan"*, The Litigator, March 2018, p.51

[30] For all auto accidents on or after November 1, 1996, pursuant to section 267.5(5) of the *Insurance Act,* plaintiffs must either die, or suffer either a permanent serious disfigurement or permanent serious impairment of an important physical, mental or psychological function, in order to be compensated for non-pecuniary losses. This is further defined by O.Reg 461/96. In order to sue for health care expenses, the same test applies (s.267.5(3)).

This issue can and does occur in other types of personal injury litigation. In a medical negligence case or occupier's liability case, the only benefits that may be available during the course of litigation would be extended health benefits through an employment plan. If someone is off work for a prolonged period of time, the extended health benefits are usually terminated after a year. If the employer keeps the person on the plan, the plans typically have low limits (ie, $350 or $500 per year per type of practitioner). It is challenging to get much, if any, treatment in these scenarios.

Plaintiffs who use all of their medical/rehabilitation benefits clearly have a need for treatment. This bodes well. Despite that, if the plaintiff cannot afford to pay for treatment out of his own pocket, then the insurer/defendant will argue that he does not need the treatment. The plaintiff may take out a litigation loan to continue to fund treatment (see discussion above at Reason #6). This is a good thing, but for the cost of the loan and how that itself can impact settlement. If no loan is taken out and the treatment ceases, the argument against the plaintiff is that the treatment is not needed or warranted.

Settling a claim after discoveries will help to avoid the plaintiff landed in this unfortunate gap and will facilitate the plaintiff in getting the needed treatment.

REASON #3 - COST EFFECTIVENESS & PROPORTIONALITY

It goes without saying that settling after discoveries is a cost effective way to approach litigation. The typical formula for partial indemnity costs of 15% on the first $100,000 and 10% on everything thereafter, does not typically improve the closer one gets to trial. In the writer's experience, there are still some counsel and adjusters who recognize that a higher proportionate share of costs needs to be paid if the matter settles on the court room doorstep, but that appears to be a dying breed. If, however, plaintiff's counsel can demonstrate that he or she did everything possible to attempt to resolve the claim early in the process, this will help in the ultimately costs assessment (should one be required).

In determining the costs award, the court applies fairness and reasonableness as the overriding principles. Rule 57[31] provides guidance as to the exercise of the discretion of the court when assessing costs. Offers to settle are one of those factors.

> …the objectives of a costs order include encouraging settlement and punishing litigants whose unreasonable conduct caused other litigants to incur unnecessary costs. A party's willingness to participate in mediation is a key factor to be considered in this regard. [32]

One of the purposes of costs orders is to encourage settlements.[33]

In assessing what is fair and reasonable, the court does not engage in a mechanical exercise but, rather, takes a contextual approach, applying the principles

[31] Rules of Civil Procedure, *supra*
[32] *David v. TransAmerica* 2016 ONSC 1777 (CanLII) at para 83
[33] *294 Lakeshore Oakville Holdings Inc. v. Misek,* [2010] O.J. No. 5692 (S.C.J.)

and factors discussed above, and sets a figure that is fair and reasonable in all the circumstances. Rule 1.04(1.1) requires the court to consider proportionality. In other words, the amount of costs ordered should be proportional to the amount of money and other interests at stake in the proceeding.[34]

Transactional costs also increase with delays. Reports become dated and require updating, adding to disbursement costs, for example. Frequently, defence counsel will state something akin to "Well we need to send your client for X, Y & Z assessments, but we would rather allocate those monies toward a settlement." Effectively managing resources – both time and money – can help to facilitate early resolution.

REASON #2 – LACK OF JUDICIAL RESOURCES & THE IMPACT OF DELAYS

Another reason to start settlement negotiations early is a practical one: there are ever-increasing delays in personal injury trials being reached. Since the Supreme Court of Canada's decision in *R. v. Jordan* [35] things have become worse. Criminal matters are prioritized, then family law cases, and then everything else. This is combined with the fact that there are a number of judicial vacancies in Ontario:

> The end result of the allocation of judicial resources to criminal matters is that the civil system is being neglected. Unfortunately for innocent accident victims this results in significant delays. An individual who cannot go back to work, cannot partake in everyday tasks due to pain, cannot pay for their treatment, who

[34] *David v. TransAmerica, supra*
[35] *R. v. Jordan* 2016 SCC 27

> requires assistance at home, and who cannot pay his or her bills, has to wait longer and longer in order to reach a conclusion to the claim.[36]

The inherent delays in the system require that plaintiff's counsel be proactive to move the matter forward:

> Counsel must create timelines and action plans in order to anticipate any potential delays their client must face. The sooner counsel can commence a lawsuit and prepare sufficient documentation, the sooner a trial date can be acquired. This includes issuing Statements of Claim early, obtaining the appropriate reports, following up on requests for information and documentation with clients, and ensuring clinical records and documentation are updated.[37]

Time erodes evidence. Witnesses move, disappear, forget or pass away. Memories about events and people change over time. Having this evidence available early, at discoveries, helps to corroborate the claims being made. It is hard to challenge what lay witnesses, who have no interest in a case, have to say; however, their evidence is of a better quality when closer to the event. It is qualitatively better to have a will say statement or videotaped statement than putting a terrified witness into the witness box at a trial. As Mr. Justice Wilkins stated: "Witnesses are human and with the best of intentions they can let you down."[38] Why not present that evidence early to help bolster settlement negotiations?

[36] Michelle Jorge and Al Alilovic, "Surviving in the World of *R. v. Jordan"*, The Litigator, March 2018, p.50
[37] Jorge and Alilovic, *supra,* p.51
[38] Wilkins, J., *supra,* p.15

Taking these proactive measures should lead to an earlier resolution. When the evidentiary record is robust, the defendant will know the case it has to meet.

REASON #1 – IT MAKES THE CLIENT HAPPY

An injured plaintiff who wants his or her day in court is a rare breed, and usually the one who marches into your office and insists on his or her day in court is surrounded by a lot of invisible yet very red flags.[39] The average plaintiff is terrified of court proceedings. Looming discoveries tend to keep plaintiffs awake at night. Trials are a whole other level of terrifying for the average soul. Mr. Justice Wilkins wrote:

> The court will always give you a judge, a courtroom and a jury. The question is whether or not the client is better served by the one or the other. The crucible of trial is psychologically very unnerving for many clients. The risk the client might be found untruthful is serious and carries scars for the rest of their lives. If they are professionals, it could ruin their reputations.[40]

Clients typically do not want actions dragging on. Many believe that taking over a year to resolve a claim is too long! Obtaining a settlement after discoveries means the client only has to go through giving evidence one time, and the resolution takes away the fear of the unknown. Happy clients are the best clients, and they also will always refer future clients to you!

[39] Obviously there are times when trials are absolutely warranted. Typically, however, counsel must spend a lot of time talking to clients about the pros and cons, risks and rewards, and help to bolster nerves of steel when recommending that they go to trial over taking a low-ball offer. The clients put their trust in their lawyers, but typically do not walk into the room demanding a trial.
[40] Wilkins, J., *supra,* p.15

CONCLUSION

While many of the reasons cited above tend to interact with one another, the over-arching message is, or at least ought to be, that delays tend to lead to problems, some of which are insurmountable. To start negotiations after discoveries will help to alleviate many of the problems that delays in the process can cause. By preparing for discoveries as though it were a test run of a trial, you will demonstrate to your opponent that you are ready and you know the case. Resolution would be in everyone's best interests.