New system means change in role of mediators

BY MARG. BRUINEMAN
For Law Times

Sweeping changes to auto accident insurance benefits eliminates the use of mandatory mediation, but there is hope that government strategies introduced in case conferences under the new Licence Appeals Tribunal system will result in early resolution of cases.

The new system ushers in an evolution in the role of the mediator, says Bernard Morrow, who developed Morrow Mediation in Toronto after working for many years as a litigator.

The idea of finding more efficient means of resolving disputes appealed to him, prompting him to study the craft and work on a high volume of files as a Financial Services Commission of Ontario mediator.

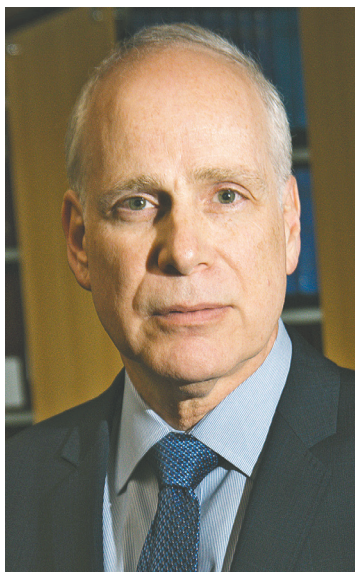
"There are significant structural changes that have happened in the no-fault regime. FSCO is out of the mediation business now. FSCO played a huge role in the mediation of accident benefits cases for years and years and years. And they were also arbitrating these cases. And now, you've got the LAT taking it over and mediation is not part of the process," says Morrow, who, in addition to personal injury cases, works on employment, commercial and construction law.

Now, there are generally no costs awarded at the LAT, so lawyers need to take a hard look at cases to determine if they're worth pursuing, says Morrow.

While the mediator's place in the process may be changing, Morrow believes there will always be a role for mediation in helping settle certain cases as well as in catastrophic cases in which there are serious physical injuries.

He believes the mediator's role as facilitator in sharing information and providing that reality check remains critical.

"The smaller cases, both in accident benefits and in tort, is where there's a big shift. Insurers are becoming more demanding when it comes to determining whether or not they're going to pay any money and to participate in a meaningful way at a mediation," says Morrow.



Marv Huberman says he is looking for potential to achieve settlements without having to go to a hearing in the new Licence Appeals Tribunal system. *Photo: Robin Kuniski*

"The bigger cases, they're still going to be mediated. My view is there is always benefits of bringing people together."

Personal injury lawyer Darryl Singer has expressed serious concerns with the move to the LAT.

And he has noticed a distinct trend by insurers to bring nothing to the table and offering little more than a walkaway.

"I think cutting out the mediation stage was a mistake because I think it gets rid of a lot of files that then don't have to go through to an arbitration," says Singer, who saw 75 per cent of his cases resolved through mediation before the LAT began. "The two major shortcomings of the LAT is it eliminates very early mediation of the AB [accident benefit] claims and also in many cases eliminates the opportunity for an actual full-blown arbitration in place of a written submission."

The government's stated goal in establishing the new system was to develop an efficient and effective way for claimants to access the benefits to which they are entitled through early resolution and reduced timelines.

Darryl Singer has expressed serious concerns with the move to the new Licence Appeals Tribunal system.

Early resolutions can be achieved through case conferences, a confidential forum in which the tribunal's jurisdiction is explained as well as the process, expectations and merits of a case, says Sarah Cope-land, spokeswoman for the office of the executive chairwoman for the Safety, Licensing Appeals and Standards Tribunals Ontario.

"Case conferences cover all aspects of a case including providing a preliminary assessment, resolving some or all of the issues, narrowing the issues, setting hearing parameters, setting a hearing date, location and method," she says.

"Adjudicators use a variety of techniques, drawing upon some mediation and arbitration practices. While there is no caucusing, the parties, along with their representatives, are expected to participate. To date, LAT has experienced a high early resolution rate with the case conferences helping to drive those outcomes."

And while mandatory mediations are no longer part of the process, Copeland points out that the Cunningham Report recommended that insurers set up formal mediation processes to resolve issues before a case comes to the LAT.

And, she adds, there is nothing preventing the parties from engaging a mediator outside the LAT process.

But the new system is still in its infancy and, while lawyers, claimants and insurers find their footings, the Automobile Accident Benefits Service expects it to remain in a transition phase over the next 18 months to allow it to be refined, processes and procedures simplified and service levels enhanced, says Copeland.

Marvin Huberman, a certified specialist in civil litigation and a chartered arbitrator in Toronto, is looking for potential to achieve settlements without having to go to a hearing in the new system.

"The question is what does the LAT system offer perhaps in lieu of the mandatory mediation," says Huberman.

He believes that potential lies in the case conference, providing it is led by someone with training in the principles of mediation and dispute resolution techniques, even though it is likely to be an arbitrator instead of a mediator. It can go beyond the procedural housekeeping issues and delve into settlement discussions as well.

"I think the case conference provision in this system could replace and even supplant or exceed the expectations or the results that were achieved from the former FSCO mediation," says Huberman."

"If settlement is what they want, I think the government has given the opportunity on a silver platter for that to happen, not through mandatory mediation but through case conference."

There's no question that users of the new system are going to have to adapt to a new reality, says Adam Wagman, president of the Ontario Trial Lawyers' Association and senior partner at Howie Sacks & Henry LLP where he practises personal injury law.

The absence of mandatory mediation means that other ways to achieve solutions must be found.

But at the same time, he believes mediation has become something of a crutch over the years.

Wagman is hopeful that the case conference, while somewhat different from mediation, can lead to some resolution, at least to settle the issues in dispute.

And because the intent is to resolve cases through the LAT within six months even with a hearing, there is incentive early on to achieve a settlement.

"The old-fashioned settlement meeting where a couple of lawyers used to get together in a room for half an hour and talk frankly and openly about the case has essentially disappeared and people have relied very heavily on mediation and the mediation process in order to get cases settled," he says.

But he believes there is still a role for mediation to play. He points to benefits claims in disputed catastrophic impairment cases where the doctor for the injury victim finds the injury falls into the new definition of catastrophic and the doctor for the insurer doesn't.

And because there's a drop in the amount of insurance money available for benefits, there is concern that money will run out before any tort claim gets to court, so there will be increased pressure to settle.

"Generally speaking, the parties want to settle their cases before and after these changes were made. So that desire is still there," says Wagman.

Ian Kirby, a personal injury lawyer with Gilbert Kirby Stringer LLP in Toronto, was among the first to start mediation about 30 years ago in his personal injury practice where he does mostly defence work.

He thinks it's too early to tell how the new system will work out.

Any new regime, he says, is followed by a learning curve and leads to new approaches and strategies.

"We are still largely in that learning period," Kirby concludes.

"I don't think mediators have to worry about finding new occupations just yet." **LT**

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