PERSONAL INJURY

To settle or not to settle: parties often get it wrong

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Every litigator must advise clients on whether to settle or proceed to trial. Unfortunately, a recent American study suggests that the decision by plaintiffs to proceed to trial often turns out to be an error.

Kiser, Asher and McShane, in "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," *(Journal of Empirical Legal Studies*, Vol. 5, Issue 3, 551591, Sept. 2008) looked at over 2,000 cases in which a settlement offer was rejected and the case proceeded to trial. The authors compared the settlement offer with the trial result to assess which side benefited from the decision to try the case.

The research revealed that plaintiffs often made the wrong decision in passing up the settlement offer and taking their chances at trial. In 61 percent of the cases that went to trial, the plaintiffs received less than what the defendants offered prior to trial. On the other side of the coin, the study revealed that in only 24 percent of the cases the defendants erred in going to trial, in that the defendants were hit with a trial judgment that was larger than what the plaintiff had offered to settle for prior to trial. In 15 percent of the cases, both sides made the right decision by going to trial in that the plaintiff received more than the defendant had offered prior to trial, but the defendant paid less than what the plaintiff had demanded before trial.

The study also looked at the effect of the mode of trial on the plaintiff and defendant errors in going to trial. Perhaps not surprisingly, jury trials had an adverse impact on a plaintiff's ability to correctly choose whether to proceed to trial: 64 percent of plaintiffs rejected a settlement offer to their detriment when the trial proceeded before a jury. Counsel experience did not play a factor in a party's ability to correctly elect to settle or proceed to trial.

If Kiser's study wasn't bad enough news for plaintiff's counsel, the recent British Columbia Court of Appeal decision in *Ashcroft v. Dhaliwal*, [2008] B.C.J. No. 1742 illustrates how plaintiffs can feel doubly punished for an ill-fated decision to proceed to trial in situations involving multiple tortfeasors. In such cases, the plaintiff who settles with only one tortfeasor and then proceeds to trial against the other tortfeasor runs the risk of coming up completely empty-handed in that trial, even where it is found the plaintiff suffered a tortious injury.

Ashcroft was involved in two motor vehicle accidents. The first accident was more serious, and Ashcroft had not yet recovered from the first accident at the time that the second motor vehicle accident occurred. The second accident aggravated the injuries Ashcroft had sustained in the first accident. Because the second accident was less serious, Ashcroft settled with that tortfeasor for the sum of $315,000, but proceeded to trial on the first accident.

A crucial finding of fact by the trial judge was that Ashcroft's injuries from the second accident were "indivisible" from her first accident injuries and their consequences because, at the time of the second accident, she had not yet recovered from the first accident and the second accident realized a vulnerability created by the first accident; namely, the risk that her first accident injuries would be aggravated and exacerbated.

Because the injuries were indivisible, the trial judge found that the defendants in the first accident were fully liable for the entirety of the injuries and the consequences the first tortfeasor had caused Ashcroft. The trial judge assessed Ashcroft's entitlement to damages for her indivisible injuries from both accidents at approximately $400,000.

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The trial judge then directed that the net proceeds from the settlement of the second accident be deducted from his award relating to the first accident to ensure that Ashcroft would not be overcompensated for her total loss. The appeal court endorsed the trial judge's approach.

Fortunately for Ashcroft, the net effect of this calculation did not leave her empty-handed from the trial. Taking the court's assessment of her total damages for both actions – $400,000 – and deducting the amount of the settlement she recovered from the second accident – $315,000 – Ashcroft in effect recovered a further $85,000 from the trial. But one suspects she had been hoping for more: it must be remembered that the first accident was the more serious of the two.

Had Ashcroft's counsel been able to negotiate an even more favourable settlement of the second accident claim, say $425,000, the required deduction would have seen Ashcroft recover no further compensation after trying the case relating to the first accident.

Although the precise facts that were behind *Ashcroft* will not come up often, at a practical level the decision reinforces the message of the settlement negotiations study that the decision to proceed to trial, especially for plaintiffs, cannot be taken lightly. ■

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