Failure to Mediate in Good Faith
A Commentary on the Court of Appeal Decision in *Ross v. Bacchus*

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Ross v. Bacchus, 2013 ONSC 7773 is a report of the costs order after a jury trial in Hamilton, in which the trial judge awarded the plaintiff an additional $60,000 in costs based on his finding that the defendant had not participated in a mediation in good faith. The plaintiff was awarded $248,000 in damages after a six day jury trial, far more than either the defendant's or plaintiff's settlement offers

The trial judge held:

> [5] The defendant offered to settle for $40,000 on August 25, 2011, making it clear that this was not a starting point. The offer was withdrawn on March 28, 2012. On October 28, 2013 the plaintiff offered to settle for $94,065 plus prejudgment interest and costs and requested mediation. The defendant replied on October 29, 2013 with an offer to settle for $30,001 plus prejudgment interest and costs. The plaintiff countered with an offer to settle for $79,065 plus costs and interest.
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> [6] Counsel for the defendant agreed to brief mediation at limited cost but wrote, "[Certas] are not interested in settling this case." Mediation took place on November 14, but the defendant's insurer stood firm. I infer that it took a six-day trial with all its attendant risk for the sake of $50,000. This is a litigation strategy that the defendant could well afford, but the plaintiff could not. I infer that the insurance company conducted itself this way in the hopes of intimidating the plaintiff and deterring other plaintiffs who have meritorious cases. It did not attempt to settle the action expeditiously as required by s.258.5 of the Insurance Act.
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> [7] It is clear to me that the defendant's participation in mediation was a sham. It refused to participate in any meaningful sense. It did not comply with s. 258.6 of the Act.

Both the damages and costs awards were appealed onto the Ontario Court of Appeal and reported as *Ross v. Bacchus*, 2015 ONCA 347. The Court of Appeal upheld the damages award, but struck down the award of the additional $60,000 in costs.

The court noted:

> [40] Counsel for the appellant argues that s. 258.6 of the Insurance Act does not contemplate an inquiry into the quality of the insurer's participation in the mediation. He contends that any attempt to assess the bona fides of the insurer's participation in the mediation will inevitably run aground on the privilege attaching to communications made for the purpose of settlement in the course of mediation: see Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35, [2014] 1 S.C.R. 800, at paras. 38-39. Finally, counsel argues that, apart from the privilege question, there is simply no evidence to justify the trial judge's description of the insurer's participation in the mediation as a "sham".
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> [41] Insurers defending claims for damages arising out of motor vehicle accidents are statutorily obliged to "attempt to settle the claims as expeditiously as possible": Insurance Act, s. 258.5. Similarly, insurers are obliged, on request of the opposing party, to "participate in a mediation of the claim": Insurance Act, s. 258.6. Failure to comply with either obligation "shall be considered by the court in awarding costs": Insurance Act, s. 258.5(5), s. 258.6(2). These and related provisions are a clear expression of the Legislature's intention to promote the early and expeditious settlement of claims arising out of motor vehicle accidents: *McCombie v. Cadotte* (2001), 53 O.R. (3d) 704 (C.A.), at paras. 15-17.

The court also noted *Keam v. Caddey*, 2010 ONCA 565, 103 O.R. (3d) 626 and *Williston v. Gabriele*, 2013 ONCA 296, 115 O.R. (3d) 144, at paras. 25-27 for the proposition that an insurer could not decline mediation altogether based on its good faith assessment of the merits of the claim. However, up to this point there was no case law on the issue of whether an insurer could comply with its statutory obligations by attending a mediation with no intention of settling.

The Court held:

> [46] … Nor can an insurer who actually participates in a mediation be declared to have failed to participate simply because the insurer indicated prior to the mediation that it was not prepared to settle the claim. A clear statement of the insurer's position going into the mediation, even a strong statement, does not preclude meaningful participation in a mediation…

> [48] There is also no evidence that the insurer did not participate in the mediation in a meaningful way. The trial judge assumed that because the insurer's counsel advised that his client was "not interested" in settling the case, the insurer's subsequent participation in the mediation was "a sham." The assumption was unwarranted. A firm position strongly put going into mediation does not preclude meaningful participation in the mediation. In any event, the insurer had made a settlement offer which was not revoked before trial.

However, and this is perhaps the most interesting part of the judgment, the Court left open the issue of whether an insurer could be held to have breached its statutory obligations if it failed to participate in a meaningful way in the mediation:

> [49] The appellant's submission that the settlement privilege effectively prevents any inquiry into the conduct of the parties during the mediation raises an interesting legal issue. I need not get into that issue. The respondent failed to adduce any evidence as to the manner in which the mediation proceeded and relied entirely on the insurer's indication that it was not interested in settling the claim some three weeks before trial. If the respondent wanted costs for the insurer's failure to participate in the mediation, it was incumbent on the respondent to lead evidence establishing the failure to participate in the mediation. Had the respondent attempted to do so, the question of the impact of the settlement privilege on the admissibility of evidence relevant to the insurer's participation in the mediation may have come front and centre. On this record, the trial judge's finding that the insurer did not participate in the mediation fails, not because the settlement privilege cloaks the mediation in confidentiality, but because the factual finding of the trial judge has no support in the evidence.

It begs the question about what kind of evidence could be led to prove that the insurer did not participate in a meaningful way considering the privilege attached to the mediation and the fact that most mediators insist on a mediation agreement being signed which precludes the parties from subpoenaing the mediator to testify.

We will wait for the other shoe to drop.