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Perspectives from New Zealand

Appellate mediation — cutting a deal after the deal has already been cut

Geoff Sharp

On the assumption that in New Zealand we are, as in most things, a few years behind the United States (where appellate mediation is integrated into court management) we should see appellate mediation emerge as a serious option in the next few years.

Appellate mediation is an unusual concept but it might provide a new exit point for litigants just when they need it on that well-worn litigation highway.

The idea is that after trials at first instance, say a High Court final hearing (or for that matter summary judgment), the parties assess whether they are now in a position to attempt mediation of their dispute. They may well have met at mediation during the run-up to the High Court hearing or may have resisted the judicial pre-trial conference encouragement to do so. Either way there are some real advantages in looking at mediation at this stage of the litigation if the matter is going on appeal.

So what are the advantages? Why mediate at the appellate level? Surely if parties have won and lost in the High Court there is no motivation, at least by the contest winner, to turn around and mediate on the back of a satisfactory outcome from the High Court?

Apart from the usual reasons for mediation that may exist even after a trial — that it addresses the interests of the parties, offers mutually satisfactory solutions, and so on — appellate mediation recognises the fact that after the trial new and different risks exist for the parties, that is *both* parties, the winner *and* the loser.

There is the obvious risk that, while the winner at first instance may be proud of the judgment, settling in the face of an appeal against that judgment allows them to avoid the risk of losing on appeal. Any risk of an adverse precedent can often outweigh the attraction of another win on appeal — sometimes it is simply better to get less in the hand but to leave the judgment intact rather than

risk the wrong result on appeal.

There are also less obvious advantages: a settlement in that twilight zone between the High Court and Court of Appeal allows the parties to explore a number of possibilities that can help one or other of them.

Mediation in between the trial and the appeal does not have to mean that the judgment is somehow up for grabs — the parties can selectively negotiate different aspects of their dispute. Those might even be matters in dispute that would never be looked at by the court. If the parties are smart they will look at the possibility of mediating.

Need for relief

The parties' need for relief other than that which they obtained from the High Court — for instance something that the winner couldn't get from the court but which the loser can provide:

What we really want is the second stage of that IT contract which is definitely not coming our way now. We never really were interested in getting damages for a past wrong but it was the only thing open for us to do.

The numbers involved in a damages award are often a drop in the bucket compared to the profit to be made by continuing to do business together, especially for the supplier — for instance architects, contractors to government, technology suppliers, and so on. The future work potential is often where the real action is and if this is secured past wrongs can be compromised if face is preserved.

Saving face

The winner in the High Court can hang onto that win, while the appellant can say to themselves and their watching business community:

It ain't over until it's over ... they got an outrageous result and they knew it wouldn't withstand an appeal.

This is important stuff if the litigants are to have a future relationship, or even contact with each other, in this small commercial community of ours.

Structured payments

Structured payments over time can be considered — sometimes the difference between the winner taking something or nothing and driving the loser to bankruptcy because they can't pay the lump sum.

Tax benefits

The tax benefits of structuring and timing payments, for example GST and income tax implications can be considered.

Immediate needs

The parties' immediate needs, such a critical short-term need for money or other relief, could make pre-appellate settlement attractive.

Finality

After trial court proceedings the parties are impatient to get to the end of the road and bringing an end to the process can be important to many litigants who adopt the 'life's too short' and 'let's move on' philosophies. While the length of time can vary, there is no doubt that winners in the High Court hold their breath until the expiry of the appeal period ticks over. Also in this vein, parties may simply want to stop, almost at any cost, the continuous disruption to business and hemorrhaging of expenses (legal, expert, accounting).

Another risk of not exploring the possibility of a sensible settlement is that it may effectively force the loser to appeal:

... might as well, I can't pay the judgment but I can fund an appeal with a shot at overturning it — at least it puts off the evil day and it gives me some leverage to do a deal on the trial costs ordered against me.



Often the trial has determined the legal side of the parties' dispute but has not necessarily made the practical aspects any more certain. Based on the High Court determination of the legal aspects of the conflict, parties can often come to a sensible settlement themselves, usually agreeing to do things that are outside of a court's jurisdiction to order, for instance commitment to a further business involvement or simply an agreement to put the litigation behind them and reinvent the way they will interact in the future — lessons learned from the conflict and all that.

Integrated appellate mediation

In the US appellate mediation is integrated into court management. Many appeal courts have their own appellate mediation programs and there are many success stories — for example since November 1994 the Seventh Circuit has had 374 appeal proceedings convened for mediation cases in its first two years

of operations. Of those 44% were settled at mediation. This is a fairly low percentage in normal mediation terms (where success rates run around the 80% mark). However when we consider that these cases are the hard nuts of the litigation industry and will have resisted settlement for some years prior to going on appeal, that percentage is acceptable.

Will we see similar voluntary or mandatory appellate mediation initiatives here in New Zealand? Who knows — perhaps only when and if our appeal courts become overloaded or too expensive and parties begin to understand the benefits that can be gained even at this late stage of their litigation. ●

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