

C 2nd **AMA** **CONFERENCE**
Sheraton Imperial Hotel
Kuala Lumpur
24-25 February 2011
**Rediscovering Mediation
in the 21st century**

**“UNCHARTERED WATERS” NEW FRONTIERS
IN RESOLVING PERSONAL INJURY CLAIMS**

**SILVA VELU
ADVOCATE & SOLICITOR
SILVA VELU & CO**

Date:	25 February 2011 (Day 2)
Time:	2:30 pm to 3:30 pm
Venue:	Nusantara Ballroom 3 (L2)

Sponsored by



CLJ

Malaysia's leading Law Publisher

“UNCHARTERED WATERS” NEW FRONTIERS IN RESOLVING PERSONAL INJURY CLAIMS

1. INTRODUCTION

Preparing a paper for this august audience is inspiring and it adds to my learning curve.

This position paper aims to provide a comprehensive view, highlighting implementation issues associated with resolving personal injury claims through mediation. This paper will also discuss to what extent mediation will adequately resolve personal injury claims within the judicial system.

So, in presenting this paper, one fundamental question which comes to my mind is to what extent will mediation merge into our judicial and legal system particularly in the context of personal injury claims. Although it is in the early stage but what I see is the emergence of a strong will to position mediation in our judicial and legal system. So I think mediation is here to stay and likely to go deeper to take a “**centre stage position**” to resolve personal injury claims. In fact mediation is already making “**inroads**” in other areas of practice where Judges are adopting mediation process to resolve issues, however complex they may be.

Mediation, it is hoped will also encourage early resolution of issues and resolution by informal settlement conference within the existing judicial/litigated framework.

Therefore it is hoped that mediation will in a way reduce the level of litigation.

At this point it is appropriate to highlight that in August 2007, the Attorney General’s Chambers proposed No Fault Liability Scheme in Malaysia and invited comments/feedback from all the relevant stakeholders including the Bar Council of Malaysia.

Although the No Fault Liability Scheme (**NFL**) did not “**take off**” and is not relevant for this paper but what is relevant is the concept of **mediation** was discussed to resolve disputes on Quantum within the No Fault Liability Scheme. Even in their paper the Central Bank of Malaysia, Bank Negara Malaysia had recommended mediation process to resolve personal injury claims.

So, as you can see, mediation has been lurking around and waiting to knock at the doors of personal injury claims. Therefore arguably the concept of mediation to resolve personal injury claims is not something new.

Of course today we are not talking about mediation in the No Fault Liability Scheme, instead this paper aims to establish the role of mediation within the existing judicial framework to resolve personal injury claims.

2. **PURPOSE OF MEDIATION**

Mediation has proven to be the cost effective alternative to entirely surrendering to a judge the right to determine the claimant's entitlement of compensatory damages in motor vehicle accident cases.

Normally the mindset of claimants in a dispute may be affected by anger, blame, revenge, frustration, and hurt; as well as a sense of injustice, infringed rights and differing perception. These features are common in personal injury claims where the claimant is injured and his/her livelihood is affected. He or she will want to ensure maximum compensation.

On the other hand, the insurer who has no previous relationship with the injured third party will want to investigate the claim to ensure that the claim is genuine and not inflated. They need to ascertain the true value of the claim to comply with the requirement for reserve purposes. Therefore there exists a divergence in the competing interest.

The purpose of mediation is therefore to balance the above factors so that parties can identify the problems and explore the best option to solve it.

The Mediator's role is therefore important here. A Mediator should commit himself /herself to conduct the mediation by assisting all the parties in the mediation process and shall control the process as far as practicable to maintain a non-confrontational atmosphere between the parties.

3) **WHO SHOULD MEDIATE?**

In my introduction, I had advocated mediation within the existing judicial framework.

Currently some courts have already initiated a mediation exercise wherein counsels are called to attend the proceedings. Counsels are also at liberty to request for the matter to be mediated by the judge where a settlement cannot be reached between the parties.

The above option has its weaknesses, which I shall discuss later.

It is my view that our courts must actively promote mediation as a way of dispute resolution i.e. a “**Court-Led Mediation**”. The mediation process will be assisted by the Plaintiff and Defence Counsels. In Malaysia, the bulk of personal injury claims are filed in the Sessions Court although some are filed in the Magistrate’s Court depending on the value of the claim.

In this regard, **S 65 (a) of The Subordinate Courts Act 1948** gives the Sessions Court unlimited jurisdiction to hear personal injury claims whereas claims below RM25,000.00 are filed at the Magistrate’s Court. That being the position, the Sessions Judges and Magistrates must assume the role of Mediators.

In the context of personal injury claims, the Judge can request to meet counsels in his or her chambers in the presence of the parties and suggest mediation as the case may be.

a) **CHALLENGES TO SESSIONS JUDGES/MAGISTRATES**

As I have mentioned, mediating personal injury claims will be within the existing judicial framework.

The success of the court-led mediation will pivot on the Judge’s experience, mediating skills and working knowledge in personal injury claims.

As we know mediation is a process to establish consents and agreement which the parties voluntarily reach. In this process the Judge does not adjudicate but merely assists parties to resolve their dispute.

The challenge is therefore to condition the mindset of the judge in Court-led mediations. The Judges who are used to establish and enforce rights of parties will now have to shift their mind to identify the needs and objectives of the parties.

In Malaysia some courts practise mediation by the trial judge whereas in certain courts, the mediation Judge is not the trial judge. Therefore when the roles are separated, **Judge A** mediates **Case B**. Likewise **Judge B** mediates **Case A**. In order words the Judge will “**wear different hat**” at different times.

So, the shift from one role (**i.e. hearing Judge**) to another role (**i.e. mediation Judge**) will pose a challenge to the Judges in their handling of the mediation process.

The mediating Judge identifies the parties' common ground, needs and objectives, so as to assist the parties to negotiate a settlement that reasonably meets their needs and objectives. This is a cornerstone of mediation.

Whereas, the Hearing Judge is concerned with the rights of parties, issue of pleadings, admissibility of evidence, adjudication etc.

The concern here is if the same judge were to play two roles (as explained above); there lies the challenge on the effectiveness of the mediation process itself because the parties will not feel a need to follow through on the mediation as they may want to **"try their luck"** with the trial judge.

Whereas if the mediating judge were also the trial judge, parties will feel more compelled to weigh the views put forth by the mediator and strive for a settlement.

b) TRAINING FOR THE JUDGES

As mediation is relatively a new approach in our civil justice system, particularly in personal injury claims, it is therefore important for the Judge to be familiar with the concept of the mediation process.

Training them is therefore crucial and it will determine the success and effectiveness of the mediation process.

A skilled Mediator will likely to achieve high rate of resolution and settlement of personal injury claims.

c) SCOPE OF TRAINING

In the context of personal injury claims, training the Court-Led Mediators in the following areas will be useful:-

- i) The Judge is to understand the operation of Insurance Companies particularly the claims mechanism and the Role of Bank Negara being the regulatory body.

- ii) The Judge is to understand the implication of Insurance Act applicable in the Insurance Industry.
- iii) Understanding the Investigative role of Adjusters.
- iv) Detailed understanding of medical terminology will help to understand the seriousness of the injuries. Understanding the seriousness of the injuries will assist to understand trauma, degree of pain, pain management and recovery process of the Claimant.
- v) Understanding the investigative role of Police Investigator.
- vi) Attending periodical mediation courses, which the Malaysian Bar Council conducts intermittently.
- vii) Study tour of other jurisdictions such as Singapore to appreciate their experience. For example, in Singapore, the government managed to revive mediation as an autonomous dispute resolution mechanism, and today Singapore is one of the leading nations in the effective use of Alternative Dispute Resolution (ADR) with a high settlement rate.

I must stress here that the areas of training discussed above are not exhaustive.

d) **WHEN TO MEDIATE?**

Early in Suit Mediation

Upon close of pleadings the Court orders Mediation before trial. Early in suit Mediation can operate as “**cheap**” discovery for both sides and also helps both sides to focus on “**necessary**” discovery to facilitate early resolution at minimum cost.

Completion of basic discovery is helpful but not necessarily in complex injuries cases.

The Claimant’s Counsel is advised to prepare materials/documents to be presented at mediation early and provide to Defence Counsel so that they can advise and take instruction from their insurer-client.

Even before mediation, both Counsels can engage in casual conversation and discuss range of settlement. This feature will smoothen the mediation process which will likely result in settlement.

In fact presently it is common knowledge that both Counsels do engage in pre-trial negotiation to reach amicable settlement. However this normally occurs on the day before or in the morning of a trial.

4) **MEDIATING LIABILITY AND QUANTUM.**

Generally navigating mediation on issues of Liability and Quantum will pose its unique difficulties to Mediators.

No two injuries are alike, likewise no two collisions can be identical.

a) **LIABILITY**

Some Common types of collision

- i) Emerging from a junction - Major road and minor road.
- ii) Road of equal status.
- iii) Traffic lights junction.
- iv) Turning across path of oncoming vehicles.
- v) U-Turn.
- vi) Vehicles travelling from opposite direction.
- vii) Rear collision.
- viii) Road crossing.

It is important that Court-Led Mediators are well versed with issues of apportioning Liability in accidents described above. The Mediators' in-depth understanding of case authorities, will facilitate the mediation process.

An in-depth understanding of the above, will assist Mediators to offer their views on the apportionment of liability. This will assist the Counsels to advise and take their client's instructions.

b) **Counsel's Role**

Counsels should play their role in educating their clients about mediation. Counsels should inform their clients about the negotiation that will be involved. Counsels should also indicate to their clients about the range of verdict and/or settlement ranges to expect. In this way Counsels will create a culture of flexibility and readiness that facilitates settlement through mediation.

In fact practitioners in personal injuries claim are likely to find mediation relatively easy because a lot of negotiations are involved. Counsels in personal injury claims have already acquired negotiation skills and therefore display of such skills will indirectly determine the effectiveness of the mediation process.

c) **QUANTUM**

In Malaysia, as many of you present here will know there is a **Guideline For Awards in Personal Injury Claims** already in place. This guideline was revisited and revised and called “**Revised Compendium of Personal Injury Awards**”.

In October 2010, the Chief Judge of the High Court of Malaya’s office endorsed the proposed quantum in the Compendium of Personal Injury Awards (“**Compendium**”).

Whilst the Compendium is merely a Guideline and intended to be a quick reference document for judges and lawyers, it is very useful. It can be useful in Court-Led Mediation to facilitate the mediation process itself.

The Compendium provides a range of awards for a particular fracture or injury.

Under each injury a range of figures have been tabulated based on the contemporary trend of awards in Malaysian Courts.

Example of range of awards:-

INJURY	LOW	HIGH
Mandible	12,000	25,000
Maxilla, Le Fort I, II or III	12,000	25,000
Zygoma	8,000	10,000
Orbit	6,000	8,000
Alveolus	6,000	8,000
Nasal Bone	6,000	10,000

Note:-

Judges and lawyers are at liberty to depart from the Compendium if case law or factual circumstances so dictates.

However, the point to stress here is that the Compendium can be used as a guide to “**kick start**” the mediation process on Quantum.

5) **STRUCTURE AND FRAMEWORK OF MEDIATION WITHIN COURT SYSTEM**

5.1) **PRACTICE DIRECTION NO. 5 OF 2010**

Our Mediation Practice Direction No. 5 of 2010 (**“the PD”**) came into force on 16th August 2010. In the PD the Right Honourable Tun Zaki Bin Tun Azmi, the Chief Justice, has formally put in place the practice and procedure for court initiated mediation.

The PD applies to the Judges of the High Court and of the Subordinate Court. In personal injury context, lawyers will see the applicability of PD in the Lower Courts.

5.2) **PROCEDURAL RULES**

In the High Court, the Judge may invoke 034 r 4 (1) of the Rules of the High Court. In the Lower Court, 019 rule 1 (1) (b) of the Subordinate Court Rules 1980 applies.

Under the said Orders, the Court will give such directions that the parties facilitate the settlement of the matter before the Court by way of mediation.

Since personal injury claims commence in the Subordinate Court, **Order 19 r1 (1) (b) of SCR 1980** applies.

It sets out the occasion for the Court to give direction as to the future conduct of the action as appear best adopted to secure the just, expeditious and economical disposal of an action.

- a) The parties must first agree whether the Hearing Judge should be the Mediation Judge. If parties disagree, the hearing Judge should not be the Mediation Judge. The Hearing Judge should then pass the case to another Judge to mediate.

The above situation envisages the involvement of two Judges i.e. a Mediation Judge and a Hearing Judge.

- b) Where the Mediation Judge is unable to bring about an amicable settlement, the case is reverted to the Hearing Judge for disposal.

- c) In either case, the Judge may not see the parties without their Counsel's presence, except where:
 - (i) parties so agree; or
 - (ii) parties are not legally represented.
- d) If a Judge is able to identify issues arising between the parties for amicable resolution, he should highlight those issues to them and suggest how those issues may be resolved.
- e) Where mediation results in an amicable settlement, the Mediation Judge shall record a consent Judgment in terms agreed by the parties. For the avoidance of doubt, before recording the consent judgment, it is necessary and advisable to ask the parties and their lawyers to prepare and sign a draft copy of the order setting out the agreed terms.

6) **CERTAIN AREAS IN PERSONAL INJURY CLAIMS WHERE MEDIATION WILL BE DIFFICULT, IF NOT IMPOSSIBLE**

6.1) **Difficult areas to mediate**

a) **Special Damages**

Loss of Earnings

- (i) Absence of documentary proof of employment.
- (ii) Existence of proof of employment but appears fabricated or exaggerated.

Claim for Nursing Care

- (i) Exorbitant quotation from Nursing Homes etc.
- (ii) Existence of two Expert reports with diverging views on the need for nursing care.
- (iii) Absence of quotation from Nursing Home.

NOTE:

Notwithstanding the difficulties outlined above, mediation can still be achieved by taking into account judicial notice on earnings.

For example in the case of:

- 1) **Balakrishnan Kunjamboo Nair –vs- Savastine Anthony Francis (1991) 1 CLJ 503; (1991) 2 CLJ 327 (Rep)**, the court allowed a claim for loss of earnings despite formal proof by taking cognizance of the fact that the injured claimant was a father of three children, which fact would have meant that he would have had to provide financially for the family. The court in this case allowed RM700.00 per month.
- 2) However in **Che Marizan Bin Che Man –vs- Ibrahim Bin Saat (1997) 4 AMR 3926**, the Court refused to take judicial notice of earnings of Lorry Driver.

Likewise in Claim for Nursing Care

For example in the case of:-

- 1) **Pua Lai Ong –vs- Kassim Yunus & Anor (1993) 3 CLJ 656**, RM300.00 per month was awarded where injured looked after by mother and brother.
- 2) In **Marappan Nallan Koundar –vs- Siti Rahmah Ibrahim (1990) 1 CLJ 174 (Rep)/(1990) 1 CLJ 32**, where nursing services rendered by parents are claimable.

The mediation skill by the Judge will determine the eventual resolution of the issues raised above.

6.2) **Areas where Mediation is unlikely to succeed**

- Questionable claims where elements of fraud is suspected.
- Denial of collusion.

In the above situation, usually and it is understandable that parties will take **“extreme”** position.

There can be no common issues and common ground in the above situations.

7) **ADVANTAGES OF MEDIATION**

- a) Mediation is normally quicker and much less expensive.
- b) Mediation allows for a better understanding of the problem.
- c) Mediation may result in clearance of backlog of cases.
- d) The parties in dispute are more likely to have a better relationship after mediation than they are after litigation.
- e) A mediation which results in settlement brings about a finality to the subject matter. There will be no Appeal and the Appellate Court will not be choked.
- f) The parties are more likely to be satisfied with the result which they agreed to. If litigated, the decision is imposed on them which brings about dissatisfaction and that means they may wish to appeal.
- g) It allows parties to communicate with each other effectively and comfortably through the mediation on issues which they are unwilling to discuss or compromise by themselves.
- h) Majority of studies shows that mediated cases have higher rate of settlement than non-mediation cases.
- i) Studies also show a greater compliance rate for judgment resulting from mediation than judgment arrived through the litigation process.

8) **DISADVANTAGES OF MEDIATION**

- a) Since mediation is voluntary in nature and non-binding and there is no force of law, it may seem to be weak.
- b) Mediation does not promote development of common law. Since mediation process focuses on parties' needs and objectives it will make a paradigm shift from rights based form of dispute resolution to needs based mediations.

In this shift, mediation does not create case precedents and therefore does not assist in the same type of recurring disputes.

9) **MEDIATION IN OTHER JURISDICTIONS**

- a) In England, the amendment to the Civil Procedure Rules empowers the Courts to encourage use of mediation with cost sanction. The effect is the number of disputes referred for mediation increased dramatically.
- b) Several Australian states adopt the highest degree of mandatoriness – referral to mediation buttressed by sanction and with no exemption. The Courts in South Australia, Victoria and New South Wales are empowered by legislation to refer parties to mediation with or without their consent.
- c) Hong Kong has introduced mandatory mediation on the highest degree. Apparently since January 2010, all parties involved in civil proceedings in the Hong Kong Courts must attempt mediation before resorting to adjudication.

A “Mediation Certificate” has to be filed together with Hong Kong’s equivalent of the Summons for direction stating whether the parties are willing to attempt mediation. Both the Solicitors and the client has to certify that the availability of mediation has been explained to the client, and a party who does not wish to attempt mediation has to explain why. Following the UK position, the Hong Kong court has been given the discretion to make an adverse cost order against any party who has unreasonably refused to undergo mediation.
- d) I had mentioned earlier in this paper that mediation in Singapore has come a long way since the early 1990’s. It forms an intergral part of the Singapore legal system.

The growth of mediation in Singapore was substantially driven by the judiciary in the mid 1990’s. Mediation has been so successful that in the opening of Legal Year 2010, the Chief Justice in Singapore Chan Sek Keong highlighted that mediation is one undisputed success story in the development of legal services in Singapore in the last decade.

In 1994 the Subordinate Court piloted a mediation programme where selected settlement judges mediated a range of civil disputes. Upon successful completion of the programme, the Primary Dispute Resolution Centre (PDRC) was formed.

Court Mediation within the PDRC is currently conducted by District Judges who are specially designated as “settlement judges”. One of the main categories of cases that are dealt by the PDRC are motor accident cases. Within the PDRC mechanism the settlement judges will form a neutral evaluation of the case and will give the Solicitor an indication of the parties’ likely liability at trial and the Solicitors will

proceed to negotiate using the indication as a basis to reach settlement.

- e) In Malaysia, Court-led Mediation particularly in personal injury claims is still at its infancy as it is not mandatory.

Presently there is a mechanism put in place for court-led Mediation with a view for parties to negotiate and achieve a settlement.

However, the effectiveness of court-led Mediation is left to be seen. Perhaps it is too early to conclude its effectiveness or otherwise in resolving personal injury claims.

But subjectively I feel that there is a general lack of commitment of parties involved in the mediation process.

Statistics does not show good success rate of settlement via mediation. There is a tendency to equate mediation with mention date.

There is a tendency of lack of commitment to negotiate and achieve settlement on mediation date.

There is a tendency to bypass the mediation process and settlements are usually achieved on trial date.

This seems to be the present culture. Mediation is not taken seriously but success rate of settlement on trial date is high.

In this regard, the statistics below show disposal of cases in Kuala Lumpur Sessions Court:-

YEAR	TOTAL NO. OF CASES DISPOSED	% OF SETTLEMENT
2009	4123	30.67%
2010	2808	46.93%

Source: Kuala Lumpur Session Court 3 and 4.

The cases in year 2009 and 2010 are generally disposed on trial date.

9.1) **What needs to be done to enhance mediation process in personal injury claim?**

- a) Some degree of mandatoriness or sanction needs to be applied.
- b) Commitment from Counsels (both Claimant and Insurer).
- c) Education and Awareness.
- d) To create a culture, where a problem is to be solved by all the parties, lawyers and mediator jointly instead of a contest between parties represented by their lawyers.

The list above is not exhaustive but certainly further suggestions are needed to ensure effective implementation of court-led Mediation.

10) **CONCLUSION**

Innocent accident victims should continue to have the right to legal recourse, subject to undergoing the mediation process first. Mediation should be adopted as a way to provide prompt and adequate compensation to victims of accident, thereby reducing back log in our court system.

A prompt resolution will also benefit the Insurance Industry by saving interest and cost and reduces claims overall.

Our Courts are set to encourage role of mediation in litigation and eventually to make it an integral part of our civil justice system.

With these in mind, there must be enhancement of awareness of mediation through education.

I would even suggest that our Law Schools and the Malaysian Qualifying body incorporate mediation as topic to better equip the next generation of lawyers and judicial officers with the right mindset to facilitate dispute resolution.

Young lawyers entering Court rooms will not think only about litigation but how mediation can overcome litigation. To the lawyers in this conference hall and others and all other stakeholders we must actively be reminded of the advantage of mediation.

I firmly believe that we all have the ability to mediate especially lawyers and judicial officers handling personal injury claims. Day in day out lawyers in personal injury practice are involved in negotiations to reach settlement.

After all mediation is assisted negotiation. So in order to understand mediation one should also understand negotiations. In the mediation process, negotiation will pivot on the magnitude of the claim.

Therefore Lawyers in personal injury claims practice are capable to bring home win-win results.

Together we can make mediation work to bring about peace and harmony between the parties.

By the way, when I attended a Seminar on Mediation organized by the Attorney General's office on 25th October 2010 one of the Speakers said this, and I quote:

Mediation and Meditation appears like twins. But they are not quite the same. Be that as it may, their diversity does not demonstrate their adversity. They share at least two identical features.

- a) In mediation, the parties hope to achieve peace and harmony. In Meditation, the participants are also looking for peace i.e. peace of mind and serenity.
- b) The ultimate success in securing peace, either by way of mediation or through meditation will make the world a more peaceful place for everybody to live.

I would conclude, Mediation is the answer and the worthwhile alternative to a trial, but it must be noted that however skilled a mediator may be, he or she is not a magician. It takes the combined efforts and co-operation and understanding and earnest willingness of all the parties to make it work, and when it does work, it works to everyone's advantage.

I now have pleasure in waiting for what all of you will like to say.

Ladies and Gentlemen, please let me hear from you.

SILVA VELU

Subang Jaya.

silvavelu@silvaveluchambers.com