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## 3 Critical Reasons Why Personal Injury Mediations Fail and How to Overcome Them

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Dispute resolution in the setting of personal injury mediation does not always reach resolution. Mediations fail to resolve the dispute in a bodily injury case for a variety of reasons. This article seeks to explore what this mediator sees as the top 3 recurring reasons that personal injury claims fail to settle.

***Inadequate Preparation by the Injured Party's Attorney***

The difference between personal injury mediations and many others is that this type of mediation mainly is all about money. Therefore, the interests of the parties have little bearing on the outcome. ( Although this is not completely true. It is in large part the primary objective) From the insurance company perspective the case is all about making a business decision, sometimes computer aided, about what "this kind" of case is worth.

From the plaintiff's perspective ( the injured party) the mindset is about getting what is fair for their injury. This perceived amount may be realistic or totally unrealistic. Even if the dollar amount requested is realistic in light of the injury and damages, if there is no adequate evidence of it presented by the injured party to the insurance company, it is unlikely that the insurance company will pay a "fair" amount.

Insurance companies require proof. For example, mere delivery of the medical records without adequate evidence that the injuries in the medial records were caused by the incident in question will not cause the insurance company to resolve the claim for what it may be worth.

Therefore, it is up to the injured parties attorney to get a medical report that connects the injuries to the incident that is claimed to have caused injuries. In many cases this is a car crash accident. If there is a report from a medial doctor, preferrably a specialist, that says for example, " In my opinion the herniated disk was caused by the motor vehicle accident" then the insurance company should take notice of this and place a higher dollar amount on the claim to resolve it.

However, without adequate evidence of the injury being connected to the event, do not expect a full value offer of settlement. It is critical for the personal injury attorney to marshal as much evidence of injury and damage as possible. So adequate preparation is a key to convincing the insurance company to pay more than less on a case.

### ***Underlying Anger of the Hurt Party Stemming From a Belief of Being Mistreated by the Insurance Adjuster***

Some injury victims feel victimized twice because their initial dealings with the at fault insurance carrier did not seem fair. This caused anger and resentment. Some bodily injury victims feel they are the ones put on trial by the insurance company for the at fault driver. They may feel they were talked down to. They may feel that the insurance adjuster implied they were not telling the truth. The insurance carrier may have minimized their injuries. It may have take a long time just to get the car damage repaired. Their calls to the insurance company may have been ignored.

Thus, when the offers are made at mediation they are viewed with suspicion and distrust. It is not unusual for this type of injury victim to feel that the offer is just another slap in the face. They actually desire to somehow inflict this hurt on the other side and see a trial as a way of doing this. When in reality it is they that likely will be disappointed in the end when they end up with less than they could have walked away with at mediation.

Recently I mediated a case where a mother and daughter were both injured. The injuries were very similar. In the scheme of life they had lasted four months. However the daughter had some small lingering issue that had not been treated in over 18 months. It would be difficult to tie this to the car crash.

The mother took what appeared to be a reasonable offer. She was happy to have her case over. Although she would have liked more money she accepted this as a reasonable settlement. However, this did not dissuade the daughter.

One method to work with the daughter is to clearly "loop" (1) her feelings. In addition, showing empathy to her was essential, but it still did not diffuse her anger. I asked her attorney if it would be alright to have the parties sit together and let the victim express herself to the insurance adjuster and the attorney.

My thought process was that if it were me I would like an acknowledgement that the insurance company was sorry that she felt mistreated. And an apology was in order. Unfortunately the attorney was not comfortable with his client expressing this displeasure.

My fall back position was going through the best alternative to a negotiated settlement ie. what could this lady reasonably expect at trial. Her words to me were that, "I was not scaring her." Of course I was not trying to scare her. My reply was that I just wanted her to be aware of what disappointment could lay ahead. Her attorney was exasperated with her. This lady although not particularly wanting a trial had fixated on a net return to her that would make up for all the grief she went through.

A settlement was still salvageable. However, the lien holders would have to be worked hard to take a reduction and the plaintiff's attorney might have to take a small reduction in fee. Although the case did not get resolved at mediation I understood that there was an ultimate resolution short of trial.

In these kinds of cases it is critical that the mediator show his understanding of how the injury victim feels. That is at least a step in the right direction as it reflects an underlying interest that the victim has that must be addressed.

## ***One of the Parties to Mediation Has Miscalculated Their Best or Worst Alternative To a Negotiated Settlement***

The [best alternative to a negotiated settlement BATNA as described by Harvard's Program on Negotiation \(http://www.pon.harvard.edu/tag/best-alternative-to-a-negotiated-agreement/\)](http://www.pon.harvard.edu/tag/best-alternative-to-a-negotiated-agreement/) is the **best possible outcome if the negotiations or the mediation fail**. In the context of a personal injury case this is the amount of money the person harmed can expect to go home with in their pocket after a trial is concluded. (As long as there are no appeals) I

If the mediation is timed right there should be a money saving to both sides, if the case gets resolved at mediation. This comes in the form of (1) the time value of money and (2) the amount of additional moneys that must be spent on expert fees and defense attorneys fees and exhibit preparation. This money savings goes right to the bottom line for the injury victim. In fact, the verdict might have to be thousands of dollars more, just to get the plaintiff the amount of money they could get if they settled at mediation, without the additional expense.

However, if the parties are way off on their calculations of BATNA, then bridging the gap at mediation may be difficult. This is especially true if the insurance company seriously disputes liability and thinks their best alternative to a negotiated settlement is \$0. Or for whatever reason they downplay a serious injury and think very little will be awarded for pain and suffering and loss of enjoyment of life.

Reality testing of the insurance company can possibly get the needle moved somewhat. It is an important exercise to go through how they calculate the money damages that will be reasonably awarded. ( [See Ohio personal injury settlement calculator \(http://www.castellilaw.com/sites/www.castellilaw.com/files/OhioPersonalInjuryPainandSufferingCalculator.pdf\)](http://www.castellilaw.com/sites/www.castellilaw.com/files/OhioPersonalInjuryPainandSufferingCalculator.pdf)) Each party should do this.

I recall a wrongful death mediation where I was co-counsel for the administrator of the deceased estate. She was the wife of a 55 year old gainfully employed man and loving husband and father, He was killed as a result of negligence of a ski slope operator in the operation of its ski lift. The insurance adjuster thought he was the expert on the case and started with a \$25,000.00 offer. Because of some liability issues the widow on advice of counsel was willing to resolve the claim for between \$500,000 and \$750,000.

However, there was never a chance to negotiate. The insurance company saw their BATNA as \$0 and their worst case as \$250,000. They completely undervalued the case. The jury returned a verdict of \$2,750,000. The insurance company paid their \$2,500,000.00 in coverage and the owner kicked in another \$50,000 and placed a plaque in memory of the deceased on their premises and further improved safety measures.

In serious injury cases, a well prepared and experienced [bodily injury trial attorney \(http://www.castellilaw.com/about-anthony-castelli-attorney-law.html\)](http://www.castellilaw.com/about-anthony-castelli-attorney-law.html) can be the antidote to an insurance company that wants to play chicken with the harmed party. Couple this with an experienced mediator that can get the insurance company to look at the risks they might not have seen can result in a fair dispute resolution at mediation

(1) [looping \(https://www.pon.harvard.edu/glossary/empathy-loop/\)](https://www.pon.harvard.edu/glossary/empathy-loop/)

### **About the Author**

Anthony Castelli is an experienced personal injury trial attorney. He has hundreds of successful settlements on behalf of injury victims and over thirty jury trials. He took his mediation training at [Harvard's Program on Negotiation Mediating Disputes \(https://www.pon.harvard.edu/courses-and-training/harvard-negotiation-institute-5-day/mediation-workshop/\)](https://www.pon.harvard.edu/courses-and-training/harvard-negotiation-institute-5-day/mediation-workshop/). He is available to [mediate personal injury \(http://www.castellilaw.com/attorney-mediation-of-ohio.html\)](http://www.castellilaw.com/attorney-mediation-of-ohio.html) as well as business and employment disputes. He actively represents injury victims seeking full and fair compensation for their injuries.

### **Further Reading**