Private Arbitrations: When and Why?

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As everyone in this room knows, personal injury tort litigation is a cruel and bloody pastime, not for the faint of heart.

Usually there are only two routes off the battlefield – mediation or trial. Although I don't have the statistics, it seems mediation is the more common route, since there are so few trials.

Mediation only works when both sides realize they have some serious risk. Mediation is therefore the safe way out – a way to reach the middle ground.

However, if mediation fails, or never starts, there is an alternative to trial – arbitration.

While arbitration is widely used in many areas, for example - commercial disputes, family law, and labour disputes, it is relatively rare in injury tort litigation. For the right case, it can work well, and is therefore worth considering. Here is a comparison chart setting out my opinion of the process.

	Mediation	**Trial**	**Arbitration**
Protocol	Written agreement by the parties	Rules of Civil Procedure + *Evidence Act*	Written agreement by the parties + *Arbitration Act* + *Statutory Powers Procedure Act*
Decision maker	The parties	Judge or jury	Arbitrator (one or more)
Start date	Set by the parties at any time	Set by the parties at Assignment Court	Set by the parties at any time

Duration	Usually one day	Consecutive days at trial sitting	On convenient dates chosen by the parties
Hours	Usually 10 to 5, controlled by the parties	Usually 10 to about 4.30, Lots of breaks, controlled by the judge	Set and controlled by the parties
Evidence	Unsworn briefs and expert reports, no testimony from witnesses	Sworn testimony from witnesses, cross-examination, documents complying with *Evidence Act*	Sworn testimony from witnesses, cross-examination, documents (subject to *SPPA*)
Limits on number of witnesses	N/A	3 experts unless consent given, unlimited others	By agreement between the parties
Transcript	N/A	Yes	Yes
Timing of decision	N/A	Jury – at end of trial Judge - whenever	Time limit set by parties
Appeal	No	Yes	Yes

Location	Anywhere	Courtroom	Anywhere
Cost of process	Mediator + room for 1 day	Free	Arbitrator + room + reporter for several days
Who pays	Defendant if mediation succeeds, split otherwise	Free	By agreement between the parties
Enforceable	On motion	Court Order	Can get Court Order
Private result	Usually private result	Public result	Usually private result

An Example

The plaintiff fractured a vertebra in an accident in January 2004 on municipally owned property. A Statement of Claim was issued in April of that year.

At a private mediation in October 2010, the parties agreed to settle in principle for $425,000.00 all in. The settlement was subject to confirmation by the council of the municipality. However the council rejected the settlement. I was retained at that point.

The matter was then set for trial in November 2011. However, because of a scheduling conflict, the parties agreed to private arbitration the following January. The arbitration was conducted over 11 hearing days and resulted in an award to the plaintiff totalling $967,399.25. The defendant's subsequent appeal of the award was unsuccessful.

What I Did Wrong

The first and most glaring mistake is that I did not scrutinize every line of the arbitration agreement my opponent drafted. It provided that an appeal on a question of law could be made to the Court of Appeal. This is not possible. Section 45 of the *Arbitration Act* says that if the arbitration agreement is silent on the point, a question of law can be appealed to the court with leave. However, the arbitration agreement can provide for an appeal to the court on a question of fact, law, or mixed fact and law (no requirement for leave). The definition section defines court as either the Family Court or the Superior Court of Justice. This error caused a delay of about a year in getting the appeal heard in the right court – the Superior Court of Justice. During that year we went to two motions and a hearing at the Court of Appeal before realizing we were in the wrong court! Fortunately the eventual appeal was decided in favour of the plaintiff, with costs.

The second thing I would have changed with hindsight is to have put some limits on the number of witnesses and the length of cross-examinations.

My opponent proposed to call thirteen witnesses, including four experts. His cross-examinations of the plaintiffs and their witnesses were very lengthy. I had the feeling that a strong trial judge would have imposed limits. As it was, the arbitrator almost never intervened and the process was often protracted. Next time I will try to reach agreement on numbers and times.

What I Did Right

The final award, including costs of the arbitration and the appeal was $1,038,960. Considering that the case had been “settled” at mediation for $425,000 all in, this was a 244% improvement.

Conclusion

As with many things in law, the choice between arbitration and trial requires a balancing of competing factors. These essentially reduce to control versus cost. At arbitration, the process is controlled by the parties, but at considerable expense. One or both parties must pay for the arbitrator, the location and the court reporter.

In the example referred to above, opposing counsel and I chose a skilled and experienced arbitrator who was also a great pleasure to deal with. We chose pleasant surroundings and efficient working hours. We were also able to be very flexible with our sitting dates to accommodate other commitments, including those of our witnesses. All this took a great deal of stress out of the process.

For the right case, when a jury is not desirable, arbitration is a very attractive alternative to trial.

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