Negotiating personal injury cases

A survey of the attitudes and beliefs of personal injury lawyers.*

Rob Davis is a Partner at Atwood Marshall, PO Box 334 Coolangatta Qld 4225, **PHONE** 07 5536 9777
FAX 07 5536 9755
EMAIL rdavis@attmar.com.au

Personal injury negotiation is a classic example of 'distributive bargaining'. That is, one party has an interest to minimise the payout while the other party seeks to maximise the payout. There is almost no opportunity for the parties to embark on 'interest based bargaining' in which each party consciously works towards a settlement by seeking to satisfy the interests behind each other's position.[1] But while distributive bargaining is a simpler process than interest based bargaining, it is also an area where a negotiated result is, in theory at least, more difficult to achieve. Paradoxically, a very high percentage of personal injury actions do settle out of court.[2]

This raises a number of questions about the dynamics of personal injury litigation. For example, why do so many cases settle out of court? And given that so many personal injury cases settle out of court, why do they not settle earlier

ROB DAVIS, COOLANGATTA

THE AUTHOR CONDUCTED A SURVEY OF PERSONAL INJURY LAWYERS who represent plaintiffs and/or defendants. What the survey results revealed about their attitudes to negotiation and settlement are analysed.

before the costs escalate? Do plaintiffs, on average, do better in court than they do by negotiation? If so, why do more of them not elect to go to trial? Who is more highly motivated to settle out of court? Does this motivation change at the same rate for both parties as the hearing nears? What is the basis of this motivation? Do open offers of compromise under the court rules promote earlier settlements? Who is most at risk under offers of compromise made according to the court rules? Is there such a thing as truth in negotiation? Are plaintiff lawyers more competitive in negotiating style than defendant lawyers (or visa versa)?

The present study examines the attitudes and beliefs of personal injury lawyers on these issues. In particular, the survey looks for both similarities and differences between the attitudes and beliefs of lawyers who represent mainly plaintiffs, compared to those who represent mainly defendants. The findings are examined and discussed in the context of the psychological literature on games and decision theory.

"Many negotiators who initially adopt a competitive approach find they are incapable of making a transition from competition to cooperation."

Naturally, the study is based on the premise that the beliefs and attitudes of litigation lawyers are shaped by both experience and the social context in which that experience is derived.[3] Insofar as these beliefs and attitudes may be shaped by experience, surveying lawyers who specialise in personal injury litigation is one way to access collective experience acquired through many thousands of cases.

The survey method

A survey questionnaire was sent out to 148 south-east Queensland solicitors specialising in personal injury litigation. Each solicitor was asked to identify him or herself according to whether they acted mainly for plaintiffs or defendants and whether they viewed their individual negotiating style as being cooperative of competitive. In addition, each survey contained 16 statements about personal injury litigation and negotiation. Each respondent was asked to advise, in relation to each statement, whether they strongly agreed, agreed, were undecided, disagreed or strongly disagreed.

Survey results

A total of 105 participants provided usable responses to the survey.[4] Of these, 58 mainly represented plaintiffs, 41 mainly acted for defendants and 6 said they acted for both plaintiffs and defendants in equal proportions

Discussion

The negotiating styles of plaintiff and defendant lawyers.

The literature on negotiation usually classifies negotiation styles along ▶

continua between the extremes of cooperative and competitive behaviour.[5] The negotiation style is a description of the motivational orientation of the negotiator.[6] These motivational orientations are not fixed. Indeed, participants will often commence a negotiation in a competitive manner until a point of deadlock is reached. At this point the negotiation will either fail, as neither side is willing to make more concessions, or the negotiation will proceed with each party shifting to a more cooperative style.

A great deal of psychological research has been directed towards describing cooperative and competitive behaviour and the transition between these extremes.[7] In general, the research indicates that competitive behaviour can be a successful strategy if the negotiators' posture appears credible.[8] That is, if the negotiator appears to be negotiating from a position of power or strength. But competitive behaviour also tends to provoke a competitive response that can rapidly lead to impasse.[9] As a result, there are considerable risks in adopting a competitive approach to negotiation unless the negotiator has both the appearance and the actuality of power and a willingness to risk impasse. As the power imbalance reduces, so too does the utility of a competitive posture. In such situations, the only alternative to impasse is cooperation. Many negotiators who initially adopt a competitive approach find they are incapable of making a transition from competition to cooperation. This is because competitive behaviour has a destructive effect on mutual trust, trust being a necessary condition for cooperation to occur. Hence, competitive behaviour is considered an ineffective and dangerous strategy where the mutual power imbalance is either small, or where the imbalance of power is narrowing over time.[10] In contrast, a cooperative strategy has greater chance of payoff in most situations, irrespective of the power balance.[11]

Of the lawyers surveyed, 71.42% classified their negotiating style as 'cooperative'; the remaining 28.6% classified themselves as 'competitive' negotiators. None of those surveyed had any difficulty in identifying with one style or the other. These results accord well with those from a study by Williams that found 65% of legal negotiators were 'cooperative', 24% 'competitive' and only 11% 'undecided'.[12]

In this survey no statistically significant difference was found between the negotiating styles adopted by each group. It follows that the practice of representing plaintiffs or defendants has no demonstrable effect on negotiating style. This was a surprise, as the writer presumed that the social environment under which personal injury litigation occurs would necessarily lead one side to assume a more aggressive posture.[13] But the results do not bear this out.

There are two possible interpretations of these results. The first is that negotiation style is not significantly affected by client orientation. The implication from this is that defendant lawyers, notwithstanding the resources of their insurer clients, either do not perceive these resources as power or alternatively, do not exercise the power. If true, this might be because most negotiation takes place late in the proceedings when hearing is imminent. This time pressure may act to counterbalance any perception of resource power.[14] It is also possible that defendant insurers might view the possession of a 'deep pocket' as a strategic weakness, not a power.[15] In other words, being resource rich may simply make them feel more vulnerable as a target for a plaintiff with little to lose. The second and alternative explanation is that negotiation style is affected by client orientation but that the effect is either small or similar on both sides, thereby masking any real difference between the groups.

The similarity in the incidence of cooperation and competition between plaintiff and defendant lawyers does not necessarily imply a similarity in the causes of such behaviour. Nor should 'cooperation' be confused with truthful, caring or even ethical behaviour. Further, it should not be assumed that cooperative behaviour is necessarily appeasement orientated. Indeed, anecdotal evidence in Hazel Genn's 1987 English study of personal injury negotiation suggests that defendant lawyers and insurance negotiators may sometimes pretend to be cooperative in an attempt induce plaintiffs to negotiate and settle for less than the true value of their claim.[16] The same study concluded that experienced plaintiff lawyers were less willing to act cooperatively than were less experienced plaintiff lawyers.[17] Unfortunately, the present survey did not gather data on the levels of experience of the lawyers surveyed. Had this information been collected it would have been possible to determine if there is a correlation between experience and the extremes of cooperation and competition. Further research is warranted in this area.

Differences in attitude between plaintiff and defence lawyers

The results of the survey have been further examined to analyse both their pattern and their content. An examination of pattern is a search for differences and similarities in attitude and belief between different survey groups. Similarity in responses may be due to several factors, but the most plausible explanation is that inter-group agreement reliably reflects the objective experiences of the respondents. Differences between responses are also open to interpretation, but the most probable explanation is that the respondents either know something that is outside the experience of the 'other group', or that the differences are due to differences in the social context that impinge on belief structure in a partisan way.[18]

The negative and affirmative results obtained for each of the 16 statements were pooled into those that agreed and those that disagreed with respect to each of the test groups. The resulting 2x2 tables were then subjected to a Chi-squared analysis to ascertain if there was any difference in the pattern of responses of plaintiff lawyers verses those of defendant lawyers. A statistically significant difference was found in the responses to five of the questions, namely:

- Defendants become more willing to negotiate as the hearing date nears?

- Plaintiff lawyers stir up litigation?
- Plaintiffs are usually malingerers?
- Defendants deliberately delay cases so as to increase the financial pressure on plaintiffs in order to make them more willing to settle out of court?
- Defendants are willing to offer less at an early stage than they are as the case gets closer to court?

While statistically significant differences exist on each of these tables, the results still reveal a high degree of correlation between survey groups on all but one of the surveys. The non-conforming statement was *'defendants deliberately delay cases so as to increase the financial pressure on plaintiffs in order to make them more willing to settle out of court'*. This statement was agreed to by 47% of plaintiffs but only 9.8% of defendants. The disagreement ratings were 43% and 88% respectively. This was such a large disagreement (which was statistically significant to a high degree) that the replies of the two groups were negatively correlated.[19] Both groups cannot be correct. If we assume that defendant lawyers may be in a better position to know the motives of defendants, then only two conclusions may be drawn. The first is that defendants do not habitually use delay to put pressure on plaintiffs. Naturally, this does not mean that defendants do not sometimes delay cases. But it would suggest that deliberate delay is not a tactic that is habitually employed to increase pressure on plaintiffs. Another possibility is that defendants do regularly employ delay as a tactic but their lawyers are either unaware of it or reluctant to acknowledge it, even in a confidential survey.[20]

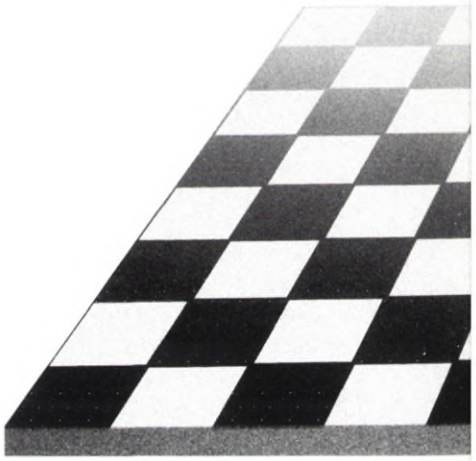
None of the other replies were so out of line as to represent a challenge to the underlying hypothesis that the replies do, in fact, represent a valid description of objective experience. Nonetheless, the results do indicate that the tendency to predominantly represent plaintiffs or defendants does have an effect on the belief structure of a lawyer. What differences do exist are probably due mainly to socialisation effects that necessarily arise as a result of representing one side in litigation more than the other. The writer speculates that these differences would become greater as the ratio of work a lawyer performs for either side approached unity. Of course, this is not to say that the underlying results are totally due to socialisation. Clearly, a number of factors will be at work. Some of the differences will be a reflection of actual experience. But it is likely to be experience coloured by prejudice resulting from identifying more with one 'team' than the other.

Negotiating out-of-court settlements: a case of motivational mismatch?

The replies reveal a strong willingness on the part of both plaintiffs and defendants to settle prior to trial. The statement, *'plaintiffs become more willing to negotiate as the hearing date nears'*, was agreed to by 71% of plaintiffs and 80% of defendants. The level of disagreement with this statement was uniform at 17%. The identical statement with respect to defendants elicited agreement from 84% of plaintiffs and 56% of defendants. Disagreement was 12% and 32% respectively. These results also suggest that plaintiffs are more willing to settle out of court than defendants. While this suggests consistency with the conclusions reached by Genn in her 1987 English study,[21] and with the predictions of psychological literature, the percentages by themselves are not strong enough for safe inference.

More interesting are the results to two other questions. The statement *'plaintiffs are willing to accept less at an early stage than they are as the case gets closer to court'* was agreed to by 34% of plaintiffs and 49% of defendants. The disagreement levels were almost uniform at 38% for plaintiffs and 41% for defendants. In contrast, 91% of plaintiffs and 73% of defendants agreed to the proposition that *'defendants are willing to offer less at an early stage than they are as the case gets closer to court'*. Disagreement was 8.6% for plaintiffs and 24% for defendants. These results suggest a motivational difference between plaintiffs and defendants. A higher percentage of plaintiffs were willing to accept less at an early stage (and, by inference, became less motivated to settle as the trial approached). But the motivation of

"...most people are risk averse when considering potential gains and risk takers when faced with losses."



defendants to negotiate settlement was lowest early in the proceedings and grew as the trial approached.

This evidence suggests that the settlement motivation curves of plaintiffs and defendants are negatively correlated, probably resulting in an early motivational mismatch.

The reasons for the 'motivational mismatch' may be different in each case. Compared to defendant insurers, plaintiffs are usually resource poor and often face considerable difficulty in raising funds to cover the expenses of proceedings. Similarly, many plaintiff lawyers are also more disposed to earlier settlement as they are often the ones who must carry plaintiffs' expenses and assume the financial risks of failure. As a consequence, many plaintiffs may be willing to negotiate on the basis of incomplete medical information notwithstanding the risks of so doing. But few defendants are willing to negotiate until they are sure the plaintiff's injuries and disabilities are as severe as the plaintiff claims. So most defendants, in the belief that they are reducing their exposure, will

require full medical information before commencing reasonable negotiations.[22] In the process, those plaintiffs who may have been willing to take less at an earlier stage suffer a change of heart proportional to the investment of time and money in their cases. A further possibility is that defendants deliberately 'hard ball' plaintiffs early in the action in an attempt to induce plaintiffs to be more reasonable in later negotiations.

Further research is necessary in order to examine each of the above hypotheses. But understanding the directional shifts in motivational status is unlikely, in itself, to result in any sudden bonanza in negotiated outcomes. There are also other factors at play and some of these will be canvassed below.

Negotiate, mediate, litigate? How parties evaluate the choices.

High proportions of the lawyers surveyed agree that *'early compulsory mediation would result in more negotiated settlements'*, (66% of lawyers representing mainly plaintiffs and 63% of those mainly representing defendants). Many ▶

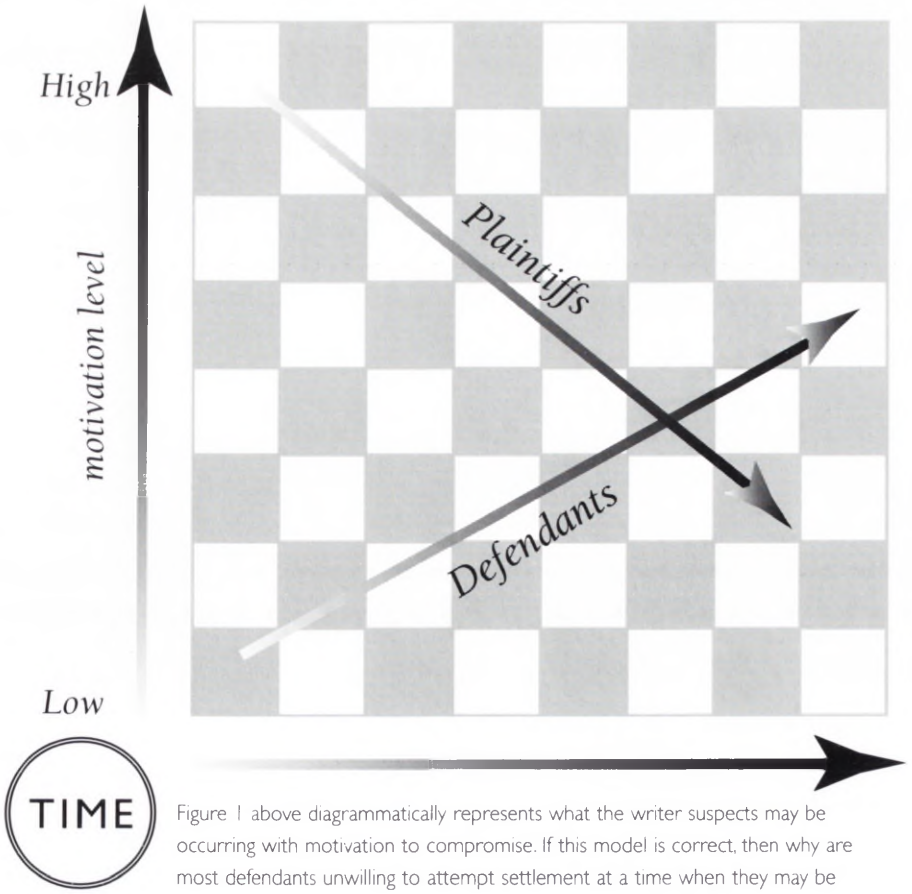


Figure 1 above diagrammatically represents what the writer suspects may be occurring with motivation to compromise. If this model is correct, then why are most defendants unwilling to attempt settlement at a time when they may be able to achieve more favourable terms? Why are so many plaintiffs willing to accept less earlier in the action than they are as the case approaches trial?

considered that *'plaintiffs usually get more compensation through mediation than by unassisted negotiation'*, (38% and 51% respectively). A large proportion of both plaintiff and defendant lawyers also believe *'plaintiffs usually recover more in court than they would have recovered through negotiation'*, (43% and 54%).[23] In comparison, the percentage of respondents who believed plaintiffs usually did worse at trial were only 31% and 27% respectively. Given these last two findings it is little surprise that *'defendants become more willing to negotiate as the hearing date nears'*, (73% agreement overall). But it is paradoxical that plaintiffs also *'become more willing to settle as the hearing date nears'*, (75% agreement overall). And, as stated previously, there is a suggestion that plaintiffs may be more willing to settle out of court than are defendants.

These latter findings all suggest that creating a structured environment for compulsory negotiation, followed by an early trial date, ought to result in earlier settlements. Several studies illustrate why plaintiffs tend to settle out of court when they could do better at trial and why defendants are reluctant to enter serious negotiations at an early stage when they would probably achieve better outcomes.

A study by Rachlinski (1990) suggests that merely creating the environment for earlier negotiation may not necessarily result in defendants making reasonable settlement offers.[24] This is because of interference by factors that defendants may have little conscious insight into. Rachlinski examined 722 cases that went to trial in California, USA between 1981 and 1988. The data he collected included the amount of the verdict together with the amounts of the last settlement offers that had been made by both plaintiff and defendant before verdict. In 55.4% of the cases the plaintiffs failed to recover more than the defendants' last offer. In 21% of the cases the verdict fell between the range of final offers made by each side. The defendants were ordered to pay more than the plaintiffs' last offer in 23% of cases. While the defendants' 'wins' were numerically larger than those of the plaintiffs, in financial terms the defendants were the losers over time. This is because the difference between the verdict and the plaintiffs' last offer was, on average, significantly less than the difference between the defendant's last offer and the verdict. When averaged across all cases the defendants lost, on average, $31,772 (USD)[25] per case by going to trial.

Why are plaintiffs' last offers usually closer to the mark than defendants' last offers? Rachlinski, drawing on the earlier research of others into prospect theory,[26] proposes a multi-factorial theory to explain these results. In essence he argues that defendants as a class suffer from 'cognitive impairments' that cause them to '...systematically undervalue the utility of the expected case against them.'[27]

He attributes the cognitive impairments to the interplay of three factors. First, as has been suggested above, partisanship can lead to a person over-identifying with their cause. Studies reveal that when a person is required to formulate reasons for a proposition then they will develop a greater belief in it.[28] Once formed, attitudes can be surprisingly hard to change. This means it is very easy for a lawyer, representing a plaintiff or defendant, to become overly convinced as to the utility of his or her own case.

Second, the motivations of plaintiffs and defendants are affected by the utility or value of the money at stake in the negotiation. Plaintiffs, because they tend to be resource poor, place a higher value on the money at risk. To them the stakes are higher. As a result, a plaintiff's motivation to maximise his or her gains is high. Conversely, defendant's insurers will place a lower value on the money at stake. At first appearance this seems to suggest that defendants should be more willing to offer higher settlements as the money means less to them. But this concept of value interacts with a third phenomenon that results in a reverse effect.

Third, the empirical data from prospect theory indicates that most people are risk averse when considering potential gains and risk takers when faced with losses.[29] So insurers are more inclined to take a risk on trial, even if the risk is substantial, than pay a certain sum by way of settlement. Paradoxically, this effect is accentuated by the lower value an insurer places on the range of money at risk. In contrast, plaintiffs are more susceptible to the 'bird in the hand' syndrome. They are less willing to trade a certain sum offered out of court for the risk of getting less in court. This will be so even if that risk is comparatively low. Because plaintiffs and defendant insurers each place a different subjective value on the money at stake, the parties do not seek to avoid or take the risks at the same rate. Hence, '...defendants [are] more risk seeking than plaintiffs [are] risk averse.'[30]

Rachlinski's findings on plaintiffs' success rates at trial, (defined as the percentage of cases where plaintiffs recover verdicts in excess of the defendants' last offer),[31] are supported by a similar study ▶

by Gross and Syverud. They examined 529 jury verdict cases in California State Superior Courts between 1985-86[32] and found an overall 'success rate' of 41.8%, (but the rate varied somewhat when the cases were categorised into the different types of action).[33] Gross and Syverud also agree that successful plaintiffs tend to recover far more, on average, than would have been the case had the defendants' last offer been accepted.[34] But unlike Rachlinski, they attribute this difference to a conscious defence tactic that seeks (sometimes unsuccessfully) to induce plaintiffs to settle for less.

While the findings on plaintiffs' success rates at trial may be an accurate description of what occurs in cases that end with a verdict, there is a wealth of evidence to suggest that in cases that settle before trial, defendants do substantially better than plaintiffs.[35] This is because plaintiffs, when considering a defendant's settlement offer, are forced to decide between a certain gain (which can be obtained by accepting the offer) and an uncertain outcome (risking withdrawal of the offer or trial). As has been discussed above, when considering gains, most individuals are risk-averse. Whilst this risk aversion is heightened by the greater subjective value plaintiffs tend to place on the amount 'at risk', there is evidence that risk-averse behaviour is also influenced by personality factors.[36] In 1988 Josephs *et al.*, examined the relationship between self-esteem and the tendency for individuals to take and avoid risks.[37] They found a strong positive correlation between self-esteem and risk-taking behaviour.[38] The lower a subject's self-esteem, the less likely he or she would gamble a certain gain for a risky outcome. Similarly, the higher a subject's self-esteem, the more likely the subject would choose a calculated risk over a certain gain.

Most lawyers are aware of the negative effect that injuries and loss of employment have on a client's feelings of self-worth. It is likely that this negative effect on self-esteem may be a further reason why plaintiffs may be more willing to settle out of court, even in the face of the knowledge that they might receive more at trial. It would be interesting to compare the self-esteem and risk behaviour of injured plaintiffs with samples of non-injured individuals. Further studies are warranted in this area in order to understand what effect injury and disability may have on an individual's ability to properly assess their choices during personal injury negotiations.

There are many other reasons why individual plaintiffs are likely to be more risk-averse than individual defendants. For practical purposes, their insurers dictate the behaviour of defendants. Corporate insurers do not assess choices in the same ways as do humans. They act through the decisions and actions of individual employees with little personal stake in the outcome. It is not their money at stake, so they are more insulated from the consequences of taking a risky decision. Furthermore, it may often be less risky for an insurance negotiator to go to trial than to pursue a negotiated settlement. For example, excessively generous settlements might be viewed unfavourably by superiors and may convey to the opponents an impression of weakness, but unfavourable court decisions can always be blamed on the judge. Finally, insurers are 'repeat players' in the litigation business and both short and long term considerations influence their strategies.[39] As a result, they are more inclined to act so as to preserve a given reputation or as a means of discouraging future litigation.[40]

There is also evidence that structural factors operate to benefit defendants more than plaintiffs. For example, defendant insurers are in the business of litigation. They have the joint ability to select specialist lawyers, and also to negotiate favourable retainers for their legal work.[41] In contrast, most plaintiffs have no way of knowing which lawyer he or she should employ, and have little ability to negotiate fees. In addition, plaintiffs are disadvantaged by their inexperience with the law and the courts, whereas defendant insurers are familiar with the system and know how to operate within it. Insurers, because of the repetitive nature of their business, can play the risks of the litigation game in much the same way as a casino operator. They can reduce their exposure by learning from their prior experience with the system in which they operate.[42] Such

experience repeatedly demonstrates the risk-averse nature of plaintiffs when confronted with low, but certain, offers of settlement. It follows that plaintiffs are more likely to feel helpless in the litigation and be uneasy about their ability to influence the outcome. These structural factors must adversely affect plaintiffs' feelings of self-efficacy. Studies have shown that persons with feelings of low self-efficacy are less likely to take risks, whereas those that perceive they have the power to influence outcomes are more likely to take risks.[43]

For the reasons stated, it pays for defendants' insurers to first try and negotiate settlements at a very low value because, more often than not, this strategy will succeed. An insurer can always afford to gradually increase the offers or even go to trial in the small minority of cases that do not result in favourable negotiated outcomes. Genn's findings[44] indicate that the more experienced plaintiff lawyers intuitively understand these effects and compensate for them by being more combative and exhibiting a greater willingness to go to trial.

Open offers of settlement: the effect on motivation to compromise?

Most states have settlement procedures whereunder one or both parties may make written offers of compromise. Indeed, over the last decade there has been a proliferation of Acts and Regulations mandating pre-action and/or pre-trial settlement offers. These procedures are designed to enable one party to increase the pressure on the opponent to settle. The inducement is based on a cost penalty imposed if that party rejects an offer and, at trial, does not obtain a verdict more favourable than the amount offered. The large majority of the lawyers surveyed agree that *'reasonable offers of compromise promote earlier out of court settlements'*, (90% of plaintiff lawyers and 85% of defendant lawyers agree with this statement).[45] Surprisingly, very few of the lawyers surveyed admitted to using this procedure tactically, at least where it was optional, by *'making early offers that are favourable to the opponent in the knowledge that the opponent will reject them in the belief that the offer will be improved on later'*. Only 12% of plaintiff lawyers and 22% of defendant lawyers admit to using this tactic.

Given that offers of compromise do operate to induce parties to settle out of court, is the level of this inducement the same for both plaintiffs and defendants? If not, which party derives the most tactical benefit from this procedure?

In the absence of any offers, the winner will recover party-party costs from the loser.[46] These costs are generally between 60% and 80% of the total costs that the successful party is required to pay his or her own lawyer.[47] Under the offer of compromise procedure, if a defendant rejects a plaintiff's offer of compromise and is ordered to pay a higher amount in court, then the defendant is required to pay the plaintiff's solicitor and own client costs. It must be remembered that if no offer had been made then the unsuccessful defendant would have been liable for the plaintiff's party-party costs in any event. So the penalty imposed on the defendant in such a case is that it must pay 100% of ▶

the plaintiff's legal costs from the date of the offer, instead of the 60%-80% that it would have otherwise been liable for. In net terms, the cost to the defendant of rejecting the plaintiff's offer amounts to about 20%-40% of the plaintiff's costs. But if a plaintiff rejects a defendant's offer of compromise and fails to recover more in court, then the plaintiff is penalised twice. In the first instance, the plaintiff, even though successful in recovering damages, is disentitled from recovering party-party costs from the date of the offer. Second, the plaintiff will also be required to pay the defendant's party-party costs from the date of the offer until verdict. Naturally, the plaintiff continues to be liable for his or her own lawyer's costs in any event. So a plaintiff, faced with an open offer from a defendant, is in a situation akin to 'double or nothing'. This complex reward/punishment structure is summarised below in **Table 1**.

Pay-off matrix demonstrating the effect of open offers of settlement in a case where the plaintiff recovers [48]

	Defendant's Offer	**Plaintiff's Offer**
Damages > Offer	Plaintiff recovers party-party costs only. 60%-80% total costs.	Plaintiff recovers 100% of costs.
	NEUTRAL	WIN
Damages < Offer	Plaintiff pays 60%-80% of defendant's costs and recovers nil for own costs.	Plaintiff recovers party-party costs only. 60%-80% total costs.
	LOSS	*NEUTRAL*

TABLE ONE

The disproportionate effect of the offer of compromise procedure is further accentuated by the difference in the value that each side places on the costs involved. A resource rich defendant will place less value on the amount it risks by rejecting a plaintiff's open offer, an amount that is already significantly less than the amount a plaintiff risks in a similar situation. In contrast, a resource poor plaintiff places much higher value on the amount he or she risks by rejecting a defendant's open offer. Similarly, the decisions of the parties will also be influenced by the other personality and structural factors referred to previously in this paper.

The result is that the offer of compromise procedure permits defendants to exert much more settlement pressure on plaintiffs than it permits plaintiffs to exert on defendants. If defendants were to make more realistic compromise offers earlier in the proceedings, this may result in a significant increase in the number of cases where a plaintiff would be unwilling to take the risk of litigating further.[49] But the number of settlements should not be confused with the average cost of settlement. For example, increasing the level and frequency of first offers might increase the number of out of court settlements, but it may do so at a higher average cost to the insurers than already occurs at present. First, most seasoned negotiators know that the value of an opening gambit is something that will affect the nature of the opponent's response. Because of this, defendants are disinclined to initiate negotiations at a level that might cause a plaintiff to increase his or her settlement range. Second, defendants already manage to settle most claims out of court for much lower values than would be likely at verdict. So while some lawyers might sometimes consider that insurers would benefit by offering more at an earlier time, the benefits to insurers of doing so may be illusory. As a result, the offer of compromise procedure is unlikely to result in earlier and more reasonable offers by insurers. But when it is resorted to by defendants, it does significantly increase the settlement pressure on plaintiffs.

'It is my client's last offer, take it or leave it': the role of exaggeration and misrepresentation in negotiation.

Every lawyer has heard these words in nearly every negotiation. But do lawyers always mean what they say in negotiations? Or do lawyers often misrepresent the position in an effort to get a better negotiated result for their client? 24% of both plaintiff and defendant lawyers agreed that, '*when they said that an offer was 'the last offer," they were nearly always exaggerating.*' 36% of plaintiff lawyers and 39% of defendant lawyers agreed that it was '*often necessary to misrepresent the strength of their client's position to get a good negotiated result*'. Clearly, neither side is more prone to exaggeration or misrepresentation than the other.

Of course, many assert that there is a difference between exaggeration, misrepresentation, and deception. The present survey does not reveal any information as to the nature or degree of exaggeration or misrepresentation undertaken by lawyers. This would be an interesting subject for further study.

The role of timing in negotiation: settlement on the door of the court.

Why do cases tend to settle on the court's doorstep? This phenomenon is undoubtedly due to a number of factors, some of which have already been touched upon above. But there are two other factors that may affect the timing of settlements. First is the time of commencement of negotiation. Is there a reluctance to be the one who first commences negotiation proceedings? If so, what is the basis of this reluctance? The writer originally hypothesized that such

reluctance did exist, and that it was based on a belief that making the first offer communicated a desire to avoid going to court. The results of the survey do not support this contention. The survey statement, *'to make the first offer is a sign of weakness'*, met with agreement by only 12% of plaintiff lawyers and 7.3% of defendant lawyers. In contrast, the level of disagreement was 78% from plaintiff lawyers and 90% from defendant lawyers.

But the results are equivocal, as the word 'weakness' was a poor choice. This is because it only taps into one of the dimensions likely to dictate whether a first offer is desirable. In retrospect, the survey should also have inquired whether the participants viewed making a first offer as being tactically unwise. For example, it is commonly known that the level of an opening offer will communicate to the opponent the upper limit of the negotiator's aspiration scale. Several psychological studies have examined the effect of extreme verses moderate openings.[50] The studies conclude that extreme initial offers result, on average, in higher outcomes.[51] Conversely, the making of initial offers that are close to the 'bottom line' is usually an ineffective strategy.[52] But laboratory studies using game paradigms do not effectively model the desire to avoid impasse through making an opening that is too extreme. In consequence, the writer suspects that many lawyers may prefer to respond to an opponent's offer rather than to initiate negotiations themselves.[53] If this is correct, then a necessary consequence of this would be delay in initiating negotiations.

A second factor is the psychological phenomena of approach and avoidance.[54] It is well known that many actions are modulated by different and often competing motives. The desire to approach a goal will increase with proximity to the goal. But the desire to flee a feared event similarly increases as the event nears. These competing motives will often intersect to create a point where a desire to achieve a certain goal is supplanted by the fear of an associated event. A simple but effective case might be the parachutist who freezes in the doorway prior to his or her first jump. Or the bungee jumper who chickens out at the last moment. The location of these conflict points is explained by a difference in the slope of the approach and avoidance gradients.[55] In litigation, the fear of court is a fear of the unknown. It is a fear of failure, magnified by the degree of uncertainty inherent in the outcome. This event, the approach of the court date, operates so that neither party can put off negotiating any further. It creates an environment in which both parties become more willing to negotiate as the hearing date approaches.

Conclusion

The superficial simplicity of personal injury negotiation obscures complex psychological factors that influence how and why parties make the decisions ▶

inherent in the negotiating process. Factors such as the motivations, expectations and attitudes of the parties and their lawyers' influence, in some cases, determine the outcome of the negotiations. While these variables are notoriously difficult to study, they surface through the behaviour of parties undergoing negotiation. So, to understand negotiating behaviour, we must look beyond the superficial acts and attitudes of the parties and examine causal factors such as emotion, motivation, and cognition. The present survey has sought to identify and explain some of the more obvious examples of negotiating behaviour. The writer has also sought to locate the results in the context of existing research findings and to make suggestions for further research. But a cautionary note is called for at this point. Even though a large quantity of laboratory research has been conducted and numerous popular books have been written on the subject of negotiation, very little empirical research has been carried out involving real life negotiators and negotiations. As a consequence, what is known about negotiating behaviour is still only a small fraction of what remains unknown.

The findings of the present survey suggest that each party's willingness to negotiate follows a roller-coaster course from commencement of the action until trial. In most cases, these paths will intersect at some point prior to trial, at which time settlement is most likely to occur. Obviously, the motivation towards settlement is affected by many things, not all of which will either occur or be obvious in every case. But the results do indicate that most plaintiffs are more highly motivated towards settlement early in the action, and again shortly prior to trial. In contrast, the motivation of defendants starts low and builds with increasing proximity to trial. As a result, both parties are most inclined to settlement at the 'eleventh hour', after considerable resources in time and costs have already been consumed.

Other researchers have suggested that, when negotiating personal injury actions, plaintiffs tend to be risk-averse and defendants tend to be risk-takers. The results from the present survey also support those findings. The writer believes that this fundamental difference in the way the parties view and assess their options is the main factor behind the high out-of-court settlement rate of personal injury actions. The risk-averse nature of plaintiffs is likely to be aggravated by factors such as; a lack of financial resources (when compared to defendants' insurers); the tendency to place a greater subjective value on the money at risk; the average plaintiff's lack of control over or experience with the legal system; the effect of serious injury on feelings of self-esteem and self-efficacy; and the in-built pro-defence bias inherent in the offer of compromise procedures. In contrast, the risk-taking nature of defendants is probably enhanced by factors such as: a lower subjective value placed on the money at risk; a greater knowledge of the court system; prior experience with the risk-averse nature of plaintiffs; the ability to average losses and gains over time; the greater financial resources of insurers; the ability to employ specialist lawyers at competitive rates; the ability to tactically increase pressure on plaintiffs by delay and by use of the offer of compromise procedures. In summary, in the game of negotiation the odds favour the 'repeat players' over the 'one-shot players'.

Logic suggests that promoting earlier settlement negotiations ought to result in earlier settlements occurring. Earlier settlements may be beneficial to the parties, as they ought to result in a reduction in legal costs. But it would be a mistake to assume that promoting earlier settlements would necessarily modify the existing negotiating tactics of insurers. Nor should it be assumed that institutionalising early negotiation would necessarily result in insurers increasing the net value of their early offers. Insurers presently derive substantial benefit from out-of-court negotiations as they understand and exploit the risk-averse nature of their opponents. Necessarily, they benefit from strategies that increase the delay and risk of proceedings for plaintiffs. For example, the open offer of compromise procedure already provides a potent incentive for earlier settlement. But, in the writer's experience, it is rarely employed to its full effect by defendants, notwithstanding that the incentive value of the procedure is weighted in the defendant's favour. This is not because defendants' insurers do not understand the benefits of the procedure. It is because they derive equal or greater benefits from other strategies that run contrary to the notion of making reasonable early offers of settlement.

As stated above, the major difficulty faced by plaintiffs is the tendency towards risk-aversion. The different levels of expertise and skill of plaintiff lawyers must, in the writer's view, add to the uncertainty experienced by plaintiffs, an uncertainty that further increases the gap between the 'repeat' and the 'one-shot' players. The plaintiff that employs a personal injury specialist is likely to be better advised and better rewarded than one who employs an inexperienced lawyer. This is because a specialist personal injury lawyer is also a 'repeat player' in the litigation business. But there is little that most plaintiffs can do to ensure the lawyer they employ is the right person for the task. The movement towards specialisation and specialist recognition should go some way towards correcting this problem. The 'gap' is further narrowed for those personal injury lawyers who participate in organised groups, such as APLA. That organisation enables greater sharing of experience through research and specialist continuing education programs. The trend towards the higher profile of plaintiff lawyers through APLA should assist the public to make more informed choices when selecting a lawyer. PL

Footnotes:

* This paper is an abridged version of a longer paper published in the *Australian Law Journal* in 1995. APLA thanks LBC Information Services, a part of Thomson Legal and Regulatory Group Asia Pacific Limited, for its kind permission to reproduce this paper.

Footnotes from 1 to 56 are published on APLA's website: http://www.apla.com