Anatomy of a Child Wrongful Death Mediation

Practice and Theory

by Frank Gomberg

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Funeral Blues

by W. H. Auden

Stop all the clocks, cut off the telephone,

Prevent the dog from barking with a juicy bone,

Silence the pianos and with muffled drum

Bring out the coffin, let the mourners come.

....

The stars are not wanted now: put out every one;

Pack up the moon and dismantle the sun;

Pour away the ocean and sweep up the wood.

For nothing now can ever come to any good.

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1. INTRODUCTION

Awards for personal injury and wrongful death were established at least as early as Biblical times. This long history is a reflection of the value that we as human beings place on the physical integrity of the person and on maintaining order in a civil society. If injury is inflicted by one person on another, and if that injury goes uncompensated, the absence of punitive sequelae has significant adverse ramifications for maintaining an ordered, civilized society. Though "an eye for an eye" is a crude "compensation" scheme, it does serve to deter negligence by warning a potential tortfeasor that if you don't take care, society will inflict the identical injury on you that you have inflicted on your victim. The eye for an eye maxim is known as Lex Talionis which is defined in Black's Law Dictionary as:

> The law of retaliation: which requires the infliction upon a wrongdoer of the same injury which he has caused to another....Expressed in Mosaic law by the formula "an eye for an eye; a tooth for a tooth". [1]

The first articulation of the Lex Talionis principle was in Exodus 21:23-25. This Biblical passage reads:

> ...life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.[2]

The Sephardic Institute's analysis references two further places in the Old Testament where Lex Talionis is also articulated.

> The "eye for eye" formulation occurs two additional times in the Torah. Following the case of the blasphemer, in a passage that is linked to the previous subject in an unusual manner, it states: "If anyone maims his fellow, as he has done so shall it be done to him—fracture for fracture, eye for eye, tooth for tooth. As he has maimed a man so shall it be rendered unto him" (Lev. 24:19-20). And in the passage dealing with false witnesses, it states: Do to him as he had schemed to do to his brother...Your eye shall have no pity—life for life, eye for eye, tooth for tooth, hand for hand, foot for foot" (Deut. 19:19, 21).[3]

It is not surprising that our civil justice system has evolved over the centuries and that we now award money to victims as a form of compensation, rather than inflict injuries on perpetrators. This evolution in the law of compensation reflects a more sophisticated and developed victim-centred approach, but arguably fails to recognize some of the more basic needs of victims; the need to be heard, understood, empathized with and the need not to be re-victimized by the very process designed to compensate. The pristine simplicity of Lex Talionis required no victim participation and indeed assured the victim a kind of moral equivalency or fundamental fairness. Once the victim lost his eye at the hands of a tortfeasor, the legal recourse was swift and highly predictable.

Personal injury litigation at the millenium in Ontario, for better or worse, has distanced victim and tortfeasor (largely through the interposition of liability insurance) and has failed to consider the emotional impact of injury on a victim's sense

1 *Black's Law Dictionary*, Revised Fourth Edition, (St. Paul, Minnesota: West Publishing, 1968).

2 Sephardic Institute, **"**Parashat Mishpatim, Part III on 'An Eye for an Eye'**"**, www.judaic.org/bible/mishpatim3.pdf, (Brooklyn, New York, 2009) at page 1.

3 Ibid.

of bodily and psychological integrity. A self sufficient 45 year old accountant may become quadriplegic in an instant due to a negligent driver. A grandmother of five, enjoying retirement after working for 40 years as a sewing machine operator in a factory, may now be blind due to medical negligence on the part of an ophthalmologist. Shuffling money from tortfeasor to victim fails to integrate concepts of recognition and apology into the process. That is unfortunate and is an area where mediation holds promise as an integral component of "healing" as an element of compensation.

Arguably, the most assaultive of all injuries is death and of all deaths, the most tragic are those of children.

The death of a child is an horrific re-ordering of the natural sequence of life's events. Grandparents are supposed to pre-decease their adult children and adults are supposed to pre-decease their own children. Anything else is outside the parameters of what we normally conceptualize.

The civil litigation process in Ontario is ill-equipped to recognize and appropriately respond to the horror of wrongful deaths of children. The binary "win-lose" paradigm is not conducive to reflect society's value of the life of a child, and in the march to the courtroom, the emotional needs of the survivors are at best ignored and at worst violated.

As the ethicist Lee Taft has said:

> Tort claimants are people whose lives have been turned upside, people upon whom "the terrors of death have fallen," people overwhelmed by horror. It is important to remember that there are dimensions to a tort victim's suffering that make it different from the suffering each of us endures as a part of human experience—ordinary suffering that is interwoven in earth-side living. The parent who loses his or her child because another fails to obey a traffic signal suffers differently from the parent whose child dies from illness. Both grieve, but the grief of the tort claimant is compounded with powerful and complex emotions because of the relationship of their loss to another's wrongful act.[4]

In this paper, I propose to analyze how mediation in the context of a civil claim for the wrongful death of a child can and should hold the promise of making things better for the deceased child's family members. This conception that things can be made better does not arise from a naive belief on my part that anything good can emerge from a child's wrongful death case, but is more a reflection upon mediation as a process that is less adversarial than a trial—and as such, at least may "do no harm" and perhaps can do some good.

I have mediated perhaps 50 child wrongful death cases and I have acted as counsel in another 5 such cases. I propose to use this experience to inform the discussion below. In addition, I have constructed a hypothetical fact pattern which I will employ throughout this paper as a model for the analysis I will undertake. The structure of this paper will be to begin with the mediator's opening comments in joint session and to work through the various stages of a mediation from the plaintiffs' lawyer's opening to the defendant's lawyer's opening. I will discuss what I think is effective and what is ineffective and damaging to the possibility of achieving a psychologically sustainable result. I hope to reflect some of the concepts through the prism of Dr. Elisabeth Kübler-

4 Lee Taft, "On Bended Knee (With Fingers Crossed)", (2005-2006) 55 DePaul Law Review 601 at p. 612 (footnotes omitted).

Ross's writing about death,[5] through consideration of mediation literature on talk and when it works,[6] and through the lens of possible "transformation" in a non Bush-Folger sense.[7] Hopefully this paper will serve as a "how to do it" primer or at least a beacon of "how to do it better".

2. FACT PATTERN

Danny Smith was born on May 10, 1989. On February 10, 2003 at about 9:30 a.m. Danny was skiing by himself at the Mogul Valley Ski Resort in Rutland, Ontario. Danny was not quite 14 years old and he was an expert skier. He was skiing on Volkl skis and he was wearing a Giro helmet with Briko ski goggles.

Prior to his 10:00 a.m. ski racing class, Danny decided to ski through Mogul Valley's terrain park. The terrain park had a table top feature to skier's right and Danny took it. He cleared the table top feature, landing quite a distance downhill from the designated landing zone. He landed very hard on his left side, suffering a fracture of the left tibia and fibula and a ruptured spleen. Danny was taken by ambulance to the local hospital where it was felt that a splenectomy (removal of the spleen) would be the treatment of choice. After the leg fracture was set, the general surgeon at the local hospital checked with the children's hospital in the city to determine the current definitive treatment for splenic rupture. The children's hospital recommended that Danny be transferred by ambulance to the city for definitive management of his splenic injury. The local hospital complied and Danny was transferred early in the morning hours of February 11, 2003. He was admitted to the trauma ward of the children's hospital for strict bed rest and for close observation under the care of Dr. Cheryl Greene, a paediatric general surgeon. Danny remained an in-patient at the children's hospital for about 6 days. On February 17, 2003, he was discharged home on restricted activities with no contact sports or gym activities until a scheduled follow-up at the children's hospital in four weeks. No follow-up care was prescribed to take place at the local hospital or at Danny's family doctor's office.

Danny remained home from school for two weeks. Sixteen days after discharge, he went to work at the local McDonald's. Two hours after arriving at work, Danny called his father and said he wasn't feeling well. Danny's father Jim went to pick Danny up at the McDonald's. Jim found Danny dead in the street. The autopsy concluded that Danny had died as a result of internal exsanguination (massive bleeding) from a ruptured spleen.

It was noteworthy that Danny's haemoglobin counts were as follows:

February 10, 2003, 6:30 p.m. (at the local hospital)	114
February 11, 2003 (at the children's hospital)	100
February 12, 2003 (at the children's hospital) a.m. p.m.	97 90
February 13, 2003 (at the children's hospital)	90
February 14, 2003 (at the children's hospital)	87
February 15, 2003 (at the children's hospital)	no haemoglobin done
February 16, 2003 (at the children's hospital)	no haemoglobin done
February 17, 2003 (at the children's hospital)	no haemoglobin done

5 Elisabeth Kübler-Ross, *On Death and Dying*, (New York: Scribner, First Paperback Edition, 2003). Elisabeth Kübler-Ross and David Kessler, *Life Lessons*, (New York: Scribner, First Paperback Edition, 2003). Elisabeth Kübler-Ross and David Kessler, *On Grief and Grieving*, (New York: Scribner, First Paperback Edition, 2005).

6 Deborah M. Kolb and Associates, *When Talk Works, Profiles of Mediators*, (San Francisco: Jossey Bass, 2001).

7 Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation*, Revised Edition, (San Francisco: Jossey Bass, 2005).

The expert reports obtained in this case were contradictory and highly partisan. The plaintiffs obtained an engineering report indicting the design of the table top jump and concluding that Danny was not skiing too quickly. The defendant, Mogul Valley Ski Resort, retained two experts, one an expert in the design and construction of terrain parks and the second, an expert in Ergonomics and Human Factors. These experts concluded that Danny was skiing too fast, lost control and as such, he was the author of his own misfortune. Mogul Valley Ski Resort also relied on the exclusion of liability defence (a contractual defence) as set out on posted signs and on the day ticket Danny had purchased that morning.

In the medical negligence part of the claim, the plaintiffs relied on a very weak expert's report from an adult general surgeon that concluded that Dr. Greene's failure to order haemoglobin tests in the three days before Danny was discharged from the children's hospital, constituted negligence.

David Jones, Dr. Greene's lawyer, obtained two supporting expert reports; one from a paediatric general surgeon and the second from an adult general surgeon. Both reports concluded that Dr. Greene had met the standard of care and that what Danny died from was a delayed splenic rupture—which is extremely rare and not predictable. Danny's haemoglobin had stabilized in the children's hospital and there was no indication to do further haemoglobin tests after discharge unless there was some clinical indication that Danny was having ongoing bleeding. The defence expert witnesses concluded that Danny had stopped bleeding by the time he left the children's hospital and he was not bleeding over the next several weeks. Danny's death was due to a sudden delayed bleed some 16 days after discharge.

Family Law Act claims were advanced by the following claimants:

Plaintiffs	Age	Relationship to Danny	Lawyer
Jim	48	Father	Richard Brown
Marilyn	46	Mother	Richard Brown
Stanley	19	Brother	Richard Brown
Marie	14	Sister	Richard Brown

The defendants were represented at the mediation as follows:

Defendants	Lawyer	Insurance Representative
Dr. Cheryl Greene	David Jones	Julia Beatty
Mogul Valley	John O'Byrne	Brian Mansfield

3. THE MEDIATOR'S OPENING IN JOINT SESSION (PART ONE)

I am going to speak to you Jim and to Marilyn and to Stanley and to Marie. I am Frank Gomberg and I'm the mediator. Richard Brown is of course your lawyer and on the other side of the table today we have David Jones who is the lawyer for Dr. Cheryl Greene, Julia Beatty who is with Dr. Greene's insurer, John O'Byrne who is Mogul Valley's lawyer and Brian Mansfield who is with Mogul Valley's insurer. I am going to look at you Jim, Marilyn, Stanley and Marie because I can't look at everyone at the same time. Everything that I say to you applies equally to Dr. Greene, Mogul Valley and to Julia, Dr. Greene's insurance representative and to Brian, Mogul Valley's insurance representative. Before I say anything at all, I want to tell you how sorry I am for the loss of your son,

Danny. Danny's death is a terrible, horrible tragedy and on a human scale, I cannot imagine the nightmare you have been through and the emptiness, sadness and loss you have suffered, are suffering and will suffer. I have two children myself and I know that there is no closure to such a loss. We are not here to provide closure or even to hint that there may be closure to this loss. You have had to live with your loss for almost 7 years and you will live with the loss for the rest of your lives. We cannot understand your loss and we haven't lived it. All that we can do today is deal with the lawsuit that is before the Superior Court. We can put closure on the lawsuit and in that way remove that worry from your list of anxieties. There's nothing we can do to bring Danny back or to diminish your pain. I'm truly sorry that you are here in these horrendous circumstances and I promise you that as mediator I will do everything that I can to help you to get this case settled so that you don't have to spend 15 days in front of a jury in 2012 fighting about responsibility for Danny's death.

This is called a mediation—which is a fancy name for a meeting. We're meeting to discuss this case because once a lawsuit is started, it goes to court if it's not settled. I hope that our discussion today leads to a settlement, but if it doesn't, at least we tried.

If I say something to you that you don't understand, please interrupt me and say "Frank I don't understand that". If you don't understand it, it's my fault and not your fault—as what we are trying to do today is not that complicated. If you don't understand it, then I haven't explained it properly. Similarly, if you don't understand what David or Julia or John or Brian say, ask them to repeat it and they'd be glad to do so.

I can tell you that Dr. Greene and someone from Mogul Valley aren't here today, not because they don't want to be here, or because they don't treat this case seriously. Our system is such that Dr. Greene has insurance and Julia is with Dr. Greene's insurance company. David is the lawyer for Dr. Greene and for her insurance company. Brian is here as a representative of Mogul Valley's insurance company. John is the lawyer for Mogul Valley and for its insurance company. I've worked with your lawyer, Richard before. I've also worked with David, Julia, John and Brian. They all have children, brothers and sisters. They are human beings just like you are with hopes, dreams and feelings just like your hopes, dreams and feelings. I'm sure that you are going to hear from David, Julia, John and Brian how sorry they are for your devastating loss and how they wish they could reverse the clock and bring Danny back—but they can't; no-one can. Remember Julia wasn't the person who sent Danny home from the hospital and Brian wasn't operating Mogul Valley on February 10, 2003. They are here to talk to you as human beings. Julia and Brian as parents haven't gone through what you've gone through, but they're here to listen and to attempt to bring an end to the lawsuit which will give you a measure of peace at least as far as the litigation is concerned. A family such as yours which has suffered the loss of a loved one, doesn't need a lawsuit to exacerbate the pain. We're here today to see if we can get rid of the lawsuit so that you can concentrate on the important things in life—your family.

Analysis

The concept of mediator neutrality or impartiality is one of the most basic tenets of mediation theory and practice. In Macfarlane's text *Rethinking Disputes*[8] Catherine Morris deals with mediator ethics in Chapter 12:

> Western dispute resolution practice tends to aspire to the ideal of objectivity, the notion that the model mediator is autonomously objective as in Rawls's concept of the 'veil of ignorance'. This ideal mediator has an objective sense of

8 Julie Macfarlane, *Rethinking Disputes*, (Toronto: Emond Montgomery, 1997).

> fairness and is unaffected by the context or the parties...[9]

Rifken, Millen and Cobb discuss neutrality and suggest that neutrality is comprised of two components:

> Drawing from the mediation literature and from our research data, we suggest that neutrality is traditionally understood as incorporating two qualities that a mediator ought to be able to employ. The first is impartiality. Most mediators equate neutrality with impartiality, which they explain as the ability to interact in the absence of feelings, values, or agendas in themselves.... Impartiality...refers to the ability of the mediator (interventionist) to maintain an unbiased relationship with the disputants. In other words, the mediator should handle the case without favoring or supporting one party for the sake of the group. Impartiality demands an unbiased approach to mediating.
>
> The second quality of neutrality is what we refer to as equidistance. Equidistance identifies the ability of the mediator to assist the disputants in expressing their "side" of the case. To ensure that information is disclosed, the mediator must sometimes temporarily align herself or himself with individual parties as they elaborate their positions. Thus the concept of equidistance refers to those practices by which mediators support or encourage the disclosure of the disputants. Equidistance works to the extent that the mediator can assist each person equally. In contrast to impartiality, where neutrality is understood as the ability to suspend judgment, equidistance is the active process by which partiality is used to create symmetry.[10]

In my submission, it is absolutely critical to the success of a child-death mediation for the mediator to establish some connection with the victim's family. Though undoubtedly human compassion, concern and empathy can be communicated by the mediator in the first caucus, my intuitive sense is that to treat the opening session in a clinical style and to defer this expression of humanity or empathy to the caucus setting, is to risk not making the connection at all. "To wait is too late" is an apt summary of this philosophy.

In addition, psychology and litigation experience tell us that what people like jurors hear first and what they hear last, they tend to retain. These are called the principles of primacy and recency and in my submission are highly relevant when dealing with emotionally charged issues. Because Danny's family members may forget some of what the mediator says, the mediator should canvass the important points first, and then again at the end. As Caldwell, Perrin, Gabriel and Gross have stated it in the context of Direct Examination:

> Two principles that aid memory and retention of information are the *frequency* with which a particular message is sent and the *uniqueness*

9 Catherine Morris, "The Trusted Mediator: Ethics and Interaction in Mediation", supra note 8 at page 329.

10 J. Rifkin, J. Millen and S. Cobb, "Toward a New Discourse for Mediation", (1991) 9 Mediation Quarterly at pages 152-153 (footnotes omitted).

of that message. Trial lawyers can use these principles by having a witness or witnesses repeat an essential fact or opinion in the case. Uniqueness can be developed by presenting the information in a novel way or by varying the format of the testimony, as through the use of demonstrative evidence and other visual devices that, in addition to increasing interest and attention, can expand the variety of senses required to encode the messages and thereby enhance recall.

The principles of *primacy* and *recency* are also critical in the retention of information. The primacy effect reveals that information presented first is more effectively recalled. Thus, for example, the expertise of the witness should be established first because it will color the jurors' receptivity to his or her testimony in a positive way. Or, if the advocate believes there will be an immediate negative reaction to a witness because of his or her appearance, it is best to bring out background information that will allow the jurors to identify favorably with the witness. If background information is tangential to the testimony, the advocate should begin by establishing the most important piece of information first, substantiating it second, and then repeating additional aspects of the important evidence. This same principle reveals that if a percipient witness is testifying to a chronology of events and the key event is in the middle of the chronology, it may be lost by the jury.

Recency, as the term suggests, holds that the last thing a person hears about a topic will be remembered best. Many advocates instinctively save a dramatic conclusion or key fact for the end of testimony because of the theatrical effect on the jurors. This instinct proves to have a sound basis in research.[11]

I believe it mandatory to the success of these wrongful child-death mediations that the defendants' lawyers and insurance representatives be included at the earliest opportunity in the humanization process. To fail to recognize that the victim's family may unconsciously demonize and dehumanize Mogul Valley and Dr. Greene is a fundamental error and puts the very success of the mediation at risk.

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Does this excerpt from my opening comments in joint session violate or undermine the concepts of neutrality, impartiality or equidistance? In my view it does not. The mediator's introduction (so far) has not talked about the factual matrix giving rise to Danny's death, nor has it discussed liability or damages as issues to be addressed at the mediation. The introductory remarks are designed to serve as a foundation upon which a settlement may be constructed. The introduction promotes mediator ethics and supports and empowers the parties to deal with each other as equals working on solving a joint problem—a sad problem for all, which will be handled elsewhere (in court) if it cannot be resolved at mediation.

11 H. Mitchell Caldwell, L. Timothy Perrin, Richard Gabriel and Sharon R. Gross, "Primacy, Recency, Ethos and Pathos: Integrating Principles of Communication into the Direct Examination", (2000-2001) 76 Notre Dame Law Review 423 at pages 437 and 438 (footnotes omitted).

3. THE MEDIATOR'S OPENING IN JOINT SESSION (PART TWO)

This case, like all other cases, will end up in court if we cannot get it settled. The decision to settle or to proceed is one for you Jim, Marilyn, Stanley and Marie and for Julia on behalf of Dr. Greene and Brian on behalf of Mogul Valley. The important people in the room today are you Jim and Marilyn and your kids Stanley and Marie, as well as Julia and Brian. You make the significant decisions. Your lawyers, Richard for you and your family, David for Julia, and John for Brian give advice, but the clients make the significant decisions. The least important person here today is me—I'm not a judge. Though I am a lawyer, I'm not here giving legal advice. I'm here to help you talk about this case—hopefully in a constructive fashion. The decision on whether to settle the case will not be made by the lawyers or by me. Today you have control over the process and decision making. If the case goes to court, you lose control over the process and over the decision making and you turn the decision over to a jury—6 people picked at random from the community. The jury will decide whether there is liability on the part of Mogul Valley or Dr. Greene for Danny's death, or whether they are both at fault or whether neither is at fault. The jury will also have to assess the damages in terms of money—because that is all our system can award victims of negligence. Whatever the jury does, you won't feel any better about Danny's death—because nothing will ever make you feel better about Danny's death.

The reason that everyone should work hard to get this case settled today is because if the case goes to court, the result is highly unpredictable. If we don't get it settled, then from your perspective—as Danny's family, Julia and Brian didn't offer enough money or from their perspectives, you wanted too much money. The case will then end up in court. The jury is not entitled to know anything about what we discussed today. Today's meeting is off the record. Therefore, the jury won't know about offers back and forth today. If you're offered $100,000.00 and you want $200,000.00, then the case won't settle. The jury could give you $250,000.00 or $50,000.00 or zero. This is entirely up to them. If you are offered $100,000.00 today and you turn it down, that's your prerogative, but when you go to court you are taking a big risk. You will either recover more than $100,000.00 (in which case in hindsight the defendants should've offered you more money today) or you will recover less than $100,000.00 (in which case in hindsight you should have taken the $100,000.00 that was offered today). If you get more than $100,000.00, then the defendants were wrong not to pay more today. If you recover less than $100,000.00 then you were wrong not to settle today. Fifty percent of litigation lawyers are wrong in 100% of the cases which go to court. If other professionals were wrong 50% of the time, they'd be out of business. If architects were wrong 50% of the time, buildings would fall down. If dentists were wrong 50% of the time, we'd all be without teeth—but litigation lawyers can be wrong 50% of the time and they thrive.

The order of the day is compromise. You as Danny's family take less than you want and the insurers pay more than they want. The reason for this is that no-one knows what the jury will do and compromise means that there won't be a trial. No-one has a crystal ball to see the future. If I had a crystal ball, I wouldn't be a mediator—I'd be buying lottery tickets. Because no-one can see the future, no-one knows how this case will turn out in court. If the case doesn't settle, then Richard thinks he'll win in court. Richard has never gone to court thinking he'll lose. Neither have David and John. No-one goes to court thinking they'll lose. That is like getting on an airplane knowing it's going to crash. People just don't do that type of thing. Well if the case doesn't settle, David and John think they'll win. If Richard is right, then David and John will be wrong. If David and John are right, Richard will be wrong. We're here to attempt to resolve this in a way which is not win-lose.

The way we are going to approach the job today is that Richard is going to speak first. He is going to talk not to John or to David but directly to Julia and to Brian, the decision makers. They are going to listen to what he says and they'll take notes. After your lawyer Richard speaks, I'd encourage you Jim, Marilyn, Stanley and Marie to speak directly to the decision makers, Julia and Brian. They're here to listen to you. Richard is not going to convince Julia and Brian that you're right. Today is not about right and wrong, but about risk assessment. What do Julia and Brian think will happen if this case goes to court to be decided by a jury? Julia and Brian are professional risk managers in addition to being parents. They make decisions not based on personalities but on what they think a jury will do. When Richard and you are finished talking, David and Julia will speak to you on behalf of Dr. Greene and John and Brian will speak to you on behalf of Mogul Valley. They will tell you why they feel that if the case goes to court, you may have problems recovering money for Danny's tragic, terrible death and how inflicting a legal disaster on you in addition to this personal tragedy will just exacerbate your pain—if that is even possible. Just as Richard will not convince David, Julia, John and Brian that you're right, they won't convince you that they're right. As I said, today is not about right and wrong but about risk assessment. Persuasion and convincing people of positions is for court. Today is not about persuasion but is about listening and trying to appreciate some of the nuances of the other side's case—just as a jury might.

Today is not about right and wrong, but about risk assessment...Today is not about persuasion but is about listening and trying to appreciate some of the nuances of the other side's case—just as a jury might.

Keep in mind that Richard, David, Julia, John and Brian each have 300 cases. That's why today is such an important opportunity for settlement—today we're working on 1 case—your case and we're here until we get it settled—all day if necessary. Today your lawyer gets to speak in a candid unfiltered way to Julia and to Brian, the decision makers. Today David and John get to speak to you not through Richard, your lawyer, but directly. Normally lawyers must speak to each other and it is against the law for a lawyer to speak directly to the other side when those on the opposite side are represented by a lawyer. Today that rule is suspended and Richard gets to speak directly to Julia and to Brian, just as David and John get to speak directly to you.

Finally, I want to talk to you about the vagaries of a jury trial. There will be 6 jurors empanelled—not dissimilar from 6 people in line at the local Tim Horton's. 150 people will receive a summons to attend court and they'll come to the courthouse and sit in a lounge for 2-3 days bored to tears. These 150 people will then be called into a courtroom. Everyone's name and occupation will be printed on a separate cardboard card. Richard will be in the courtroom in a black gown. So will David and John. A judge will be on the dais in a black gown with a red sash. A court clerk will be up in front and she will roll a tumbler with the 150 cards in it and pull out 6 cards. The six people whose names are on the cards will go from the back of the courtroom into the jury box. The lawyers will each have 4 challenges and as jurors are removed, others will join the panel. You will appreciate that jury selection is a happenstance process and the jury will be comprised of 6 laymen who don't want to be there, who are unpaid and who will do their best to attempt to do justice in this case. As I've said, the result cannot be predicted and the only thing that is certain is that with your intelligence Jim and yours Marilyn and Richard's intelligence and David's and Julia's and John's and Brian's, we are far better off trying to achieve a result today than turning this over to six strangers to figure out.

Just as Julia and Brian are professional risk-managers, so do you Jim and Marilyn manage risk in your everyday lives. If you get on an airplane you are taking a risk. Because the risk of a crash is so remote we all get on airplanes. Every once in awhile a plane crashes and 100 people die. We then get on airplanes again—a good risk and three

years later there's another crash. The risk of going to trial is a risk like many others; however today we can manage that risk and I hope we do manage it because there's nothing we can do to make you feel better about Danny's death and throwing these horrible circumstances into the laps of six strangers is not going to help anyone.

Analysis

This part of the mediator's opening is critically important as it signals to everyone that the parties are in control of the decision-making at the mediation and that if the case remains unresolved, then control is ceded to six strangers. It also introduces the concept of a fault based tort system and conveys to the Smiths what is well known to the three lawyers and to the two claims examiners, Julia and Brian—that if the case goes to court, it will be contested in an adversarial setting where the Smiths may very well lose.

As Stephen Mehta has said:

> At some point the party must come to terms that the legal system may not agree with them about the case. They have to come to terms with reality. At that time, the parties not only have to mourn the "loss of the case" as they saw it, but also have to mourn the underlying facts at the same time. Such a double blow is often very difficult to deal with and can create many problems in the mediation context.[12]

It is vital that the Smiths hear about the potential for an adverse litigation result from the mediator. It is "softer" and less challenging if it first comes from the mediator as opposed to the painful possibility of a loss in court being raised for the first time by David or by John. This discussion also tells the Smiths that no matter how little they may believe it, each of the defendants has a legal position and these legal positions may be accepted or vindicated at trial, notwithstanding the horror of Danny's death. By telling the Smiths about this, the mediator will also begin to reverse any possible perception on the part of David, Julia, John or Brian that by focussing on Danny's death, the mediator was not neutral, impartial or equidistant.

This part of the mediator's opening is also important because the mediator conveys to the Smiths that the insurance representatives make decisions based on extrinsic principles such as law and risk assessment and not on whether they like the Smiths, empathize with them or feel compassion for their loss. The mediator also conveys that there is no rush and that the two lawyers on the other side, David and John and the two claims examiners, Julia and Brian have set aside the whole day to work on the case. It is of real importance to the people on the opposite side of the table to deal with this case in a serious way—now! Finally, though this segment of the opening deals with law, the civil jury system and dueling positions, it ends with another attempt to recognize in a humane way, the enormity of the loss suffered by the Smiths.

4. THE PLAINTIFFS' LAWYER'S OPENING

Richard Brown is the first of the advocates to speak. He has a unique opportunity to set the tone for what follows. Richard's choices are stark. He can either employ the rhetoric and behaviour of conciliation or he can embrace the adversarial advocacy model.

12 Steven G. Mehta, "Mediation Matters", A Mediation and Negotiation Blog by Steve Mehta, SteveMehta.Wordpress.com/2009/06/01 at page 2 of 6.

It is to be noted that lawyers in court-connected mediation in Ontario exchange Mediation Memoranda or Statements of Issues in advance of the mediation. As such, the conciliation-adversarial decision is usually made well in advance of the actual mediation session.

Richard may receive David's memorandum on behalf of Dr. Greene before he submits his own. David's memorandum, if received first, may influence Richard's tone and content.

In my view, Richard should not squander the truly wonderful opportunity to be "statesmanlike" by adopting an aggressive adversarial position. This view holds regardless of whether David's written position is adversarial or co-operative.

Richard should at least be conversant with the relatively new Theory of Therapeutic Jurisprudence (TJ).

> TJ directly responds to the potential negative impact of the adversarial system. TJ proponents argue that lawyers should examine the emotional impact of the law.
>
> TJ explores the psychological ramifications of a legal solution for the client.
>
> Although lawyers review the legal impact and financial ramifications of any decision, TJ argues that a third set of factors, the emotional impact of the decision, should also be taken into account. A lawyer should attempt to create the most beneficial and emotionally satisfactory solution for a particular client's interests and unique circumstances. The use of legal rules and processes to provide emotionally satisfactory solutions is considered therapeutic. On the other hand, when legal rules and processes are nontherapeutic, they have a negative emotional impact on the client.[13]

As part of this sensitivity to emotions and their impact, Richard must be mindful of his forum. This is a mediation, not a jury trial:

> Consider a story an excellent plaintiff's lawyer told me. The lawyer's best friend was a physician who had been sued. The physician confided in his friend that a mistake had been made and that the matter was scheduled for mediation. The physician not only consented to settlement, but very much believed the family was entitled to compensation. His best friend advised the physician that mediation was an excellent way to resolve the dispute.
>
> At the mediation, the family's attorney made a hostile, threatening opening presentation and concluded by suggesting that the physician had "murdered" the deceased. The physician, who would have otherwise settled the dispute, was so offended that he declared the mediation to be over and left. Unfortunately, the case was tried and resulted in a verdict adverse to the physician.[14]

Richard knows that he has the moral high ground and he should also know that Julia (for Dr. Greene) and Brian (for Mogul Valley) are there to settle the case. Whatever Richard says should be painstakingly crafted to encourage and in fact to feed into Julia's and Brian's humanity.

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13 Andrea Kupfer Schneider, "The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative Dispute Resolution", (1999) Psychology, Public Policy and Law 1084 at pp. 1086-1087.

14 Eric Galton, "Mediation of Medical Negligence Claims", (1999-2000) 28 Capital University Law Review 321 at page 328.

It is unhelpful and therefore unwise for Richard to engage in a diatribe attesting to the validity of the Smiths' liability position either against Mogul Valley or against Dr. Greene. Richard knows that both claims are highly contentious. Richard should also know that he is outmatched in the expert witness contest both as against Mogul Valley and as against Dr. Greene. Regardless of whether Richard feels he is overmatched in the battle of the experts, Richard should be sufficiently insightful to realize that liability is not the strongest part of his case. Since the Ontario Court of Appeal[15] set the maximum award to a parent for death of a child at $100,000.00 and the maximum award for the death of a sibling at $25,000.00, damages aren't much of a contentious issue, either.

Richard must therefore find another well to tap into in order to forge a connection with the claims examiners, Julia and Brian (regardless of whether he can "connect" with the lawyers, David and John). As trite as it sounds, Richard should tap into the common humanity of us all and the wish that we all have at our cores to do the right thing.

In her watershed work *On Death and Dying*[16] the psychiatrist and thanatologist, Dr. Elisabeth Kübler-Ross formally sets out the five stages that the dying person must move through in order to have a "healthy" death. These stages are of course:

i. denial
ii. anger
iii. bargaining
iv. depression
v. acceptance

15 *To v Toronto Board of Education*, (2002) 55 O.R. (3d) 641.

16 Supra note 5.

In her subsequent book *On Grief and Grieving*, Dr. Kübler-Ross clarifies that the 5 stages do not only apply to the dying person but to the grieving family members as well:

> Denial in grief has been misinterpreted over the years. When the stage of denial was first introduced in *On Death and Dying* it focused on the person who was dying. In this book, *On Grief and Grieving*, the person who may be in denial is grieving the loss of a loved one. In a person who is dying, denial may look like disbelief. They may be going about life and denying that a terminal illness exists. For a person who has lost a loved one, however, the denial is more symbolic than literal.[17]

Richard knows about denial and he also knows about anger, bargaining, depression and acceptance. Even if he's not read Kübler-Ross, he knows intuitively that Jim and Marilyn are angry. As Kübler-Ross said:

> You may also be angry with yourself that you couldn't stop it from happening. Not that you had the power, but you had the will. The will to save a life is not the power to stop a death. But most of all you may be angry at this unexpected, undeserved, and unwanted situation in which you find yourself. Someone once shared, "I'm angry that I have to keep living in a world where I can't find her, call her, or see her. I can't find the person I loved or needed anywhere. She is not really where her body is now. The heavenly bodies elude me. The all-ness or one-ness of her spiritual existence escapes me. I am lost and full of rage".[18]

17 Elisabeth Kübler-Ross and David Kessler, *On Grief and Grieving*, (New York: Scribner, First Paperback Edition, 2007), page 8.

18 Ibid at p. 12.

Richard should also have some understanding that since Danny died almost 7 years ago, Danny's family has probably reached the acceptance stage of their grieving.

> Acceptance is often confused with the notion of being all right or okay with what has happened. This is not the case. Most people don't ever feel okay or all right about the loss of a loved one. This stage is about accepting the reality that our loved one is physically gone and recognizing that this new reality is the permanent reality. We will never like this reality or make it okay, but eventually we accept it. We learn to live with it. It is the new norm with which we must learn to live. This is where our final healing and adjustment can take a firm hold despite the fact that the healing often looks and feels like an unattainable state.[19]

As such, Richard Brown should do everything that he can to focus on Danny as a person and as an important member of his family. Richard must of course talk about liability in some form and the form is up to him. I believe that the ordering of Richard's presentation is highly significant and doesn't have to mirror the order of the written presentation in his mediation memorandum.

Richard should not over-sell Danny as a person or engage in maudlin histrionics. It is sufficient to engage Julia and Brian to talk about how Danny loved skiing, was a good student, wanted to be a veterinarian and was a companion to his widowed grandmother and a big brother to Marie, while emulating Stanley and following in his footsteps as a baseball and hockey player. These humanizing traits will forge a connection with the insurance representatives and will facilitate them in doing what they've come to do—settle the case.

Richard must then necessarily move to a discussion of liability. A brazen, boastful statement like "liability should not be in issue" or "our experts are better than your experts" is counterproductive and indeed is very harmful. The liability discussion need not be challenging and it need not be exhaustive. A statement like "Danny shouldn't have died as a result of a ruptured spleen 16 days after discharge from the children's hospital", coupled with a statement that "liability is contentious and may very well be decided in the plaintiffs' favour" ought to suffice with perhaps some fleeting references to the plaintiffs' expert reports. It is a mistake for Richard to be cocky and indeed this may add to the client's anguish:

> Plaintiff's counsel can add to their client's pain, when they bring them to a mediation with unrealistic expectations about the value of the case and with unrealistic expectations about the defendant's willingness, in the context of litigation, to accept responsibility or to fully acknowledge the loss.[20]

Julia and Brian I'd like to talk to you very briefly about the liability aspects of this sad case. I think you'd agree that in a perfect world or even in an imperfect but reasonably predictable world, Danny would not have died 16 days after discharge from one of the world's leading paediatric hospitals. Just over 3 weeks after falling at the ski hill and breaking his leg and damaging his spleen Danny was dead.

19 Ibid at pp. 24-25.

20 Joe Epstein, "Mediating Wrongful Death Cases", www.mediate.com/pfriendly.cfm?id=2095.

We now know how that happened. We can choose to embark on a three week jury trial to fight about whose fault all of this is or we can try to bring legal closure to an incident where there will never be real closure for Jim, Marilyn, Stanley and Marie. We can parade our expert witnesses and yours before six lay jurors and have them attempt to sort it out or we can attempt to arrive at some mutually satisfactory conclusion today. If we go to court there is litigation risk for all of us and the cost will be enormous to attempt to persuade the jury that each of us deserves to win. When there are expert witnesses on each side of an issue, the jury has the power, an unfettered power to award a victory to whoever it wants. Let us recognize the uncertainty of a jury verdict coupled with the certainty that if we all compromise today we can achieve a result which is reasonable and fair to all without embarking on a lengthy polarizing trial which will serve no-one's emotional or economic interests.

When Richard has completed his presentation, Jim and Marilyn have the choice to speak. In an ideal paradigm, I believe that it would be beneficial for them to speak from the heart and to thank the insurance representatives in a sincere and meaningful way for attending the mediation and for attempting to bring some finality to the pain of litigation. Of course, in reality, they may not think to make this type of gesture; they may not have been advised to make this type of gesture; or they may simply not be capable of it. Of all the parties in attendance, the expectations should lie most lightly on the family of the deceased child.

5. THE DEFENDANT (DR. GREENE'S) LAWYER'S OPENING

David Jones, acting for Dr. Greene and John O'Byrne acting for Mogul Valley must now execute their respective game plans. The most obvious question is whether they should adopt a conciliatory or an adversarial approach. I submit that regardless of what Richard has done in his opening, David and John ought to be compassionate, caring and conciliatory. David's client and John's client are there to settle the case and to settle it fairly. The mediation is not the place to decide on the desirability of a settlement. A settlement is desirable from the defence perspective or presumably there would be no mediation. How then to move towards a settlement in a constructive fashion?

David Jones acting as Dr. Greene's lawyer should express a profound apology[21] and tell the Smiths that Danny's death is horrific and appalling and is the last thing that Dr. Greene, herself the mother of three children, wanted. David should also tell the Smiths that he, as a father cannot fathom their pain and he should tell them that he and Julia Beatty are here to settle the case in a fair way given the vagaries of our legal system.

It is hardly coincidental that pain is a recurring theme in mediation literature. As Kolb states in her profile of Patrick Davis, a special education dispute mediator:

> Pain, in fact, is a pervasive theme. I had considered various topics I might discuss in this profile, among them issues of concern to professional observers, promoters, and critics of mediation. For example, I had intended to write about the mediator's efforts to balance unequal power, eschew or use authority, hedge or confront issues of legal rights. I ran the transcripts of several mediation sessions

21 There has been much academic discussion on the effect of apology on litigation. Though I am not going to review this literature, it is worth noting that there is support for the proposition that apology keeps lawsuits from being filed at all and leads to lower damage settlements when lawsuits are commenced. See Lee Taft supra note 4 at page 602 and "On Apology" by Dean Robert Ward (2006) 1 S. New England Roundtable Symp. L. J. 166.

> through a computer program that counts words, to identify the places where parties made claims of right; arguments about law, rule or statute; threats to turn to litigation or courts; claims of authority and expertise. I found that there were few references to law, few claims of right or obligation or related words. The most frequently used word, other than prepositions and articles, was *pain.*[22]

As part of his very insightful article, Galton discusses how a defense lawyer's insensitivity can derail a mediation:

> A defense lawyer, in a case I mediated, made a similar mistake, which we were fortunately able after many hours to overcome. The defense lawyer, during his opening presentation, accused a mother of such terrible prenatal care that it was like "putting a bullet to your unborn child's head". While the mother's prenatal care was in fact far from perfect, the mother reacted so poorly to the defense lawyer's remark that she almost refused to continue with the mediation.
>
> My point is that the lawyer's role at mediation, especially during the opening presentation, is very different than the lawyer's role at trial. An attack on a physician's competency usually dooms the mediation to failure. Personal attacks on the motivations or behavior of the claimants have a similar effect.[23]

22 Deborah M. Kolb and Associates, "When Talk Works", (San Francisco: Jossey Bass, 2001) at p. 101.

23 Supra note 14 at page 329.

We are here to settle this case in a way which is fair to you and fair to Dr. Greene and to Mogul Valley. Though we cannot feel your pain, we know that the loss of a child is absolutely horrible and resonates forever with you as family members. I have children and so does Dr. Greene. Neither of us would wish a death such as Danny's on anyone. You have suffered tremendously in the last 7 years and there will be a lot of pain and anguish ahead. What we would like to do today is to bring the suffering attached to this lawsuit to an end so that the lawsuit is over and done with. You can then devote your time, energy and emotions to something more satisfying than this lawsuit—because this lawsuit is not satisfying for anyone. A lawsuit is a very crude instrument to right wrongs and to fix injustice. We have a highly unpredictable legal system which is really not a justice system in any true sense of the word.

Danny was and will always be a fabulous child and a crucial part of your lives. His death doesn't change that and a jury trial regardless of the outcome is not going to change that either. All four of us on this side of the table are here to try to settle this lawsuit. We are here to tell you, although you hardly need to hear it from us, that it is clear that Danny was a truly fantastic boy, a joy to you, to his grandparents and to his many friends. His death is a real tragedy, an unmitigated disaster for you and we sincerely and honestly apologize[24] *to you for all you've gone through and for the pain you will go through in the future.*

24 The literature pertaining to apology in the specific context of the mediation of medical malpractice cases is surprisingly rich. See for example Ashley Davenport, "Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases" (2006) 6 Pepperdine Dispute Resolution Law Journal 81, Ann Kellett, "Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients" (1987) Mo. Journal of Dispute Resolution 111, Lee Taft, "Apology and Medical Mistake: Opportunity or Foil?" (2005) 14 Annals of Health Law 55, Peter H. Rehm and Denise Beatty, "Legal Consequences of Apologizing" (1996) Journal of Dispute Resolution 115.

The general literature on apology is incredibly developed and highly diverse—see for example Jennifer K. Robbennolt, "Apologies and Legal Settlement: An Empirical Examination" (2003-2004) 102 Michigan Law Review 460, Jonathan R. Cohen, "Advising Clients to Apologize" (1999) 72 S. Cal. L. Rev. 1009, Deborah L. Levi, "The Role of Apology in Mediation" (1997) 72 New York University Law Review 1165, Allfred Allan, "Apology in Civil Law: A Psycho-legal Perspective" (2007) 14 Psychiatry, Psychology and Law 5.

Our system of compensation is a fault-based system. Our courts award compensation to victims when someone is at fault. In the absence of fault, no compensation is awarded. The obligation to prove fault is on the claimants—in this case on you.

If this case goes to trial, which we sincerely would like to avoid, your expert will testify that Dr. Greene was negligent and our two experts will testify that Dr. Greene wasn't negligent. The 6 jurors will have to decide this issue and regardless of what you think, or Richard thinks, or I think, or Julia thinks, no-one can predict what these 6 jurors will think or do. The jurors will have sympathy for you and they will empathize with all you've been through. There is no question about that and if I suggested otherwise, you'd think I am a fool or worse. Sympathy is not the issue. The judge will instruct the jury not to decide this case based on sympathy or empathy but rather on the evidence and here the evidence pertaining to Dr. Greene is highly contentious. I get no satisfaction from telling you that with our two liability experts, it is open to the jury to reject your claim and to dismiss this case. Having said that, we are here to attempt to settle this case, taking everything the mediator, your lawyer Richard, you and I have said today into account. We have listened carefully and thoughtfully to what you have said, to what the mediator has said and to what Richard has said. When I am finished you will hear from my client Julia and then from John and from his client Brian. I expect that they, like I, will express their most profound regret and indeed horror at what happened to Danny and to your family. Nothing that I have said is meant to detract from that in any way. In fact, without being patronizing, I can't think of a family nicer than yours. We're here to settle this case in a fair way taking everything into consideration, including the state of our law. We will work hard with you and with Richard and we will stay for as long as it takes. We on this side of the table would like to thank you for coming and for listening. We know that it has not been easy to re-live this nightmare yet again this morning.

Analysis

The defendants and their representatives must intuitively know that it is critical to the success of the mediation that a connection be forged with the Smith family members and that nothing be done to re-victimize the claimants.

Seven years after Danny's death, the Smiths have probably reached what Kübler-Ross calls the acceptance stage of coping with the death. An overarching objective of the mediation from the defence perspective ought to be to refrain from re-traumatizing the Smiths. To fail to recognize that every stage in the litigation process has the potential to throw the family members back to the earlier stages of denial, anger, bargaining and depression is a serious miscalculation on the part of defence counsel and insurer. This failure to connect means that an important opportunity for "transformation" has been lost and probably irretrievably lost.

Kübler-Ross talks about sitting down with dying patients and having them share their experiences with her and with her medical students. Though there is an obvious difference between talking to a dying person, and a defendant and her lawyer listening to and communicating with bereaved family members at a mediation, there are some useful parallels:

> If we ask ourselves what is so helpful or so meaningful that such a high percentage of terminally ill patients are willing to share this experience with us, we have to look at the answers they give when we ask them for the reasons of their acceptance. Many patients feel utterly hopeless, useless, and unable to find any meaning in their existence at this stage. They

> wait for doctors' rounds, for an x-ray perhaps, for the nurse who brings the medication, and the days and nights seem monotonous and endless. Then, into this dragging monotony a visitor comes who stirs them up, who is curious as a human being, who wonders about their reactions, their strengths, their hopes and frustrations. Someone actually pulls a chair up and sits down. Someone actually listens and does not hurry by. Someone does not talk in euphemisms but concretely, in straightforward, simple language about the very things that are uppermost in their mind—pushed down occasionally but always coming up again.[25]

Kübler-Ross then remarks that "This shows how meaningful such relationships can become and how little expressions of care can become the most important communications".[26]

If this is the case between a psychiatrist and a dying patient, similar regard for and attention to the bereaved family members in a mediation setting bodes well for a negotiated settlement.

In *The Promise of Mediation*"[27] Bush and Folger posit that transformative mediation is "a unique model of mediation, not simply a stylistic variation of other approaches to practice".[28] This is discussed further in "The Purple House Mediation" video.

25 Supra note 5 *On Death and Dying* at p.260.

26 Ibid at p. 261.

27 Supra note 7.

28 Supra note 7 at p.131 and Robert A. Baruch Bush and Sally Ganong Pope, *The "Purple" House Conversations*, Institute for the Study of Conflict Transformation Inc. at Hofstra University School of Law (2003), Monograph accompanying video at p.1 and video.

Though Bush and Folger articulate a party driven approach, with the parties generating the agenda and the discussion (the parties are in charge of the process and the content) Bush and Folger hold no monopoly on the use of the words transformation or transformative in a mediation context.

In a non "Bush-Folger" sense, the recognition by the defendants' representatives at the mediation of the reality of the Smiths' loss, may at least send the Smiths home feeling that their concerns and emotions have been considered in a meaningful and non-patronizing way. In this limited sense, the mediation holds the promise of transformation—as the family members will go home feeling good at least about the mediation component of the lawsuit experience. As Kübler-Ross has said:

> People often think of the stages as lasting weeks or months. They forget that the stages are responses to feelings that can last for minutes or hours as we flip in and out of one and then the other. We do not enter and leave each individual stage in a linear fashion. We may feel one, then another, and back again to the first one.[29]

It is thus readily apparent that a thinking defence lawyer like David Jones and a compassionate insurance examiner like Julia Beatty must understand that much of the emotion at the mediation has little to do with the mediation or for that matter with the litigation. The Smiths loss of Danny is at the heart of the mediation and though the mediation is ostensibly to talk about money, in reality much more is going on. The mediation itself is a microcosm of the skiing accident and of the subsequent medical misadventure. The Smiths are now being exposed yet again to the pain of their loss and to the isolation of being without Danny, which feels like the ultimate punishment.

29 Supra note 17 at p. 18.

As Rosenblatt has said:

> A law suit may be connected to a litigant's self in important ways. To prosecute a suit may be an expression of one's loyalty to the deceased or an expression of one's feeling of loss. In that sense, one may be strongly invested in a suit as a symbol of the value of the relationship ended by the event leading to the death. The end of the suit, by legal decision or by out-of-court settlement, may be an end of the symbolizing of loss and as such may be disorganizing and may set off a new grieving process. One may feel let down, disloyal, in need of finding some other way to express one's feeling of loss. And at that time, when other family members and friends may think that finally the litigant can end grieving, the litigant may be feeling new and intense pain.[30]

Kübler-Ross's analysis is also helpful. The Smiths may view the litigation as a matter of ordering or structuring their lives. They may not want to surrender the litigation by way of a settlement, as in a way this seems like a further loss of Danny—a further loss of control:

> Control covers painful feelings such as sadness, hurt and anger. Many of us would prefer to fight it out rather than feel grief, loss, and seemingly inconsolable pain.
>
> But control feels empty and harsh as it covers up the more vulnerable sensations, underneath. Control gives the illusion of safety and helps us think we are holding everything together, but an illusion is all it is. And breaking it is a daunting task. In the movie Broadcast News, Holly Hunter played a very controlling news producer. In one scene she is confronted about her controlling behaviour by her boss, who says sarcastically, "It must be great to always be right". Her unexpected answer "No it's hell".[31]

The ability on the part of the defence lawyers, David Jones and John O'Byrne and on the part of the insurance examiners, Julia Beatty and Brian Mansfield to relate to and identify with these realities will either transform the process into one of co-operation, with a negotiated settlement as a possibility, or will doom the process to failure. How then to maximize the prognosis for success at mediation?

The most obvious answer is for the defence lawyers and their insurance examiner clients to have some awareness of the literature on death, dying, grief and grieving. In addition, there must be an advertent, conscious focus on the proposition that the Smiths will have gone through the 5 stages of grief and they will likely be cycling through them again at the mediation. This reality poses a threat to the process but also presents opportunity to claims examiners and to their lawyers—opportunity borne from knowledge of the stages of grief and how they can be accessed to benefit everyone.

It is unlikely that if the Smiths are treated with dignity, respect, compassion and sensitivity that they will reject these human feelings and opt instead for a trial—which is by definition adversarial and bereft of the very ingredients that make mediation a hopeful and useful process. An understanding of the main theories in the Kübler-Ross body of work and other related professional literature is an essential arrow in the quivers of the defence lawyer and the adjuster, and should never be underestimated as an essential tool to make "talk work".

30 Paul C. Rosenblatt, "Law and Human Behaviour" (1983) Vol. 7, No. 4, 351 at page 354.

31 Supra note 17 at p. 95.

6. CONCLUSION

Now that the joint session is over, the mediation will proceed by way of caucuses. The Smiths will be placed in one room. David Jones, Julia Beatty, John O'Byrne and Brian Mansfield at least at the beginning, will be placed together in a separate room.

I contend that traditional positional bargaining can undermine all of the hard work that has been invested in the mediation. I suggest that positional bargaining on the part of the defence may indeed re-cycle the plaintiff through the stages of denial, anger, bargaining and depression. This is a particular problem as it serves to undermine everything that has taken place up to that point and may render the mediation unsalvageable. To reverse all of the gains made in joint session by implementing unsound negotiating tactics is ill advised. This applies equally to Richard Brown and to his negotiation strategy on behalf of Jim, Marilyn, Stanley and Marie.

If Richard Brown has connected with Julia Beatty and with Brian Mansfield in joint session, then to ask for $250,000.00 for each of Jim and Marilyn is foolhardy; particularly since Richard knows that when making such a demand, he must consider the absolute certainty that he could lose the case at trial as against both defendants. This consideration is known as "litigation risk". If the case for each parent at its highest is worth $135,000.00 including prejudgment interest, and if Marie's case at its highest is worth $35,000.00 including prejudgment interest[32], then to demand $250,000.00 for each of Jim and Marilyn and $35,000.00 for Marie, leads to an exceptionally poor settlement prognosis.

Similarly, for David Jones and for John O'Byrne to offer Jim and Marilyn $10,000.00 each, while offering $5,000.00 to Marie, is a very unsound tactic.

In my submission, the negotiations should go no more than 3 rounds and each side should be principled in its numbers. Neither side should rise to perceived provocation by the other side.

This is the time which will define the mediation; the make or break point. To risk dismantling all that has been arduously constructed, is to almost certainly march the lawsuit to the courtroom.

To risk dismantling all that has been arduously constructed, is to almost certainly march the lawsuit to the courtroom.

Richard Brown, David Jones and John O'Byrne should view their settlement offers as the "negotiation equivalent" of in-court cross-examinations of critical witnesses. To treat the formulation of offers in this fashion, highlights the importance of planning the offers. Appropriate planning will ensure that the mediation doesn't founder or worse, because of the implementation of bad spur-of-the-moment strategy.

As the negotiations proceed to round 3, the parties move closer to the edge of the cliff. To end the mediation with no settlement in the highly charged emotional atmosphere of child death litigation, is truly unfortunate.

When a child has died, the parents have obviously lost control. To lose control yet again—to fail to save the mediation, is a psychologically damaging conclusion to a process that was intended to be constructive, collusive and sustaining.

32 Supra note 15.

To fail to achieve a settlement bodes extremely poorly for Richard Brown, David Jones and John O'Byrne and for the Smiths, Dr. Greene, Mogul Valley, Julia Beatty and Brian Mansfield. This will lead inexorably to a highly contentious and extremely adversarial trial.

It is trite but true that Richard Brown, David Jones and John O'Byrne should consider the possible failure of the mediation when formulating their in-mediation settlement offers. Backing away from the abyss, shows intelligence, good judgment and common sense.

As the well known Boston mediator, Lawrence Susskind, has so eloquently said:

> The mediation process is the epitome of what I think democracy is really supposed to be like. It's not that people are no longer concerned about what they need. It's that they now realize that the only way to meet their needs is to respond to what others need as well, and therefore to come up with something they can do together that meets their needs. And this doesn't happen for altruistic reasons. The "we" here is special. This "we" can help each of us get what each of us wants and needs. There's no loss of "I", but there is recognition of others, of differences.[33]

In the year 2009, we are obviously far removed in time and in sophistication from Lex Talionis. We must ensure for the humanity of us all and in the memory of Danny Smith that we take no steps backward towards Biblical times.

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33 Supra note 6 at pages 352-353.

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About the Author

Frank Gomberg

BA (McGill), JD (Osgoode), LLM (Osgoode), of the Bar of Ontario

Frank Gomberg was called to the Ontario Bar in 1979 and for 20 years acted principally for plaintiffs in wrongful death and personal injury claims. He represented families at a number of landmark Coroners Inquests, including the inquests into the 1995 TTC subway crash and the 1998 in-hospital death of Lisa Shore.

Mr. Gomberg was designated a Specialist in Civil Litigation by the Law Society of Upper Canada in January 1990. He resigned as a specialist in 2005 given his evolving practice to full-time mediator. He now spends all of his professional time mediating civil cases pending in the Ontario Superior Court of Justice. He has mediated over 5,200 such claims since he began mediating in 1995.

Mr. Gomberg is a graduate of the Harvard Mediation Workshop (1995) and of the Advanced Mediation Workshop (1996). He believes in the transformative power of apology as an element in mediated settlements. He has written a major research paper entitled "*Apology for the Unexpected Death of a Child in a Healthcare Facility: A Prescription for Improvement*".

Mr. Gomberg has taught Trial Advocacy for the former Ontario Centre for Advocacy Training (OCAT), The Advocates' Society, to law students at Osgoode Hall Law School and at Osgoode's annual Intensive Trial Advocacy Workshop (ITAW). He has lectured and written extensively on personal injury, mediation, negotiation and related topics. He has chaired or co-chaired numerous Advocates' Society, Law Society and Ontario Trial Lawyers Association programs.

He has taught for the Toronto Police Service and has been on many panel discussions on damages; settlement of civil cases at mediation; ethical considerations at mediation; strategies for success at mediation and related topics.

Mr. Gomberg is an avid downhill skier. He lives in Toronto, though he is a Montrealer at heart.

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