

Insurance & Personal Injury

Mediation for Personal Injuries Cases in Hong Kong

Introduction

Going to trial and asking the Judge to adjudicate the case is usually an expensive and time-consuming tool to seek justice. It also causes the litigating parties a lot of stress. The Hong Kong Courts have encouraged alternative ways of dispute resolution that aims to minimize the legal cost by avoiding the need to go to trial.

Alternative Dispute Resolution (“**ADR**”) allows the disagreeing parties to come to an agreement in a more amicable way without going through lengthy litigation. One of the common forms of ADR is mediation. Recently, there have been more people opting for these out-of-court resolutions especially in the context of personal injuries.

What is mediation?

Mediation requires the consent of both parties. It provides a forum in which parties can resolve their disputes with the help of a trained and impartial third party, the mediator. The nomination of the mediator as well as the time and location to conduct the mediation will be decided upon the agreement of both parties.

Mediation depends very much upon the commitment of the parties to solve their own problems and the mediator never imposes a decision but keep both parties talking in order to reach an agreement. The mediator also does not decide who is right or wrong and the decision-making power rest in the hands of the participating parties. As such, any involved parties could choose to terminate the mediation at any time during the process.

While the mediation process is entirely voluntary, the Court has the power to encourage and assist the parties to use an ADR to facilitate settlement of disputes if the Court considers appropriate. The parties along with their legal representatives have the duty of assisting the Court in exercising such power. Practice Direction 18.1 issued by the Courts covering personal injury cases stipulates that trial in personal injury disputes should be regarded as the last resort, after ADR such as mediation or negotiation has failed to achieve a resolution of the disputes.

Commencement and the process of personal injuries mediation

Parties to the disputes can explore settlement by engaging in settlement negotiations by way of without prejudice correspondence or by any other manner agreed by the parties. If it does not lead to an agreement, the parties can proceed to mediate.

Mediation session usually begins with a joint session where the mediator would explain the whole mediation procedures together with some rules throughout the mediation. During the joint session, all the involved parties would have chance to state their point of views and express their concerns in turn. If no consensus could be reached during the Joint Session, private sessions will be held by the mediator with each involved party individually. Matters discussed during private sessions will be kept in strict confidence and will not be disclosed to any other parties unless with consent. The mediator's job is not to decide for the parties, but to assist them to understand the strengths and weaknesses of their own cases and to facilitate them to reach a settlement agreement.

Implications of failing to reach an agreement

If settlement agreement has been reached, the agreed terms will be reduced into a written agreement which will become a legally binding document and will then be enforceable under the law of contract. However, if the parties could not reach an agreement during the mediation, they may proceed to other forms of ADR or bring the case to Court.

Although the mediation process is entirely voluntary, the parties should be advised as to the cost implication if they are unwilling to attempt mediation. In Court proceedings the court takes into account all relevant circumstances in awarding legal costs. The Court may look at whether a party has unreasonably refused to take part in the mediation and may make an enhanced order if the Court finds the refusal to attempt unreasonable.

Both parties must bear in mind that all discussions during a mediation session is on a privileged and without prejudice basis, which means that everything discussed during the mediation session cannot be used as evidence in future legal proceedings. For example, if during the mediation the defendant was willing to pay \$1,000,000 for damages but no agreement could be reached at the end of the mediation, the Plaintiff cannot submit to the court that the Defendant was prepared to pay such sum and ask the court to award the damages accordingly.

Conclusion

If a deadlock is reached during the negotiation for settlement in the personal injury claim, mediation can be considered as a way to break the stalemate. Mediation also allows the parties to sit in the same room in a less adversarial setting, and puts a human face on a

claim before it develops into more contentious proceedings in court. It may be a good chance for both sides to learn about the other side's case and allow both sides to be more sympathetic.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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