

The Goliath Factor

And its application to Mediation

by Frank Gomborg



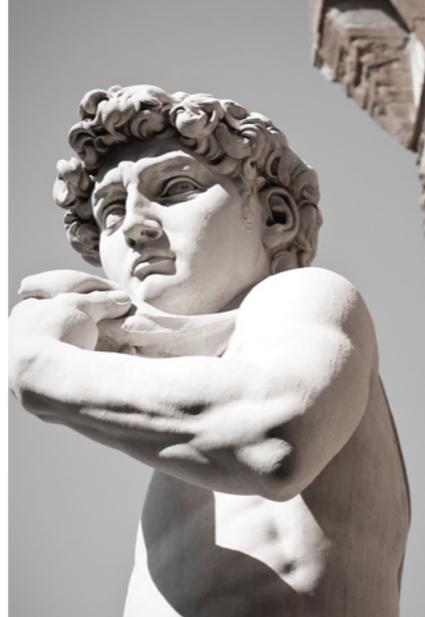
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1. INTRODUCTION

The David and Goliath story is told in the Biblical First Book of Samuel. Goliath, the Philistine, came to battle with a brass helmet; a coat of mail; shin armour; a javelin and a shield carried by an associate. David found his equipment (helmet, coat of mail and sword as supplied by Saul) to be too cumbersome; so he ditched them. He confronted Goliath with an arsenal of five smooth stones he'd plucked from a nearby brook; and with his simple slingshot and walking stick. David launched the first stone and it struck Goliath right in the one unprotected spot on his forehead. Goliath tumbled to the ground. David grabbed Goliath's sword, stabbed him to death and then beheaded him.

It is to be noted that I've never seen this at mediation. David's shot must have been the luckiest, unlikeliest shot ever taken. The archetypal "one in a million", "Hail Mary", "nothing to lose", "snatching victory from the jaws of defeat" miracle.

The question is whether this type of thing happens in the real life, real-time context of mediation; or whether this phenomenon is an outlier, more to be recognized than to be counted on? I submit that at least in the context of mediations between insureds and insurers, or between plaintiffs and insured defendants, unlike the way it turned out in Samuel I, Goliath has a distinct advantage and will succeed most of the time.



The more interesting question is for mediation Davids to determine the value of being Goliath; and whether David can turn some of his own attributes into ammunition which serves to balance what would otherwise seem to be a very one-sided fight. In other words, can David threaten Goliath with something that makes Goliath pause before the fight starts?

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I posit, that once the fight starts (or the case goes to Court), Goliath will "win" most of the time. However; the win may be at great cost to Goliath, a cost David should exploit in negotiating a mediated settlement.

II HOW DOES ONE "VALUE THE VALUE" OF BEING GOLIATH?

In the context of personal injury litigation, it is usually extremely difficult to precisely assess the value of a plaintiff's claim. The plaintiff will naturally evaluate the case at a much higher level than will the defendant. There are almost invariably numerous heads of damages such as general damages, special damages, past and future wage losses, Family Law Act claims, housekeeping claims and claims for future care. It is not at all unusual for the plaintiff and the defendant to be hundreds of thousands of dollars apart in their respective damages assessments. There is also liability to consider. The defendant may legitimately assert a liability defence which the plaintiff may legitimately reject. If at the end of the mediation the plaintiff's damages number is \$1.5 million and his discount for liability is 20%, his reduced number is \$1.2 million. If at the end of the mediation, the defendant's damages number is \$900,000.00 and his discount for liability is 50%, his reduced damages number is \$450,000.00.

Though there is a chasm between the plaintiff's \$1.2 million and the defendant's \$450,000.00, it is difficult to determine

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whether any part of this gap is attributable to the accident victim being "small" and the insurer being "big". In fact, it is rare to have an example where the Goliath factor (the negotiating advantage of being big) can be quantified. I have such an example. I propose to discuss it and to then draw some conclusions from this example.

III A DAVID AND GOLIATH MEDIATION

Jane Keele was 63 years old. She was employed as a human resources manager for a petroleum company. She was admitted to hospital on February 14 to have a laparoscopic gallbladder removal. After the laparoscopic cholecystectomy, she suffered severe belly pain. On February 17 she collapsed at home. An ambulance was called. Jane was taken to hospital where she died in the early hours of February 18. She died of peritonitis. The peritonitis was caused as a result of a cut in her bile duct suffered during her gallbladder removal surgery. Jane had a \$1 million accidental death insurance policy.

The issue in litigation was whether the peritonitis caused by the nicking of Jane's bile duct was an "accident". If it was, then \$1

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million was payable by the insurer to Mr. Keele, the beneficiary. If not, then nothing was payable. This all or nothing case is perfect for determining the value of being

Goliath. The question is what is the law to be applied to the \$1 million in damages? Let's turn to that.

IV THE LAW

In *Wang v. Metropolitan Life*,¹ Stacey Chiu died after undergoing an elective caesarian section. She had suffered an amniotic fluid embolism post caesarian section. The question for the Court was whether this death was accidental. The motions court judge, Sachs J. concluded that the death was accidental. The Ontario Court of Appeal, in a 2:1 decision allowed the appeal and dismissed the action, finding for the insurer. This death was not accidental and the policy proceeds were not payable.

Fifteen months later (and quite co-incidentally) Sachs J. had to reconsider the very issue of what constitutes an accident, this time in the context of a claim on an insurance policy for accidental injury.

Mr. Kolbuc was bitten by a mosquito which transmitted West Nile virus to him. He was rendered paraplegic. The question was whether his paraplegia was a bodily injury caused by an accident. Sachs J. this time concluded that the West Nile infection causing paraplegia was not accidental. A differently constituted Ontario Court of Appeal in a brief 6 paragraph endorsement unanimously allowed the appeal and concluded that this injury was accidental and the policy proceeds were payable.²

It is readily apparent that these fact matrices pose confounding difficulties for plaintiffs and insurers. Lawyers are supposed to be able to give clients prospective reliable advice. Do certain facts give rise to a winning case for the plaintiff, who claims insurance proceeds payable upon a finding of accident; or is the case a winner for the insurer, who asserts that the injury or death

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¹ (2004) 72 O.R. (3d) 161; leave to appeal denied by the Supreme Court of Canada on April 21, 2005.

² (2007) 85 O.R. (3d) 652.

was not accidental? The latest word from the Ontario Court of Appeal is that death arising from an amniotic fluid embolism is not accidental but West Nile virus caused by a mosquito bite is accidental. How about our Keele gallbladder case described in section III above?

My thesis is that most litigation lawyers on both sides of the plaintiff/insurer divide would see the Keele case as a 50/50 case. If we assume for discussion purposes that Keele is a 50/50 case, then it ought to be settled for \$500,000.00 in damages. If the insurer is maxed out at a number which is less than \$500,000.00, then arguably, the difference between its highest number and \$500,000.00 constitutes the Goliath factor on the unique set of facts in Keele.

V THE MEDIATED RESULT

The Keele case settled at mediation for damages of \$375,000.00. As posited, it ought to have settled for \$500,000.00 given the litigation risk. The \$125,000.00 reduction from \$500,000.00 (the estimated settlement value) to \$375,000.00 (the actual settlement) is the Goliath factor in the Keele case. The Goliath factor in Keele was 25% ($\$125,000.00/\$500,000.00$), a very significant reduction.

VI HOW DOES A NEGOTIATOR BLUNT THE GOLIATH FACTOR?

In order to at least notionally counteract the Goliath factor, it is most obviously necessary to first recognize its existence. As postulated above, I say that the Goliath factor is omnipresent and must be considered in every single mediation. Indeed, the Goliath factor may even transform the apparently weak side into the strong side and vice-versa. In other words, (though it may be somewhat counter-intuitive) Goliath may really be David and David may really be Goliath. Thus for reasons which transcend

issues of liability and damages, a band-aid in a Harvey A. W. McWendy's hamburger may transform Popeye's confrere Wimpy into Goliath and these facts may transform the Harvey A. W. McWendy corporation into David. Though the hamburger chain has tremendous monetary and litigation resources and can easily withstand a litigation loss from a financial perspective, such may not be the case from a public relations, marketing or good corporate citizen perspective. Consequently, Wimpy's lawyer is in a very good negotiating position and she must recognize this. Contrariwise, the Harvey A. W. McWendy's corporation has some potential negotiation weaknesses which may not at first blush be apparent. Adverse publicity and loss of confidence in burger quality control are chief among these concerns. In this particular set of circumstances, the Goliath factor may be completely neutralized or may indeed tilt in David's favour.

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VII CONCLUSION

I suggest that in virtually every insurance mediation, there is apparent disparity in the "ability to withstand a loss" between the plaintiff, who is perceived to be weaker, and the defendant (or the defendant's insurer) who/which is perceived to be stronger. This disparity is usually one of the components which adept negotiators consider when they analyze litigation risk.

A good negotiator at mediation will consider the Goliath factor and will be prepared to deal with it in an informed and constructive way. For reasons discussed above, the Goliath factor may be extremely large and may compel a plaintiff to accept far less than he "should" settle for in a case that poses even a 50% risk to the defendant.

Plaintiffs' lawyers should be sensitive to this Goliath factor and to ways in which to neutralize or reduce its application. By doing so, the plaintiff's lawyer may be able to mitigate or eliminate the application of the Goliath factor and in this way obtain a mediated result which is more reflective of actual litigation "fallout" and less reflective of the reality that in the real, non-Biblical, litigation world, Goliath will "win" almost every time!

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About the Author

Frank Gomberg

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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 3,700 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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