

Dutton Brock LLP



Due to CASL (anti-spam legislation), this is the last E-Counsel that will be mass emailed. You can find this edition and all future E-Counsels at our website, www.duttonbrock.com. We publish quarterly so look for it in early July.

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E-Counsel Quotes

For the lawyers:

We were not born to sue, but to command.
- William Shakespeare

For the baseball fan:

The first principle of contract negotiation is don't remind them of what you did in the past; tell them what you're going to do in the future. - Stan Musial

WHAT IF PERSONAL INJURY CLAIMS WERE NEGOTIATED BASEBALL STYLE

In major league baseball there is a defined market and signing period, which opened on November 8, where teams can negotiate with free agents. Usually it creates a "feeding frenzy" where teams desperate to appease their fan base, overpay for the top players available.

This past off-season, however, experienced something new. The market for power hitters, once the most in demand position players, entered a vacuum loud enough that you could hear the air being sucked out of not only the fan base, but also the typically talkative Joey Bats, who went into stealth mode until he eventually resigned with the Jays.

This got Elie and I thinking, what if we could negotiate in civil claims the way they do in major league sports. We put on our Blue Jays team wear and asked the \$80 million dollar question: "Could a personal injury claim follow a similar path as we saw in baseball free agency?"

Of course, baseball, like other major sports, has an extended but not limitless number of free agents each year. The Blue Jays did sign Jose Bautista, Kendrys Morales, and Steve Pearce. There is an adjunct lesson that could be learned from Bautista's re-signing in terms of waiting until the end of the day to make serious settlement proposals does not always work in the Plaintiff's favour.

As is well documented, the team's first offer to Edwin Encarnacion was made a few days before free agency opened. That offer was for a four year contract totalling \$80 million, with an option for a fifth year for a further \$20 million.

Encarnacion and his agent were told that if the offer was not acceptable, the Blue Jays would be "moving on". Imagine if you could arrange three mediations at once and tell each claimant here is what we'll pay, total. If you don't accept it, we'll be

taking that money to door #2.

When the Jays' management told Encarnacion and his agent that they would move on, no one took them seriously. Time limited offers happen frequently in settlement discussions as both sides would prefer not to incur additional costs and expenses, but they aren't always stated with that kind of clarity of consequences.

For whatever reasons, the offer with a deadline is frequently ignored in personal injury claims. Perhaps it is simply because one side thinks that if the other side offers "x" dollars on day one, why would they not settle for that amount later on. The better question when presented with a time limited offer is to ask why does the other side feel the deadline is necessary in the first place.

Obviously, that is what transpired for the Blue Jays. Their initial offer was, in fact, the highest value of any offers Encarnacion would receive. Before the player's agent could figure out he was dealing with a dwindling market, the Blue Jays signed a slightly inferior player limited to the designated hitter position, Kendrys Morales, for 3 years and \$33 million on November 11.



- Case Finding Liability Against a Car Theft Victim to Be Heard By Supreme Court
- A Recipe for Failure: Negotiating with the Court on what Evidence Might Be Required on a Summary Judgment Motion
- Rule 49 Offers, Costs, and Disbursements: Should Lawyers Negotiate what is "Fair and Reasonable"?

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