



Litigation Primer:
Pleadings, Parties,
Processes and Pitfalls
of Tort-Auto
Litigation

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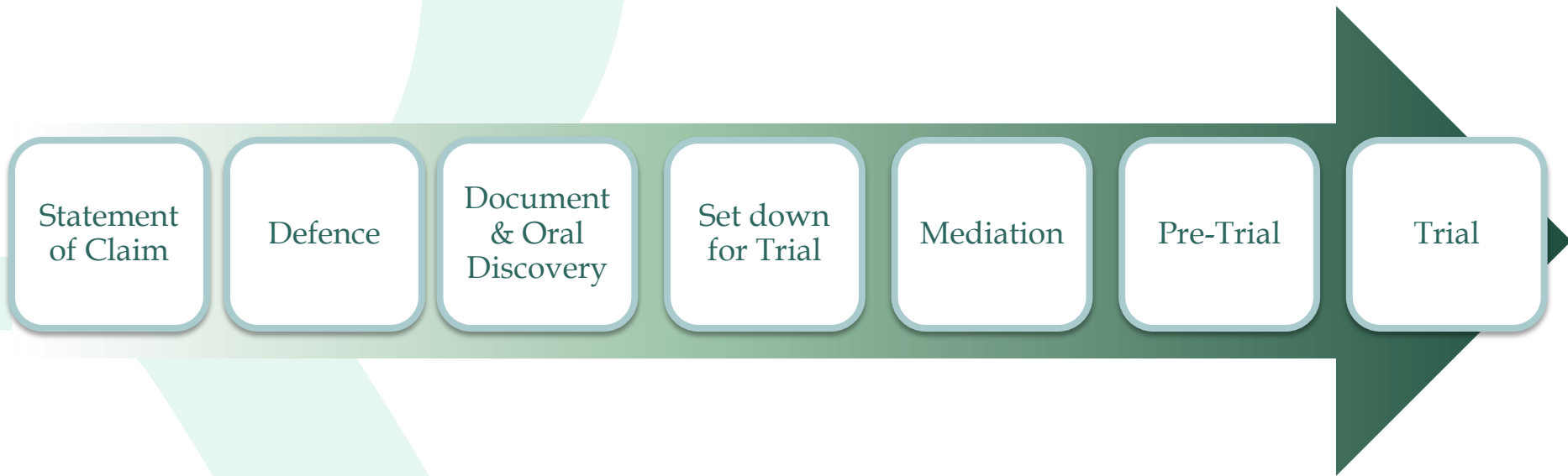
Rogers Partners LLP

Outline

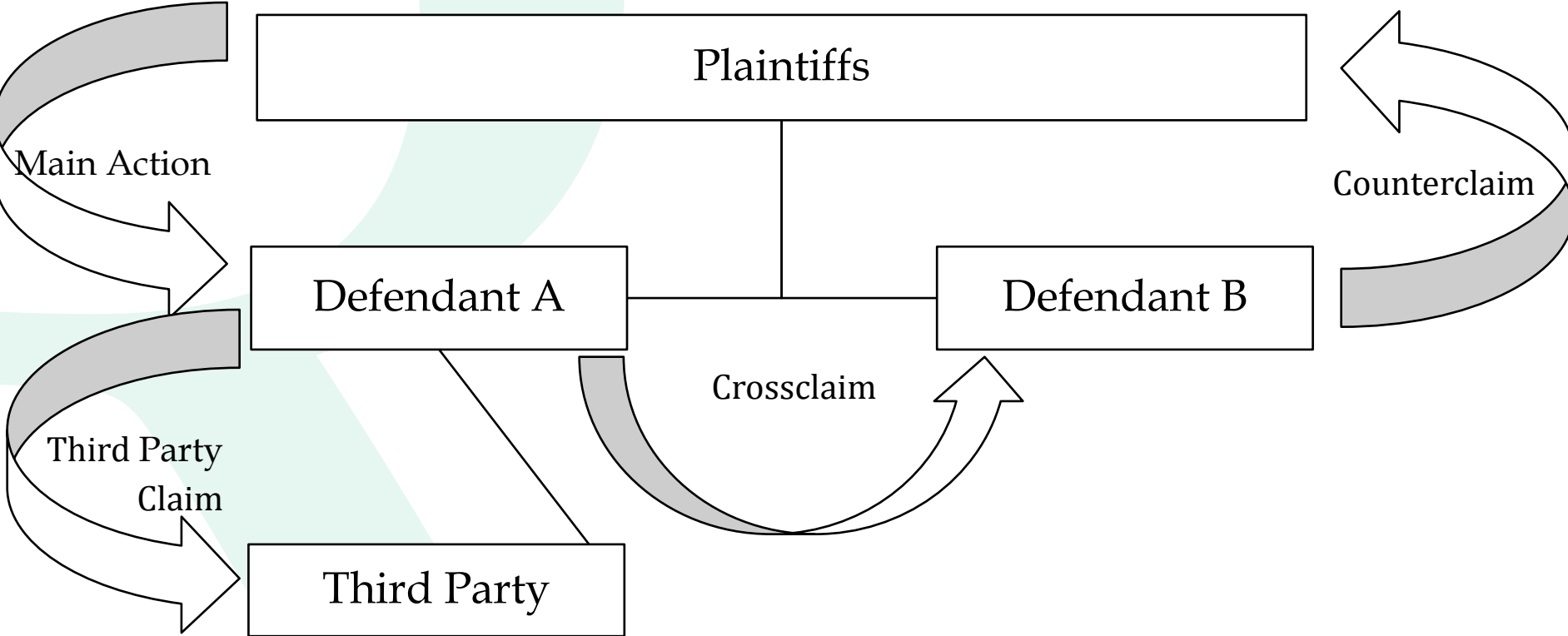
1. Overview of the Litigation Process
2. Parties and Types of Claims
3. Timelines for Issuing and Delivering Pleadings
4. Instructions and Information for a New Retainer
5. Understanding Pleadings
6. Documentary Production
7. Examinations for Discovery
8. Reports following Examinations for Discovery
9. Mediation

We invite you to ask questions at any time.

1. The Basic Litigation Process



2. Parties & Types of Claims



3. Timelines for Pleadings

Issue Statement of Claim

- Within Limitation Period as determined by *Limitations Act, 2002* (Ontario)
- Generally, the limitation period expires after the second anniversary of the day on which the claim was discovered or discoverable. (i.e. **2 years**)
- Exceptions for minors, abuse survivors, and “parties under a disability”

Serve Statement of Claim

- Within **6 months** of when the Statement of Claim or Notice of Action is issued

Deliver Statement of Defence & Counterclaim

- Typically, within **20 days of being served**
- However, a defendant may deliver a Statement of Defence at any time until not “noted in default”

Commence a Third Party Claim

- Within Limitation Period determined by *Limitations Act, 2002*
- Typically, within **2 years of date of service of statement of claim**

4. Opening Instructions & Information

- Coverage
 - Who to defend
 - Who to indemnify
 - Restrictions on scope of indemnity (in a very general sense)
- Policy Limits
- Insured's legal name and contact information
- Crossclaims, Counterclaims, Third Party Claims Considered

- Helpful Documents
 - Any contracts that may apply (e.g. lease)
 - All pleadings received and, if possible, the date upon which they were served
 - Notice letters
 - Any investigations, reports, surveillance, statements, etc.
 - Settlement offers exchanged to date

5. Statement of Claim

Court File No. CV-00-000000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SAM PLAINTIFF

Plaintiff

- and -

JOHN DOE

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

5. Statement of Claim

Date Jan 1, 2000

Issued by A. Registrar
Local registrar

Address of court office:
Court House
393 University Avenue
10th Floor
Toronto, Ontario

TO: JOHN DOE

5. Statement of Claim

CLAIM

1. The plaintiff claims as against the defendant:
 - (a) General damages in the amount of \$1,000,000.00;
 - (b) Special damages in the amount of \$1,000,000.00;
 - (c) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (d) The costs of this action on a substantial indemnity basis; and
 - (e) Such further and other relief as this Honourable Court may deem just.

5. Statement of Defence

STATEMENT OF DEFENCE AND CROSSCLAIM OF THE DEFENDANT JOHN DOE

1. The defendant, John Doe, (hereinafter referred to as “this defendant”), admits the allegations contained in paragraph 5 of the Statement of Claim.
 2. This defendant has no or insufficient knowledge to admit the allegations in paragraph 6 of the Statement of Claim.
 3. This defendant denies that the plaintiff is entitled to the relief sought in paragraph 1 of the Statement of Claim.
 4. The allegations contained in paragraph 14 of the Statement of Claim are of such character that they cannot be admitted or denied by this defendant.
-
5. Save as to the allegations referred to in paragraphs 1, 2, 3 and 4 of this Statement of Defence and except as may hereinafter be expressly admitted, this defendant denies each and every allegation in the Statement of Claim.

5. Commonly Relied Upon Legislation

- *Courts of Justice Act and Rules of Civil Procedure*
 - Rules of court and civil litigation practice
- *Family Law Act*
 - Permits addition of family members
- *Negligence Act and Highway Traffic Act*
 - Liability, impose joint and several liability, contributory negligence
- *Insurance Act and the regulations thereunder, Workplace Safety and Insurance Act, 1997, and Limitations Act, 2002*
 - Defences, such as threshold and deductible

5. Jury versus Judge Alone

- In most cases, the parties have a right to trial by jury, as opposed to a judge-alone trial.
- One exception is where a municipality is a defendant.
- Juries are often considered to be less generous than judges in assessing damages.
- Juries are often thought to assess liability in simpler terms, as “what did the defendant do wrong.”
- Jury trials are slightly longer.

6. Documentary Production

Document includes:

- sound and video recording.
- photographs
- charts, graphs, maps, plans
- accounts
- data and information in electronic form

Relevant means:

- “relevant to any matter in issue”

- Parties are obligated to disclose and produce all relevant documents which are not privileged and which are in their power, possession, or control.
- Insureds should provide their counsel with everything they have that is related to the claim.
- The duty is broad and ongoing.
- Relevant documents are disclosed in an “Affidavit of Documents,” which has three Schedules
- The duty is subject to a principle of “**proportionality**”

6. Documentary Production: Defence

Schedule A

All documents that the party does not object to producing.

For example, the Defence might produce:

- Motor vehicle accident reports prepared by police
- CCTV footage, traffic cameras, and black box data
- Photographs of property damage (depending on who took them)
- Medical records and reports
- Notice letters
- Insurance policies which may satisfy all or part of a judgement
- Media coverage

6. Documentary Production: Defence

Schedule B

Documents that the party objects to producing as it is privileged

1. **Solicitor-Client Privilege** - communication in the course of seeking legal advice
2. **Litigation Privilege** - prepared for the dominant purpose of anticipated litigation
3. **Settlement Privilege** - created for intended purpose of reconciling or settlement
4. **“Confidential Communication” Privilege** - case-by-case basis

- Your work product
- Statements made by insured to insurer
- Internal incident reports
- Surveillance reports, investigations and background checks
- Settlement discussions and mediation briefs

Schedule C

Documents no longer in the party's possession, control, or power

6. Documentary Production: Waiver

- Do not send privileged documents to any person/entity other than your counsel.
- If you send a privileged document to an expert, privilege is likely lost and will be lost if that expert relies upon it.
 - i.e. Signed statement from insured

If you receive an “inadvertent communication” from plaintiff’s counsel, do not read it and:

- a) Send it back, or
- b) Call counsel immediately and destroy the document

This is the right thing to do and builds good will.

6. Documentary Production: Plaintiff

Liability Documents

- Motor vehicle accident report
- Police, fire, and ambulance
- Witness statements

Property Damage Documents

- Photographs
- Estimates & work orders

Medical Documents

- Decoded OHIP summary
- Ambulance records
- Hospital records
- Clinical notes and records of family physician
- Clinical notes and records of specialists
- Prescription Summaries
- Physiotherapy Records

5 years pre-accident to date

Income Loss Documents

- Income Tax Returns
- CPP, ODSP files
- Employment File

Other Pecuniary

- Particulars for out-of-pocket expenses
- Particulars for housekeeping and home maintenance
- Particulars for personal care

Accident Benefits File

Collateral Benefits File, STD, LTD

WSIB File

7. Examinations for Discovery

Who is examined:

- The plaintiffs
- Individual defendants
- Representatives of Corporate Defendants
 - Someone with personal knowledge of the events or processes in question
- Persons with relevant information who are not parties, only with the court's permission

7. Examinations for Discovery

What is covered: *Everything!*

- **Liability:** what happened and whose fault was it
 - What did the witness see/hear/feel/smell/think/do
 - Road and weather conditions
 - Personal conditions (sober, awake)
 - Vehicle conditions
 - Witnesses & Statements
- **Damages:** what damages, losses and injuries are being claimed and how can the plaintiff prove them
 - Details of plaintiff's life before and after accident: health, work, relationships, activities of daily living
 - Details of injuries and treatment
- **Confirm** documents and information as accurate
- **Explore** inconsistencies and gaps
- **Fence In** the witness's answers
- **Obtain Admissions & Undertakings**
- **Test Credibility**

7. Examinations for Discovery

Who is entitled to attend:

- The Witness
- Counsel for all parties
- Court Reporter
- Interpreter
- Other parties (though rarely)

Who is not entitled to attend:

- A Judge
- Friends & Family
- Adjusters (though on consent)

Time Limits:

- 7 hours per party “adverse in interest”
- 2 hours under *Simplified Procedure*, but often extended on consent

8. Reports from Counsel

Before Examinations for Discovery

- An initial opinion which provides a liability assessment and estimate of damages
- Updates regarding settlement proposals or significant developments
- When and where examinations are scheduled
- Whether examinations will involve atypical travel & expenses

8. Reports from Counsel

Following Examinations for Discovery

- Credibility & likeability of the witnesses
- Key Facts
- Updated liability assessment
- Updated damages assessment
 - non-pecuniary general damages
 - income loss (past and future)
 - housekeeping & home maintenance
 - personal care
 - treatment expenses
 - out of pocket expenses
- Recommendations & Action Plan

8. Reports from Counsel

Common Recommendations

- Admit or Deny Liability
- Expert Opinions and Assessments
 - accident reconstruction & human factors
 - road standards/civil engineer
 - biomechanical kinesiologist
 - medical & psychological
 - vocational
 - actuarial & accounting
- Investigations & Surveillance
- Settlement & Mediation
- Third Party Claims
- Motion for Summary Judgment

9. Mediation

What is Mediation

- Mediation is a “without prejudice” discussion about the parties’ positions, typically with the goal of resolving the claim or narrowing the issues.
- Written briefs are exchanged in advance.
- It is helpful if adjusters have arranged for authority in advance.
- The parties attend, along with their counsel. Typically an adjuster attends on behalf of a defendant.
- Often, parties make opening statements and are separated into breakout rooms with the mediator “shuttling” between them.
- Mediators come in a range of styles, skills, and price points.
- “Roster” mediators are often used for lower value, less complex claims.

9. Mediation

What is Mandatory Mediation

- Actions commenced in Toronto, Ottawa, and Essex
- Actions arising out of a motor vehicle accident, s. 258.6 of the *Insurance Act* (defence pays, if requested)

Mandatory mediation does not mean mandatory settlement.

Mediations can still be productive if the parties do not settle. This is an opportunity to address the plaintiff directly and to explain the threshold, costs risks of litigation, and weaknesses in their claim.

Settlement often follows a failed mediation.

Exercise Caution...

- Costs
- Coverage
- Conflicts of Interest
- Co-Operation of Insured
- Bad Faith and Punitive Damages

ROGERS PARTNERS LLP offers a variety of Lunch and Learn programs.

Other programs related to tort-auto claims include:

- Basics of Accident Benefits and Loss Transfer Disputes
- Coverage Issues
- Interaction between WSIB, Tort and AB schemes
- Retaining Experts
- Commercial Trucking Claims
- Understanding Tort: Assessing Damages
- Understanding Tort: Elements & Defences to Negligence
- What Happens at Trial

... and custom programs upon request

Thank You!

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