

Managing
Occupier's Liability
Claims Efficiently,
Effectively &
Expediently

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Outline

1. Retainer: Initial Review & Ongoing Communications
2. Pleadings: Responding to the Claim
3. Discovery Process (Documentary & Oral)
4. Potential Summary Judgment
5. Alternative Dispute Resolution
6. Pre-Trial and Trial Considerations
7. Settlement of Claims / Closing Documents



WHAT
DID
THE
OCCUPIER
DO
WRONG?

1. Communications with...

- Representative(s) and Employee(s) (if business)
- Opposing Counsel

1. Opening Steps

Once retained,
Initial Evaluation of the File

1. Considerations in an Initial Evaluation

- Review Liability & Further Investigations
- Expert Opinions and Assessments
 - medical & psychological
 - vocational
 - actuarial & accounting
- Investigations & Surveillance
- Settlement & Mediation
- Third Party Claims
- Potential for Summary Judgment

2. Pleadings: Responding to the Claim

Review
Statement of
Claim

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graph TD; A[Review Statement of Claim] --> B[Limitation Period]; B --> C[Affidavit of Service];
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Limitation
Period

Affidavit
of Service

2. Pleadings - Contribution Claims

✓ Consider other potentially liable parties:

- ✓ Landlords
- ✓ Contractors
- ✓ Manufacturers
- ✓ Suppliers
- ✓ Repairers
- ✓ Installers
- ✓ Other customers

✓ Consider whether insurance has been obtained

Statement of Defence

- Declarations
- Crossclaims, Counterclaims
- Third Party Claims
- Jury Notice

Coverage Application

- Duty to Defend
- Duty to Indemnify

2. Pleadings: Commonly Relied Upon Legislation

- *Occupiers' Liability Act*
- *Negligence Act*
 - Liability, impose joint and several liability, contributory negligence
- *Limitations Act, 2002*

3. Documentary Production: Plaintiff

Liability Documents

- Plaintiff's statement to collateral insurer or employer
- Witness statements

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

Collateral Benefits File, STD, LTD

WSIB File

6. Documentary Production: Occupier

Affidavit of Documents

- *Schedule A v. Schedule B*
 - Incident Reports
 - First Aid Reports
 - CCTV footage
 - Employee Statements
 - Attendance Records
 - Policies & Procedures

3. Discovery Plan

Affidavit of Documents

- Scope
- Service Deadline
- Format
- Costs

Examinations for Discovery

- Witnesses
- Corporate Deponent
- Timing
- Length

3. Examinations for Discovery

- **Preparing Deponents for Oral Discovery**
 - Identify Knowledgeable Representative of Occupier (if business)
 - Prepare Representative by explaining purpose and process – Do's & Don'ts
 - Review & Swear Affidavit of Documents

3. Examinations for Discovery of Plaintiff

- **Liability:** what happened and whose fault was it
 - What did the witness see/hear/feel/smell/think/do?
- **Damages:** what damages, losses and injuries are being claimed and how can they be proven
- **Confirm** documents and information as accurate
- **Explore** inconsistencies, gaps and information not found in documents
- **Obtain** Admissions, Undertakings, and an understanding of the case to be met
- **Fence In** the witness's answers
- **Test Credibility** and **Evaluate** Likeability

3. Post-Discovery

Consider:

- Credibility & likeability of the witnesses
- Key Facts
- Reassess liability
- Reassess damages
 - ❑ non-pecuniary general damages
 - ❑ income loss (past and future)
 - ❑ housekeeping & home maintenance
 - ❑ personal care
 - ❑ treatment expenses
 - ❑ out of pocket expenses
 - ❑ Collateral benefits
- Further Investigations & Action Plan
- Answers to Undertakings

4. Potential for Summary Judgment

Consider:

- ✓ No genuine issue requiring a trial where motion judge “**is able to reach a fair and just determination on the merits**”.

- ✓ **The summary judgment process:**
 1. Allows the judge to make the necessary findings of fact;
 2. Allows the judge to apply the law to the facts; and
 3. Is a proportionate, more expeditious and less expensive means to achieve a just result.

5. Alternative Dispute Resolution

Mediation

- Suitability
- Scheduling
- Selection
- Strategy

5. 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; however, mediations can still be productive if the parties do not settle.

6. Preparing for Trial

Pre-Trial Conference

- Pre-trial Memorandum
- Formal Positions
- Settlement
- Orders
- Trial Management

6. Preparing For Trial

Pre-Trial Conference Orders

- Timetable
- Witness Lists
- Motions / Discovery
- Will-Say Statements
- Oral Evidence Time Limits
- Summary of Opening Statement / Jury Questions
- Expert(s) Deadlines
- Defence Medicals
- Security of Costs

7. Settling Claims

- ✓ Full & Final Release
- ✓ Confidentiality Agreement
- ✓ OHIP's Subrogated Claim
- ✓ Court Approval where Parties under Disability
- ✓ Dismissal Order

Thank You!

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