LAW SUITS IN CANADA

Rogers Partners LLP

1. WHICH PROVINCE?

Canada has ten provinces and three territories. The justice systems in all provinces except Quebec are quite similar. The Quebec legal system, however, is notably different and, like the legal system in Louisiana, is based on French civil law rather than British common law. As well, legal procedures in Quebec are conducted in the French language.

However, although the legal systems in all provinces except Quebec are relatively similar, the law with respect to motor vehicle accidents is quite different. Some provinces, notably Quebec, Manitoba, Saskatchewan, and British Columbia, have government insurance schemes and variations of no-fault motor vehicle schemes. The laws of the Atlantic provinces (New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland) are more similar to those of Ontario.

Rogers Partners lawyers are licenced to practice law only in Ontario. If you need advice with respect to an accident which occurred in a province or territory of Canada other than Ontario, or with respect to no fault benefits of a Canadian jurisdiction other than Ontario, we cannot handle the file, but can refer you to a lawyer in the proper jurisdiction.

2. U.S./CANADA DICTIONARY

Canadian and U.S. terminology differ slightly on some key litigation concepts. Here is a short guide to some of the differences:

U.S. Lingo	**Canadian Lingo**
Attorney	Lawyer, barrister, solicitor, or counsel
Deposition	Examination for discovery
Complaint	Statement of claim
Defence	Statement of defence
PIP (Personal Injury Protection Benefits)	SABs (Statutory Accident Benefits), or ABs

3. ONTARIO COURT SYSTEM

Most motor vehicle litigation takes place in the Ontario Superior Court of Justice, before federally appointed judges. These judges are appointed for life, and are not elected. Appeals from final decisions of the Superior Court of Justice go as of right to the Ontario Court of Appeal. A further appeal to the Supreme Court of Canada is available, but requires leave of the Supreme Court, which is very difficult to obtain. The Supreme Court of Canada usually only hears matters of national importance, or where there are conflicting decisions of appeal courts in different provinces on the same issue.

4. ONTARIO COURT PROCEDURES

Initial Procedures

Motor vehicle actions are started in Ontario by a statement of claim, which must be issued by the court within two years of the date of the accident. Extensions are available in certain circumstances. The statement of claim must be served personally on a defendant within six months of the date of issue, although extensions are readily available if the plaintiff has a reasonable excuse for failing to serve in a timely fashion.

Once the statement of claim is served, the defendant has 20 days to deliver a statement of defence, assuming the defendant was served in Ontario. If the defendant was served in the U.S. or another province of Canada, the time for defence is extended to 40 days.

Plaintiffs may waive strict compliance with the time limits for delivering a defence, and it is customary for plaintiff's counsel to do so on request as a professional courtesy.

Jury notices

By default, civil actions are tried by a judge alone in Ontario. However, either side may require trial by a six-person jury by delivering a "jury notice." A jury notice is typically delivered by the plaintiff with the statement of claim, or by the defendant with the statement of defence. If either side delivers a jury notice, the case must be tried by a jury, with certain exceptions (for instance, jury trials are not available if the federal or provincial government, or a municipality, are parties to the action).

If neither side has delivered a jury notice within 10 days of delivery of the statement of defence, the matter will, generally speaking, be tried without a jury. As a result, if the plaintiff has not delivered a jury notice, the defendant should decide at the time of delivering its defence whether to require a jury.

Should We Require a Jury?

Many of the major auto insurers in Ontario are of the opinion that, on average, juries assess damages lower than do judges, and as a result, provide their defence counsel with standing instructions to require a jury unless specifically instructed otherwise.

In addition, civil juries are typically unaware of the cost implications to a plaintiff when answering jury questions in favour of the defendant. Whereas a judge is familiar with the notion that finding no liability against a plaintiff could result in a devastating costs award against him/her, a jury likely does not appreciate this outcome.

However, there are circumstances which mitigate against a jury:

- Concerns about "homer" juries – there are concerns that juries might favour local plaintiffs over non-local defendants

- If liability is an issue, you may not want a jury where the conduct of the defendant was particularly offensive – drunk driving, or street racing, for instance – as the jury may punish the defendant by inflating damages

- Jury trials are much more expensive

- Jury results are less predictable

Documentary Production

Following the close of pleadings, each side is required to deliver a sworn "affidavit of documents," listing in Schedule A all non-privileged documents and in Schedule B all privileged documents. The parties are required to exchange all non-privileged documents. The rules of the court require defendants to reveal their insurance policy limits and to include the insurance policies in Schedule A.

Oral Discovery

Following documentary discovery, the parties arrange "examinations for discovery." Examinations for discovery are similar to U.S. depositions, but only the parties to the action may be deposed. Except in extremely rare situations, depositions of witnesses and experts are not permitted.

Examinations for discovery of the plaintiff can be quite thorough. Defendants are entitled to ask plaintiffs to obtain and produce a copy of their SABs (PIP) insurer's file, copies of prescription summaries from their pharmacies, a list of all treatments

provided by the provincial health carrier (OHIP, the Ontario Health Insurance Plan), files from short and long term disability carriers, ambulance call reports, hospital records, physicians' clinical notes and record (CNRs), employment files, income tax return documentation, and other documentary evidence relevant to the matters outlined in the pleadings.

Independent Medical Examinations

As part of the discovery process, defendants are entitled to have the plaintiff submit to one or more independent medical examinations by practitioners of the defendant's choice (but usually not more than one examination per medical specialty). However, the defence is required to obtain written reports of such examinations and to provide copies of them to the plaintiff on receipt.

Often the defence will delay in taking the opportunity to have a defence medical assessment until all of the plaintiff's documentary discovery has been completed, in order to make sure that the medical examiner has a complete picture of the plaintiff. Initial expert reports must be served on the other parties 90 days prior to the pre-trial conference of the action, and responding reports 60 days before the pre-trial conference.

Mediation

Procedures may vary slightly from county to county within Ontario, but most courts require mandatory non-binding mediation to be held before trial. Payment of the professional mediator's fee is the parties' responsibility. In motor vehicle litigation it is the defendant insurer's responsibility to pay for mediation, if mediation is sought pursuant to the *Insurance Act*. Written mediation memorandums are exchanged prior to the mediation itself, which is usually scheduled for a full day.

Normally, the defendant claims handler is expected to attend the mediation, as is the plaintiff, so that a settlement can be completed at the mediation. In certain situations, we have been able to persuade the parties to allow the claims handler to be available by telephone, rather than be in attendance personally, because of travel distance involved.

Mediations are strictly confidential, and nothing said at a mediation can be used in court. Most cases settle at mediation.

Pre-trial Conference

The final step before a trial is the pre-trial conference with a judge. These are typically one to two-hour conferences with counsel and their clients (or insurance representative). During the pre-trial conference the judge will attempt to bring the parties together to settle the matter. Like mediations, they are non-binding, but unlike

mediations, most judges will express a strong opinion as to the likely outcome of the case if it were to go to trial.

If a settlement cannot be reached at the pre-trial conference, then the pre-trial judge will deal with trial procedure issues, such as the number and identity of witnesses to testify for each party. The pre-trial judge also has the power to deal with various interim orders.

The judge who hears a pre-trial is precluded from sitting as the trial judge, and the materials submitted by counsel to the pre-trial judge are returned at the conclusion of the pre-trial conference, and do not find their way into the court file. Although procedures vary across Ontario, in many counties the trial date is set at the pre-trial conference.

Trial

Trials in Ontario are much like trials in the U.S., except that both the judges and the lawyers wear black gowns, with the result that the corridors of our court houses at 9:30 in the morning look like a Batman convention. We do not wear wigs, thankfully.

5. PRE-JUDGMENT INTEREST

In addition to damages, a plaintiff is entitled by statute to be paid "pre-judgment interest" on any award. Pre-judgment interest is also paid on settlement.

Pre-judgment interest on non-pecuniary general damages for pain and suffering is currently payable at 5% per annum simple interest for accident occurring before January 1, 2015 (not compounded). Recent legislative reform has reduced the pre-judgment interest rate in cases involving automobile accidents occurring after January 1, 2015 to a figure consistent with prevailing bank rates of interest.

Pre-judgment interest is also payable on past pecuniary losses (e.g. wage loss and out of pocket expenses) from when the losses were incurred. Pre-judgment interest for past pecuniary losses is paid at a rate keyed to the bank rate on the date on which the statement of claim was issued. No pre-judgment interest is payable on future pecuniary losses.

In automobile cases pre-judgment interest is calculated from the date on which the defendant was first given written notice of the claim, to the date of judgment or settlement.

6. POST-JUDGMENT INTEREST

Interest is also payable on judgments from the date of judgment, so there is some urgency to pay judgments quickly.

7. COSTS

Perhaps the biggest difference between the U.S. and Canadian court systems is the issue of "costs." In Ontario and most other Canadian jurisdictions, "costs follow the cause," meaning that the loser of a law suit has to pay a portion of the winner's legal fees and disbursements. The loser is also obliged to pay the Ontario Harmonized Sales Tax (HST) on the costs. The HST rate is currently 13%.

There are two scales of costs: partial indemnity costs; and substantial indemnity costs. If partial indemnity costs are awarded, the loser has to pay approximately two-thirds of the winner's legal fees, and all of the winner's attorney's "disbursements," which includes things such as expert fees (including medical experts' costs), photocopying and fax costs, costs of ordering transcripts, and court fees.

If substantial indemnity costs are awarded, then the winner's legal fees are paid more or less in full (approximately 85% to 90%). The default scale is partial indemnity costs.

The default costs consequences can be altered by settlement offers made by the parties. The rules are a little complicated, and costs awards are always subject to the discretion of the judge, but in general terms, they are as follows:

- If the defendant makes a written settlement offer, and then at trial the plaintiff obtains judgment that is equal to or less than the amount of the defendant's written offer, the cost consequences are reversed.

The defendant would still have to pay the plaintiff partial indemnity costs up to the date of the offer, but the plaintiff would then have to pay the defendant's costs on a partial indemnity basis from the date of the offer to the conclusion of trial. A realistic written settlement offer by the defence can therefore be a powerful incentive for the plaintiff to settle, the failure to do so means that the plaintiff runs the risk of paying the defence attorney's fees through trial if he/she is not successful in beating the offer at trial.

The other side of the coin is as follows:

- If the plaintiff makes an offer prior to trial and gets as much or more than his/her offer at trial, the obligation of the defence to pay costs is increased

to substantial indemnity costs from the date of the offer.

These costs provisions substantially change the settlement dynamic from the U.S. practice. A realistic settlement offer by either party significantly increases the risk to the opposite side in taking the matter to trial.

Generally speaking, we gauge whether a party has won or lost at trial based on whether the party first beat the other side's offer to settle, and next whether the party beat its own offer to settle. If a defendant meets or beats its offer to settle, that is usually a 'win.'

Costs are Not Included in your Liability Policy Limits

In Ontario the liability limits in an automobile insurance policy apply only to damages and pre-judgment interest. They do NOT apply to costs. Your obligation for costs is unlimited. For instance, if your policy limits are $200,000, then on a $200,000 claim you might be obliged to pay $30,000 for costs, $20,000 in disbursements, and a further $6,500 in HST, in addition to the $200,000 in damages. So, on a $200,000 policy, your real exposure is probably more in the range of $255,000 to $260,000.

Typically, costs are calculated at 15% of the first $100,000 of all assessed damages (excluding pre-judgment interest), and then 10% of any further damages.

Some useful links:

Rogers Partners LLP Publications and Resources page:	http://www.rogerspartners.com/resources/
Currency Convertors:	http://www.bankofcanada.ca/rates/exchange/daily-converter/ http://www.rbcroyalbank.com/cgi-bin/travel/currency-converter.pl
Ontario Statutes:	https://www.ontario.ca/laws
Ontario Insurance Act:	https://www.ontario.ca/laws/statute/90i08
SABs Regulation:	https://www.ontario.ca/laws/regulation/100034