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# THE OCCUPIERS' LIABILITY HANDBOOK

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## Contents

I. INTRODUCTION.....	1
II. RETAINER: INITIAL REVIEW & ONGOING COMMUNICATIONS.....	1
Litigation Strategy.....	1
Information Gathering, Initial Communications and Reporting.....	2
III. RESPONDING TO THE CLAIM.....	4
Jurisdiction.....	4
Actions Commenced by Simplified Procedure and in the Small Claims Court.....	4
Simplified Procedure.....	4
Small Claims Court.....	7
Notice Requirements for Slip and Falls.....	7
Reasonable Excuse.....	9
Prejudice.....	9
Date of Issue and Service of Claim.....	11
Parties Under a Disability.....	12
Other Party Defendants.....	12
Quantum and Nature of the Damages Sought.....	13
Pleading into the Action.....	14
IV. LIABILITY AND THE TRANSFER OF LIABILITY.....	15
Case Study: The Snow Removal Contractor.....	16
A) CLAIMS IN NEGLIGENCE.....	17
The Law.....	17
Defining an "Occupier".....	17
The Duty and Standard of Care.....	19
Secure and Gather Liability Documentation.....	21
Consider Other Tortfeasors.....	21
Limitation Period for Contribution Claims.....	23
B) CLAIMS IN CONTRACT.....	23
Breach of the Covenant to Insure.....	24
Remedy for Breach of the Covenant to Insure.....	25
Tendering the Defence and Defence Handling.....	25

Indemnification Pursuant to the Hold Harmless and Indemnity Clause.....	26
Limitation Period for Claims in Contract.....	27
Breach of the Covenant to Insure .....	27
Hold Harmless and Indemnity .....	28
C) CLAIMS IN INSURANCE.....	28
The Duty to Defend .....	29
Covered vs. Uncovered Claims.....	31
Defence Costs From Date of Tender.....	31
Separate Counsel.....	32
Commencing a Coverage Application.....	33
The Duty to Indemnify.....	33
Limitation Period .....	34
V. THE DISCOVERY PROCESS.....	36
Discovery Plans .....	38
Preparing Corporate Deponents for Examinations for Discovery .....	38
Examination for Discovery of the Plaintiff.....	39
Reporting Following Examinations for Discovery.....	41
Exploring Damages: Issues Regarding Entitlement to Collateral Benefits.....	41
OHIP Subrogated Claims .....	43
VI. SUMMARY JUDGMENT MOTIONS .....	44
Recommending Summary Judgment.....	45
VII. ALTERNATIVE DISPUTE RESOLUTION .....	46
Mandatory Mediation .....	46
Suitability of a Mediation .....	47
VIII. PRE-TRIAL AND TRIAL CONSIDERATIONS.....	47
Preparing for Trial .....	47
Pre-Trial Conference.....	48
IX. SETTLEMENT AND CLOSING DOCUMENTS.....	48
Closing Documents.....	48
Parties Under a Disability.....	49
Post-Settlement Issues .....	50
X. CONCLUSION .....	50

## I. INTRODUCTION

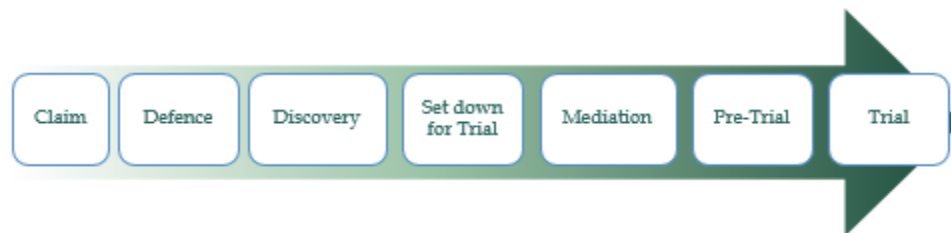
An ice-covered sidewalk, a spilled water-bottle, steep stairs, or a rogue grape on the floor at the supermarket, are all examples of hazards that can lead to injury, and in some instances, a lawsuit pursuant to the *Occupiers' Liability Act*<sup>1</sup> ("the OLA").

Where a plaintiff has brought an action pursuant to the OLA, there are several issues that corporate defendants should consider and review in response. This Occupiers' Liability Handbook will explore and analyze the approach to an occupiers' liability claim from the initial retainer through to the pre-trial conference and settlement, in order to provide the essential tools that will assist in managing these claims efficiently, effectively, and expeditiously.

## II. RETAINER: INITIAL REVIEW & ONGOING COMMUNICATIONS

### Litigation Strategy

The general stages of a personal injury action are indicated in the diagram below:



Throughout the litigation process, it is important to ask: "*what did the defendant do wrong?*" As the matter develops, the answer to this question may change from "*we did nothing wrong*" to "*maybe we did this wrong*" to "*we definitely did something wrong*". During the initial stages where information is being gathered, referring to this question will assist with the development of the litigation strategy. As the litigation progresses and more evidence comes to light, it is valuable to revisit this question in order to determine and re-evaluate the defence theory and approach.

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<sup>1</sup> R.S.O. 1990 c.O.2

In cases where there is no evident breach of a duty owed to the plaintiff by the defendant, the defence strategy is commonly to dispute the matter as vigorously as possible, using all legal avenues available.

Where it is apparent that the defendant breached the standard of care, the defence strategy may be focused more on controlling the quantum of damages and early resolution. Facing these issues early and re-evaluating strategy as the matter develops will assist in efficiently handling the claim.

### **Information Gathering, Initial Communications and Reporting**

Once notice of a claim or notice of an incident is received, investigations should take place as soon as possible in order to secure valuable evidence and information. For example, the following information, if available, should be gathered, secured, and provided to defence counsel in a usual slip-and-fall action:

- |  |   |   |
|--|---|---|
| ✓ Incident reports                                   | ✓ Witness contact information   | ✓ Floor cleaning/waxing schedule  |
| ✓ Photographs  | ✓ Inspection logs for the week of the incident  | ✓ Shelving protocols  |
| ✓ Witness statements from employees and/or customers | ✓ Information pertaining to relevant store policies including cleanliness and maintenance | ✓ Lease agreement   |
| ✓ CCTV footage                                       |   | ✓ Service contracts, additional insured endorsements, and full insurance policy wording |
| ✓ Floor plan   |   |   |
| ✓ Attendance records                                 |   |   |

Obtaining this evidence will assist with the initial litigation strategy, as it may point to negligence on the part of the plaintiff, the corporate defendant, or to other entities that

should be brought into the action. In an initial report, defence counsel should analyze and make recommendations for the litigation strategy based on the available evidence and client guidelines and protocols. Common recommendations may include:

- further investigations and evidence preservation initiatives;
- admitting or denying liability (depending on the facts);
- obtaining expert opinions and assessments (engineering, human factors, medical, psychological, vocational, life care planning, and/or accounting);
- evaluating the benefits of surveillance and social media searches;
- settlement and mediation (consider whether mediation is mandatory or if the use of a mediator may be effective in managing the plaintiff's and opposing counsel's expectations);
- analysis of any claims for contribution and indemnity in contract or tort (crossclaims and/or third party claims); and
- whether a demand for coverage should be made to another insurer, and the prospects of a coverage application.

Defence counsel should provide an initial evaluation report which includes a liability and damage exposure assessment and an action plan. Aspects of the initial evaluation should be further revised and updated as necessary as the litigation develops.

Once retained, defence counsel should write to opposing counsel as soon as practicable to advise of the retainer. In the opening letter, counsel should request a waiver of defence, any productions already gathered, and an affidavit of service of the statement of claim. In addition, counsel should consider a request that the plaintiff preserve any property in the plaintiff's possession that may be relevant to the lawsuit, such as the shoes that the plaintiff was wearing on the date of the incident.

Defence counsel should also request that plaintiff's counsel advise whether the plaintiff obtained adverse costs insurance, and disclose the coverage amount and a copy of the policy. This insurance may provide a source of funds against which a successful

defendant may recover in the event that it is successful at trial and seeks payment of defence costs.

### **III. RESPONDING TO THE CLAIM**

When reviewing the statement of claim, there are several considerations that should form part of the initial defence analysis. These include: the jurisdiction and applicable court procedures; the dates of issuance and service of the statement of claim on the defendant; the identity and relationship of the other parties; and the quantum and nature of the damages sought. Each of these areas are further analyzed below.

#### **Jurisdiction**

The location in which the action was brought will impact how the action progresses. For example, actions commenced in the City of Toronto, the City of Ottawa and the County of Essex are subject to mandatory mediation pursuant to the *Rules of Civil Procedure*.<sup>2</sup>

In addition, each jurisdiction has its own practice directions and policies with respect to the governing procedures for various aspects of the litigation, including motions, pre-trial conferences and trials. Knowing this information at the start will assist in streamlining the process and approach.

Further, if the plaintiff resides outside of Ontario, there may be other procedural conflicts of law to consider – such as whether the plaintiff’s home jurisdiction may be the more convenient forum.

#### **Actions Commenced by Simplified Procedure and in the Small Claims Court**

##### **Simplified Procedure**

Actions seeking damages for \$200,000 or less (excluding interest and costs) should be commenced by way of Simplified Procedure.<sup>3</sup> In Simplified Procedure actions:

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<sup>2</sup> R.R.O. 1990, Reg. 194 at Rule 75.1.

<sup>3</sup> Rule 76 of the *Rules of Civil Procedure* governs the Simplified Procedure.

- the parties must discuss document disclosure and settlement within 60 days of filing the statement of defence;
- the action must be set down for trial within 180 days of filing the statement of defence or notice of intent to defend; and
- examinations for discovery are limited to three hours per party.<sup>4</sup>

Effective January 1, 2020, the rules governing the Simplified Procedure were significantly reformed. Notably, the monetary jurisdiction of Simplified Procedure matters was increased from \$100,000.00 to \$200,000.00. Further, with only narrow exceptions, an action under the simplified rules can no longer be tried by a jury.<sup>5</sup>

Other important changes include the new cap on costs and disbursements. Pursuant to the new rules, no party may recover costs over \$50,000 or disbursements over \$25,000 (exclusive of HST).<sup>6</sup>

In addition, the pre-trial and trial procedures were sufficiently reformed. The new rules state that a notice of pre-trial conference will be served by the registrar at least 45 days in advance of the pre-trial conference. In addition, 30 days prior to the pre-trial conference, parties are required to agree to a trial management plan, which shall include:

- a list of witnesses; and
- division of time between parties for openings, evidence in chief (by affidavit), cross examinations, re-examinations, and oral argument.<sup>7</sup>

At the pre-trial conference, the judge or master may:

- fix the number of witnesses (other than experts) whose evidence may be adduced;
- fix dates for the delivery of witness affidavits, including outstanding expert affidavits;

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<sup>4</sup> *Supra* note 2 at Rule 76.

<sup>5</sup> Under the new rules, no party may deliver a Jury Notice except for actions in slander, libel, malicious arrest, malicious prosecution, or false imprisonment.

<sup>6</sup> *Supra* note 2 at Rule 76.12.1.

<sup>7</sup> *Supra* note 2 at Rule 76.10(2).



- fix a trial date (subject to the direction of the regional senior judge); and
- approve or modify the trial management plan, except for the 5 day trial limit.<sup>8</sup>

Simplified Procedure actions also have a specified trial procedure.<sup>9</sup> Trials are limited to 5 days, and the trial judge has *no discretion* to extend the duration of the trial. Trials shall proceed as follows:

1. Before the presentation of evidence, each party may make an opening statement.
2. The plaintiff may adduce evidence, including any expert evidence, by affidavit and under rule 31.11.
3. A party who is adverse in interest may cross-examine the deponent of any affidavit served by the plaintiff.
4. The plaintiff may conduct a re-examination of any deponent who is cross-examined.
5. When any cross-examinations and re-examinations of the plaintiff's deponents are concluded, the defendant may adduce evidence, including any expert evidence, by affidavit and under rule 31.11.
6. A party who is adverse in interest may cross-examine the deponent of any affidavit served by a defendant.<sup>10</sup>
7. A defendant may conduct a re-examination of any deponent who is cross-examined.
8. When any cross-examinations and re-examinations of the defendant's deponents are concluded, the plaintiff may, with leave of the trial judge, adduce any proper reply evidence.
9. After the presentation of evidence, each party may make oral argument.<sup>11</sup>

Depending on the complexities of the case, and the number and nature of the witnesses to be called, as well as the number of existing or other issues which may arise and need to be addressed, it is not difficult to imagine that the strict 5 day limit may be very hard

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<sup>8</sup> *Supra* note 2 at Rule 76.10(5).

<sup>9</sup> *Supra* note 2 at Rule 76.12.

<sup>10</sup> As per Justice Archibald during panel discussion on the New Simplified Procedure at the Advocate's Society's Annual Tricks of the Trade Conference on January 31, 2020

<sup>11</sup> *Supra* note 2 at Rule 76.12(1) and (2).

or impossible to adhere to in certain circumstances. It is, as yet, not clear what remedies or next steps are available should the case not be completed in the time (5 days) allotted. It has been suggested that a mistrial is the most likely outcome.

### **Small Claims Court**

Actions seeking damages for \$35,000 or less (excluding interest and costs) should be commenced in the Small Claims Court and are subject to the *Rules of the Small Claims Court*.<sup>12</sup> The plaintiff commences an action in the Small Claims Court by way of a plaintiff's claim, and the defendant files a defence. Plaintiffs in Small Claims Court actions are commonly self-represented. As such, the procedures are simplified, and the action moves at a faster pace than those commenced in Superior Court.

All parties in Small Claims Court actions are required to attend a mandatory settlement conference with a judge, in an effort to resolve the matter expeditiously within 90 days after the defence is filed. If the matter is not resolved at the settlement conference, the matter will proceed to a trial.

Costs in Small Claims Court actions are limited. While a successful party is entitled to have the party's reasonable disbursements paid, the *Courts of Justice Act*<sup>13</sup> limits fees payable to 15% of the amount claimed, unless the Court considers it necessary to penalize a party for unreasonable behaviour. As such, and in most circumstances, the maximum fees that can be awarded is \$5,250.

### **Notice Requirements for Slip and Falls**

Amendments to the *Occupiers' Liability Act* came into force on January 29, 2021, which impose on a plaintiff the obligation of providing notice in writing within 60 days of an accident involving a slip and fall on ice or snow.<sup>14</sup> Notice must be served either personally or by registered mail on an occupier of the premises or an independent

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<sup>12</sup> O. Reg. 258/98. Note: the monetary limit was increased, effective January 1, 2020, from \$25,000 to \$35,000.

<sup>13</sup> R.S.O. 1990, c.C.43 at section 29.

<sup>14</sup> *Supra* note 1 at section 6.1.

contractor employed by the occupier to remove snow or ice from the premises during the relevant period. Notice is valid only if it sets out the following:

1. The date of the incident;
2. The time at which the incident took place; and
3. The location of the incident.

The amendments to the *Occupiers' Liability Act* set out that any occupier or independent contractor who receives notice must serve a copy of the notice on any relevant occupiers or independent contractors involved with the premises during the period at issue. Importantly, the occupier or independent contractor must serve the notice personally or by registered mail on the other affected occupiers or independent contractors.

A failure to give notice results in the plaintiff's action being barred. Fatal accidents are exempt from the notice requirement. Furthermore, a failure to give notice or the insufficiency of notice is not a bar if a judge finds that there is reasonable excuse and that the defendant is not prejudiced.

Notice by e-mail does not comply with the *Occupiers' Liability Act*. If notice is provided in this manner, the court will examine whether there was a reasonable excuse for doing so and whether the other party suffered prejudiced. The court will likely focus on whether the other party was actually notified of the incident.

If a party decides to provide notice by e-mail, despite the *Occupiers' Liability Act* not permitting same, it would be a good idea to seek confirmation from the other party that it agrees with being served in this manner and that it will not raise an issue of improper service.

## Reasonable Excuse

It is likely that the courts will consider the issue of “reasonable excuse” in a similar manner to the approach with the notice requirement under the *Municipal Act*.<sup>15</sup> The courts there have taken a contextual approach in order to evaluate whether a reasonable person in the circumstances would have turned their mind toward notice requirements. Specifically, the courts have found that the plaintiff’s physical and mental state, and the severity or lack of severity of the plaintiff’s injuries, are relevant factors in examining whether the plaintiff had a reasonable excuse for providing late notice.

For example, the plaintiff in *Crinson v. Toronto (City)*<sup>16</sup> suffered a serious injury requiring a prolonged period of rehabilitation during which he was deeply worried about his job and his ability to provide for his family. The Court of Appeal stated that, given the plaintiff’s mental state, it was hardly surprising that he did not turn his mind to the notice requirement within the required time. Therefore, the plaintiff had a reasonable excuse.<sup>17</sup>

It is worth stressing that the notice period required under the *Municipal Act* is 10 days. There is a good chance that the courts are tougher on plaintiffs who provide insufficient notice under the *Occupiers’ Liability Act*, given that a more generous notice period is set out. In other words, it will be more difficult for a plaintiff to provide a reasonable excuse why notice was not provided within 60 days, as compared to 10 days under the *Municipal Act*.

## Prejudice

On the issue of prejudice, the onus is on the plaintiff to establish that the defendant will not be prejudiced in its defence as a result of the delay.<sup>18</sup>

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<sup>15</sup> SO 2001, c.25 at section 44(10).

<sup>16</sup> 2010 ONCA 44.

<sup>17</sup> See also *Seif v. Toronto (City)*, 2015, ONCA 321; in *Hennes v. City of Brampton*, 2014 ONSC 1116, the court dismissed the plaintiff’s claim due to lack of timely notice, provided 18 months after a slip and fall on snow and ice.

<sup>18</sup> See Court of Appeal ruling in *Seif*, *supra* note 17

The Ontario Court of Appeal in *Seif*, considering the notice requirement in the *Municipal Act*, indicated that there can be an “inherent probability of prejudice” where a plaintiff provides late notice.<sup>19</sup>

A plaintiff can address the inherent probability of prejudice with evidence showing other sources of information about the accident’s circumstances. In *Seif*, the Court of Appeal provided the following examples of how a plaintiff could address prejudice:

1. A plaintiff might adduce evidence that the defendant had taken steps to investigate the scene in spite of not having notice from the plaintiff.
2. There were timely photographs taken of the scene.
3. A named witness to the accident has been identified.<sup>20</sup>

The court will consider at this stage whether timely notice would have even permitted the occupier to conduct the necessary investigations in the first place. In *Patrick v. The Corporation of the Municipality of Southwest Middlesex et al.*<sup>21</sup>, Justice Leach stated that, in accidents involving snow or ice, notice given even a few days later realistically might not have provided the defendant with any opportunity to examine and document conditions as they existed at the time of the accident.<sup>22</sup>

Overall, the issue of prejudice is a fact-based inquiry. The key issue to consider is whether the defendant’s ability to investigate and learn of the circumstances of the accident has been inhibited due to late notice.

Defendants would be wise, upon receipt of a claim, to immediately consider whether proper notice was provided pursuant to the *Occupiers’ Liability Act*. If not, then the failure

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<sup>19</sup> See *Sief*, *supra* note 17 at para. 56.

<sup>20</sup> *Ibid.*

<sup>21</sup> 2017 ONSC 17.

<sup>22</sup> See on the other hand *Kanner v. The Corporation of the City of Hamilton*, 2017 ONSC 6795 (that passage of time may prevent a defendant to properly investigate and respond), *Azzeh v. Legendre*, 2017 ONCA 385 (that the length of delay is a factor to consider in examining prejudice), *Hennes supra* note 17, *Argue v. Tay (Township)*, 2013 ONCA 247 (defendant is prejudiced where it has lost the opportunity to interview witnesses while their memories were fresh), and *Langille v. Toronto (City)*, 2010 ONSC 443.

to do so should be pleaded in the statement of defence, and consideration should be given to bringing a motion for summary judgment.

### **Date of Issue and Service of Claim**

When served with a statement of claim, it is important to note when the claim was issued. The *Limitations Act, 2002*<sup>23</sup> imposes a basic limitation period of two years from the date in which the claim was “discovered.” A claim is “discovered” on the earlier of:

- (a) the day on which the person with the claim first knew,
  - (i) that the injury, loss or damage had occurred,
  - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
  - (iii) that the act or omission was that of the person against whom the claim is made, **and**
  - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).<sup>24</sup>

The affidavit of service of the statement of claim on the defendant will allow counsel to confirm proper service. The statement of claim must be served personally on a defendant, or by an alternative to personal service, within six months of issuance.<sup>25</sup> If the statement of claim was served outside of the six months, plaintiff’s counsel should bring a motion to extend the time for service, or in the alternative, to validate service on the defendant. The date on which a defendant is served with the Statement of Claim can impact the limitation period for claims for contribution and indemnity by that defendant.

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<sup>23</sup> S.O. 2002, c.24, Sched. B.

<sup>24</sup> *Ibid* at section 5.

<sup>25</sup> *Supra* note 2 at Rule 14.08(1).

As stated above, it is also important that defence counsel advise of their retainer and request a waiver of defence as soon as practically possible. Pursuant to the *Rules of Civil Procedure*<sup>26</sup>, where the defendant is served in Ontario, opposing counsel may technically initiate default proceedings as early as 20 days after service, although this is rarely done in practice.

### **Parties Under a Disability**

A party is under a “disability” where the person is either a minor or is deemed to be mentally incapable within the meaning of the *Substitute Decisions Act*.<sup>27</sup> In these circumstances, the action must be commenced, continued, or defended by a litigation guardian (on behalf of the party under a disability).<sup>28</sup> Any person who is not under a disability may act as a litigation guardian without appointment by the Court.

Where there is no appropriate person willing and able to act as a litigation guardian, the Court will appoint a litigation guardian to act on that party’s behalf. Where the party is a minor, the Court will appoint the Office of the Children’s Lawyer. Otherwise, the Court will appoint the Public Guardian and Trustee.<sup>29</sup>

It is important to consider that where a party is under a disability, a judge must approve any settlement, even, for example, where a minor is only a claimant pursuant to the *Family Law Act*.<sup>30</sup>

### **Other Party Defendants**

When reviewing the claim, defence counsel should consider the roles of other co-defendants that have been named in the action. More than one party can be an “occupier”

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<sup>26</sup> *Supra* note 2 at Rule 18.01.

<sup>27</sup> 1992, S.O. 1992, c.30 at sections 6 and 45.

<sup>28</sup> *Supra* note 2 at Rule 7.

<sup>29</sup> *Supra* note 2 at Rule 7.04.

<sup>30</sup> R.S.O. 1990, c.F.3.

pursuant to the *OLA*, and these parties may have contractual relationships relevant to responsibility for the premises and the transfer of liability.<sup>31</sup>

When serving a statement of defence containing a crossclaim against any of the co-defendants (most commonly for contribution and indemnity), if those parties do not have representation, the crossclaim must be served personally.<sup>32</sup>

### **Quantum and Nature of the Damages Sought**

Upon receipt of the statement of claim, it is important to evaluate the quantum and nature of the damages claimed. Where a statement of claim pleads damages which exceed the limits of the applicable insurance policy responding to a claim, an insurer must advise its insured of same and the insured should place any excess insurer on notice, if excess insurance is available.

Damages in a personal injury action may include non-pecuniary damages for pain and suffering, and pecuniary damages, which include special damages claims for various expenses such as out-of-pocket costs, past and future care costs, past and future income loss, loss of competitive advantage, and housekeeping and home maintenance costs. The statement of claim will indicate whether any or all of these heads of damages are being claimed by the plaintiff.

In Canada, there is a cap on non-pecuniary damages awarded in personal injury claims. As of September 2020, the upper limit is \$390,028 and increases and decreases with inflation. Tort actions pursuant to the *OLA* are not subject to the threshold or monetary deductibles imposed by the *Insurance Act*<sup>33</sup> in motor vehicle accident cases.

In exceptional and relatively rare circumstances, the Court may order aggravated and/or punitive damages showing a strong disapproval of the defendant's conduct. Aggravated damages are awarded to compensate the injured party for additional harm occasioned

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<sup>31</sup> *Supra* note 2 at Rule 28.

<sup>32</sup> *Supra* note 2 at Rule 28.04(2).

<sup>33</sup> R.S.O. 1990, c.18.



by the defendant's conduct. Punitive damages, on the other hand, are awarded on top of full compensation and where a defendant's actions are considered particularly malicious or egregious.

Both punitive and aggravated damages were awarded by the Court in *Dogan v. Pakulsk*.<sup>34</sup> In *Dogan*, the plaintiff slipped and fell on a walkway at the defendants' property in which the plaintiff was a tenant. As a result, the plaintiff commenced an action, pursuant to the *OLA*, against the defendant property owners, seeking damages for injuries he sustained. Following the commencement of the action, the defendants (landlords) harassed and threatened the plaintiff, removed his personal belongings from the premises and locked him out of his home. As a result of the defendants' egregious conduct, the Court awarded \$2,500 in aggravated damages and \$2,500 in punitive damages to the plaintiff, in addition to non-pecuniary damages.

### **Pleading into the Action**

Contribution claims, crossclaims, counterclaims and third party claims should be considered when preparing a statement of defence. It is best to issue third party claims within 10 days of the defendant delivering a statement of defence, otherwise the plaintiff's consent or leave of the Court is required before issuance.

The following procedural deadlines should also be noted at the pleadings stage:

- the statement of claim must be issued within **2 years** from the date of the incident (subject to discoverability);
- the statement of claim must be served **personally** on the defendant, or by an alternative to personal service, within **6 months** after the issuance of the statement of claim;
- claims for contribution and indemnity must be commenced within **2 years** from the date the defendant was served with the statement of claim (subject to discoverability);

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<sup>34</sup> [2007] OJ No. 1903, ACWS (3d) 673.

- the action must be set down for trial or terminated within **5 years** from the date the statement of claim was issued, or otherwise will be dismissed for delay; and
- an administrative dismissal can be avoided if a party, with the consent of the other parties, files a timetable and draft order **30 days** prior to the relevant five year dismissal deadline.

### **Jury Notices**

Consideration should also be given to whether to deliver a jury notice. Although juries can be unpredictable, juries are generally less generous on damages in personal injury cases, especially those involving soft tissue injuries. While sympathy for the plaintiff should be considered, a jury is more likely to answer questions on liability in a straightforward manner, without necessarily understanding how a finding of no liability finding could impact the plaintiff's claim. Further, unlike a judge, a jury may not be aware of the financial and/or cost implications of dismissing a plaintiff's claim.

The decision by the Ontario Court of Appeal in *Kerr v. Loblaws Inc.*<sup>35</sup> illustrates a further advantage to proceeding with a trial by jury. This case involved a slip-and-fall in a grocery store. The court noted that when a jury is evaluating the standard of care, the judge need not specify the factors that have been accepted or rejected in other cases as being sufficient to meet the reasonableness standard. The issue of how the standard is met or breached in any given case is for the jury to determine, based on all the circumstances of the case. As such, a jury will not be told of the case law examples regarding certain time intervals for safety sweeps or inspections. The jury must determine what is reasonable based on the evidence before it.

## **IV. LIABILITY AND THE TRANSFER OF LIABILITY**

Claims pursuant to the *OLA* invariably include allegations of negligence. However, they may also contain other causes of action such as breach of contract. These issues are

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<sup>35</sup> 2007 ONCA 371.

important to address when drafting the statement of defence, and when considering any appropriate crossclaims and third party claims.

Where a defendant has a service relationship with a co-defendant or other entity, there are three potential rights and remedies available. These issues should generally be considered before a statement of defence is entered, especially in claims involving commercial occupiers:

a) Claims in Negligence	b) Claims in Contract	c) Claims in Insurance
Liability pursuant to the <i>OLA</i>	Breach of contract (hold harmless/indemnity) and the covenant to insure	Contractor's insurer's duty to defend and indemnify

To assist in the analysis of the various rights and remedies available in negligence, contract and insurance, the following case study will be referenced:

### **Case Study: The Snow Removal Contractor**

On a cold December afternoon, Ms. Volenti attends her local grocery store, Rogers Foods, to pick up a few items for dinner that night. Rogers Foods owns and operates the grocery store and an adjacent parking lot for its customers. Ms. Volenti wants to be quick, as she has company visiting that evening. She grabs the items she needs and leaves the store, her hands full with two grocery bags. As she approaches her vehicle in the parking lot, she slips on ice, landing hard on her back on the pavement. As a result of the fall, Ms. Volenti breaks her tailbone and sustains other soft tissue injuries.

Rogers Foods had hired a snow removal company, Melt-Away Inc., to perform snow removal and winter maintenance services in the parking lot. According to the service contract, Melt-Away Inc. agreed to regularly inspect the parking lot for hazards and to maintain the area, which included the application of salt and sand. In addition, the

contract with Melt-Away-Inc. contained a hold harmless clause and covenant to insure in favour of Rogers Foods. Rogers Foods was provided with the certificate of insurance from Melt-Away Inc.'s insurer, Caveat Insurance Co. The certificate confirmed that Rogers Foods was named as an additional insured pursuant to Melt-Away Inc.'s commercial general liability policy, with respect to liability arising out of the business operations of Melt-Away Inc.

As a result of her injuries, Ms. Volenti commences a civil action against Rogers Foods and Melt-Away Inc. pursuant to the *OLA*, claiming that she slipped and fell on ice in the parking lot. Ms. Volenti makes allegations of negligence, including that both parties failed to properly maintain and inspect the parking lot, failed to apply salt or sand, and failed to perform proper winter maintenance of the premises.

### **A) CLAIMS IN NEGLIGENCE**

All claims pursuant to the *OLA* will involve a negligence-based analysis, as the *OLA* imposes on occupiers a duty of care to all (even unlawful) visitors on the occupiers' premises. An overview of some of the legal principles which arise in such claims is outlined below.

### **The Law**

Defining an "Occupier"

An "occupier" is defined in the *OLA* to include:

- a) a person who is in physical possession of a premises; or
- b) a person who has responsibility for and control over the condition of the premises or the activities there carried on, or control over persons allowed to enter the premises<sup>36</sup>.

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<sup>36</sup> *Supra* note 1 at section 1.

In the case study above, whether Rogers Foods is an “occupier” will depend on whether Rogers Foods had care and control of the parking lot where the plaintiff fell. As owner of the parking lot, Rogers Foods would certainly fall within this definition.

On the facts as outlined in the case study, Rogers Foods is likely not the only occupier pursuant to the *OLA*. Both an owner and an independent contractor can be occupiers pursuant to the *OLA*. Moreover, s. 6 states that where the plaintiff’s damages are caused by the negligence of an independent contractor employed by the occupier, the occupier may escape liability:

**Liability where independent contractor**

6 (1) Where damage to any person or his or her property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken [*emphasis added*].<sup>37</sup>

If it is determined that Rogers Foods complied with the obligations outlined in s.6 of the *OLA* by entrusting the work to Melt-Away Inc., Rogers Foods would likely escape liability. If, however, the maintenance system was found to be sub-standard with respect to the co-ordination of services with Melt-Away Inc., or if Rogers Foods failed to ensure that Melt-Away Inc. was competent and/or had properly maintained the parking lot, some liability may nevertheless be attributable to Rogers Foods.

In the recent decision of *Lebko v. Toronto Standard Condominium Corp.* 1862<sup>38</sup> for example, the plaintiff tripped and fell while exiting an elevator at a condominium property. The plaintiff commenced an action against several defendants, including the condominium corporation, the property management company, and the elevator maintenance company. The Court determined that the defence afforded in s.6(1) of the *OLA* was

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<sup>37</sup> *Supra* note 1 at section 6.

<sup>38</sup> 2019 ONSC 1602.

available to the condominium corporation and the property management company. There was a contract in place regarding the maintenance of the elevators and there was no issue with respect to the competence of the elevator maintenance company. As such, entrusting the work to the service company was considered reasonable.

In *Britt v. Zagjo Holdings Ltd.*<sup>39</sup>, however, the occupier kept no records to show that the snow maintenance system was operating, and failed to provide instructions to the maintenance contractor to keep the parking lot clear. As such, the owner was found liable to the plaintiff, despite having an independent contractor employed to maintain the parking lot.

### **The Duty and Standard of Care**

Whether there was a duty owed to persons entering the premises and whether that duty was breached, are the central questions in occupier's liability cases. Section 3(1) of the *OLA* codified the common law with respect to this duty:

#### **Occupier's duty**

3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises [*emphasis added*].

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.

The *OLA* imposes a positive duty on the occupier to take all reasonable steps to ensure that the premises are reasonably safe. This standard, however, is not absolute. Occupiers are not required to take unrealistic or impractical precautions against known risks. The

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<sup>39</sup> [1996] O.J. no. 1014, 1996 CarswellOnt 1186.

presence of a hazard does not in itself lead to the conclusion that the occupier breached its duty of care in the circumstances<sup>40</sup>.

The standard of care for an occupier is one of reasonableness and not perfection. Reasonableness is measured on the facts, including foreseeability, the gravity of possible harm, the burden of cost preventative measures, industry practice, custom and regulatory standards.

No one fact is determinative. The failure to follow one's own policies and/or industry standards is not necessarily negligent. A company may well have internal policies or guidelines which are so robust that they exceed a basic reasonableness standard. Courts have recognized this commercial reality, indicated that such goals are laudable and should be encouraged, and noted that they should not be used to support a finding of negligence.<sup>41</sup>

In *OLA* claims, the onus is on the plaintiff to pinpoint an act or failure on the part of the occupier that resulted in the plaintiff's injury.<sup>42</sup>

The reasonableness standard was recently affirmed in *Hosseinkhani v. QK Fitness Inc.*<sup>43</sup> The plaintiff in that case brought an action pursuant to the *OLA* after she tripped and fell on a dumbbell that had rolled from its original position during an exercise class at a gym. The Court granted summary judgment, determining that neither the exercises nor the equipment at the gym were inherently dangerous. Further, the Court stated that "...accidents can occur without anyone being negligent".<sup>44</sup> There was no evidence that the round dumbbells represented an unusual hazard or that the gym had any reason to believe they were hazardous. As such, the Court determined that there was no genuine

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<sup>40</sup> *Waldick v. Malcom*, [1991] 2 SCR 456; [1991] SCJ No. 55; *Kerr v. Loblaw's Inc.*, 2007 ONCA 371.

<sup>41</sup> *Garratt v. Orillia Power Distribution Corp.*, 2008 ONCA 422.

<sup>42</sup> *Hamilton v. Ontario Corporation #2000533 o/a Toronto Community Housing Corporation*, 2017 ONSC 5467.

<sup>43</sup> 2019 ONSC 70; affirmed on appeal in *Hosseinkhani v. QK Fitness Inc.*, 2019 ONCA 718.

<sup>44</sup> *Hosseinkhani v. QK Fitness Inc.* 2019 ONSC 70 at para 100.

issue requiring a trial in relation to the defendant's negligence. The plaintiff's action was dismissed.

In some situations involving criminal activity or trespass to property or where the plaintiff otherwise willingly assumes risks, the reasonableness standard in s.3(1) of the *OLA* does not apply. In those circumstances, s.4(1) of the *OLA* states that "the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property."

### **Secure and Gather Liability Documentation**

Securing various liability information and documentation such as closed-circuit television ("CCTV") footage, floor plans, incident reports, sweep/maintenance logs, witness statements, and employee statements, will assist in determining liability in negligence. This information should be preserved as early as possible, as the trier of fact may draw a negative inference should it be unavailable.

In the event that physical or documentary evidence was not preserved, and is no longer available, the court may conclude that the evidence was subject to spoliation. Spoliation is very difficult to prove, as a party must show that the evidence was lost both *intentionally*, and also *with the goal of procuring an advantage in the litigation*. While this is an extremely high standard to meet, a party is well advised to take all necessary steps in order to ensure the preservation of evidence, in order to avoid the suggestion of spoliation.

### **Consider Other Tortfeasors**

In some cases, the plaintiff may have been injured by the actions of two or more concurrent tortfeasors. Pursuant to s. 1 of the *Negligence Act*<sup>45</sup>, defendants are held jointly and severally liable if their combined actions brought about the harm to the plaintiff. Joint

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<sup>45</sup> R.S.O. 1990, c.N.1.



and several liability is impactful, as the plaintiff may then seek from any of the defendants the full amount of damages suffered.

Claims for contribution and indemnity allow a defendant to sue the co-defendants and outside third parties for damages owing to the plaintiff. These claims may be in the form of crossclaim or, where the party has not been named in the statement of claim, by way of a third party claim. Ultimate legal responsibility will depend on findings of fact made or the evidence developed through the action in advance of trial.

In occupiers' liability cases, other parties that commonly may be liable to the plaintiff include landlords, contractors, manufacturers, suppliers, repairers, installers and even other customers. It is important to review any contracts that may exist that can shift responsibility to other parties.

The focus at this stage is to determine whether the contractor has assumed certain responsibilities pursuant to the agreement such that the contractor can be seen to be an occupier and/or otherwise owe a duty of care to perform its services reasonably. Such contractual obligations and undertakings can thereby support a claim in negligence. For example, in the case study above, as Ms. Volenti slipped on ice, and since the contractor agreed to perform winter maintenance services, Rogers Foods will want to bring a claim for contribution and indemnity against Melt-Away Inc. pursuant to its obligation to perform maintenance services at the property.

The *Occupiers' Liability Act* mandates that an occupier given notice by a claimant of a slip and fall on snow or ice, provide a copy of that notice to any other occupiers of the premises and to any independent contractors employed to remove snow or ice from the premises. This is the case whether or not the occupier intends to commence a claim for contribution or indemnity against any other party. If an occupier receives a notice, it must be forwarded to other occupiers or independent contractors by personal service or registered mail.

### Limitation Period for Contribution Claims

The *Limitations Act, 2002*,<sup>46</sup> states that claims for contribution and indemnity must be commenced within two years of the day on which the party was served with the claim in respect of which contribution and indemnity is sought.

Notwithstanding the above, discoverability principles outlined in the *Limitations Act, 2002* apply to claims for contribution and indemnity. Though the limitation period is presumed to begin to run when the party is served with the claim, the presumption may be rebutted and the limitation period can be extended beyond two years of service in some circumstances.<sup>47</sup>

### B) CLAIMS IN CONTRACT

Where a defendant occupier had in place at the time of an incident a contract with a service provider, that occupier may have a claim in contract against that other entity in relation to the plaintiff's claim. The following are some of the key clauses to review in such contracts:

- **scope and responsibility of services** will determine whether the incident could be attributed to the contractor's work. This is often related to the hold harmless and indemnity clause.
- **hold harmless and indemnity clause** will often impose a contractual duty on the contractor to indemnify and hold harmless the defendant occupier from and against any and all claims that may directly or indirectly result from, arise out of, or be in relation to the service contractor's performance of the services.
- **covenant to insure clause** will impose a requirement that the service contractor obtain and maintain insurance, commonly a comprehensive general liability policy, and name the defendant occupier as an additional named insured on that policy. The service contractor's insurer is commonly responsible for claims arising from the service contractor's business operations. If the service contractor was required to name the defendant occupier as an additional insured, a copy of the

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<sup>46</sup> *Supra* note 23 at section 18.

<sup>47</sup> *Mega International Commercial Bank v. Yung*, 2018 ONCA 429.

certificate of insurance along with a copy of the policy should be obtained as soon as possible.

### **Breach of the Covenant to Insure**

The service contractor is required to obtain insurance coverage as set out in the contract. Typically, this is comprehensive general liability insurance including coverage for bodily injury and property damage arising from the business operations of the service contractor.

In the case study above, if Melt-Away Inc. was required to name Rogers Foods as an additional insured on its policy of insurance but failed to do so, then Rogers Foods may have a claim against Melt-Away Inc. for breach of the covenant to insure. The breach is determined by the **pleadings** and the **terms of service**. If the allegations in the statement of claim arise out of the service contractor's contractually defined services, this would most likely have triggered the insurance coverage that the contractor was supposed to provide.

The contract between Melt-Away Inc. and Rogers Foods required Melt-Away Inc. to regularly inspect the parking lot, to shovel snow, and to apply salt. The statement of claim includes allegations regarding a failure to inspect and a failure to remove ice and snow. As such, the claim likely arises out of Melt-Away Inc.'s services or business operations. If a duty to defend should have been triggered but Melt-Away Inc. failed to acquire the requisite insurance (as outlined in the contract), then Rogers Foods has a valid claim in contract.

The following inquiries should be made when determining whether a service contractor has breached the covenant to insure:

- 1) Does the plaintiff's claim as pled arise from the business operations of the service contractor, particularly as set out in the service contract?
  - Note: there is no need for the claim to arise from the *negligent* operations of the service contractor, unless this is specifically illustrated in the certificate or policy of insurance.

- 2) Did the service contractor obtain the requisite insurance?
- 3) Did the service contractor name the defendant as an additional insured on the policy without additional limitations or restrictions?

If the answers are “yes” to question one and “no” to either of questions 2 or 3, then the defendant has a claim as against the service provider for breach of contract.

### **Remedy for Breach of the Covenant to Insure**

The remedy for a breach of the covenant to insure is an **award of damages** equal to the value of the insurance that would have been available if insurance was in place, absent the breach of contract. These damages generally equate to the costs of the defence of the action, save for any costs incurred exclusively to defend claims that do not arise from the performance or non-performance of the service contract.<sup>48</sup> The remedy is not, as a matter of law, that the contractor or the contractor’s insurer will assume the defendant occupier’s defence. The defendant occupier is entitled to maintain its choice of counsel and seek damages equal to the cost of having to defend itself.

In order for a defendant occupier to preserve its right to damages in contract in circumstances where it is denied coverage by the insurer for the service contractor, the occupier can and should initiate a crossclaim or third party claim against the service contractor, claiming damages for breach of contract.

### **Tendering the Defence and Defence Handling**

Where there is a hold harmless or indemnity provision in the contract between the insured and the service contractor but no covenant to insure, the contract may permit the service contractor to satisfy the indemnification of defence costs by actually assuming the defence of the insured (rather than paying the defence costs as they are incurred).

The assumption of an insured’s defence is not an insuring agreement, but an arrangement between the two companies. Therefore, certain terms should be included when

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<sup>48</sup> *Papapetrou v. 1054422 Ontario Ltd.*, 2012 ONCA 506; see also *Ashcroft v. Aviva*, 2019 ONSC 4634.

requesting the service provider's insurer to assume an insured's defence. Some of these terms may include:

- The carrier shall provide written notice of any change in the assumption of the defence.
- The defendant occupier will not interfere but will co-operate with the defence.
- The defendant occupier shall be advised of the identity of counsel representing its interests so that it can satisfy itself that counsel is competent to do same.
- The defendant occupier will be advised of significant developments in the context of the litigation (settlement offers, pre-trial/trial dates).
- The defendant occupier will be provided with closing documents at the conclusion of the litigation.
- The insurer will not prejudice the occupier's defence position and will not make any admissions without the insured's consent.
- The insurer shall pay all defence costs incurred by the defendant occupier and shall reimburse the defendant occupier for defence costs incurred to date .
- If the service contractor commenced a crossclaim against the defendant occupier, the crossclaim shall be discontinued. Counsel cannot act both for and against a party in the same action.
- If a crossclaim is being maintained, separate counsel shall be appointed to handle the defences.

### **Indemnification Pursuant to the Hold Harmless and Indemnity Clause**

In addition to claiming damages against the service contractor for breaching its contract by failing to name the occupier as an additional insured, the defendant occupier can also look to the service contractor for indemnification pursuant to any hold harmless and indemnity clause in the contract. Any damages awarded would include the defence costs for claims that would be considered covered by the hold harmless/indemnity

provision.<sup>49</sup> Damages for breach of a hold harmless/indemnity clause could also include any amounts the defendant may be required to pay to the plaintiff.

If Rogers Foods is not provided with indemnity by the insurer for Melt Away Inc. (either because it was not added as an additional insured, or because the insurer for the service provider denies coverage), Rogers Foods is entitled to bring an action against Melt-Away Inc. in contract. Rogers Foods in this context would seek damages for breach of contract in an amount equivalent to what Rogers Foods may be found liable to pay to the plaintiff, plus full defence costs, pursuant to Melt-Away Inc.'s contractual obligations to hold harmless and indemnify Rogers Foods.

If Ms. Volenti's action included claims that fell outside of Melt-Away's obligations, such as that the parking lot was uneven or the lighting was insufficient, then these claims may be considered to be outside of the contractor's business operations and may not be covered by the hold harmless and indemnity provision in the contract. As such, the expenses associated with defending these claims may not be awarded to Rogers Foods from Melt-Away Inc., and Rogers Foods could still be liable to the plaintiff for these claims.

### **Limitation Period for Claims in Contract**

#### **Breach of the Covenant to Insure**

Generally, the limitation period for a breach of contract is two years from the date of the breach. In the context of a breach of a covenant to insure, the limitation to commence a claim for breach of contract is two years from the date that the party alleging the covenant was breached was served with the statement of claim.<sup>50</sup>

Normally, this limitation is considered to be the same as a claim for contribution for indemnity (two years from the date the party was served with the statement of claim),

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<sup>49</sup> *Page v. Rogers*, 2017 ONSC 2341.

<sup>50</sup> *Canaccord Capital Corporation v. Roscoe*, 2013 ONCA 378.

subject to discoverability.<sup>51</sup> During the initial investigations, it is important to note the date on which the defendant occupier first became aware of a potential claim by the plaintiff that may involve a service contractor. As soon as it is evident that this party may be involved, the certificate of insurance should be requested and, if the matter is being transferred to defence counsel, this date should be highlighted in order to avoid any issue with respect to a limitation period.

### **Hold Harmless and Indemnity**

Though the service contractor's obligation to hold harmless and indemnify the defendant is pursuant to a contract, the Court has held that indemnification clauses in commercial contracts are properly characterized as claims for contribution and indemnity.<sup>52</sup> Therefore, s.18 of the *Limitations Act, 2002*, would apply such that the limitation period for a claim for breach of a hold harmless and indemnity clause would be two years from the date in which the defendant was served with the statement of claim,<sup>53</sup> subject to discoverability.

### **C) CLAIMS IN INSURANCE**

Next we consider the situation where the contractor or vendor does not breach the covenant to insure and as such does obtain the requisite insurance and names the defendant occupier as an additional named insured on that policy. If the service contractor obtained insurance, the following steps should be undertaken:

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<sup>51</sup> The Court has determined that in some circumstances, however, a claim for breach of the covenant to insure can have a shorter limitation period than a claim for contribution and indemnity. In *Brookstreet v. Economical*, 2018 ONSC 80, the Court held that a claim against a contractor for breach of the covenant to insure was reasonably discoverable shortly after the plaintiff advanced a claim. Reasonable inquiries in that case would have led the claimant to realize the contractor did not obtain the insurance that they agreed to obtain.

Until the plaintiff serves the statement of claim, however, it is difficult to ascertain whether the nature of the allegations in the statement of claim would have triggered a duty to defend if the requisite insurance policy had been obtained. As such, it appears that *Brookstreet v. Economical*, may only serve as a cautionary tale to bring claims in contract based on the covenant to insure as soon as reasonably possible.

<sup>52</sup> *Canaccord Capital Corporation v. Roscoe*, 2013 ONCA 378.

<sup>53</sup> *Supra* note 23 at section 18.

1. Request a copy of the certificate of insurance and the relevant policy.
2. Tender the statement of claim to the insurer, and request that the insurer defend the insured (and demand that any crossclaims made by the service contractor be discontinued).
3. Consider launching a coverage application if coverage is denied or refused.

These issues are outlined in further detail below.

### **The Duty to Defend**

A careful review of the pleadings, the service contract and the insurance policy/certificate of insurance will reveal whether an insurer has a duty to defend in the circumstances.

The duty to defend is an unqualified obligation by an insurer to its insured. An insurer's duty to defend is triggered by the **pleadings**. The pleadings must allege facts that, if true, would require the insurer to indemnify the insured. The "mere possibility" that a claim falls within the policy will trigger the duty to defend. This remains so even though the actual facts may differ from the allegations pleaded.<sup>54</sup> As such, the facts obtained through the litigation such as at examinations for discovery, or that which are adduced at trial, are irrelevant with respect to an insurer's ongoing duty to defend.

If the pleadings are not framed with sufficient precision such that it is difficult to determine whether the claims are covered by a policy, an insurer's obligation will be triggered if on a reasonable reading of the pleadings, a claim in coverage can be inferred.<sup>55</sup>

Commonly, the service contractor will take out insurance naming a party as an additional insured providing coverage pursuant to a commercial general liability policy with respect to liability **arising out of the operations** of the service contractor. The Ontario Court of Appeal recently emphasized that when considering whether an insurer owes a duty to

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<sup>54</sup> *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33.

<sup>55</sup> *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49.



defend an additional named insured, the language of the insurance policy is paramount.<sup>56</sup> The Court of Appeal also outlined that, in considering the language of “arising out of the operations,” a but-for analysis is necessary, but not sufficient on the question of coverage. The courts must consider:

- a) whether there is a but-for connection between the allegations of negligence against the additional insured and the operations of the named insured;
- b) whether the connection is more than merely incidental or fortuitous; and
- c) whether the claim alleges an unbroken chain of causation, or whether there is an intervening event that is outside the scope of the contractor’s operations.<sup>57</sup>

For example, the claim against Rogers Foods includes allegations relating to its failure to inspect and remove snow from the parking lot. As such, the claims contained in Ms. Volenti’s statement of claim would likely trigger coverage and a defence obligation upon Caveat Insurance Co., as these claims:

- clearly relate to the business of Melt-Away Inc., specifically regarding the removal of snow and ice removal where the incident occurred
- relate to a connection that is more than merely incidental, and
- do not allege an intervening event that would break the chain of causation.

The Court of Appeal in *Sky* reiterated that an insurer owes a duty to defend where there is a “mere possibility” that the true nature of the claims, as pleaded, would fall within the coverage grant if proven at trial.

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<sup>56</sup> *Sky Clean Energy Ltd. (Sky Solar (Canada) Ltd.) v. Economical Mutual Insurance Company*, 2020 ONCA 558.

<sup>57</sup> *Ibid.*

## Covered vs. Uncovered Claims

Generally, if the pleading contains both covered and uncovered claims, the insurer must pay the costs of those covered claims, even if doing so also advances the defence of the uncovered claims.

If the insurer has not clearly specified in its policy that the duty to defend is limited to covered rather than uncovered claims, then the insurer's duty is to defend all of the claims, both covered and uncovered.<sup>58</sup>

Where the uncovered claims are clearly severable from the covered claims, the insurer would be responsible for those expenses associated with only the covered claims.<sup>59</sup> Moreover, if the same defence costs are incurred for both the covered and uncovered claims, the insurer is responsible for all defence costs, and it is unnecessary for these costs to be allocated between the insurer and the insured unless the policy provides otherwise. The effect, for defence purposes, is that all of the claims become 'covered claims.' A party may apply, however, to the Superior Court for a determination of apportionment following judgment when the duty to indemnify has been decided.

We will assume that the statement of claim in the case study above alleges that, after she fell in the parking lot, Ms. Volenti walked into Rogers Mart and then slipped on a piece of fruit on the floor, sustaining a broken arm. As Melt-Away Inc. is not responsible for the operations inside Rogers Foods, Melt-Away's insurer would not be required to fund Rogers Foods' defence as it relates to the incident inside the store (an uncovered claim).

## Defence Costs From Date of Tender

The Court has determined that an insurer's right and duty to defend is only triggered when it receives notice of a potentially covered claim, subject only to wording in the insurance policy to the contrary. Where it is clear that an insurer has a duty to defend, it

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<sup>58</sup> *Markham (City) v. AIG Insurance Company of Canada*, 2019 ONSC 4977.

<sup>59</sup> *Hanis v. University of Western Ontario*, 2008 ONCA 678; *Papapetrou v. 1054422 Ontario Ltd.*, 2012 ONCA 506; *Carneiro v. Durham (Regional Municipality)*, 2015 ONCA 909.

is important that an occupier tender a request for coverage as soon as possible in order to be reimbursed for defence costs owed. Absent specific policy wording or an agreement, a commercial general liability insurer is not required to cover pre-tender defence costs.<sup>60</sup>

### Separate Counsel

Though the insurer has the right to conduct the defence of its insured, including the appointment of defence counsel, this right is not absolute. Where an insurer behaves in such a manner that raises a reasonable apprehension of a conflict of interest, the Court may order the appointment of separate counsel at the insurer's expense.<sup>61</sup>

For example, if Caveat Insurance Co. directed its counsel to allege liability or advance a crossclaim against Rogers Foods, or attempted to shift liability to Rogers Foods while minimizing the liability of Melt-Away Inc., this might create an apprehension of a conflict of interest such that Rogers Foods may be entitled to direct and appoint its own counsel at Caveat Insurance Co.'s expense.

In *Markham (City) v. Intact Insurance Co.*,<sup>62</sup> the contractor's insurer, Intact, owed a duty to defend the City of Markham as an additional insured under the contractor's policy. The Court determined that there was a conflict of interest between Intact and the City of Markham, as it became clear on the reading of the contractor's statement of defence and crossclaim that Intact's objective, and that of legal counsel appointed by Intact to defend the contractor, was to shift liability to the City of Markham.

The Court in *Markham (City) v. Intact Insurance Co.*, did not believe that "ethical walls" separating Intact insurance adjusters were sufficient, as there was evidence that the conflict of interest was real. As such, the Court determined that the conflict was best dealt

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<sup>60</sup> *Brockton (Municipality) v. Frank Cowan Co.*, [2002] I.L.R. I-4097, [2002] O.J. No. 20; *Markham (City) v. AIG Insurance Company of Canada*, 2019 ONSC 4977.

<sup>61</sup> *Brockton (Municipality) v. Frank Cowan Co.*, [2002] I.L.R. I-4097, [2002] O.J. No. 20; *Carneiro v. Durham (Regional Municipality)*, 2015 ONCA 909.

<sup>62</sup> *Markham (City) v. Intact Insurance Co.*, 2017 ONSC 3150.

with by the City of Markham retaining independent counsel without having to report to Intact or take instruction from Intact. Intact was required to fully fund this defence.

The entitlement to appoint independent counsel without having to report to the insurer is determined on a case-by-case basis. Where, for example, a crossclaim has been advanced against a party to which a duty to defend is owed, there are circumstances where separate counsel appointed by the insurer and ethical walls between adjusters will be sufficient to ensure that the defence is handled properly.<sup>63</sup> An insurer has a duty of good faith to its insured, and counsel appointed to defend that insured also has an obligation to represent that client in good faith. As such, the Court will undertake an analysis of the facts to determine whether there is a reasonable apprehension of a conflict of interest.

### **Commencing a Coverage Application**

Where the service contractor's insurer refuses to honour its obligation to defend an insured occupier, the insured occupier may bring an Application in front of a judge for a coverage determination. An Application is commenced by issuing a notice of application and would seek a declaration that the insurer owes a duty to defend.

The materials used for an Application includes an application record and factum to be delivered by both the applicant and the respondent. An Application is a relatively straightforward process, generally with no evidence considered outside of the relevant insurance policy documentation, the service agreement, and the statement of claim. Costs of a successful application are payable on a substantial indemnity basis.<sup>64</sup>

### **The Duty to Indemnify**

The duty to defend is much broader than the duty to indemnify. As outlined above, it is not necessary to prove that the obligation to indemnify will actually arise in order to trigger the duty to defend. An insurer has a duty to defend where there is a "mere

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<sup>63</sup> See e.g., *Markham (City) v. AIG Insurance Company of Canada*, 2020 ONCA 239

<sup>64</sup> *Reeb v. The Guarantee Company of North America*, 2019 ONCA 862 at para 12.

possibility” that the true nature of the pleaded claim, if proven at trial, falls within coverage and would trigger the insurer’s duty to indemnify.<sup>65</sup>

The duty to indemnify is triggered in two situations: first, where the insurer agrees to defend the allegations as asserted in the Statement of Claim as against the insured without articulating in a timely fashion any qualification or reservation on the issue of indemnity; and second, where a court makes findings of fact which place the events at issue within coverage for which the insured is entitled to indemnity. The latter circumstance arises where an insurer asserts at the outset that there are both covered and uncovered claims (for the purpose of indemnity) and it is left to be determined at trial as to whether the actual loss causing event arises out of a covered claim.

An insurer may anticipate, upon receipt of a claim, that it will argue, depending upon the findings of fact by the court, that it owes the insured no indemnity (because the facts as found may bring the events outside coverage). In that case, the insurer should articulate in a timely fashion, with clarity and specificity, that it intends to take this position -- that there are both covered and uncovered claims being asserted, a description of the covered and uncovered claims, and the insurer’s position as it relates to both the duty to defend and the duty to indemnify. In the event that an insurer does not clearly articulate this position in a timely manner and instead simply defends the insured occupier without reservation, then it may be precluded (estopped) from later taking the position that it does not owe a duty to indemnify for certain claims later said to be uncovered.

### **Limitation Period**

The Court of Appeal recently clarified the limitation period for commencing a duty to defend application. Previously, the case law suggested that there must be a clear and unequivocal denial of coverage for the limitation period to begin to run for such claims.<sup>66</sup>

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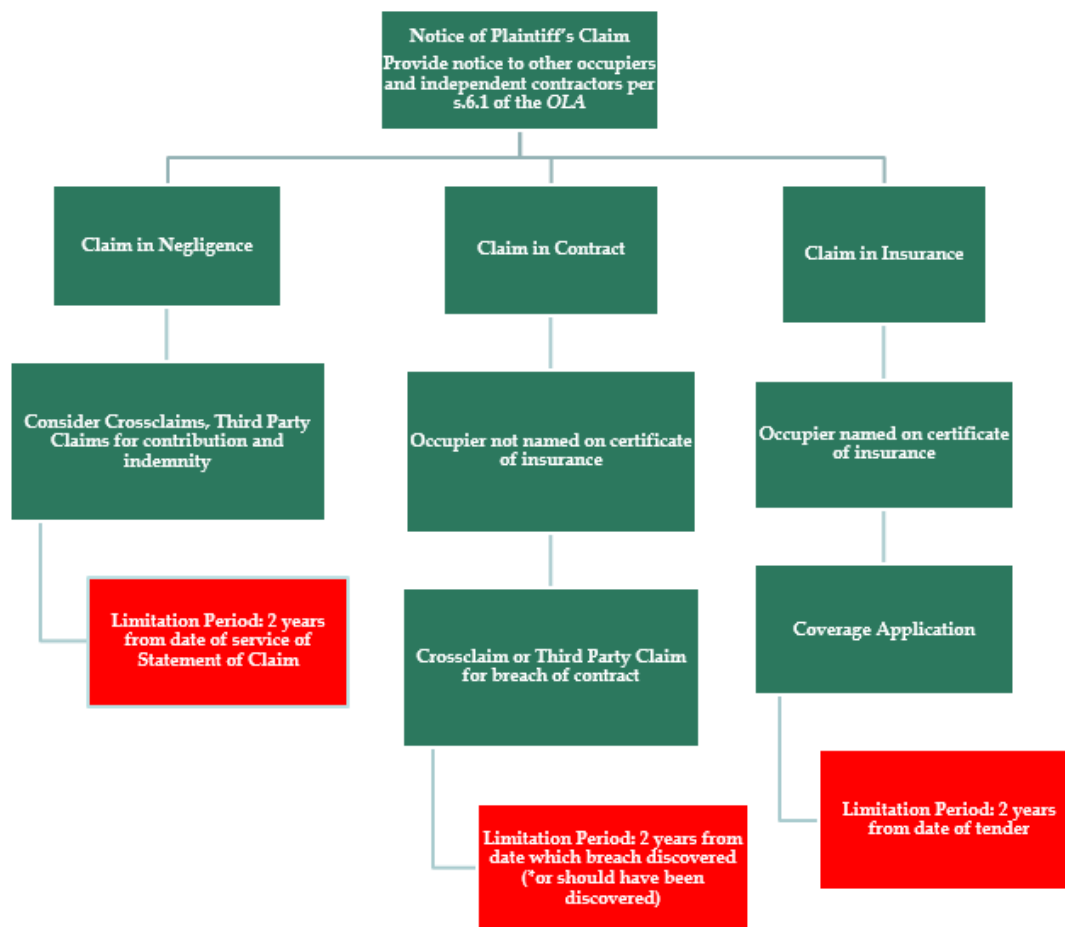
<sup>65</sup> *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33

<sup>66</sup> *Daverne v. John Switzer Fuels Ltd*, 2015 ONCA 919; *Zochowski v. Security National Insurance*, 2015 ONSC 7881; *Federation Insurance Co. of Canada v. Markel Insurance Co. of Canada* 2012 ONCA 218; *Georgian Downs Ltd. v. State Farm Fire and Casualty Co*, 2012 ONCA 181.

In *Reeb v. The Guarantee Company of North America*,<sup>67</sup> the Court of Appeal stated that the duty to defend is an ongoing obligation to be applied on a “rolling basis”. As such, even more than two years following a denial of coverage, a duty to defend application can be brought. In such circumstances, damages for defence fees incurred can only be recovered against an insurer from two years prior to an application being issued.

In any event, the best practice for an occupier would be to commence a coverage application within two years of the date which the statement of claim was tendered to the insurer.

The illustration below provides an overview of the claims and issues in negligence, contract and insurance that should be considered as part of the initial defence strategy:



<sup>67</sup> *Supra* note 64.

## **V. THE DISCOVERY PROCESS**

Documentary discovery and examinations for discovery are essential pre-trial procedures which permit the parties to better understand the case. At the discovery stage, the evidence upon which factual contentions are based is gathered, and the strengths and weaknesses of each party's case is revealed.

### **Documentary Discovery**

Prior to oral examinations, there is a period of documentary discovery. It is important to make requests for documentation early. Examples of documents to obtain from the plaintiff include:

#### **Liability documents:**

- police reports, fire, ambulance call records, and witness statements.

#### **Property damage documents:**

- photographs, estimates and work orders.

#### **Collateral benefits documents:**

- insurance coverage documents including a plan booklet (summary of benefits available) as well as a list of payments broken down by category. These records include any short-term or long-term disability policy or health care plan.

#### **WSIB File:**

- including summary of any benefits received.

#### **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.

**Income loss documents:**

- income tax returns, CPP and ODSP files, employment file.

**Other pecuniary loss documents:**

- particulars for out-of-pocket expenses, particulars for housekeeping and home maintenance, particulars for personal care.

All parties must produce an affidavit (or list) of documents, along with the records (if requested) over which privilege is not being claimed. Only documents that are relevant to the issues in the litigation (i.e. liability and damages) are required to be disclosed.

Common documents that may be contained in an occupier's affidavit of documents may include:

- incident reports
- floor cleaning schedules
- photographs
- floor plans
- policies and procedures
- attendance records
- witness statements\* (commonly not produced and listed in Schedule "B")
- CCTV footage

Any documents over which privilege is claimed are required to be listed in a Schedule "B" of the affidavit of documents. A party may claim privilege over these documents in two main ways:

**Lawyer and Client Privilege**

All correspondence between a lawyer and client is privileged, and shall not be produced to any other party. This type of privilege is broad and strictly enforced. The Court will go to great lengths to protect this, as individuals have a right to seek and obtain legal advice without fear of disclosure. The privilege belongs to the client (or defendant) and as such a waiver of privilege should only occur upon the client's direction and instruction.



## **Litigation Privilege**

Documents which were created for the purpose of litigation or in which litigation was anticipated are covered by litigation privilege. Documents will be included under this umbrella if the purpose of the document is for protection in case of litigation or if the document was created where the plaintiff threatened litigation.

It is important to note that the dominant purpose for the creation or completion of the document must be actual or anticipated litigation. It is generally not sufficient if actual or anticipated litigation is just one of many reasons for the document creation or completion.

## **Discovery Plans**

The *Rules of Civil Procedure* require that parties agree to (and update) a written discovery plan for examinations for discovery. The purpose of the discovery plan is to provide a road map to the discovery process, and shall include the scope of documentary discovery, dates for the service of affidavits of documents, information regarding the intended persons to be produced for oral examination, and the timing and length of examinations.<sup>68</sup> A key term to include in the discovery plan is the date by which the plaintiff will provide productions, in order to allow time for sufficient review and preparation ahead of the examination for discovery.

## **Preparing Corporate Deponents for Examinations for Discovery**

In occupiers' liability cases, it is important for the deponent selected to give evidence at examinations for discovery to have knowledge of the business' safety, maintenance and inspection procedures. Corporate deponents are required to make efforts to inform themselves by speaking to others and reviewing relevant documents in advance of their examination. It is important to remember that the deponent is not speaking only from his or her own perspective. The deponent selected is giving evidence on behalf of the

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<sup>68</sup> *Supra* note 2 at Rule 29.1.03.

corporate defendant and must take reasonable steps to inform themselves of the information and documentation in the possession of the corporation that is relevant to the issues in the action.

Counsel should ensure the corporate deponent is aware of the expectations from them and should review the key information and documentation that is likely to be canvassed during questioning. At a minimum, counsel should review with the corporate deponent all documents contained in the affidavits of documents, and highlight contentious areas such as policies of maintenance, repair and inspection, post-accident investigations and post-accident safety measures.

The corporate defendant's deponent should also be made aware of the further investigations that will take place after the examinations for discovery, which will often include further document gathering related to undertakings provided at his or her examination.

### **Examination for Discovery of the Plaintiff**

In an action pursuant to the *OLA*, there will typically be two general areas to explore with the plaintiff on examination for discovery: liability and damages.

When exploring the issue of liability, the overarching issues to be determined are *what happened* and *who is at fault*? Some general areas to explore include:

- **What did the plaintiff see/hear/feel/smell/think/do?**
  - Have the plaintiff explain the specific facts and circumstances surrounding the incident. Important information can be adduced from the plaintiff's account of the environment and their actions. Details of the mechanics of the slip and fall should be canvassed particularly in relation to the nature of the injuries alleged to have been sustained.
  
- **Personal conditions**
  - What activities did the plaintiff do earlier in the day/do they have any medical issues or eyesight difficulties/were they wearing clothing that could have impacted their mobility/were they wearing proper footwear?

- **Hazard detection**

- Was the plaintiff familiar with the store/do they have any complaints with respect to the lighting or the state of the floor/were they carrying anything in their hands that would impact their balance or ability to brace themselves on a fall?

- **Witnesses & Statements**

- Did the plaintiff attend the store alone/has counsel obtained any statements from anyone who witnessed the accident/were pictures or videos taken in the aftermath and, if so, for what purpose?

The discovery process also provides an opportunity to investigate the damages, losses, and injuries being claimed by the plaintiff, and how the plaintiff intends to prove them. It is important to adduce and test information regarding the plaintiff's initial injuries, treatment, and the current state of those injuries. Questioning will include:

- Details of the plaintiff's life before and after the accident, including post and pre-accident health concerns, employment, education, personal relationships, hobbies and other activities of daily living;
- Information regarding the specific injuries and the extent of ongoing impairment alleged to have been caused by the incident;
- Whether the plaintiff attended or received any treatment for the injuries alleged and the details of that treatment, including whether the plaintiff ceased treatment and the reasons for same; were recommendations made by a treating healthcare provider that have not been followed? If not, why not? and
- Undertakings should be obtained for any medical or loss substantiation records or information discussed that have not been produced. A request should be made for all such records to be updated periodically, upon request, such as in advance of significant steps in litigation process, including trial.

The discovery process also allows for the plaintiff's credibility and likeability to be evaluated. Inconsistencies in the plaintiff's evidence should be explored and gaps in the plaintiff's story questioned. In some circumstances, however, defence counsel may make a strategic decision to leave inconsistencies for trial, in order to impeach the plaintiff.

Finally, the plaintiff will be required to disclose any findings, opinions or conclusions from any experts or undertake not to call them as a witness at trial.

### **Reporting Following Examinations for Discovery**

After examinations, we provide our clients with a detailed and fulsome report on the outcome of the oral discoveries. These reports often include an analysis of the following areas:

- The credibility and likeability of the witness;
- Key facts adduced;
- An updated liability assessment;
- An updated damages exposure assessment including:
  - Non-pecuniary general damages;
  - Income loss (past and future);
  - Other pecuniary losses, including housekeeping and home maintenance;
  - Health care claims including claims for treatment expenses and personal care, and
  - Out of pocket expenses.
- Recommendations and an updated action plan to bring the matter to a resolution, which may include mediation, pre-trial and/or a motion for summary judgment or some other dispositive or procedural motion ;
- Review of loss control measures, including the benefits of surveillance, social media searches and defence medical or other assessments; and
- An updated budget (if necessary).

### **Exploring Damages: Issues Regarding Entitlement to Collateral Benefits**

The Supreme Court of Canada has made it clear that an injured person should be compensated for the full amount of their loss, but not further.<sup>69</sup> A plaintiff should receive

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<sup>69</sup> *Ratych v. Bloomer*, [1990] SCJ. No. 37, [1990] 1 SCR 940.

full and fair compensation, with a mind to put the plaintiff in the position she or he would have been in had the tort not been committed. As such, double recovery must be avoided when awarding damages to an injured plaintiff. If, for example, a plaintiff sustains no wage loss as a result of a tort because the employer continued to pay his/her salary while off work, the plaintiff should not be entitled to recover damages for loss of income.<sup>70</sup>

There are, however, exceptions to the rule against double recovery in *OLA* cases (and other non-auto matters). These exceptions effectively allow a plaintiff in certain circumstances a right to double recovery. If the plaintiff paid or gave up something in exchange for a policy or benefit, or if the plaintiff has been paid pursuant to a contract of indemnity, collateral benefits generally should not be deducted unless otherwise prescribed by legislation. Below are some examples.

### 1. Private Insurance Exception

Where a plaintiff has paid for insurance (i.e., premiums), a defendant will not get the benefit of the plaintiff's foresight for obtaining and maintaining that insurance. As such, no deduction is made on a damages award where the plaintiff has paid premiums to a private insurer in exchange for the collateral benefits that the plaintiff received. An example is where the plaintiff receives short-term disability benefits through a plan to which she or he contributed or paid premiums.

### 2. Subrogation Exception

The plaintiff's benefits policy may contain a subrogation clause allowing his/her collateral benefits insurer to sue in the name of the plaintiff to recover benefits paid as a result of the plaintiff's injuries. If the collateral payor has a right of subrogation, then the collateral benefits received by the plaintiff will not be deducted.

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<sup>70</sup> *Supra* note 69. See also: *Cunningham v. Wheeler*, [1994] 1 SCR 359.

In respect of contracts of indemnity, the insurer has a right of subrogation in common law, whether it is expressly outlined in the contract or not and whether or not the insurer exercises that right.<sup>71</sup>

The ability of a collateral benefits insurer to subrogate, however, is limited. The Supreme Court of Canada in *Ledingham v. Ontario (Hospital Services Commission)* stated that the right of subrogation is dependent on **full recovery** by the insured.<sup>72</sup> As such, if an injured plaintiff only receives **partial** recovery from a tortfeasor for his/her injuries, an insurer's right of subrogation will not vest. Similarly, if the policy itself does not fully cover the category of loss covered by the policy (e.g., a co-pay situation), the plaintiff may not be covered and fully indemnified and the right of subrogation may not vest. This common law rule may be altered, however, by the terms of the contract between the parties.<sup>73</sup>

Where an insurer is entitled to subrogate, but there are insufficient resources available to satisfy both the insured's personal claim for the uninsured losses and the insurer's subrogated claim, then recovery is to be shared between them on a pro-rata basis.<sup>74</sup>

**The limits on a collateral carrier's right to subrogate at common law is important and should be considered and explored by defence counsel wherever a subrogated interest is being advanced.**

### **OHIP Subrogated Claims**

In actions pursuant to the *OLA*, there may be some exposure to subrogated claims brought on behalf of the Ontario Health Insurance Plan (OHIP), for health care expenses incurred in connection with the treatment of the injured person. However, the Court has

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<sup>71</sup> One example of a policy of indemnity is a disability policy in which the benefit amount is tied to the plaintiff's pre-accident income and where the benefit payment is tied to the plaintiff's post-accident ability to work. An example of a policy of non-indemnity is a life insurance policy in which the benefit payment is in a defined amount and payable upon a defined event (i.e. death).

<sup>72</sup> [1974] 1 SCR 332, [1974] SCJ No. 53. See also *Tuffnail v. Meekes*, 2020 ONCA 340; *Somersall v. Friedman*, 2002 SCC 59; *Globe & Rutgers Fire Insurance Co. v. Truedell* (1927), 60 O.L.R. 227 (Ont. C.A.).

<sup>73</sup> *Somersall v. Friedman*, 2002 SCC 59.

<sup>74</sup> *Ibid.*

stated that the primary consideration is to see full compensation to the insured, and only where an insured is fully compensated is there any surplus for the insurer.<sup>75</sup>

In *Ledingham v. Ontario (Hospital Services Commission)*, the Supreme Court held that the ordinary meaning assigned to subrogation applied to OHIP claims, and that OHIP's right of subrogation did not vest until the injured persons recovered the full amount of their damage award. As such, OHIP does not have a right of subrogation until the plaintiff has been fully compensated. These considerations can be impactful, especially as part of settlement discussions for amounts payable to the plaintiff for an OHIP claim.

## **VI. SUMMARY JUDGMENT MOTIONS**

Certain actions may be capable of judicial resolution without the need to proceed through to a formal trial on the merits of the case. As such, the *Rules of Civil Procedure*<sup>76</sup> provide for summary judgment, a pre-trial procedure applicable to those cases where there is **no genuine issue requiring a trial**.

On a motion for summary judgment, the motion judge is granted the power to weigh evidence, evaluate credibility and draw inferences. Although summary judgment motions are usually determined on a written record, the motion judge has the power to order oral evidence. These motions are designed to promote access to justice, and increase expediency and affordability in civil litigation.

The Supreme Court of Canada in *Hryniak v. Mauldin*<sup>77</sup> provided further guidance on the application of the rule. Whether there is a genuine issue requiring a trial will depend on whether the motion judge can reach a fair and just determination on the merits. This will be the case where the summary judgment process:

1. Allows the judge to make necessary findings of fact;

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<sup>75</sup> *Ontario Health Insurance Plan v. United States Fidelity & Guaranty Co.* 1986 CarswellOnt. 68, 33 DLR (4<sup>th</sup>) 439; affirmed on appeal 1989 CarswellOnt 2323, 57 DLR (4<sup>th</sup>) 640 (ONCA).

<sup>76</sup> *Supra* note 2 at Rule 20.04

<sup>77</sup> *Hryniak v. Mauldin*, 2014 SCC 7.

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.

A case will be appropriate for summary judgment where there are narrow and discrete issues involving evidence from a small number of witnesses.<sup>78</sup> The responding party is required to put his/her best foot forward through affidavit or other evidence to show that there is a genuine issue requiring a trial for all affected parties.

### **Recommending Summary Judgment**

Initially, the summary judgment procedure appeared to provide parties with an opportunity to expedite an adjudication of uncomplicated cases, without incurring the costs of proceeding with the litigation through to a trial. However, despite the comments and encouragement of the Supreme Court in *Hryniak*, courts have been reluctant to grant summary judgment.

The high onus on the respondent to put their best foot forward, actions that are complicated by multiple defendants, and a party's right to a jury trial all are all examples of issues that may hinder the summary judgment process and cause a motion judge to be reluctant to grant a summary disposition of the issues in dispute.

In some cases, the court has refused to grant summary judgment despite seemingly simple and unassailable facts. In *Rego v. Walmart*<sup>79</sup>, for example, the plaintiff alleged that she slipped and fell due to a puddle of liquid on the floor. CCTV footage was available which did not depict any liquid or debris on the floor. Further, the behaviour of many other individuals seen walking through the area suggested that there was no liquid or other hazards on the floor. As such, the defendants argued that there was no genuine issue for trial and that summary judgment should be granted.

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<sup>78</sup> *James v. Miller Group Inc.*, 2014 ONCA 335

<sup>79</sup> 2017 ONSC 812; leave to appeal refused in *Rego v. Walmart*, 2017 ONSC 2599.



The plaintiff in *Rego v. Walmart* testified at her examination for discovery that she later observed a Walmart employee cleaning liquid in the area where she fell. However, the CCTV footage did not capture this employee. As such, the motion judge concluded that the record revealed a genuine issue requiring at trial, and that the plaintiff should have the opportunity to examine the CCTV operator.

Despite potential shortcomings, summary judgment can, in some instances, be an effective way to resolve an action without incurring the costs associated with preparing a matter for pre-trial and proceeding with a trial. However, the determination of the suitability of summary judgment has been limited by the Court. Limitation period cases may remain appropriate whereas cases with conflicting evidence from a variety of witnesses where the final determination will be based on an evaluation of credibility will generally not be appropriate for summary judgment.

## **VII. ALTERNATIVE DISPUTE RESOLUTION**

### **Mandatory Mediation**

The *Rules of Civil Procedure*<sup>80</sup> establish a mandatory mediation program for actions in Toronto, Ottawa and Windsor. In these cases, a mediation is expected to take place within 180 days after the first defence is filed.

Mandatory mediation, however, does not equate to mandatory settlement. Nevertheless, mediations can still be productive if the parties do not settle, as it provides an opportunity to address the plaintiff directly, and to explain the costs and risks of the litigation and the weaknesses of the plaintiff's claim.

It also presents an opportunity for clients and decision-makers to meet the plaintiff and plaintiff's counsel. The credibility and likeability of the plaintiff and the effectiveness of plaintiff's counsel can have a major impact on the outcome of the case.

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<sup>80</sup> *Supra* note 2 at Rule 24.1.

### **Suitability of a Mediation**

Actions that are not subject to mandatory mediation may still benefit from the assistance of a mediator who can help manage the expectations of both counsel and the plaintiff and can push towards a narrowing of the issues.

Mediations can also be helpful in matters where liability is clear, where there is a trial pending or where the plaintiff appears to have unrealistic expectations of the matters at issue. It is our perspective, however, that frivolous claims are often not worth the cost of a mediation. These cases would benefit more from a critical review by a pre-trial conference judge.

## **VIII. PRE-TRIAL AND TRIAL CONSIDERATIONS**

### **Preparing for Trial**

After the close of pleadings, any party ready for trial may set the action down for trial by serving a trial record.<sup>81</sup> Setting a matter down for trial limits that party's ability to bring motions and pursue further discovery. However, failure to set the matter down for trial in a reasonably timely fashion risks a dismissal for delay.

Any actions commenced on or after January 1, 2012 are subject to automatic dismissal without notice. The registrar will dismiss an action for delay if it has not been set down for trial by the fifth anniversary of the date which the statement of claim was issued. Thirty days before this fifth anniversary, a party wishing to extend the time to set the matter down for trial may, with the consent of all parties, file a timetable setting out steps to be completed. The proposed consent date by which the action must then be set down may be no more than two years after the day the applicable period expires.

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<sup>81</sup> *Supra* note 2 at Rule 48.

### **Pre-Trial Conference**

Prior to trial, the Court will schedule a pre-trial conference with a judge who will meet with counsel (and sometimes the parties) to discuss their views on the case and to evaluate whether the action may be capable of settlement. The pre-trial conference judge will not be the judge who will hear the case at trial, should the matter proceed.

In advance of the pre-trial conference, the parties will submit a pre-trial memorandum, similar to a mediation memorandum, setting out the issues and evidence to support their positions on liability and damages. Often, the pre-trial judge will push the parties to come to an agreement, will question liability, simplify outstanding issues and review the quantum of damages.

The pre-trial judge can make various trial management orders or directions at the pre-trial, including those relating to:

- timetables for the delivery of expert reports, requests to admit and will-say statements;
- the disclosure of witness lists;
- timelines for any expected motions or further discoveries;
- time limits on oral evidence;
- summaries of opening statements and jury questions;
- requiring the plaintiff to attend defence medical assessments; and
- security for costs.

## **IX. SETTLEMENT AND CLOSING DOCUMENTS**

### **Closing Documents**

Once a claim has been resolved, whether informally between counsel or with the assistance of a mediator or pre-trial judge, the defendants will want to obtain a full and final release and opposing counsel's consent to obtain a dismissal order.

The purpose of the full and final release is to obtain a formal acknowledgment from the plaintiff that his/her claims against the defendants are resolved and that no future claims or actions will be brought against the named defendants or any others in relation to the subject incident.

The defendant may also wish to include a confidentiality agreement with the release. Such a clause provides protection against communication of the settlement terms and stipulates that the details of the settlement may only be disclosed to legal counsel or unless otherwise required by law, on notice to the defendant. These terms, however, are not often considered standard and should be raised during settlement negotiations and form part of the settlement agreement.

Defence counsel should also consider whether to obtain a release from OHIP.

### **Parties Under a Disability**

A “party under disability” refers to minors (under the age of 18) and those who have been deemed mentally incapable to make decisions pursuant to the *Substitute Decisions Act*.<sup>82</sup> Parties under a disability are required to have a litigation guardian, who will instruct counsel throughout the litigation and make decisions on the individual’s behalf.

A settlement is not binding on a party with a disability without approval by a judge.<sup>83</sup> Similarly, judgment cannot be obtained on consent in favour of or against a party under disability without judicial approval. As such, before a settlement can be binding and enforceable, the party must bring a motion or application for approval by a judge, which must include an affidavit of the litigation guardian setting out the material facts and reasons supporting the proposed settlement, and the position of the litigation guardian in respect of the settlement.<sup>84</sup>

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<sup>82</sup> 1992, S.O. 1992, c.30.

<sup>83</sup> *Supra* note 2 at Rule 7.08.

<sup>84</sup> *Supra* note 2 at Rule 7.08.

### **Post-Settlement Issues**

If a party fails to honour its settlement obligations, a motion can be brought before a judge to enforce settlement. A court may choose not to enforce the settlement, however, where it is evident that:

- a) the resulting agreement and settlement was unconscionable, fraudulent, or based on a party's misapprehension of a material fact which was known to the opposite party;
- b) the solicitor representing the party was not retained or did not have authority to settle the action and this limitation was known to the opposing party; or
- c) the party lacked the legal or mental capacity to enter into the settlement agreement at the material time.<sup>85</sup>

If a party alleges that the agreement was unconscionable, the court will consider:

- a) whether the settlement agreement is grossly unfair and improvident;
- b) the party's lack of independent legal advice or other suitable advice;
- c) overwhelming imbalance of bargaining power caused by a party's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
- d) other parties knowingly taking advantage of this vulnerability.<sup>86</sup>

### **X. CONCLUSION**

There are no shortage of claims made pursuant to the *OLA*. The key to managing these claims efficiently and effectively is through a detailed review at each stage of the litigation and a thorough understanding of the litigation process. As the action progresses and new evidence comes to light, an analysis of the facts, liability exposure, and damages exposure, along with an analysis of legal obligations and remedies (such as in contract or

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<sup>85</sup> *Morant v. Sun Life Assurance Company of Canada*, 2014 ONSC 2876; see also *Huma et al. v. Mississauga Hospital and Queensway Health Centre (Trillium Health Partners) et al.* 2019 ONSC 5115.

<sup>86</sup> *Thompson v. Rogers Communication Inc.*, 2013 ONSC 6975.

in insurance), provide an opportunity to re-evaluate the strengths and weaknesses of the claim, and to determine the appropriate action plan.

Our firm's experience and expertise in handling occupiers' liability actions and our knowledge of the complexities involved in such claims will assist in the strategic handling of these matters from the initial stages of the claim through to reasonable resolution or trial.

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