

Litigating In Ontario

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Litigating in Ontario: A Primer on the Process

When a dispute relates to an amount of over \$50,000, it may be litigated under the *Ontario Civil Practice* (rules of civil procedure). If the action is commenced in Ottawa or Toronto, it is case-managed and a Judge or a Master is assigned to the case to ensure that it moves along in a timely manner. The basic steps in the process are as follows:

The Statement of Claim

The litigation process is commenced by issuing a Statement of Claim within the relevant limitation period. The claim sets out the facts and the legal grounds that the Plaintiff is relying on in its claim against the Defendant. Once the claim is issued by the Court, it must be personally served on the Defendant within six months from the date of issue. If there is insufficient time to prepare a Statement of Claim before the expiry of the limitation period, a Notice of Action may be issued. However, a formal Statement of Claim must still be filed within 30 days after issuing the Notice of Action.

Statement of Defense

The Defendant has 20 days to respond to the Claim if they reside in Ontario, 40 days if they reside in another province or in the United States, and 60 days if they reside outside Canada and the United States. The Defendant may deliver a Notice of Intent to Defend which gains them an additional 10 days in which to deliver a Statement of Defense. If the Defendant does not respond to the claim within the timeline set out in the *Rules of Civil Procedure*, then the Plaintiff can note the Defendant in default and thereafter move to obtain default judgment from the Defendant.

If the Defendant has a Counter-claim against the Plaintiff, it should be included with the Statement of Defense.

Reply and Defense to Counter-claim

Once the Statement of Defense has been provided to the Plaintiff, the Plaintiff has an opportunity to file a Reply and a Defense to Counter-claim, if a Counter-claim has been made. If the Plaintiff fails to file a Defense to the Counter-claim, the Defendant can note the Plaintiff in default and proceed to obtain default judgement.

Affidavit of Documents

After the parties have filed their claims, the first step in the process is for all parties to prepare, swear and serve their Affidavit of Documents. The Affidavit of Documents is due 10 days after all the pleadings referred to above have been delivered. An Affidavit of Documents is a sworn document that contains all the documents that the party has in its position that are relevant to the litigation between the parties. For example, in a dispute over

a contract, a copy of the contract, letters between the parties, invoices and cancelled cheques, would be some of the documents included in the Affidavit of Documents.

In more complicated litigation a lawyer will often have to attend at the premises of his/her client and review all the documents to ensure that the Affidavit of Documents is accurate and complete.

Mandatory Mediation

The next step for actions commenced in Ottawa and Toronto is a Mandatory Mediation. At a Mandatory Mediation, the parties to the litigation attend, with their lawyers, before a neutral Mediator with a view to resolving the dispute between the parties. Generally, the Mediator is an experienced lawyer or a retired Judge.

Discussions at the Mandatory Mediation are confidential and without prejudice. Accordingly, any offers to settle that are exchanged during the Mediation cannot be raised in the future during the course of the litigation. Of course, a mediator does not have the power to force a settlement.

Examinations for Discovery

If the parties are unable to resolve their dispute at the Mandatory Mediation, the next step in the process is an Examination for Discovery. As part of this process, the lawyer for the Plaintiff, for example, gets an opportunity to ask questions of the Defendant.

The customary oral discovery process can be very expensive because a lawyer will have to prepare the client prior to the date of attendance at discovery. The discovery itself can be as short as one hour and can be as long as a few months depending on the complexity of the litigation and the number of issues involved.

Answering Undertakings and Pre-Trial Motions

Quite often, during the course of discovery, there is information that the party answering questions cannot readily provide to the other side. As part of the discovery process, the parties can provide answers to questions or copies of documents within an agreed period of time following the discovery. When parties promise to do this, they are giving an Undertaking. A party that does not comply or satisfy an Undertaking within a reasonable time may be compelled to do so by a Judge or Master following a motion, and may face an Order for costs of the motion.

On occasion, a lawyer during the course of the discovery process will refuse to allow his/her client to answer a question. The parties, rather than delay or waste time arguing about the issue at the discovery, can go to a Judge or Master after the discovery and force the party to answer the question if the Judge or Master believes the question was relevant and appropriate.

Trial Scheduling Court

Once the preliminaries and undertakings are dealt with, the parties attend in front of a Judge to get a date for trial. The complexity and length of trial will determine how quickly the parties can have their matter resolved. Currently, short trials (i.e., less than five days) can be scheduled within a few months. Receiving a hearing date for longer trials (i.e., more than five days) can take from six months to two years.

The claim sets out the facts and the legal grounds that the Plaintiff is relying on in its claim against the Defendant.

Settlement Conference

A settlement conference occurs before trial and takes place in front of a Judge. Usually, by the time the settlement conference takes place, the parties will otherwise be ready to go to trial and will have the documents that they will be relying on and reports from their experts.

The lawyers for the parties, in advance of the conference, send the Judge a brief summary of their arguments along with any relevant documents. When the conference takes place, the Judge will listen to the lawyers (without the litigants in attendance) and try to achieve a settlement. Sometimes, the Judge will give an opinion on how she/he would decide the case if this were a trial. It is important to know that the Judge that presides over the conference cannot be the same Judge that presides over the trial. This is necessary to ensure that the parties speak freely and openly. A Judge at a settlement conference cannot force a settlement.

Trial

Of all the steps that have been mentioned, the trial is generally the step that is *not* reached during the course of litigation. The vast majority of disputes settle before reaching trial due to the high costs associated with Trials.

First, the parties will have to pay their lawyers to prepare for trial. The general rule is that for every day of trial time, there will be two days of preparation. Therefore, if a trial is going to be five days long, the client will likely have to pay a lawyer for fifteen continuous days of work (ten days preparation and five days of trial time). During the course of a trial, a lawyer will often work from early in the morning until late at night. The client will be responsible for paying all these costs.

In addition to the legal fees, the litigants will have to take time out of their schedules to prepare for the trial and to attend at the trial. This will result in lost time from business that cannot be recovered.

Finally, trials are often filled with surprises and it is difficult to predict the outcome of a case. It is for the foregoing reasons that over 90 per cent of actions settle before the beginning of trial.

The Simplified Procedure

The Simplified Procedure deals with cases involving claims between \$10,000 and \$50,000.

The Simplified Rules process eliminates some of the more costly steps that form part of the process in the Superior Court for actions over \$50,000. In particular, the Simplified Rules eliminate: Examinations for Discovery and the undertakings and refusal process. Instead, the parties are required to set out, in their Affidavit of Documents, the names of any witnesses that might have information on the dispute between the parties.

One important difference in the Simplified Rules is that the parties, in addition to their lawyers, will appear in the settlement conference (called a Pre-trial) in front of a Judge.

Small Claims Court

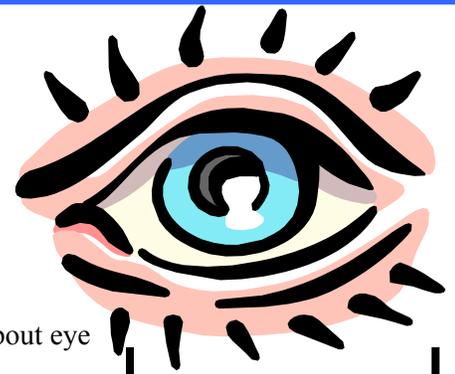
The Small Claims Court is for claims between \$1.00 and \$10,000. It is the least expensive process and, in most cases, the parties can represent themselves.

The parties are required to attend a pre-trial in front of a Judge who will attempt to achieve a settlement. The trial process in the Small Claims Court is short and a trial can last anywhere from half an hour to a full day. It is rare for a Small Claims Court trial to take more than a full day. ■

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The World of Laser Accidents

Has science learned how to protect against light technology?



Twice in the past several months there have been lead news stories about eye injuries as the result of lasers. The first on July 14, resulted in an undergraduate student performing work with a Class IV laser at the Los Alamos facility in New Mexico.

According to the Los Alamos Daily News Bulletin, the student was a guest affiliate working on a research program through NASA. She is a chemistry major entering her senior year with experience in electron microscopy but none in laser operations. According to the accident report, the mentor and student had set up a laser experiment designed to suspend and then analyze particles inside a vacuum target chamber. The report said the mentor energized two laser power supplies and was operating the second laser with the Q switch trigger cable disconnected (a mode the mentor believed did not allow the laser to produce a laser beam). With the Q switch disabled and the laser's flash lamps operating, the mentor believed that only white light exited the laser and traveled down the laser beam path. He told the student he could see suspended particles and invited the student to take a look. As the student bent down to look into the chamber, she saw a flash and immediately noted a reddish brown substance floating in her left eye.

Following the reporting of the laser accident, operations at the lab were suspended by Laboratory Director G. Peter Nanos, and the lab recently issued an all-employee memo on the status of the investigations and personnel actions taken.

The second involved a Delta Airlines pilot suffering laser eye damage on approach to Salt Lake City International Airport on September 22.

Once unheard-of and seldom reported even now, laser incidents are not isolated. In 1997, for instance, a Canadian helicopter pilot suffered eye damage several hours after an aerial surveillance mission to photograph a Russian merchant ship in the Strait of Juan De Fuca south of Vancouver Island, B.C.

In fact, Clyde E Moss, B.Sc., M.Sc., M.P.H., a physicist specializing in laser safety who served with NIOSH for 13 years and currently works as a Laser/Radiation Safety Officer with Corning in Corning, N.Y., says approximately 900 laser-related injuries and accidents may have occurred, as far as is known from the data available from all present databases. According to Moss, there are several laser-accident databases in existence. These databases have collected accident information on laser users from military, industry, medical, and university workplaces. While some preliminary attempts are being made to consolidate the various databases together, that has not yet happened. One of the oldest and best-known databases is maintained by Rockwell Laser Industries in Cincinnati, Ohio (www.rli.com).

According to Moss, almost all of the laser-accident data is obtained from literature references or citations government reports, salespersons, or personal communication. Where possible the existing databases attempt to elicit such information as type of laser, power levels, particulars associated with work activity, location of accident, type of laser injury or accident, availability of PPE, etc. Unfortunately, many times it is difficult to

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gather meaningful and accurate information about the episode since many of the reports are second or third-hand sources of information. In addition, facility safety and management staff are often reluctant to report accidents that might have been prevented by following simple safety procedures.

Moss says it has also been found that current laser accident data is much harder to obtain than older accident information, which suggests that databases need to collect information over time before predictive trends are available. Finally, it should be obvious that medical/legal issues arise when dealing with accidents, and that further complicates retrieval of pertinent accident information.

An accident with a laser can burn a permanent line in the retina.

Since information exists in several databases, Moss says, it is difficult to cite accurately the number of laser accidents that have happened as a function of accident parameters, i.e., laser type, type of worker, etc. However, it may be possible to use the data to present composite observations about how accidents occurred. This peek-in-the-box approach on past accidents can be very useful to safety personnel in identifying approaches to reduce or eliminate future accidents.

Since one available database deals with military personnel and another addresses medical populations (as well as patients), and those populations do not provide access confidential information, what we know about the worker occupational category that has accidents has to be limited to databases covering industrial/university accidents. When that information is known, it appears that occupational groups of scientists, technicians, plant workers, and students are more at risk.

Unfortunately, outside of students it is not possible to break out information about groups, since companies often have different names for laser workers. A facility may call scientists who do laser work plant workers while another facility denotes technicians as plant workers.

Approximately 10 per cent of students at colleges and universities have accidents, Moss says. Therefore, it would appear more could be done to prevent exposure to this occupational group. Important in this group is the need to have advisors/mentors become more knowledgeable about the hazard potential for students when working without supervision in labs. In the horrifying incident at Los Alamos, a student was actually following the instructions of a mentor who was in the room with her at the time.

For obvious reasons, annual reports of laser accidents started off slowly. The laser was invented in the early 60's. and almost from the start accidents happened. Realizing the aforementioned difficulty in getting good information, Moss says, it can be shown from about 1961 to 1976 the number of accidents reported annually was quite low --- around two to four. After 1976 the numbers started to rise gradually and are still rising to a level up to about 10 or 12 per year. From discussions with salespersons and laser manufacturers, Moss suggests we are recording only about 20 per cent of all accidents. Thus, about 80 per cent of the accidents go unreported. If this were the case, then the number of accidents may be as high as five per month.

Of the dangerous lasers, three laser types are historically associated with most of the accidents, those being argon, carbon dioxide, and Nd-YAG. In fact the Nd-YAG laser operating at 1.06 μm , has been involved in 20 to 30 per cent of all the accidents. Carbon Dioxide (10.6 μm) and argon (@ 0.414 μm) lasers have been reported in about 15 percent and 10 per cent respectively of all accidents. However, in the last few years more accidents involving excimer, dyes, and diode lasers are being reported. It is anticipated that accidents involving excimer (UV-producing) lasers will continue to be a concern in the future.

Lasers are classified in most countries according to their power emission levels, Moss says. The highest-power lasers are classified as Class 3B and 4. Moss estimates 80 to 90 per cent of laser-beam accidents are caused by Class 4 lasers, and Class 3B lasers would account for the remaining 10 to 20 per cent. Serious accidents caused by lasers lower than Class 3B are very few in number.

The important finding for this parameter is that the higher the laser class (power), the greater the chance for serious accidents to occur. However, it is important to recognize that some accidents may be caused by non-beam laser issues from devices that operate at lower laser classes, these accidents would include such issues as fires and electrical problems.

So what part of the body is most affected by laser accidents? As indicated in the examples at the beginning of this article, the eye is most vulnerable, with the two critical organs for laser beam exposure being the eye and skin. Approximately 70 to 80 per cent of all accidents are related to eye exposure in some way, and 15 to 20 per cent involve the skin. Further, Moss says, up to 10 per cent of the accidents may involve non-beam issues and death has occurred from such laser-related scenarios as intra-tracheal tube fires.

The incidence of skin and eye accidents are slowly increasing with time, probably because of an increase in laser power levels.

Not surprisingly, many of the eye accidents occur because laser-safety eyewear is not worn by users, even when the eyewear is available and actually on the laser table. Unfortunately, in a large percentage of the situations when the eye is struck, the accident results in some form of permanent vision function loss.

As laser power moves into the femtosecond domain, laser safety eyewear has limitations. This is because one is approaching the time domain over which the absorption function of the eyewear material operates. Simply stated, the pulse has passed through the material before being absorbed. Such situations could require one to consider other protective measures besides eyewear. For example, it may be that laser users may not be permitted to work in rooms having lasers operating above certain power levels.

Two things learned from the reported accidents are that they are repeated over and over, Moss says and the events leading up to these accidents are very predictable. Factors that cause more accidents are higher laser power in smaller systems, use of faster-pulsed lasers, movement of wavelengths into UV/x-ray regions, and the presence of laser generated laser contaminants (LGAC).

However, says Moss, the ruling factor in laser-related job injuries is human error. Eyewear is not used, or procedures are not followed. Notably, both the Delta pilot and the Canadian helicopter pilot may not have been the victims of an accident at all, but of a deliberate attack. However, as lasers become more sophisticated and as knowledge of their use becomes more commonplace, it is reasonable to expect that the Canadian workplace will need to accommodate those incidents in their safety procedures as well. ■

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Gems from the Flight Attendants & Pilots

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All too rarely, airline attendants make an effort to make the in-flight safety lecture and their other announcements a bit more entertaining.

Here are some real examples that have been heard or reported:

- ◆ "There may be 50 ways to leave your lover, but there are only 4 ways out of this airplane."
- ◆ As the plane landed and was coming to a stop at Washington National, a lone voice came over the loudspeaker: "Whoa, big fella. WHOA!"
- ◆ From a Southwest Airlines employee: "Welcome aboard Southwest Flight XXX to YYY. To operate your seat belt, insert the metal tab into the buckle, and pull tight. It works just like every other seat belt; and, if you don't know how to operate one, you probably shouldn't be out in public unsupervised."
- ◆ "Weather at our destination is 50 degrees with some broken clouds, but we'll try to have them fixed before we arrive. Thank you, and remember, nobody loves you, or your money, more than Southwest Airlines."
- ◆ "Your seat cushions can be used for flotation; and, in the event of an emergency water landing, please paddle to shore and take them with our compliments."
- ◆ "Should the cabin lose pressure, oxygen masks will drop down from the overhead area. Please place the bag over your own mouth and nose before assisting children...or other adults acting like children."
- ◆ "As you exit the plane, make sure to gather all of your belongings. Anything left behind will be distributed evenly among the flight attendants. Please do not leave children or spouses."
- ◆ Heard on Southwest Airlines just after a very hard landing in Salt Lake City" The flight attendant came on the intercom and said, "That was quite a bump, and I know what y'all are thinking. I'm here to tell you it wasn't the airline's fault, it wasn't the pilot's fault, it wasn't the flight attendant's fault...it was the asphalt!"
- ◆ Overheard on an American Airlines flight into Amarillo, Texas, on a particularly windy and bumpy day: During the final approach, the Captain was really having to fight it. After an extremely hard landing, the Flight Attendant said, "Ladies and Gentlemen, welcome to Amarillo. Please remain in your seats with your seat belts fastened while the Captain taxis what's left of our airplane to the gate!"
- ◆ An airline pilot wrote that on this particular flight he had hammered his ship into the runway really hard. The airline had a policy which required the first officer to stand at the door while the Passengers exited, smile, and give them a "Thanks for flying XYZ airline." He said that comment, in light of his bad landing and he had a hard time looking the passengers in the eye. Finally everyone had gotten off except for a little old lady walking with a cane. She said, "Sonny, mind if I ask you a question?" "Why

no Ma'am," said the pilot. "What is it?" The little old lady said, "Did we land or were we shot down?"

- ◆ Part of a flight attendant's arrival announcement: "We'd like to thank you folks for flying with us today. And, the next time you get the insane urge to go blasting through the skies in a pressurized metal tube, we hope you'll think of US Airways."
- ◆ A plane was taking off from Kennedy Airport. After it reached a comfortable cruising altitude, the captain made an announcement over the intercom, "Ladies and gentlemen, this is your captain speaking. Welcome to Flight Number 293, nonstop from New York to Los Angeles. The weather ahead is good this should be an uneventful flight. Now sit back and relax - OH, MY GOD!" Silence followed and after a few minutes, the captain came back on the intercom and said, "Ladies and Gentlemen, I am so sorry if I scared you earlier; but, while I was talking, the flight attendant brought me a cup of coffee and spilled the hot coffee in my lap. You should see the front of my pants!" A passenger in Coach said, "That's nothing. He should see the back of mine!"

DATES TO MARK ON YOUR CALENDAR



September 17 & 18, 2005

**CURIE University & College Risk Management Conference (AGM)
Marriott Montreal Chateau Champlain
Montreal, Quebec**

September 18 - 21, 2005

**RIMS Canada Conference
Montreal, Quebec**

BULLETIN:

The Atlantic Universities Risk Management Workshop has been rescheduled to April 12/05 in Halifax. For registration information please contact Ron MacDonald at 902-453-2414 or rcm@interuniversity.ns.ca

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