Insurance Litigation in the Time of Physical Distancing

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Every person and business has been profoundly impacted by the COVID-19 pandemic. The closure of all non-essential businesses and the need for physical distancing have completely altered the way business is conducted, if it is conducted at all. This is true even for those businesses that are considered essential or whose employees can work from home. We want to explore how insurance litigation has been affected by this new reality.

Although the courts are open, much of the work they normally do has been suspended or greatly curtailed. The Ontario courts are currently only hearing emergency motions, pre-trying cases in limited circumstances and it is unclear what will happen to a trial schedule that has already been severely disrupted. For example, the Ontario courts announced last week that civil jury trials are suspended until, at least, September.

Given these realities the question arises: what can be done before the situation returns to something that approximates “normal”? Once those things have been identified, then the question becomes how can we do them? Finally, is it a good idea to do them now or is it better to wait?

Forge Ahead or Wait

We want to explore what steps in the litigation process can be completed, albeit differently, right now. However, before doing so we will outline some general considerations regarding whether litigation files should be advanced or put on hold.

Gathering Evidence

As a general rule it is better to gather evidence as quickly as possible after a loss. We believe that this is even more important now. It is critical to identify witnesses and obtain their statements as close to the loss as possible. Memories fade, the ability to locate witnesses diminishes and documents disappear when fact gathering is delayed. This truism is even more apt now. As the pandemic will lead to the dislocation of many people, thousands have already

lost their jobs and may not return to work with their previous employers. They may move to find new work. If you do not obtain their evidence now it may be very difficult to find them and obtain it later. Businesses are also being dislocated and this could make it more difficult to locate key documents in 6 months or a year.

The Litigation Phase

More complex considerations apply when judging the desirability of advancing files that are already in litigation. For casualty files there are statistics that indicate that the cost of a claim increases by a specified percentage for every year the file remains open. This suggests that allowing a file to remain dormant will cost insurers money. However, this is not the only consideration when deciding whether to take steps to advance a file. Given the number of trials that have been adjourned, the fact that jury trials may not even begin until the fall or 2021, there is a very good chance that trials will be significantly delayed after the pandemic has abated. There has always been a tension between getting a case to discoveries early, so that you can set your reserves, and waiting to ensure that the discovery evidence is not stale when the action gets to trial.

If the case is likely to settle, and most do, then it may make sense to go to discoveries as soon as possible so that appropriate reserves can be set. On the other hand, for personal injury claims, if the injuries are serious, a long trial is likely and there is a significant risk that the case cannot be settled, then it may make sense to delay the discoveries. This is a factor that must be considered together with the fact that discoveries conducted now will not be in-person discoveries. We will come back to this point.

Every case is different. Insurers and their counsel must consider whether it is in the best interests of the claim to push it forward or let the file remain in abeyance. If fear of a second or third wave of COVID-19 cause witnesses to be reluctant to participate in “live” discoveries or attend defence medical assessments, even in the fall or next winter, then insurers will need to re-evaluate the wisdom of allowing files to remain in abeyance.

Before the Issuance of a Claim

We have already commented on the fact that evidence gathering should proceed now. However, gathering it may be more difficult. Most businesses and witnesses will have access to a computer but many may not have access to a scanner or printer or even have access to critical documents. If those documents have not been assembled, then it may be difficult or impossible to obtain meaningful statements from witnesses. However, many businesses and witnesses do have access to their files, electronic or paper, and can assemble relevant documents. Every attempt should be made to do so. For those insureds who do not have access to their documents it is critical to follow-up as soon as they do.

For those with access, there are many ways for documents to be exchanged between insureds, claims examiners and counsel. When selecting a method, attention must be paid to the security of the platform or application chosen. It goes without saying that security becomes an even more important consideration when personal records, particularly medical records, are being

exchanged. Everyone must make sure that the platform chosen meets the security requirements mandated by the insured organization and the insurer.

What about witness statements? These can be taken over the phone and recorded if desired. Where the witness and examiner need to review documents, the inability to meet personally presents challenges. This means that video conferencing will likely be necessary. Again, care must be taken to ensure that the conferencing platform chosen has appropriate security and is approved by the involved parties. The more sensitive the information being exchanged the more important the security question becomes. You should ask for permission to record any video statement. Witnesses should be asked to sign statements and return scanned copies by email or originals via mail. Ask the witness to review each page of the statement and show it to the camera. This will provide a visual record of what the witness agreed to even if they do not return a signed copy.

Where documents are to be discussed, thought must be given to how the documents can be exchanged, viewed and marked to make the video conference useful when reviewed at a later time. Everyone should be working from the same document file and the documents should be marked in a manner which makes them readily findable. For example, each document could be assigned a letter and each page for that document could also be numbered. That would make reference to document B at page 123 understandable to everyone. Care must be taken to ensure that everyone can properly view the documents. You do not want to spend time arranging a 3 or 4 party video conference and then find out that one of the participants is trying to view blueprints on their cell phone. You may have to courier an appropriate device or hard copies to each participant. You need to ensure that everyone has the necessary up-to-date versions of the programs required to review each document. For example, if video files are to be reviewed you need to make sure that that each device has a video app that permits each video file to be opened. Where the participants are using different systems such as Apple, PC or Linux, this may present some challenges. If documents need to be marked or written on, again you need to ensure that the proper programs are installed and that each participant understands how to use the technology to mark or annotate the document. Of course, there must be stable high-speed internet connections for any video conference to be successful. It may make sense, to have separate test video conferences with each participant in advance to ensure that everything works and that each participant understands how to use the technology.

You can even conduct examinations under oath using video conferencing technology. However, this can be a real challenge if the witness is not tech savvy. The protocols outlined above will need to be followed for such depositions. Again, documents can be a real challenge but, in most cases, with proper preparation such examinations can be conducted successfully.

Conduct of the Litigation

For subrogated claims, once the claim has been properly investigated a statement of claim can actually be issued by the Courts electronically. Defences can also be served and filed electronically. Personal service of statements of claim may prove to be more difficult. At the moment, many people are not at work and this is often the only address you have for service.

In these cases, you may be able to get the claim to the person electronically but unless they are prepared to concede that this service is sufficient, you will need an order for substituted service. Such orders cannot currently be obtained unless the claim is urgent. You may also find that defendants are reluctant to meet with process servers.

Assuming that you can get the claim served and defended or this occurred before the emergency order, then the usual next step is to exchange relevant documents and serve affidavits of documents. There are now Court and Law Society of Ontario approved methods for swearing affidavits of documents via video conference. Clearly, unsworn affidavits can be exchanged as was often the case before the pandemic. Assembling and reviewing documents before the affidavit is finalized will require following the same sort of procedures advocated earlier.

Examinations for discovery can be conducted via video conference as well. Again, the key to successfully conducting such discoveries is adequate preparation. However, everyone must consider the desirability of conducting discoveries via video conference. In many cases where the credibility of the witnesses is not really an issue, as in many property damage and subrogated claims, there is probably little lost in conducting discoveries this way. However, where credibility is an issue it may be unwise to proceed via video conference. Counsel cannot see the witness and assess his or her reactions to questions. You always run the risk that when the critical question is asked and the witness knows they are in trouble that, for some unexplained reason, their computer crashes. It may also be inappropriate where detailed large blueprints or similar documents need to be reviewed. In a personal injury case, we would be reluctant to conduct a discovery where scarring injuries are important. And as discussed previously, consideration needs to be given to the likely trial date. If discoveries are conducted now will the evidence be stale at trial and impede the ability of counsel to cross-examine the witness.

Once affidavits of documents have been exchanged, we would also suggest that the parties take a hard look at the settlement potential of the file. Discoveries, in some cases, add little if any information that is essential to resolving the file. If a review of the documents raises questions about the existence of other documents or it is determined that witness statements will be needed to resolve the matter, then counsel should have frank discussions with their counterparts about obtaining such information without going to discoveries.

It may make sense to put off discoveries and enter into settlement negotiations or consider mediating the dispute. Even where the credibility of a party or the effectiveness of a witness is important to the resolution of the matter, you need to ask if those concerns can be resolved through informal interviews of these parties or witnesses? Alternatively, can they be resolved through informal statements and question and answer sessions at the outset of a mediation? If the matter does not settle, then discoveries can be conducted after the mediation.

It has been our experience that where there has been a full exchange of documents and counsel have been candid about their positions, many cases can be successfully mediated

without discoveries. However, for property damage claims it has also been our experience that discoveries will likely be necessary where there are serious disputes about causation or mitigation.

For personal injury claims, this may also be a good time for insurers to consider conducting slow-moving settlement blitzes. They should be considered on all files which have even moderate settlement potential.

That takes us to defence medicals in personal injury actions. We are aware that some providers are offering video conference IMEs. We have spoken to several doctors who have serious reservations about conducting assessments via video conference. They have questioned the effectiveness of such assessments particularly where the plaintiff has psychological problems. Frankly, we believe that such IMEs will be unhelpful in resolving the case. More importantly, if the matter does proceed to trial the defence doctor will almost certainly have his or her evidence undermined by a cross-examination which focusses on the frailties of such an assessment. If you are trying to get ready for a mediation, then we would suggest a thorough paper review by an expert and the production of this report in your mediation brief only. If it is only produced for the mediation, then the other side cannot use it later. You may, however, need to retain a different expert to conduct a proper IME if the mediation fails.

Pre-trials are proceeding in limited circumstances right now. However, we suspect that within a few weeks the opportunities for pre-trials will increase.

What is not clear is whether a reasonable number of trials will proceed during these times. Our guess is that as the physical distancing rules are relaxed, the Courts will work out protocols to allow more cases to proceed to trial. Those trials may not look exactly like any trials we have seen in the past. For example, an unhealthy or vulnerable witness will probably give their evidence via a video link. Some cases will clearly need to be allowed to proceed to avoid too large a backlog once physical distancing rules are relaxed. As indicated previously, jury trials may be put on hold for some time. Parties may wish to consider whether it is advisable to agree to a bench trial rather than wait for jury trials to resume.

Closing Comments

Frankly, these times present some unique opportunities and challenges to resolving disputes. Many people and businesses may welcome an opportunity to settle their claims now. These opportunities need to be identified and pursued.

The danger is that insurance files are simply ignored. If that approach is taken, then they could be more expensive to resolve after this crisis abates. Court reporters, lawyers, clients and mediators will need to clear the backlog of cancelled discoveries and mediations. If everyone waits for a return to “normal”, then litigation will be slowed appreciably over the next two to three years. It is incumbent on parties and their lawyers to take reasonable, imaginative and innovative steps to advance claims during this time of physical distancing.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.