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STEPS IN A LAWSUIT

The timing, and direction, and outcome of a lawsuit are difficult to predict. They depend on many things, including actions the opposing parties take and court schedules. A lawsuit can take several years or longer to settle or go to trial. However, most lawsuits go through the same basic steps, although not always in the same order. Some lawsuits omit some steps, and some steps are repeated many times over. The steps listed here are the main steps that occur in most lawsuits. This will give you a general idea of what to expect. There is no assurance that those steps will happen in any specific lawsuit, or that any specific lawsuit will have some or any of the steps described below. In a lawsuit almost anything can happen.

1. DETERMINATION OF UNDERLYING FACTS

Everything in a lawsuit depends on the facts on which the claim and defense are based. With the clients' assistance the lawyer's first concerns are to determine what actually happened, and who the important persons are, and where and when the basic events which give rise to the lawsuit occurred. Sometimes investigators or experts are needed to assist the lawyer, so this step can involve disbursements. Often many important elements of fact or evidence are in the possession of the opposing party, and cannot be ascertained until the lawsuit is started and some information has been obtained from the opposing party pursuant to the rules of court.

The conclusion of the determination of underlying facts is a summary of all facts material to the lawsuit. Usually, but not necessary this summary is reduced to a written document.

2. CLIENT'S ASSISTANCE

Determination of facts is expensive, and a client is able, and well advised, to assist his/her lawyer as much as possible in determining facts to reduce the cost, and to improve preparation for trial.

3. REVIEW OF THE LAW

Once the lawyer a good idea of all the facts, he/she and then review the law. He/she can then give the client his/her legal opinion about what the likely outcome of a trial would be, and how much money the client can expect to get.

This review of the law based on the facts is repeated at any time during the life of the lawsuit when the lawyer becomes aware of more facts. At each such step the review is made on a narrower and narrower area of the law, and eventually it should relate only to the facts of this particular lawsuit.

4. STARTING THE LAWSUIT

Lawyer begin the lawsuit by preparing a notice of civil claim, formerly a writ of summons, or petition, filing them in the Court. This means the Court Registry date-stamps the copies of the documents submitted, and retains the original copy for their official record. This writ of summons or petition is then served on the opposing party by a process server. The

opposing party usually has seven days to file an appearance, or like document. This step involves disbursements such as the court filing fees, the agent's fees for filing the writ of summons, and the process servers fee for serving the writ of summons on the defendant.

5. RULES OF COURT

All the steps that all parties to a lawsuit take are governed by a set of rules known as the rules of court. The rules of court say that the purpose of those rules is to determine all matters before the court promptly, economically, and on the merits. Many parties try to avoid this and make the action as expensive and difficult for their opponents as possible.

6. PLEADINGS

In most lawsuits the facts, and lawyer's ideas of the law, which are in dispute between the opposing parties are described by the parties in documents called pleadings, which are usually a statement of claim, a statement of defense, and a reply. Those documents tell the judges and the lawyers what the parties hope to prove and obtain by starting the lawsuit and going to trial. Once all parties have delivered their pleading it should be possible to determine what the opposing parties agree on and what they disagree on, and what steps each will have to take to prove his/her case, and to defeat their opponents' cases.

7. TRIAL PLAN

Murphy J said that a trial plan is the master document or plan which sets out or lists all the things that a party must do or say and succeed at trial to obtain a verdict favourable to himself/herself. A trial plan is revised whenever the lawyer obtains more information about the facts or the law. The summary of material facts prepared at the conclusion of the determination of underlying facts is the first draft of the trial plan.

8. DISCOVERY

Under the rules of court there are three principal methods of learning what the opposing party has done and will say at trial. Those three methods are: discovery of documents; interrogatories; and examination for discovery.

9. DISCOVERY OF DOCUMENTS

In a demand for discovery of documents the opposing party is obliged to deliver a list, and then copies of all documents he/she says are important to the lawsuit. Those documents, and what they say about the events when the lawsuit began are important, as they usually describe the facts on which the lawsuit is based, and were written before any one thought of a lawsuit, or at least by persons who had no interest in the lawsuit. Usually if a party does not challenge the facts set out in important documents those facts are accepted as correct and the lawsuit depends on them. If a party does not accept the facts set out in the documents he/she will have to challenge those facts as early as possible.

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10. INTERROGATORIES

Interrogatories are questions sent to an opposing party which demand answers, usually under oath. Interrogatories can often be used to find out what happened in the events in which an action is based. Master Grist, now a Justice, said that interrogatories can be used to narrow the issues set out in the parties' pleadings, to obtain admissions from an opposing party, and to prepare for examination for discovery. Interrogatories are important to advance the client's trial plan.

11. EXAMINATION FOR DISCOVERY

An examination for discovery is a meeting where a lawyer is allowed to ask questions, under oath, of the opposing party. It is usually the only time, before trial, that a lawyers is allowed direct contact with an opposing party. Prior to conducting an examination for discovery a lawyer must have a preliminary version of his/her trial plan sufficiently detailed to allow him/her to know what questions he/she will have to ask of the opposing party to prepare for trial. If the lawyer does not have a reasonably detailed trial plan by the time for examination for discovery he/she will not know what questions to ask, what he/she does not have to ask, and when the examination for discovery is complete.

The examination for discovery can be used to:

a. learn what the opposing party knows, does not know, or will say at trial;

b. set traps for the opposing party or his/her lawyer which will attack or damage their credibility or case;

c. support arguments which the lawyer intends to make at trial;

d. find out what the opposing party will do or say in response to anything the lawyer intends to do at the trial;

e. shorten the trial by establishing how the lawyer will cross-examine the opposing party at trial. This is important as many judges become irritated if a lawyer asks questions on cross-examination that could have been asked on examination for discovery.

The better a trial plan a lawyer has the better he/she can examine the opposing party at examination for discovery and make the opposing party's trial more difficult.

12. INTERIM APPLICATIONS

Often during the steps in a lawsuit preliminary to a trial an opposing party will refuse to comply with the rules of court on one excuse or another to hinder the lawyer and his/her client from preparing properly for trial. When this occurs the lawyer is obliged to make an application to the court in chambers for an order to compel the opposing party to comply with the rule and provide evidence, answers, documents, etc. If the party and his/her lawyer does not make the application to obtain such orders, and compliance with the rules of court he/she will often be prejudiced at the trial of an action.

Insurers, who usually take great precautions to get the most of the facts of a lawsuit, will often instruct their insured's lawyer to oppose as much of the plaintiff's discovery as possible to

run up the plaintiff's cost of the action, and increase his/her risk and difficulty. Examples of this are when the defendant refuses to discover certain documents, or to answer interrogatory or examination for discovery questions, on the pretext that documents or the question is not relevant to the lawsuit.

13. NEGOTIATION AND SETTLEMENT

Once the examinations for discovery have been concluded the parties and their lawyers know, or should know, everything they ought to know at trial, including what the plaintiff's chances of success are, and how much he/she might receive from the court for his/her claim. At this time it becomes useful to see if a settlement can be arranged which both parties can be happy with. If the lawsuit is settled, it does not go to trial.

Defendants, and often insurers, will try to keep facts away from the opposing party and so make their case more difficult. If this occurs a settlement might not happen until just before the trial begins, or in some cases after a judge tells the parties to settle.

14. STRATEGY

Generally the plaintiff's strategy is to be as well prepared for trial as the size of the claim will permit, and to avoid making any claim or argument that the defendant, usually defended by an insurer could easily appeal. At a trial lawyer's association seminar Mark Stephen said that time is on the plaintiff's side and the judge is on the defendant's side.

The defendants' strategy, in general, is to avoid discovery of facts, and to keep the plaintiff as ignorant of what happened, and of what the defendant's defense is. This is in particular true of insured defendants defended by insurers who routinely defend meritorious claims. In many cases insurers will vigorously defend meritorious claims substantially to discourage potential claimants from pursuing like claims.

15. PREPARATION FOR TRIAL

The lawyer has to prepare the case for trial. This means preparing for everything that can or might possibly happen at trial, and have as complete a trial plan as possible, He/she also has to make all the arrangements for witnesses, books of documents and legal cases, argument and anything else that might be needed at trial.

16. TRIAL

At trial the lawyer presents the clients case and the opposing lawyer presents the opposing party's case to the court. When the judge has decided the case the successful lawyer prepares the Court order for the judge to sign, or review how the other lawyers write up the order to make sure it correctly reflects what the judge intended.

At trial the judge, or jury, can make essentially any decision he/she or they feel is just or will do justice between the parties in court. Some senior lawyers have said that in a trial the judge or jury simply decides which party, or which party's case, is more worthy of favour, and then make their judgment in accordance with their decision.

Many trial courts make an effort to ensure that their decisions cannot be appealed, or in any case, appealed easily. Insurers on the other hand often take appeals on minor points. Some lawyers believe that some insurers take not well founded appeals to deter claimants from comparable actions. A plaintiff is best served if the court finds that his/her evidence is entirely credible, and rejects the defendant's witness' evidence as unreliable for such a finding on evidence makes an appeal difficult or impossible.

17. CONCLUDING THE ACTION

Once a trial judgment is entered by the court registry the lawyer can conclude the action, and recover the money from a settlement or judgment, after he/she has deducted his fees and disbursements. This doesn't include starting new steps such as enforcing or appealing a Court judgment. To enforce a judgment means to start proceedings to force the Defendant to actually pay what he or she has been ordered to pay. To appeal a judgment means to start work to get a higher Court to change the trial Court's judgment.