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The Statement of Defence - A Few Considerations

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Introduction

The statement of defence provides a concise roadmap of a defendant's position. It is the first opportunity to respond to the allegations contained in the statement of claim. A defendant may admit, deny or plead insufficient knowledge about the paragraphs contained in the statement of claim. In addition, a defendant will state the material facts that form the basis of the defences that will be raised. It is worth noting that failing to admit an allegation that the defendant knows to be true may cause unnecessary delays and ultimately put that defendant at risk of an adverse costs award.

The *Rules of Civil Procedure* establish the timeline for the delivery of the statement of defence. Where a statement of claim has been served in Ontario, a defence shall be delivered within twenty days.[1] The *Rules* allow forty days for the delivery of a defence on claims served elsewhere in Canada as well as the United States, and sixty days for those served anywhere else in the world.[2] The defendant will prepare a statement of defence and serve it on the plaintiff. Once served, a copy will be filed with the court along with proof of service.

Where a defendant delivers a Notice of Intent to Defend within the time prescribed for the delivery of a defence, that defendant will be entitled to ten additional days to serve a defence.[3] If a defence cannot be delivered within the timeline prescribed by the *Rules,* it is critical that the defendant communicate with plaintiff's counsel to request an indulgence. Counsel may agree on a timeline for the delivery of same. The failure to communicate with opposing counsel if a defence has not been delivered within the timeline prescribed by the *Rules* will put a defendant at risk of being noted in default pursuant to subrule 19.01(1).

When preparing the statement of defence, counsel may look to a precedent database to save time and keep costs low. This approach can prove efficient as clients will not be interested in having their counsel reinvent the wheel when it comes to preparing a straightforward defence. However, no two cases are identical. Accordingly, it is critical that counsel review each statement of claim with their client thoroughly to contemplate the defences available and seek instructions in order to prepare the appropriate response. A well thought out defence will reduce the likelihood of the need for an amendment later down the road and the risks as well as costs associated with same. With that in mind, this paper will highlight a few considerations to keep in mind when reviewing the statement of claim. This is not a conclusive list of factors to think about as each claim is different and brings its own unique nuances.

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[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*Rules of Civil Procedure*], Rule 18.01(a).
[2] *Rules of Civil Procedure*, Rule 18.01(b) and (c).
[3] *Rules of Civil Procedure*, Rule 18.02(1).

1. Identification of the Parties

The plaintiff may be unsure of a defendant's correct legal name or inadvertently misspell it on the statement of claim. It is important that counsel review the claim closely to confirm that the party served with the claim has been identified by their correct legal name on the pleading. The statement of defence is a critical opportunity to address any inaccuracies or misspellings of the defendant's legal name.

Pursuant to subrule 5.04(2) and Rule 26, a plaintiff may bring a motion to amend the claim to rectify any such errors. Subrule 5.04(2) grants the court the discretion to add, delete or substitute a party or correct the name of a party, provided that it does not give rise to prejudice that is not compensable by costs or an adjournment. Similarly, Rule 26 stipulates that the court shall grant leave to amend a pleading, including the addition or substitution of a party, unless it results in non-compensable prejudice.

The doctrine of misnomer permits the substitution of a party on the claim. This test will be met where the court is satisfied that the proposed defendant, though identified incorrectly on the claim, would know upon reviewing the claim that the "litigating finger" was being pointed at them. The court will consider whether a reasonable person reviewing the claim and looking at the case as a whole would know that the plaintiff meant to name them but simply got their name wrong. The doctrine of misnomer applies notwithstanding the passage of the limitation period. As a result, a plaintiff will not be precluded from pursuing a claim due to a typographical or other minor error, so long as it can be established that the defendant knew that he/she was being sued.

It is worth noting that depending on the nature and seriousness of the error, counsel may decide, upon instruction by their client, that an amendment is not necessary. This will minimize the time and costs incurred by opposing counsel to address a minor error and will go a long way in building rapport between the parties over the course of the litigation.

2. Appropriateness of Venue

A plaintiff may commence their claim where they wish. Pursuant to subrule 13.1.02(2), a defendant can bring a motion to seek to change the venue of the claim. The court may, on any party's motion, order that the proceeding be transferred to the county where it should have been commenced.[4]

When considering this request, the court will look at whether it is likely that a fair hearing cannot be held in the county where the proceeding was commenced or if a transfer is desirable in the interest of justice. To determine whether a transfer is in the interest of justice, the court will consider a number of factors including, but not limited to, where a substantial part

[4] *Rules of Civil Procedure*, Rule 13.1.02(2).

of the events that gave rise to the claim occurred, where damages were sustained, and the convenience of the parties.

In the context of a claim arising from a motor vehicle collision, the plaintiff's place of residence as well as the region where the accident occurred will be key considerations in determining the appropriate venue for the proceedings. When reviewing the statement of claim, it is important to pay close attention to whether a jurisdictional issue exists. If the proposed venue has no rational connection to the cause of action or the parties, counsel can raise the appropriateness of the venue in the defence. This will help lay the groundwork for any potential motions that are contemplated in the future.

3. Limitation Periods/Discoverability

The *Limitations Act*[5] provides that court proceedings in respect of an action must be initiated within a certain period of time. This Act sets out a basic limitation period of two years from the day the claim is or ought to have been "discovered" to commence a legal proceeding. For example, a plaintiff will have two years from the date of a motor vehicle collision to commence an action for damages arising from injuries sustained. Set against this backdrop, when reviewing the statement of claim, defence counsel should verify the date of loss, whether it be through a motor vehicle accident report or their client's recollections to ensure that the claim was issued, electronically or otherwise, within the two year period. If this has not happened, a limitation defence can be raised to indicate that the claim is time-barred.

The determination of when a claim is discovered may not always be straightforward. Section 5 of the *Act* provides that 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).*

[5] *Limitations Act, 2002*, S.O. 2002, c. 24.

It is presumed that a plaintiff is aware of the matters in clause (a) on the day that the act/accident/omission giving rise to the claim occurred. However, this is not always the case. The considerations under section 5(a) are typically at the forefront of claims where damages or the events/parties responsible for same may not be readily identifiable. In these instances, the plaintiff bears the onus of establishing that he/she did not know of these matters on the day that the act/accident/omission giving rise to the claim occurred. Where a plaintiff is successful in establishing these elements, the limitation period will be deemed to run from the time the loss was first discovered.[6]

Concluding Remarks

It is critical that defence counsel review the statement of claim carefully and consider all aspects in preparation of their defence. Counsel should speak with their client to go over the claim to get the defendant's account of the facts and seek instructions. A review of the claim with the client at first opportunity is critical as memories and recollections are likely to be fresher. Moreover, there will be an opportunity to look for other sources that corroborate their client's account if counsel can move quickly to arrange a discussion with their client. When drafting the defence, it is helpful to keep in mind that it will more than likely go before a presiding judge. Accordingly, it is recommended that counsel prepare a concise statement that avoids hyperbole, argument and posturing as much as possible.

[6] The plaintiff need only prove that the actual discovery of the claim was not on the date the events giving rise to the claim took place. They must offer a reasonable explanation about why the claim was not discoverable through exercising reasonable diligence. This is a low evidentiary threshold and the court will give the plaintiff's reasoning a generous reading.