

# Lawyers' negligence actions: experts and pleadings

*Ribeiro v. Van Moorlehem*<sup>1</sup>: A modest dollar, successfully defended malpractice action highlights issues surrounding pleadings, expert reports, amendments and partners' liability.

In 1994 the plaintiff became partners with two brothers. Each of the three partners invested \$45,000 into a business and each held one third of the shares. No sooner was the venture started, however, than the partners had a falling out. By the end of the year the brothers had fired the plaintiff and excluded him from the business.

The plaintiff retained a lawyer who attempted to negotiate a resolution of the dispute. With no settlement ultimately finalized, the plaintiff decided to commence court proceedings against the brothers with new counsel. In June 1995, the plaintiff met the defendant lawyer who arranged for his partner to act. The defendant's partner represented the plaintiff from June 1995 through March, 1996 when he left the law firm. The defendant lawyer then took over the plaintiff's matter until May, 1998 at which point he was discharged. At the outset, the defendant's partner had commenced proceedings by way of application. By three years later, there had been several attempts by the parties to resolve the matter, resulting in numerous adjournments, but no actual settlement or hearing on the merits.

## Amendments following the expiry of a limitation period

The plaintiff sued the defendant lawyer in April, 2004 but did not name the defendant's partner (or the firm) as a defendant. The plaintiff alleged that the defendant lawyer breached the standard of care by, *inter alia*, failing to advise of the importance of moving quickly. The judge hearing the matter noted that all of the breaches alleged arose in the early stages of the plaintiff's proceedings during which the defendant's partner, *and not the defendant*, represented the plaintiff. The plaintiff accordingly moved after closing arguments to amend his statement of claim to plead vicarious liability and a duty to supervise. The amendments were not allowed: the judge found that the amendments constituted an entirely new cause of action that was now statute barred and, as such, dismissed the motion.<sup>2</sup>

## Vicarious liability for partner

In considering the plaintiff's arguments on their merits, the judge found that the defendant lawyer could not be vicariously liable for his partner in the absence of a judgment against the partnership or the partner himself. There was likewise no evidence to support

the allegation that the defendant was under a duty to supervise his then partner.

## The absence of expert evidence

The judge further held that, in any event, negligence was not made out against the defendant given the absence of expert evidence with respect to the appropriate standard of care. With reference to the general rule that it will not be possible to determine professional negligence without the benefit of expert evidence as outlined in *Krawchuk v. Scherbak*<sup>3</sup>, the plaintiff relied primarily on the first exception set out in that case. The plaintiff argued that the need for expeditious prosecution if there is to be any hope of recovery is a non-technical matter commonly known to an ordinary person and therefore expert evidence was not required. The judge disagreed, noting that in this case, the parties in the underlying action had been interested in an out-of-court settlement and the amount at issue was quite small. There is, the judge outlined, a balance in such cases (between keeping the opponent's feet to the fire versus allowing time for an out-of-court resolution) which calls for considered and professional judgment. As such, expert evidence was needed.

## The allegations of negligence; causation and damages

The judge noted in closing that, even had he embarked upon the exercise of evaluating the appropriate standard of care, he would not be prepared to find that the defendant lawyer was negligent as alleged. Moreover, causation and damages were not made out as there was no evidence led to establish that the plaintiff had lost the opportunity to recover his \$45,000 investment, given that his application was never dismissed.

The action was dismissed. ■

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<sup>1</sup> *Ribeiro v. Van Moorlehem*, 2011 ONSC 5430.

<sup>2</sup> The motion to amend was decided under the "old" limitations regime and, as such, there was a presumption of prejudice. For a discussion of what constitutes a new cause of action see *Ascent Incorporated v. Fox 40 International Inc.* 2009 CanLII 36994 (On S.C.) at para 3; *Rotvold v. Rocky Mountain Diesel Ltd.* [1994] B.C.J. No. 2718 at para 18.

<sup>3</sup> 2011 ONCA 352 (CanLII) paras 132-135; see also *Precision Modeling Ltd. and Levy v. Soskin, Soskin & Potasky LLP*, 2008 CanLII 31411 (ONSC) para 57.