Retired solicitors:

Do you have enough insurance to fight "ancient" or recent claims?

In 2002, a plaintiff sued lawyers A and B, and lawyer B's law firm, alleging that the two lawyers failed to competently represent the plaintiff, and negligently advised him to settle his personal injury claim for an inadequate amount in 1977. The judgment dismissing the action against the solicitors was rendered on September 22, 2008, nearly 31 years after the plaintiff's motor vehicle accident was settled.

The plaintiff was injured in a head-on collision in November, 1974. The police could not determine in which lane the collision had occurred. The plaintiff and his passenger were unable to recall the accident. The other driver said that the plaintiff was speeding and that the collision had occurred in the driver's lane.

Lawyer A was retained to sue the other driver. Lawyer A got a second opinion from lawyer B, before settling the claim for $5,000 in December, 1977. Although the plaintiff suffered serious injuries, the two lawyers were concerned that the plaintiff could not establish liability against the other driver. The plaintiff had returned to work full time 18 months before the settlement.

Twenty-five years after the settlement, the plaintiff sued these solicitors, alleging that they were negligent in failing to obtain an accident reconstruction, and in failing to further investigate the plaintiff's head injuries.

The judge dismissed the plaintiff's action.

The judge preferred the evidence of the defendants' engineer to that of the plaintiff's engineer. There was simply not enough evidence available at the accident scene to do a worthwhile accident reconstruction. The photographs were poor, and the measurements imprecise. The plaintiff's engineer used techniques not available in the 1970s.

The court also preferred the evidence of the litigation expert called by the defendants, to that of the expert witness for the plaintiff.

The court disagreed with the plaintiff's expert evidence that the decision not to retain or recommend retaining an accident reconstruction expert was a departure from the standard of care. The hiring of such experts in civil cases was not unheard of in the 1970s, but it was not common. The extent to which forensic experts should be used was a matter of discussion in the profession at the time.

The court found it impossible to say, as the plaintiff's expert witness did, that the glaring lacuna in the physical and eyewitness evidence required the hiring of an expert. The expert's report would necessarily have depended on the quality of the input available to him. The lack of objective evidence was a factor militating against, not for, the hiring of an expert. In the 1970s professionals were not accustomed, as they are today, to take steps designed solely to help defend themselves from future negligence actions.

The court disagreed with the plaintiff's contention that with experts anything is possible. It is not difficult to attack an expert opinion when the weakness of its underlying factual assumptions is evident. Lawyer B's view was that while you might get an accident reconstruction expert to give an opinion, you might be met by a better opposing one. This is exactly what happened.

The court did not accept that lawyer A fell below the standard of care in failing to pursue further evidence about head injury. The orthopedic surgeon reported that the plaintiff had made a good recovery. There was nothing in the hospital records to suggest otherwise. The defendants' expert testified, and the court agreed, that it was the practice in the 1970s to proceed on the basis of such a report, and lawyer A did not need to hire another doctor. The migraine headaches which developed many years after the accident were not caused by the accident.

Neither lawyer A nor lawyer B were negligent. Lawyer B was given a $300.00 retainer. He did more than his retainer required. He visited the scene of the accident, drove the other driver's route, and spoke with the police. He ascertained that the plaintiff's passenger would be of no assistance on the liability issue. Lawyer B discussed obtaining an accident reconstruction with the plaintiff, but felt that nothing would be gained from it. Far from failing to meet the standard of care, lawyer B went well beyond it.

The action was also statute barred. The court rejected the plaintiff's contention that there was any connection between his viewing a computer animated reconstruction of Princess Diana's car accident, and the plaintiff's discovering that he had a cause of action against the solicitors.

A pdf copy of the reasons for judgment, which was never reported, may be found at: www.practicepro.ca/runoffcase.

Defending a lawsuit arising from legal services rendered more than a quarter of a century ealier is difficult. In this case, the other driver as well as lawyer A were dead by the time the malpractice action was tried.

The need to evaluate insurance coverage limits

A retired solicitor cannot assume that he or she will have adequate insurance when faced with an "ancient" claim, or any claim, for that matter. If a solicitor is

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sued after he or she retires from practice, and ceases to pay errors and omissions premiums, the solicitor has the benefit of $250,000 in Run-Off coverage under the Law Society's insurance program. This coverage limit is per claim and in the aggregate, and is a one-time limit. It is not re-instated annually. A retiring solicitor is covered to a maximum of $250,000 for all of the clams made against the solicitor while in retirement or otherwise on exemption under the Law Society program (for reasons other than temporary leave of absence or mobility). This $250,000 per claim/in the aggregate limit is applicable to claims payments, defence costs and pre-judgment interest. All such payments made to resolve a claim reduce the funds available under the policy to respond to all other claims against the solicitor.

In short, the $250,000 must cover all payments by LAWPRO associated with all claims against the retired solicitor, from the date of retirement, until the solicitor's death, and beyond. A substantial claim can easily consume the entire $250,000.

Retiring lawyers are encouraged to buy-up their run-off limit protection under the Law Society program. Increased limit options include $500,000 per claim/$1 million aggregate, and $1 million per claim/ $2 million aggregate. Retiring lawyers may also consider applying for optional excess insurance above the latter increased limit option.

For details concerning the various insurance options available to retiring lawyers, and the kinds of things that lawyers might consider in deciding what option bests suit them, see LAWPRO's Insurance Matters booklet for retired lawyers at: http://lawpro.ca/insurance/pdf/Retired_Lawyers_Policy.pdf.

Forms and further information are available on-line at: http://lawpro.ca/insurance/Practice_type/retired_lawyers.asp.

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Starting a green committee

One of the key components in LAWPRO's sustainability program has been the creation of a company-wide Green Committee. It's helped to put focus around our ideas and encouraged sober and thoughtful debate on the merits of each initiative before the idea is moved up the ladder.

Starting a Green Committee at your company has the dual effect of helping the environment and engaging your employees in a cause that they can relate to – and can be fun.

LAWPRO's Green Committee has tabled a number of initiatives in six short months, a few of which have been brought to our management team for consideration. Ideas implemented at LAWPRO include: reducing the amount of material we automatically print (i.e. moving more information online); tracking each department's monthly paper consumption with a goal of reducing that consumption; switching to recycled paper and identifying a "green" charity for the employees and the company to support.

Here are some of the things we took into consideration when developing our Green Committee. Feel free to borrow liberally or come up with your own take.

- Get at least one representative from each department.
- Write a mandate or mission statement and follow it. This ensures that you have a clear and focused goal.
- Make sure that you're not pushing political agendas – present the information in an unbiased way.
- Allow everyone to have a say.
- Make it fun – put together competitions and initiatives that bring the entire organization together.

For more information on starting a Green Committee, check out this resource – http://tinyurl.com/cb7qke.