

LAWPRO defends its insureds

When identifying cases that merit a formal defence (or appeal), LAWPRO counsel consider a range of strategic factors, including whether the case has the potential to alter the standard of care applicable to professional legal services. This article summarizes a sampling of those claims in defence of which we went to court in 2015.

Family law

Two notable judgments in 2015 involved family lawyers.

The court dismissed a multi-million dollar claim against a family lawyer arising from his negotiation of a marriage contract. The client alleged that the lawyer should have advised him to negotiate a “downside protection clause,” so that, if his income did not increase during the course of the marriage, he would not be obliged to make any equalization payment to his wife. The court held that even if the lawyer were obliged to recommend such a clause, which he was not, there was no evidence that the wife would have agreed to it. Even

if the contract had allowed the husband to avoid any equalization payment, a court would likely have awarded the wife support in an amount totalling what the husband eventually paid her by way of settlement. She had no assets, and no employment prospects. The claimant established neither liability, nor damages.¹

The second family law judgment also arose from the negotiation of a marriage contract. In this case, the court summarily dismissed a multi-million dollar claim against two lawyers. Under that contract, the wife waived support and equalization payments in exchange for a long-term stream of employment income, and other benefits. When the marriage ended shortly thereafter, she was immediately dissatisfied. For five years, she unsuccessfully attempted, with the help of independent legal and financial advisors, to renegotiate almost every element of the marriage contract.

She never sued her husband to re-open the marriage contract. Instead, she sued her own lawyer, and also the lawyer for the family corporation. She alleged that she did not receive adequate disclosure from her husband, and that she failed to adequately understand the nature and consequences of the marriage contract. She alleged that the marriage contract was one-sided and failed to protect her rights.

The solicitors pleaded that her action was statute barred. Secondly, they argued that the entire proceeding was an abuse of process because, if her allegations of lack of knowledge and understanding were true, then she had an avenue available to her under s. 56(4) of the *Family Law Act* to seek redress from her husband.

The court accepted both arguments, and dismissed the action. The action was commenced more than two years after the plaintiff discovered or ought reasonably to have discovered her claims.

¹ 2015 ONSC 5456





Secondly, it was unfair to permit her to treat her solicitors as *de facto* guarantors of her support and equalization rights, particularly where they had no right to contribution or indemnity from the party responsible for her support and equalization: her husband.²

Real estate

S.A.Q. Akhtar, J. struck out an action brought against a real estate lawyer. The plaintiff alleged that the lawyer, by drafting an affidavit for signature by one individual, allowed a second individual to defraud the plaintiff, and that the lawyer was therefore liable to the plaintiff for his loss of equity in two properties. The court held that the words of the affidavit were those of the affiant, and not of the lawyer, as was the representation that the content contained therein was true. To hold otherwise would expose lawyers who draft affidavits to liability claims, and potentially put them into a position of adversity with their clients.³

In another case, a solicitor acted on the discharge of two mortgages. Several years later, the lenders alleged that the discharges were fraudulent. Fortunately, the solicitor had retained photocopies of the plaintiffs' actual citizenship cards and their then current driver's licences, as well as signed and witnessed authorizations to discharge their mortgages. The action against him was dismissed.⁴

LAWPRO regularly cautions lawyers against representing parties on both sides of a real estate transaction or who are otherwise adverse in interest, and urges lawyers to consider the *Rules of Professional Conduct* relating to conflicts of interest. Nevertheless, we still see claims arising out of circumstances in which there has been such a conflict. In a matter we defended in 2015, a plaintiff's action against a solicitor was dismissed, notwithstanding that he acted for both the plaintiff purchaser, and for the vendor. In this case, the evidence demonstrated that the solicitor did not prefer the vendor's interests. In fact, he was able to obtain from the vendor concessions that an "independent" lawyer could not have obtained. While the plaintiff did suffer losses in the transaction, nothing the solicitor did or did not do caused the plaintiff's losses – the losses arose from factors beyond his control.⁵

Civil litigation

LAWPRO counsel appeared before the Supreme Court of Canada in an attempt to overturn a Court of Appeal of Ontario order upholding a finding of contempt against a lawyer. The lawyer had returned money held in his own trust account to the client to whom it belonged, despite the fact that there was a Mareva order in place with respect to the funds. In arguing that the finding of contempt should be overturned, LAWPRO counsel argued, among other grounds, that civil contempt requires a finding of "contumacious intent", and that retaining the funds in the trust account would have conflicted with other duties that the lawyer owed the client. These arguments were not persuasive, and the court dismissed the appeal.⁶

Finally, LAWPRO successfully argued for the striking out of a pleading on the basis that it disclosed no cause of action against a litigation lawyer. The claims, which alleged numerous torts against the lawyer and her associates, were either premature, or improperly pleaded, or incapable of proof. The Court of Appeal also found that the claim was an abuse of process. It was designed to frustrate pending medical malpractice actions against the plaintiff, where the defendant lawyer represented the plaintiff's patients.⁷

As the foregoing shows, LAWPRO does not hesitate to seek summary judgment, go to trial, and even pursue appeals in cases in which a vigorous defence is warranted. Also helpful is Rule 2.1 of the *Rules of Civil Procedure*, which allows for the dismissal of actions which are frivolous and vexatious on their faces, without the necessity of bringing motions.⁸ For a report on LAWPRO's rate of success in these matters, see "Our 2015 claims handling report card" on page 9. ■

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² 2015 ONSC 3081

⁴ 2015 ONSC 3683

³ 2015 ONSC 4807

⁵ 2015 ONSC 6217

⁶ 2015 SCC 17, dismissing appeal from 2013 ONCA 530

⁷ 2015 ONCA 631

⁸ 2015 ONCA 733