

LAWPRO defends lawyers: Opposing inappropriate expansion of lawyer's scope of responsibility

Advising clients of their rights on a legal matter is a significant responsibility and lawyers have a duty to discharge it with competence and care. But when defending a negligence claim where clients seek to hold lawyers accountable for the unfavourable results of their own business or strategic decisions, LAWPRO's defence counsel don't hesitate to draw the line.

In 2014, LAWPRO successfully defended lawyers engaged in every field of law. One case¹ especially stands out. The result was not only favourable to the insured, a commercial lawyer, but because of the generality of the principles this judgment expresses, it will be useful in defending lawyers in all areas of practice.

The plaintiffs unsuccessfully alleged, among other things, that the defendant solicitors failed to protect their ownership interest in the partnership dispute and forced them into a sale of their partnership interest, that the solicitors acted without their authorization or instruction, and failed to keep them properly advised of proceedings throughout.

The judge dismissed the action. The Court preferred the solicitors' evidence to the plaintiffs'. The Court placed no weight on the plaintiffs' expert witness.

At paras 107-112 of its judgment, the Court relied on the following useful principles:

- The reasonable lawyer standard does not call for an assessment of the sagacity of the decision made by the lawyer. The standard demands that the lawyer bring to the exercise of his or her judgment the effort, knowledge and insight of the reasonably competent lawyer. If the lawyer has met that standard, his or her duty to the client is discharged.
- Where decisions made by the lawyer are within a range of reasonable choices that could be made by a competent member of the profession, a lawyer will not be found negligent in the discharge of his or her duties.
- A solicitor should not be found negligent for not obtaining a term in an agreement or taking some step in a transaction that, at a later date, is said may have been available.
- A solicitor's conduct must be viewed in the context of the surrounding circumstances. The reasonableness of the lawyer's impugned conduct is judged in light of the surrounding circumstances

such as the time available to complete the work, the nature of the client's instructions, and the experience and sophistication of the client.

- It has been said that "all other things being equal... the version of the client is to be preferred." In this case, however, in view of the Court's findings on credibility, all things were not equal, and the solicitors' evidence was to be preferred.
- The solicitor had a duty to advise only on legal issues, not on legal and business issues. The plaintiff was a sophisticated, experienced, successful, shrewd and demanding businessman. He was able to make his own decisions about business matters.

A few other cases decided in 2014 are also worthy of mention. The Court of Appeal² affirmed the dismissal of an action against a real estate lawyer who had acted for a client on the purchase of a shopping mall where a dry cleaning business had previously been conducted. The client ignored the solicitor's suggestion that he get an environmental assessment. The courts held the decision whether to proceed with the transaction without obtaining that assessment was a business decision for the client, not a matter for a lawyer. The court stated it would have been preferable to have written instructions or written confirmation of them, but that it is not required.

In another case, the court summarily dismissed an action against a firm of civil litigators where the plaintiff fired them after an unsuccessful mediation. The plaintiff subsequently obtained a \$100,000 offer to settle from the tortfeasor, but turned it down. Her action was dismissed at trial, where she represented herself. Justice Perell held that she did not retain the lawyers to prepare her to be a successful self-represented litigant; instead, she retained them to represent her and to be her lawyer of record to settle or try her actions. She terminated the retainer, and the lawyers could not be blamed for the outcome, which could be explained by the weaknesses in the plaintiff's case, independent of whether she was represented or self-represented.³

In another decision⁴, the Court of Appeal agreed that the plaintiff's action against a criminal lawyer should be struck out as an abuse of process. The plaintiff did not allege on the appeal of his conviction that the lawyer provided inadequate representation at the criminal trial, nor did he attempt to overturn his conviction as set out in s. 696.1 of the *Criminal Code*. His negligence action against the solicitor was instead a collateral attack on his criminal conviction. ■

¹ 2014 ONSC 4521 (CanLII)

² 2013 ONSC 3022; Appeal Dismissed 2014 ONCA 415

³ 2014 ONSC 2348

⁴ 2014 ONCA 608, dismissing appeal from 2014 ONSC 1300.