LawPRO Webzine

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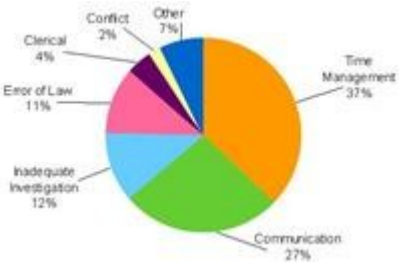
Litigation claims trends: errors & insights



Civil litigation accounts for more legal malpractice claims in Ontario than any other area of law. It is also responsible for the second highest percentage of claims costs, after real estate.

From 2000 to 2010, litigation-related claims accounted, on average, for 34 per cent of LAWPRO's claims count (650 claims per year), and 28 per cent of our claims costs ($17.4 million per year). On average, resolving a litigation claim cost LAWPRO $38,000 over that period.

While the annual number of civil litigation claims has remained relatively consistantly in the 600-700 range over the last 10 years, the cost of litigation claims is on the upswing, with costs in 2005-2008 being much higher than earlier in the decade. We are still assessing costs for 2009 and 2010.

This article examines the most common civil litigation-related errors that LAWPRO sees, and the steps you can take to reduce the likelihood of a claim.

The most common errors

In the civil litigation area, the most common causes of claims are the following:

- time- and deadline-related errors;
- lawyer/client communication failures;
- inadequate discovery of facts or inadequate investigation;
- failure to know or properly apply the law;
- clerical/delegation; and
- conflicts of interest.

Figure 1 illustrates the relative proportion of these errors. Many lawyers are surprised that law-related errors rank fourth, well behind time management and communication errors.

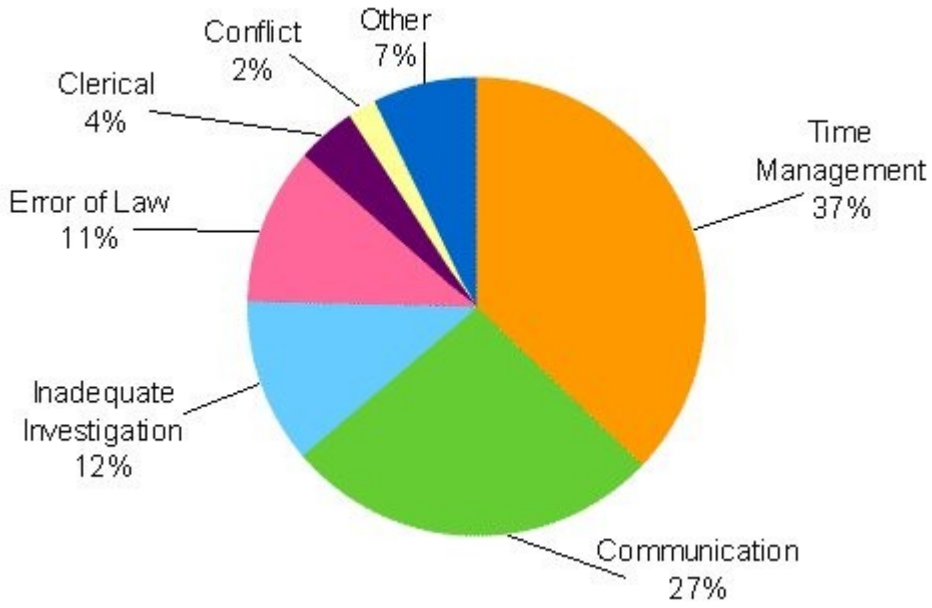


Figure 1: Civil litigation claims by type of error (2000-2010)

Time management errors, which include missed limitation periods, are the most common, accounting for 37 per cent of litigation claims. Contributing to this high number are Ontario's *Limitations Act, 2002* and case law that has restricted judges' discretion to extend limitation periods.

Lawyer/client communication-related errors rank second, representing 27 per cent of the errors in the civil litigation area.

Time and deadline-related errors

Time- and deadline-related errors are the most common type of error we see in the civil litigation area. They fall into one of two distinct types:

(1) missing deadlines or limitation periods which cause 80 per cent of time-related litigation claims, and

(2) not completing tasks in an appropriate amount of time (a.k.a. procrastination) which cause 20 per cent of claims in this area.

Commonly missed deadlines or limitation periods include:

- failing to issue a claim within two years of the date when a claimant knew or ought to have known that he/she had a cause of action/claim;
- failing to commence an action for injuries sustained in a motor vehicle accident before the expiry of the two-year limitation period;
- failing to discover and name all proper parties to an action, e.g., all the proper defendants to a motor vehicle action, before the expiration of the limitation period;
- failing to start an action against an insurance company for loss or damage to automobile or its contents within one year after the loss occurred pursuant to s. 259.1 of the *Insurance Act*;
- failing to provide 60 days notice of a claim to the Crown before commencing an action as required by the s. 7 of the *Proceedings Against the Crown Act*;
- failing to set down an action for trial within 90 days after the registrar has served a status notice under Rule 48;
- failing to file a timetable at least seven days before the date of a status hearing as required under rule 48.14(10);
- failing to meet the deadlines for perfecting and preserving construction liens.
- failing to set a perfected construction lien down for trial within two years of the commencement of the action;
- When acting for a franchisee, failing to rescind the franchise agreement within 60 days after receiving

the disclosure document if the franchisor failed to meet the requirements of section 5 of the *Arthur Wishart Act*; and

- When acting for a franchisee, failing to rescind the franchise agreement within two years after the date it was signed if the franchisor provided no disclosure document, pursuant to s. 6(2) of the *Arthur Wishart Act*. (Although franchise law per se is not civil litigation, litigators are often retained when franchise disputes arise.)

Risk management tips

A tickler system that tracks all critical deadlines is an essential for avoiding time-related errors. Entering reminders that occur before the final deadline can help to ensure there is sufficient time to complete all necessary tasks (e.g., prepare and affidavit and exhibits and have both sworn and to the courthouse by the filing deadline). Setting a target completion date that is before the absolute deadline can also be a lifesaver in the unforeseen circumstances arise (e.g., at 3:30 p.m. the taxi the articling student took to the courthouse got lost and didn't make it in time for the close of the court clerk's office due an ice storm).

The procrastination-related errors we frequently see include:

- failing to prosecute an action in a timely fashion, leading to administrative dismissal of the action for delay;
- failing to promptly bring a motion to set aside an administrative dismissal;
- failing to engage the expertise of the appropriate medical experts and "work up" the claim in a personal injury action within a reasonable period of time.

Risk management tips

As a piece of general advice, it's a good idea to review your file before closing it and/or putting it into storage to ensure that nothing still needs to be done. If there is and it is part of your retainer, you should ensure that you complete the outstanding work. If it is not, confirm in writing to the client that it is the client's responsibility to complete the work.

Communications-related errors

The second most common cause of malpractice claims on civil litigation files are lawyer/client communication-related errors. These fall into one of three general categories:

- a failure to inform the client or obtain the client's consent;
- a failure to follow a client's instructions; and
- poor communication with the client.

A review of common fact scenarios for each type of error gives you a good understanding of why these errors happen and the steps you can take to avoid a communications-related claim.

Poor communication with client

Poor communication with the client is the most common communications-related error and causes 37 per cent of this type of error. Common scenarios for this error include:

- failing to ensure that the client understands what you are telling him/her and that you understand what he/she is telling you, particularly if there is a language barrier;
- failing to ensure that the client understands clearly what you will be doing as the lawyer and what the client is responsible for doing;
- failing to establish clearly who your client is, (e.g., when acting for a public interest advocacy group, failing to establish clearly at the outset who is actually retaining and instructing the lawyer and whether that person has authority to do so);
- failing to confirm in writing a client's instructions not to file a writ of execution against a particular property because the judgment debtor appears to have little equity in it.

Failure to follow client's instructions

A “failure to follow client instructions” is the second most common communications-related error and accounts for 35 per cent of communications-related claims. It really amounts to nothing more than a simple failure to follow a client’s specific instruction. The most frequent scenarios for this error include:

- failing to clarify that a client intends a settlement at mediation to cover all claims against the other party to a proceeding or only certain types of claims;
- failing to clarify with a creditor client the total amount that will become due and payable if the debtor defaults on a settlement;
- failing to explain clearly to a client why you did not call a witness suggested by the client to testify at trial. (If the client is unsuccessful at trial, that witness will invariably become the “smoking gun” witness whose testimony would have made all the difference!)

Failure to inform client or get consent

The third most common type of communications error on civil litigation files – representing 29 per cent of communications-related claims – involves a failure to obtain the client’s consent or to inform the client. Examples of this type of error include:

- failing to manage client expectations, specifically: failing to clearly explain the risks and cost implications of litigation; failing to realistically explain the chances of success in proposed litigation; encouraging false hopes and unrealistically high expectations;
- failing to obtain the client’s authority to settle the client’s claims;
- failing to inform the client about limitation periods, steps the client needs to take, and other critical information that affects the client’s interests when declining a retainer;
- not disengaging properly, and failing to make it clear that you are no longer acting for the client;
- failing to clearly explain to a client the likely adverse consequences of settling a claim for statutory accident benefits for a lump sum early in a personal injury action, and failing to document the settlement instructions if a client insists on such a settlement in spite of the lawyer’s advice;
- failing to make it clear to the client that you are declining a retainer;
- failing to warn public interest group clients about the potential risk of adverse cost awards and SLAPP (strategic litigation against public policy) lawsuits.

Risk management tips

When it comes to avoiding or reducing the likelihood of a communications-related claim, the importance of putting things in writing cannot be over-emphasized. Although the failure to have written confirmation of instructions and advice is not negligence in and of itself, such written communication can be extremely helpful in defending you if a claim is made against you (or you are the target of a law society complaint or if you are defending your account before an assessment officer).

Why is having something in writing so helpful? Because more often than not, this type of claim involves the lawyer recalling that one thing was said or done – or not said or not done – and a disappointed or upset client who alleges something different. This type of claim is very hard for LAWPRO to defend successfully. It comes down to a question of credibility. Judges tend to prefer the client’s evidence, as the client usually has a much better recollection of what transpired and what was said.

Remember, most clients are only involved in one or two lawsuits in their lifetimes, so they tend to remember exactly what happened. On the other hand, lawyers who have handled dozens or hundreds of civil litigation files tend to have little or no specific recollection about what happened in a specific lawsuit, especially one in the distant past.

And unfortunately, we frequently find inadequate documentation in the lawyer’s file to back up the lawyer’s version of what occurred. All too frequently, we see files with no notes or correspondence documenting what was said and done, and on occasion, even files with no reporting letters whatsoever.

Fortunately, communications-related errors are among the easiest to prevent.

You can significantly reduce your claims exposure by documenting your work. Confirm the information that your client provided to you, your advice to the client, the client’s instructions to you, and what steps were taken on those instructions. Document the time spent reviewing the case, and note what issues were discussed with the client. This can be done in your notes, and in interim or final reporting letters, or even in an e-mail message. Admittedly, you can’t document everything on every file, but taking the time to

document unusual things or issues that seemed to concern the client can be very helpful in the event of a claim, especially if you have a difficult or demanding client.

Litigation lawyers do not always track or docket the time they spend on files. This is a shame, as there are two benefits of doing so. First, by tracking lawyer and staff time you can determine the actual amount of time you are spending on each file – a critical piece of information for determining if you are making any money on each civil litigation file you handle.

Secondly, even taking just a few seconds to make detailed dockets can be a lifesaver. “Conference with client re proposed testimony of witness X” is much better than just “Conference with client re trial;” “Conference with client re risks and costs of litigation” is much better than just “Conference with client re lawsuit.” Weeks, months or even years after a file is completed, detailed dockets such as these can serve to confirm that particular issues were discussed with the client. Remember not to include privileged information in a time entry that might end up before the court (e.g., for a costs motion).

Inadequate discovery of facts or inadequate investigation

The third most common malpractice error in the civil litigation area is an “inadequate discovery of facts or inadequate investigation.” Examples include:

- failing to name the proper defendants in a motor vehicle action either as a result of failing to obtain a motor vehicle accident report that would identify all the parties involved or misreading the report;
- failing to identify and sue the correct defendant in an occupier’s liability case;
- when acting for the plaintiffs, failing to name all potential plaintiffs, using their correct corporate names, (e.g., both a principal shareholder and his/her corporation, where both have a cause of action);
- failing to ensure that a truly independent other lawyer is present when an Anton Piller order is executed, as required by a judge’s order.

Risk management tips

Don't take shortcuts – they can and will come back to haunt you. Lack of attention to details also arises when there are time pressures created by other lawyers or clients – and details get missed or drafting errors occur. Take the time to do the job right, even if it takes a bit longer or involves coming back on another day.

Failure to know or properly apply the law

The fourth most common type of error in the civil litigation area is a failure to know or apply the law, accounting for 11 per cent of the number of claims between 2000 and 2010. The law-related mistakes we most frequently see are the following:

- in a personal injury action, failing to be adequately informed about statutory accident benefits (SABs);
- in a motor vehicle case, failing to be adequately informed about the various automobile insurance regimes in Ontario and the time periods when they were in effect;
- where a plaintiff client was a passenger in a vehicle that was involved in an accident with an unidentified driver, mistakenly suing the uninsured and underinsured carrier (the client’s own insurer) instead of correctly suing the insurer of the vehicle in which the plaintiff client was a passenger;
- failing to draft the release clause in a settlement agreement in clear and unambiguous terms;
- failing to return documents inadvertently disclosed by an opposing party’s counsel and asserting that those documents had lost privilege without legal grounds for this assertion, thus leading to a successful motion disqualifying the lawyer’s firm from acting for the client.

Risk management tips

Attending CPD programs can help keep your knowledge of substantive law current. Do not dabble in an area of law you are not familiar with – refer the matter to another lawyer with appropriate expertise.

Clerical and delegation errors

Clerical and delegation errors account for four per cent of the number of civil litigation claims. Typical examples include the following:

- misdirecting an email message;
- inadvertently disclosing a privileged document;
- inadvertently disclosing a defamatory document;
- diarizing a limitation period incorrectly.

Conflicts of interest

Conflicts of interest accounted for two per cent of civil litigation claims reported between 2000 and 2010.

Examples include:

- in general, acting for too many parties without recognizing the potential for conflicts of interest;
- acting simultaneously for members of the same family and their business or corporate entities;
- acting for both a corporation and its individual shareholders;
- sitting on the board of directors of a corporate client;
- acting for a corporate client and providing legal services on the side to an employee of the client, especially a key employee from whom the lawyer receives instructions.

Risk management tips

When it comes to avoiding conflicts, you need to be vigilant from the very start of the matter. Follow firm conflicts checking procedures religiously. In most cases, law firm conflicts checking systems seem to catch potential conflicts, and the warning is ignored because of poor judgment and/or greed.

Don’t fall into this trap – listen to your instincts. Ask yourself – who is my client? Is there a real or potential conflict? Also, remember that you probably can't objectively judge your own conflicts – get input from someone who is outside the matter.

Lastly, take appropriate action when real or potential conflicts arise. This includes declining the retainer or getting off the matter if it is appropriate to do so, even if it means turning down work from a good client or a matter that will involve substantial fees.

ven if no allegations are made tell us

If you become aware of a potential claim, you should immediately report it to LAWPRO, even if no allegations of negligence are made.

Putting us on notice will help us help you, and will most likely help reduce the damages on any potential claim. We may retain counsel to assist you and protect your interests, including helping you draft an affidavit and attending with you if you are examined as a witness. And remember, best practice is not to turn your file over without a court order. We can help to ensure that the court order is worded appropriately to protect your interests. It is interesting to note that we close about 87 per cent of our civil litigation claims without any indemnity payments.

our marching orders

You can't totally eliminate the risk of a malpractice claim. However, you can substantially reduce your risk of a claim by improving your lawyer/client communications and documenting your work. Review and consider the types of errors that occur in the civil litigation area, and set aside time to integrate the various risk management strategies outlined above into your practice.

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About LAWPRO Webzine:

LAWPRO Webzine is distributed to LAWPRO insureds and other contacts (on request) to keep them up to date on the LAWPRO insurance program, risk management information and other news.

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