

# Resolve: Plaintiffs push the envelope – LAWPRO pushes back

*Throughout 2010, plaintiffs attempted to expand the scope of solicitors' liability for defamation, conspiracy, inducing breach of contract, and breach of warranty of authority. They also attempted to establish that novel duties of care were owed to non-clients. LAWPRO was substantially successful in resisting these claims. LAWPRO also enjoyed success in defending negligence claims which arose, in part, from solicitors' failure to fully document their files.*

## Letter to proposed witness privileged

In *522491 Ontario Inc. v. Stewart, Esten Professional Corporation*,<sup>1</sup> the Divisional Court dismissed a defamation action against Stewart, Esten. The defendant's client, a real estate developer, was involved in a dispute with a second developer about a parcel of land. The defendant sent a draft statement of claim on behalf of their client, with a letter attached, to a town planner. The planner later swore an affidavit which the defendant used to obtain a certificate of pending litigation against the disputed land. The statement of claim was issued the following day. The second developer sued Stewart, Esten for an allegedly defamatory statement contained in the letter.

The Divisional Court held that whether or not the letter contained gratuitously defamatory material, it was written on an occasion of absolute privilege. The decision to litigate had already been made when the communication was delivered, steps had been taken to prepare for the litigation and legal action was commenced shortly after the publication of the statements. The defendant made the communication in the course of its investigation of its client's case, with a view to litigation. The communication was directed to a limited audience, from whom the solicitors anticipated obtaining relevant information. Therefore, the alleged impropriety of the solicitors' motives was irrelevant and could not be the subject of judicial inquiry.

## Letter to client's suppliers privileged

The Court of Appeal agreed that a defamation action against solicitor Hertzberger and his firm should be summarily dismissed.<sup>2</sup>

The insured lawyer's clients purchased a company from the plaintiffs, the Jamals. After closing, the clients believed that the plaintiffs were dealing with the company's suppliers, contrary to the share purchase agreement. The defendant wrote to those suppliers on behalf of his clients, stating that the plaintiffs had agreed not to deal with the suppliers, and asking that the suppliers document any of these dealings. The plaintiffs then launched their defamation action against the defendant.

Using the criteria set out in *1522491 Ontario Inc. v. Stewart, Esten Professional Corp.*, Justice Walters held that even if the defendant's letter were defamatory, it was written on an occasion of absolute privilege. The Court of Appeal agreed.

## Scandalous allegations against solicitors punished by the court

In *New Solutions Extrusion Corp. v. Gauthier*,<sup>3</sup> Justice Karakatsanis awarded substantial indemnity costs to solicitors wrongfully accused of conspiracy, inducing breach of contract, and interfering with economic relations.

In the underlying judgment,<sup>4</sup> Justice Karakatsanis had summarily dismissed the plaintiff's action against these solicitors. The statement of claim included scandalous allegations about the solicitors including that they "deliberately and cynically decided to ignore all applicable law when hatching their plan, confident that their behaviour would never face judicial scrutiny." In cross-examination, the plaintiff admitted that it had no evidence to support these accusations; they were based on "assumptions" and were "embellished" by the plaintiff's lawyers.

## Taking another firm's client is not actionable

The Court of Appeal agreed that an action brought by the law firm Heydary Hamilton against Hanuka and his firm Davis Moldaver (the defendant) was rightly dismissed (*Heydary Hamilton Professional Corporation v. Hanuka*, 2010 ONCA 881).

The Bawejas retained the plaintiff on October 19, 2007, to assist them with a commercial dispute. The Bawejas eventually terminated their retainer with the plaintiff firm, and hired the defendant, Heydary Hamilton.

The plaintiffs sued the Bawejas for the fees outstanding. They also sued the defendant, claiming damages for conspiracy, inducing breach of contract, unlawful interference with economic interests, and unjust enrichment. The plaintiffs alleged that the

defendant “clandestinely enticed and assisted the [Bawejas] to terminate the [October 19, 2007, retainer agreement] without paying the amounts due and payable to [Heydary Hamilton.]”

The motions judge struck out the claim against the defendant. The court relied especially on *Manning v. Epp*, 2006 CanLII 24126 (ON S.C.); affirmed by the Court of Appeal at 2007 ONCA 390, which supports the absolute right of a client to discharge a lawyer.

## Breach of warranty of authority

*Attis v. Ontario (Minister of Health)*<sup>5</sup> is an extraordinary judgment. It suggests that where a client authorizes a solicitor to commence litigation, but this authority is not fully informed, the solicitor has no authority to commence the litigation and is liable for breach of warranty of authority.

Solicitor B.J. Legge acted for the representative plaintiffs in a class action against the Ontario Minister of Health and the Attorney General for Canada arising from their failure to prevent the marketing and use of breast implants in Canada. This class action was dismissed by Winkler R.S.J., who ordered significant costs against the class plaintiffs. They incurred further cost liabilities to the defendants in their unsuccessful attempts to appeal this judgment.

The solicitor then advised the defendants that the plaintiffs were impecunious.

The attorney general sought an order that the solicitor pay the outstanding costs personally, on the basis that the solicitor breached his warranty of authority. Cullity, J. accepted plaintiff's evidence that the solicitor never explained to them that they faced personal exposure for the defendants' costs, should the class action fail.

Cullity, J. relied on Rule 15.02(4), and/or the inherent jurisdiction of the court in deciding that the solicitor should be liable for the defendant's costs. The plaintiffs had already commenced a negligence action against the solicitor, but Cullity J. said it would be unfortunate if they were required to prosecute a negligence action to get indemnity for these costs.

LAWPRO is appealing this judgment.

## Landlord's solicitor not liable to tenant for alleged duress

In *Taber v. Paris Boutique and Bridal Salon; Ambrose (T.P.)*,<sup>6</sup> the Court of Appeal upheld the motion judge's order striking out a tenant's third party claim against the landlord's solicitor.

The tenant alleged that the solicitor exerted duress on it during a lease dispute – she would not allow the tenant to re-enter the premises unless it signed the minutes of settlement and a promissory note.

The court held that the solicitor was doing nothing more than advancing her client's position. It was plain and obvious that the tenant could not succeed in elevating the solicitor's routine conduct to a level that the law regards as illegitimate.

## Solicitor for grantor of power of attorney owes no duty to grantee

In *Barbulov v. Huston*,<sup>7</sup> Newbould J. summarily dismissed the plaintiff's action against solicitor Huston. He held that the defendant, who prepared a power of attorney for the plaintiff's father, owed no duty of care to the plaintiff, the grantee of the power of attorney for personal care.

The plaintiff spent \$30,000 in legal fees unsuccessfully appealing a decision of the Consent and Capacity Board concerning his father's treatment plan. The plaintiff alleged that the power of attorney did not reflect his father's wishes, and that the defendant was responsible for these costs.

Newbould, J. held that a solicitor advising the grantor of a power of attorney owes no duty of care to the attorney. Such a duty of care could conflict with the solicitor's duty to the grantor. The defendant did not undertake to look after the plaintiff's interests; he was concerned solely with the interests of the plaintiff's father.

Newbould J. further stated there is no need to create a separate duty of care owed by the grantor's solicitor to the attorney. An attorney is entitled to reimbursement from the grantor for all expenses reasonably incurred by the attorney in the course of his duties. After reimbursing his attorney for these expenses, the grantor may sue his solicitor to recover them, if they were incurred because of the solicitor's negligence.

In any event, the court was not satisfied that the power of attorney did not reflect the grantor's wishes.

## Duty potentially owed to disappointed beneficiary, but duty not breached

Justice Mulligan found that solicitor Riffert was not liable to the plaintiff Sarah McCullough, a “disappointed beneficiary,” where the testator, Robert McCullough, died without executing the will the solicitor had drafted.<sup>8</sup>

Robert McCullough died just 10 days after visiting solicitor Riffert to give instructions for a will, which would have left his entire

estate to the plaintiff, his niece. The issue in the plaintiff's claim against the solicitor was whether the solicitor was negligent in not obtaining the execution of the will before Robert died.

The solicitor met with Robert within one week of the plaintiff's requesting an appointment on his behalf. Robert walked into the solicitor's office and expressed no urgency other than a desire to complete the will before a proposed trip to Texas. Robert had not seen a doctor recently and there was no diagnosis that he was subject to a terminal illness.

Three days later a draft will was prepared and sent to Robert for review. The solicitor noted on the file that the will was to be signed by February 29, 2010, – about two and a half weeks after the initial interview. Robert's death on February 21, 2010, was completely unexpected.

Justice Mulligan held that there may be circumstances where a solicitor is obliged to prepare a will immediately. While visits to a hospital, nursing home or a palliative care centre will give rise to greater urgency, especially when the lawyer has medical advice that the client is terminally ill, Justice Mulligan was not satisfied that, on these facts, the solicitor fell below the standard of care.

## Solicitors must protect themselves against their clients

In *Hall v. Watson*,<sup>9</sup> the plaintiff Hall unsuccessfully appealed Justice Crane's dismissal of her negligence claim against solicitor Watson. The plaintiff transferred her home to the St. Joseph's Villa Foundation, but retained a life estate in the home. The defendant acted for her on this transaction.

The plaintiff alleged the defendant did not advise her of the nature of the transfer. The plaintiff claimed that she had no intention of transferring the property to the Foundation in her lifetime, but rather intended to make a bequest in her will.

Justice Crane concluded that the defendant was a conscientious and competent solicitor. The only fault Justice Crane found with the defendant's conduct, if it was a fault, was that he did not adequately protect himself against the plaintiff's change of mind. This observation was tempered by the fact that the plaintiff was a strong-willed, intelligent woman who knew what she wanted.

Lawyers must be prepared to defend their competence and integrity with documentation, including personally written memoranda, signed acknowledgements and instructions and directions from their clients. Even so, there are limitations to what the defensive practice of law can achieve – the plaintiff denied receipt of 32 documents delivered to her by Canada Post and the defendant.

## Saved by third party witnesses

In *Dinevski v. Snowdon*,<sup>10</sup> Dinevski unsuccessfully sued solicitor Snowdon who had acted for him on the sale of his property to Tim Hortons Inc, and on the lease back of part of it to the plaintiff. The property lease back contained a restaurant, Texas Grill, which the plaintiff had operated for several years before the sale.

The plaintiff complained that the lease back did not allow for a second, five-year renewal term at the same rent as the first term, and did not allow the plaintiff to assign the lease, which meant that he could not sell Texas Grill.

The court found that the defendant discussed these issues with the plaintiff prior to the sale, who understood them. The plaintiff had no realistic choice but to sell the property to Tim Hortons, since the property was heavily mortgaged, and the plaintiff owed substantial back taxes.

Tim Hortons was not prepared to maintain rent at the same level for 10 years. Tim Hortons intended to build its own restaurant, and wanted to see a high-traffic franchise next door to it. It wanted the Texas Grill wound down, not sold to another operator it did not control.

Evidence from Tim Hortons' solicitor and its real estate manager established that Tim Hortons' position on these issues was inflexible. There was nothing the defendant could have done to alter them. The court dismissed the plaintiff's claim.

## Conclusion

In 2010, plaintiffs' efforts to create new bases for legal malpractice liability continued unabated, as did their efforts to exploit deficiencies in solicitors' file documentation. LawPRO demonstrated its determination to resist these claims, and enjoyed considerable success in doing so.

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<sup>1</sup> 1522491 *Ontario Inc. v. Stewart, Esten Professional Corporation*, 2010 ONSC 727 (Div.Ct.); reversing 2008 CanIII 63198 (ON.S.C.); leave to appeal to the Divisional Court 2009 CanIII 15656 (ON S.C. Div.Ct.)

<sup>2</sup> *Jamal and Jamal v. Hertzberg*, 2010 ONSC 2362; affirmed 2010 ONCA 794

<sup>3</sup> *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1897

<sup>4</sup> *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037; appeal dismissed 2010 ONCA 348

<sup>5</sup> *Attis v. Ontario (Minister of Health)*, 2010 ONSC 4508

<sup>6</sup> *Taber v. Paris Boutique and Bridal Salon; Ambrose (T.P.)*, 2010 ONCA 157, dismissing appeal from 2009 CanIII 48500 (ON S.C.)

<sup>7</sup> *Barbulov v. Huston*, 2010 ONSC 3088

<sup>8</sup> *McCullough v. Riffert*, 2010 ONSC 3891

<sup>9</sup> *Hall v. Watson*, 2010 ONCA 839

<sup>10</sup> *Dinevski v. Snowdon*, 2010 ONSC 2715