LPIC'S Winning Ways

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Over the past seven years, LPIC has won a reputation for "going to bat" for its insureds. Its win rate has been impressive. The following are some of LPIC's successes on behalf of its insured members in 2001. It is especially satisfying to LPIC and its counsel to successfully defend insureds who have done no wrong. LPIC's efforts on behalf of "erring" insureds will be the subject of a future column.

The Law Society of Upper Canada

Not everyone realizes that LPIC insures the Law Society of Upper Canada. Since time immemorial, the law has been that the Law Society is immune from suit when it exercises its statutory duties, provided that it exercises its powers in good faith.

In *Edwards v. Law Society of Upper Canada*, the claimants challenged this longstanding principle. LPIC defended the Law Society up to and in the Supreme Court of Canada. [2001] S.C.J. No. 77, affirming (2000) 48 O.R. (3d) 321 (C.A.), affirming (1998) 37 O.R. (3d) 279 (Ont.Ct.Gen.Div.). Had LPIC lost the appeal, the Law Society would have found itself added as a "deep pocketed" co-defendant in future lawsuits arising from lawyers' dishonesty or other malpractice. Even defending such claims would have been a heavy burden, not only to the Law Society and LPIC, but to the Ontario lawyers who fund both organizations.

The plaintiffs were allegedly victimized by a gold delivery fraud. A selling agent persuaded the plaintiffs to purchase "Gold Delivery Contracts," and to pay $9 million US in purchase funds into a law firm's trust account. The plaintiffs later learned no mines existed and no gold was ever produced. They sought to recover their damages from the Law Society.

The Supreme Court held that the Law Society owed no duty of care to a person who deposited money into a solicitor's trust account in respect of losses resulting from the misuse of that account. An examination of the *Law Society Act* did not reveal any legislative intent to impose a private law duty on the Law Society in the facts of this case.

The Law Society maintains a Compensation Fund to compensate for losses sustained as a result of dishonesty by lawyers. The Lawyers' Professional Indemnity Company provides insurance for claims by clients against their lawyers in negligence. Section 9 of the *Law Society Act,* which gives immunity from damage claims to officials of the Law Society who act in good faith, precludes any inference of an intention to provide compensation in circumstances that fall outside the lawyers' professional indemnity insurance and the lawyers' fund for client compensation.

Individual Insureds

The following are brief descriptions of cases which LPIC successfully litigated on behalf of insured members in 2001. They are organized according to the area of law in which the insured was engaged at the time of his or her alleged error.

Criminal Litigation

Rashwan v. Farkas, Unreported judgment of Boyko, J., released July 26, 2001, Court File No. 99/CU/175864 (Ont.S.C.J.)

The defendant solicitor represented the female plaintiff at a trial wherein she was convicted of assaulting (spitting at) her tenant. The plaintiff and her husband sued the solicitor for negligence. The Court found that the five matters about which the plaintiffs complained either did not cause the plaintiff to be convicted, or were genuine exercises of judgment, or were not egregious errors.

Stekar v. Gilmore [2001] O.J. No. 5019 (Ont.S.C.J.)

The plaintiff sued his former counsel, who represented him in his criminal and matrimonial difficulties. The allegations of negligence related to the criminal proceedings. They focused primarily on issues relating to counsel's handling of a Charter Application for

disclosure of the identity of a man who was allegedly at the plaintiff's wife's house when the plaintiff assaulted his wife. The plaintiff also complained about the defendant's representation at a second bail hearing, where the plaintiff had been charged with breach of his recognizance in breaking into his wife's house on a second occasion to install video surveillance equipment. The plaintiff was not in fact one of the two individuals shown on the video, and the plaintiff alleged that if the defendant had obtained the video for the bail hearing, it would have been shown that the plaintiff had not entered his wife's house.

Wilson, J. dismissed the plaintiff's action against the defendant.

The Court commented that in this trial, every aspect of the defendant's retainer was scrupulously examined as if under a microscope with the wisdom of twenty-twenty hindsight. Litigation, be it criminal or civil, is an ever changing, often unpredictable landscape. Given this context, a solicitor who acts in good faith is not negligent for an error in judgment.

Civil Litigation

Kasstan v. Ontario (Public Trustee) [2001] O.J. No. 1071 (C.A.), affirming [2000] O.J. No. 819 (Ont.S.C.J.)

The Ontario Public Guardian and Trustee became the statutory guardian of Clara Kasstan's property. Litigation began concerning property owned by Kasstan. The Public Trustee retained Randall Johns to act as counsel. Kasstans was represented by another solicitor, who was guardian of her person.

Kasstan later sued Johns, alleging that the was negligent in the presentation of her case. He allegedly failed to promote her defence under the Constitution. Kasstan's action was summarily dismissed. Johns was not retained by Kasstan; he was entitled to take instructions from the Public Guardian and Trustee. Kasstan's appeal to the Court of Appeal was dismissed as "without merit." Her cause of action, if any, was against the Public Trustee.

Shuman v. Ontario New Home Warranty Program et al. [2001] O.J. No. 4102 (Ont. S.C.J.)

The plaintiff Earl Shuman unsuccessfully sued the Ontario New Home Warranty Program (ONHWP) for coverage with respect to certain alleged defects in his new home. He then sued three solicitors who had represented ONHWP in the litigation. His action was struck out.

Dr. Shuman attempted to rely on the tort of misfeasance in public office. Insofar as the three solicitors were concerned, none of these solicitors were public officers exercising administrative or legislative power. They were counsel for the Program, and owed no duty of care to the plaintiff. Complaints relating to an opposing solicitor's allegedly unethical conduct during the proceedings do not provide a basis for a cause of action.

Commercial Law

Annab v. Jabour [2001] O.J. No. 1694 (Ont.S.C.J.)

The plaintiff solicitor was retained by the plaintiff and his business partners to act on the purchase of a pizza business in Ottawa in 1987. The business eventually failed, and an action was commenced against the solicitor in 1992. The chief complaint was that the solicitor failed to ensure that the vendor made adequate financial disclosure, and that the purchase agreement contained the appropriate warranties and representations concerning the business. In 1996, the plaintiff made an assignment in bankruptcy. Debts arising from this failed business venture constituted half the debts owing in the bankruptcy. Immediately after the plaintiff's discharge from bankruptcy, the plaintiff purchased the cause of action against the solicitor from the trustee in bankruptcy.

At the trial of the action before Chadwick, J., the Court accepted that the solicitor had not been negligent in his representation of the plaintiff. The Court accepted the evidence of the defendant's expert witness that in purchasing a small business, representations and warranties are rare. Financial statements would have been of little assistance in the purchase of a pizza business, because these tend to be run on a "cash" basis. Chadwick, J. preferred the evidence of the defendant's expert over the plaintiff's expert because the defendant's expert had far greater experience in buying and selling small businesses.

The Court held that the solicitor was not retained to give business advice, and that the plaintiff would have purchased the business notwithstanding the solicitor's advice.

"...damages are to be assessed in the real world. It is not to be made an occasion for recovery of a loss (that) has not been suffered."

The Court would have chosen the date of trial as the appropriate time to assess damages. Because the plaintiff's business indebtedness had been discharged in the bankruptcy, he suffered no losses. To award damages to the plaintiff would give him a windfall, since the creditors of the bankrupt estate would receive nothing. Chadwick, J. followed the judgment of the English Court of Appeal in *Kennedy v. Van Emden:* "...damages are to be assessed in the real world. Compensation is a reward for actual loss. It is not to be made an occasion for recovery in respect of a loss which might have been, but has not been, suffered."

Royal Bank of Canada v. Gentra Canada; Osler, Hoskin (T.P.) [2000] O.J. No. 315, affirmed [2001] O.J. No. 2344 (Ont.C.A.)

The Royal Bank sued Gentra to recover money it paid to Gentra under a letter of credit. Gentra third partied Oslers for advising it that it was proper to draw down the money. Royal Bank's action was dismissed, as was the third party claim.

L.L.P. Holdings Limited v. Hongkong Bank of Canada; Pilzmaker Suzuki (T.P.), Unreported judgment of Lang, J. Court File No. 65574/91Q (Ont.S.C.J.), judgment rendered July 27, 2001

Barbara Suzuki was sued personally with respect to funds misappropriated by her ex-partner, Martin Pilzmaker. The misappropriations occurred over one year after the partnership was dissolved; however, Ms. Suzuki had not given the notice suggested by ss. 36 – 37 of the *Partnership Act*. The action against Ms. Suzuki was dismissed. Pilzmaker did not misappropriate the money in his capacity as solicitor. He took the money from an account which he had opened in the client's name. He purported to have control over the account in his capacity as secretary-treasurer of the client.

Real Estate

Zebedee v. Hickson et al, [2001] O.J. No. 4160 (C.A.), affirming unreported judgment of Marchand, J. Court File 4899/97 (Cobourg), February 15, 2001

Zebedee and Hickson were equal shareholders in a corporation which owned a hotel. The hotel increased in value. The corporation sold the hotel, and took back a very substantial vendor take-back mortgage.

Several years later, the hotel's purchaser fell behind on its taxes. The hotel was sold at a tax sale. Zebedee subsequently learned that Hickson was the purchaser of this property, along with an individual named French.

Zebedee thought that the property was sold at an undervalue, and that Hickson had "stripped" their corporation's mortgage receivable, all to Zebedee's disadvantage. Zebedee sued French and Hickson for conspiracy. He also sued solicitor Russell, who had acted on the incorporation of Zebedee and Hickson's corporation, and on the sale of the hotel, and on the purchase of the hotel at the tax sale. Zebedee alleged that Russell had acted in a "conflict of interest" and had conspired with Hickson and French.

The three defendants successfully moved to have the claim dismissed on the basis that the action was essentially a derivative action which should have been asserted by the corporation. The action offended the rule in *Foss v. Harbottle*. The claim for conspiracy against the three

defendants was so closely intertwined with the impermissible derivative claim, that it too was struck out.

The Court of Appeal affirmed the motions court judgment.

Mancuso et al v. York Condominium Corporation No. 54 and Harris Sheaffer, Unreported endorsement by Gans, J., Court File No. 01-CV-214627CM, November 5, 2001

The defendant solicitors were instructed by their client, York Condominium Corporation No. 54, to prepare and register a notice of lien against a property which one plaintiff owned, and the other plaintiff occupied as tenant. The defendant solicitors also served a notice of sale under lien, again on their client's instruction.

The plaintiff sued the Corporation on the basis that no special assessment was owing, that the lien was not properly registered and perfected, and the costs claimed were unconscionable. The plaintiffs also sought damages against the law firm. The claim was struck out. The solicitors acted as agents of their client throughout, and they owed no separate duty of care to the plaintiffs.

White v Bryant, [2001] O.J. No. 2125 (Ont.S.C.J.)

The plaintiff purchaser sued his solicitor because events proved that the vendor's obligations under the agreement of purchase and sale were not as the plaintiff understood them to be. The purchaser wished the vendor to be responsible for all costs associated with moving a power line. In fact, the vendor paid only 25 per cent of these costs. The plaintiff read the purchase agreement before signing it. He did not consult the solicitor about its terms, and retained him only after it was fully executed. The Court dismissed the plaintiff's action. The purchase agreement may not have reflected the purchaser's understanding of the vendor's obligation, but the solicitor could not be faulted for this. A solicitor is entitled to assume that a sophisticated client will review an agreement or undertaking before signing it. A solicitor is obliged to see that his client receives the rights to which he is entitled under the contract – which was done here.

Wills and Estates

Kirsh v. Minden Gross [2001] O.J. No. 5051

The defendant law firm was retained by Mr. and Mrs. Rosenberg to implement an estate plan on September 25, 1997. There were three parts to the estate plan: First, there was to be an estate freeze with respect to the shares of their privately held corporation. Second, there was to be a preparation of a formal partnership with respect to a small shopping centre which was held by the Rosenbergs in joint tenancy. Third, revised mirror wills were to be prepared that would create spousal trusts, as well as testamentary trusts for their three granddaughters.

At the September 25 meeting, it was agreed that the Rosenbergs' son-in-law would provide certain documentation necessary to implement the estate plan: an up to date Minute Book for the corporation, and evidence that the shopping centre was held in partnership. The Minute Book was provided on October 20, but it was not up to date. No partnership evidence regarding the shopping centre was ever provided to the defendants.

The defendants began work on the estate plan just after October 20. On November 5, they learned that Mrs. Rosenberg had cancer. Mrs. Rosenberg suddenly and unexpectedly died on November 10, without the estate plan having been completed, or the wills signed.

The defendants were sued by Mrs. Rosenberg's estate, and by the three granddaughters. The Court accepted the evidence of the defendants' expert witness that the defendants acted with reasonable care and expedition in attempting to implement the estate plan. The defendants' retainer was to implement the entire estate plan, not merely to prepare wills. The Court accepted that the overall estate plan would likely have taken several months to implement. There simply was not enough time to do all that was necessary to be done.