"Repairing" Lawyers' Mistakes

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The practising legal profession knows that the Lawyers' Professional Indemnity Company (LAWPRO) pays claims and defends claims against lawyers. LAWPRO 's efforts to repair errors committed by solicitors are less well publicized. This is unfortunate, since "repair" efforts save LAWPRO and you, the lawyers we insure, millions of dollars in claims payments.

Litigation

Limitations

LAWPRO's "repair" efforts are best known in the area of civil litigation. These efforts include intervening in cases where limitation periods have allegedly been missed by the insured, setting aside default judgments, adding parties to claims after the expiration of limitation periods, extending time for serving statements of claim, opposing the enforcement of settlements entered into through solicitors' errors, and other miscellaneous errors.

Ontario's legal malpractice insurers, first through the Errors and Omissions Department of the Law Society, then through LPIC, and now called LAWPRO, have been so extensively involved in the evolution of Ontario's limitations law that a lengthy article would be necessary to do justice to this subject. The point of the insurer's involvement in the limitations cases is to demonstrate that the insured in fact had not missed a limitation period. LAWPRO has most recently been involved in cases where limitation periods for claiming Statutory Accident Benefits have allegedly been missed. A few examples will suffice.

Kitchenham and Axa Insurance (Ont. Ct. Gen. Div, August 19, 1998, Court File 23899/96)

Kennedy, J. held that by virtue of s. 281(5) and Regulation 67(2) of the *Insurance Act*, Axa as insurer is not allowed to rely on this limitation period unless its denial is clear and unequivocal. Where the insurer offered to reconsider its position after the date of its denial letter, it was no longer entitled to take the position that the limitation period ran from the date of his original letter of denial.

Smith v. Co-operators General Insurance Co. [2002] S.C.C. 30

Bernadette Smith , who was injured in a motor vehicle accident on April 14, 1994, received statutory benefits from the Co-operators General Insurance Company. The insurer ceased paying those benefits on May 8,1996. Its notice of termination read as follows:

> "We have assessed your claim for accident benefits. This form tells you how we calculated your benefits. If you disagree with our assessment, please contact us immediately.
>
> "If we cannot settle the application to your satisfaction, you have the right to ask for mediation through the Ontario Insurance Commission. You can contact them in Toronto at (416) 250-6750 or toll free at 1-800-668-0128."

In a letter sent to Ms. Smith's solicitor on the same day, the Co-operators wrote, "please be advised that Ms. Smith is no longer entitled to Income Replacement Benefits." After the mediation failed, Ms. Smith issued a statement of claim for ongoing statutory benefits on September 8, 1998. The insurer brought a motion for summary judgment on the grounds that the claim was barred under the two-year limitation period set out in s. 281(5) of the *Insurance Act*. MacKinnon, J. allowed the Co-operators motion and dismissed the action. A majority of the Court of Appeal upheld that judgment.

The Supreme Court of Canada allowed Smith's appeal. The two-year limitation period under s. 281(5) of the *Insurance Act* only begins to run upon the issuance by the insurer of a valid refusal. No such refusal is given if there has not been adequate compliance with s. 71 of the *Statutory Accidents Benefits Schedule* ("SABS"). Section 71 obliges insurers to inform claimants of the entire dispute resolution process under ss. 279 to 283 of the *Insurance Act* and not merely the right under s. 280(1) to refer a dispute to mediation. Since Ms. Smith was only informed of the first step of the process, a proper refusal was not given. Consequently, the limitation period under s. 281(5) of the *Insurance Act* did not begin to run.

Extending Time for Serving Statement of Claim

Chiarelli v. Wiens, (2000) 46 O.R. (3d) 780 (C.A)

The plaintiff Cathy Chiarelli was injured when the car in which she was a passenger was struck by a vehicle driven by Elizabeth Wiens. The accident occurred in a parking lot on October 26, 1988. The statement of claim was issued on October 24, 1990. The plaintiff's solicitor, who was

retained shortly after the accident, failed to serve the statement of claim. His explanation was that he "froze" and was unable to come to grips with his error. The plaintiff only became aware of the problem when she changed solicitors in 1997. Taliano, J, allowed an extension of time for service of the statement of claim. The Divisional Court set aside Justice Taliano's order.

The Court of Appeal allowed the plaintiffs' appeal from the order of the Divisional Court; Taliano, J. committed no error in principle in exercising his discretion to allow an extension of time. The basic consideration is whether the extension of time for service will advance the just resolution of the dispute, without prejudice or unfairness to the parties. The court should be mainly concerned with the rights of litigants, not the conduct of counsel. While the onus is on the plaintiffs to establish that the defendant will not be prejudiced, the defence has an evidentiary obligation to provide some details of the alleged prejudice that it will suffer. The defence cannot create prejudice by its failure to do something which it reasonably could or ought to have done. Prejudice that will defeat an extension of time for service must have been caused by the delay. The Divisional Court erred in suggesting that because the limitation under the *Highway Traffic Act* is two years, an extension should not be granted where there is more than two years of "silence" after the time for serving the statement of claim has elapsed. Each case should be decided on its own facts, focusing, as the motions court judge did, on whether the defence was prejudiced by the delay.

Clarke v. Pattison, [1999] O.J. No. 374 (Ont.Ct.Gen.Div.)

A statement of claim relating to a motor vehicle injury which occurred in August, 1990, was issued in a timely fashion, but not served due to stress and marital problems on the part of plaintiff's then solicitor. An order was made extending time for service and allowing substitutional service on the defendant's insurer. Farley, J. held that while the onus of proving lack of prejudice or unfairness lies with the plaintiff, it rests with the defendant to demonstrate actual prejudice and unfairness in the circumstances. The defendant must show that he will be prejudiced, as opposed to speculating that there could be prejudice on general grounds which may have lead to problems because of the delay. The plaintiff should only have the burden of presenting evidence which is in the knowledge of the plaintiff. The court is concerned primarily with the rights of litigants rather than the conduct of solicitors.

Adding Parties after Expiration of the Limitation Period

Glassman v. Honda Canada Inc. et al., (1999) 41 O.R. (3d) 649 (C.A.)

Brenda Glassman was a passenger in a Honda all terrain vehicle on August 18, 1990, when it went off the roadway and into a ditch. Her statement of claim was served on Honda Canada on September 19, 1991. Honda Canada requested additional time to file a statement of defence. The statement of defence was finally delivered some four months after the expiry of the two-year limitation period. In the statement of defence, Honda Canada denied that it designed or manufactured the vehicle, or that when the vehicle was imported into Canada, or that it was in any way unsafe. Honda Canada did not add Honda R & D Co. Ltd. or The Honda Motor Company Ltd. (both Japanese companies) as third parties, or claim against them in any way. Due to inadvertence, Glassman's solicitor did not notice Honda Canada's denial that it had designed or manufactured the vehicle until several months later.

In conducting the examinations for discovery of Honda Canada's representative in May, 1994, the identities of the Honda companies that designed and manufactured the vehicle were obtained. Ms. Glassman's solicitor drafted a motion seeking to add Honda Motor and Honda R & D as party defendants. Philp, J. granted leave to add Honda Motor and Honda R & D as parties as if they had been named in the original statement of claim. In supplementary reasons Philp J., confirmed that the added defendants were not allowed to put the expiry of the limitation period in issue in their statement of defence. Philp J stated, "...a reasonable inference can be drawn that when Honda Canada is presented with a claim alleging faulty manufacture and design of one of its parent's ATV's, that it would immediately advise its parent of the claim."

The two Japanese Honda corporations unsuccessfully appealed to the Divisional Court, and then to the Court of Appeal. The Honda companies chose not to file an affidavit in reply to the application to add them. Philp J. drew the inference that Honda Motor and Honda R & D were aware of the action, and in the opinion of the Court of Appeal, he was entitled to do so.

The Court of Appeal also agreed that special circumstances existed which would warrant the adding of the proposed parties. Ordinarily, allowing defendants to be added to a lawsuit involving a motor vehicle after the expiry of the two-year limitation period gives the plaintiff an advantage because it takes away the right a defendant would have had to plead a defence. Assuming that the limitation period in this instance was two years, the presumption of prejudice to the added defendants was rebutted by the inference that they had knowledge of the action. The appeal was dismissed.

Extending Time for Serving Notice of Appeal

Duca Community Credit Union Limited v. Giovannoli et al. [2001] O.J. No. 36 (Ont.C.A.)

Solicitor for the appellant attempted to serve notice of appeal by fax on the 30th day after release of reasons for judgment at trial. Most of the respondents were served on the following day. Two respondents, however, were not served until six months later. The Court of Appeal Registry refused to allow filing of the notices of appeal since they were served outside the 30-day period. An application to extend the time for serving and filing the notice of appeal was not brought until seven months after the reasons for judgment. MacPherson, J.A. allowed the application, although he commented that it was a "close call." The appellant always intended to appeal, and did attempt to serve and file the appeal within the time stipulated by Rule 61.04. The respondents would not be prejudiced by allowing the extension.

Settlements Entered into Through Solicitors' Mistakes

Wilde v. Wilde [2000] O.J. No. 2395 (Ont.S.C.J.)

Mrs. Wilde brought a divorce action against her husband. The couples' only substantial assets were the matrimonial home and the husband's pension entitlement with the federal government. Throughout the negotiations, it was clear that Mrs. Wilde claimed an interest in her husband's pension. Negotiations proceeded on the basis that the pension issue would be dealt with pursuant to the *Pension Benefits Divisions Act*.

Mrs. Wilde's solicitor served an offer to settle which made no mention whatsoever of the pension. Mr. Wilde quickly accepted it. Mr. Wilde's solicitor then asked that the Minutes of Settlement contain a release of Mrs. Wilde's pension claim. This was agreed to. The Minutes of Settlement were incorporated into the divorce judgment which was not, however, formally issued and entered. One week after judgment was pronounced, Mrs. Wilde and her solicitor appreciated that an error was made. Mrs. Wilde moved to set aside the agreement and the judgment; Mr. Wilde moved for judgment. The Court refused to enforce the judgment on the basis of unilateral mistake. Mr. Wilde and his counsel knew or should have known of the error. The Minutes of Settlement were rescinded on the same basis.

Rule 57.07

Khalil v. Ontario College of Art [2001] O.J. No. 1846 and 1847 (Ont.Div.Ct.)

A solicitor represented the plaintiff on an appeal from a decision of the Human Rights Commission Board of Inquiry. The appeal was unsuccessful, as were a number of motions brought by the solicitor along the way. The Divisional Court expressed concern that the appeal proceedings were lengthened unnecessarily by the appellant's pursuit of unmeritorious motions and groundless allegations against the Commission and Board of Inquiry.

The Court declined to award costs against the solicitor under Rule 57.07. The Court considered *Young v. Young, Carmichael v. Strathshore Industrial Park*, and *Fong v. Chan*, and held that after hearing all the submissions and exercising its discretion, the material before it did not attract an order under Rule 57.07

Wills and Estates

Kelly v. Hughes and Garbutt [2000] O.J. No. 4491 (Ont.S.C.J.)

The Estate Trustee (a solicitor) was under the mistaken impression that taxes had already been withheld on a RRIF owned by the deceased. He therefore made an interim distribution of $150,000 to the two residuary beneficiaries. The Estate Trustee then learned that approximately $95,000 in taxes was owing to Revenue Canada. The beneficiaries refused to repay the money. The Estate Trustee was successful in a motion to compel repayment of the money. Immediately after receiving the money, the two beneficiaries had used the money to pay out a mortgage on their home. This was not sufficient prejudice or change of position on the beneficiaries' part which would justify a refusal of the relief sought by the Estate Trustee.

Construction Liens

Zemelman v. Feder [2001] O.J. No. 1857 (Ont.Div.Ct.)

Property owners moved to vacate a construction lien registered against their property, on the basis that the Commissioner of Oaths had failed to sign the *jurat* in the affidavit of verification. Affidavit evidence was presented by the Commissioner to the motions judge that the affidavit was properly completed in her presence by the lien claimant, and that she neglected to sign the *jurat* through inadvertence.

Archibald, J. allowed the application, holding that the error was fatal and could not be remedied. The lien claimants successfully appealed to the Divisional Court. The Court held that there is a distinction to be made between the affidavit of verification itself and the *jurat*, which merely provided the evidential proof of the proper completion of the affidavit. It was appropriate to accept subsequent proof that the affidavit was properly completed.

Commercial Law

Insurance Management Inc. v. RTH & A. Inc. [2000] O.J. No. 4768 (Ont.S.C.J.)

A solicitor acted for both the vendor and the purchaser of a business. The closing date

was December 31, 1998. Part of the purchase price was payable on closing. Two other installments were due one year and two years from the closing date. The solicitor initially prepared a promissory note stipulating a payment of $200,000 on January 1, 2000, and a second payment of $200,000 on January 1, 2001. The solicitor then received instructions that the payment date should be December 31. The solicitor's secretary changed "January 1" to "December 31", but did not change "2000" and "2001" to "1999" and "2000". Therefore, instead of moving the payment date up one day, she moved it back one year.

The vendor successfully moved for rectification. The purchaser took the position that parole evidence was not admissible to contradict the clear provision of the promissory note. The Court rejected this contention. A review of minutes of meetings, correspondence, and cash flow statements made it clear that the parties had agreed that the second and third installments of the purchase price were due on the first and second anniversaries of the closing, not on the second and third anniversaries. The Court accepted the approach set out in S.M. Waddams' *The Law of Contracts – Fourth Edition* – with respect to the burden of proof on rectification applications. There is no need for a special onus of proof.

Real Estate

Doraty v. Dallas Homes Inc. and Costanzo, Unreported judgment of Charbonneau, J. June 21, 2001, Court File No. 98-CV-7638 (Ottawa)

The plaintiff solicitor acted for the VanDoormaals in placing a $100,000 first mortgage on a building lot. The owner defaulted. The owner then contracted to sell this lot, and two others, to Dallas Homes, another builder. Costanzo was the owner of Dallas Homes. The purchase price was simply the assumption by Dallas of all of the liens and encumbrances on the properties. Because Dallas needed cash to complete the houses, it was agreed that the VanDoormaals' mortgage would not be paid until after closing.

The solicitor inadvertently discharged the VanDoormaals' mortgage. Costanzo, who learned of the error several months after closing, arranged to quickly sell the property to a third party, who had no notice of the error. Costanzo then refused to pay the mortgage.

LawPRO paid out the VanDoormaals, and then commenced an action against Dallas and Costanzo personally. The action was successful. The Court held that Dallas was "unjustly enriched", and imposed a constructive trust. When Costanzo realized that the discharge had been registered by mistake, he proceeded to convert the VanDoormaals' interest in the property to the benefit of Dallas. As such, his conduct was tortious. It was both wrongful conversion and interference with the VanDoormaals' contractual rights. Costanzo authorized and participated in the tortious conduct. He acted wilfully and in bad faith.

Midland Mortgage Corporation v. #784401 Ontario Ltd. (1997) 34 O.R. (3d) 594 (C.A.)

In August, 1989, Midland Mortgage Corporation agreed to advance a new first mortgage of $225,000. At that point, the property was encumbered by a $190,000 first mortgage in favour of Midland, plus other encumbrances. Midland's solicitor advanced the mortgage proceeds and discharged the first Midland mortgage without obtaining a postponement from one of the "subsequent" chargees, or obtaining any written confirmation that a postponement would be forthcoming.

Midland became aware of the problem in 1991. When the "subsequent" (now "prior") chargees refused to give a postponement, Midland brought an application for a declaration that the new Midland charge had priority over the other charge. Jarvis, J. dismissed the application, apparently on the basis that subrogation is not applicable in the Land Titles system.

The Court of Appeal held that Midland did have priority over the other charge, but only for the amount advanced to retire the old Midland charge, rather than for the full amount of the new charge. Midland enjoyed priority at the old Midland charge rate – 12.25 per cent rather than the "new" rate of 13.5 per cent.

The Court rejected the other chargee's contention that they would be prejudiced if effect were given to the doctrine on subrogation. By limiting Midland' s subrogation rights to the amount actually advanced to discharge the old Midland charge plus the "old" rate of 12.25 per cent interest, the other chargees were no better and no worse off than they were before the new Midland charge was proposed.

Conclusion

LawPRO's "repair" efforts take many forms – limitations motions, obtaining extensions of time to serve pleadings, adding parties after expiration of limitation periods, defending motions to enforce settlements entered into by error, rectification of defective documents, recovering funds erroneously paid out, and using subrogation to solve mortgage priority problems. While "repair" efforts may not be as glamorous as trials, they are nevertheless extremely important to LawPRO and its insureds.