# Do you owe a fiduciary duty to your office manager?

## The case

The Supreme Court of Canada's judgment in *Perez v. Galambos*[1] is unusual – indeed, the Supreme Court of Canada says its facts are "unique." Nevertheless, this judgment establishes several points that have already proven useful in defending Ontario solicitors.

The plaintiff Perez was office manager for solicitor Galambos. Without being asked to do so, she loaned Galambos's law practice $200,000 without security. The main issue in this case was whether the relationship between Galambos and Perez was a fiduciary one at the time the loans were made.

When Perez began her employment in 2001, the law firm was doing reasonably well. In early 2002, Perez noticed that there were insufficient funds available to cover the pending payroll. Without being asked, Perez deposited $40,000 into the law firm's bank account.

The law firm's financial position worsened during 2002 and 2003. Perez deposited more of her own money into the firm's general account. Galambos never provided any security for this indebtedness, nor did he suggest that she get independent legal advice.

In 2002, one of the firm's lawyers prepared wills for Perez and her husband. The following year, lawyers in the firm completed mortgage transactions for her. Galambos was aware of this.

In 2004, Galambos assigned himself into bankruptcy. Perez recovered nothing of the $200,000 owing to her.

Perez obtained leave of the bankruptcy court to bring an action against Galambos which she hoped would be paid by Galambos's professional liability insurer. Perez alleged negligence, breach of contract and breach of fiduciary duty.

Mr. Justice Rice dismissed Perez's action.

He held that the wills and mortgage retainers were separate, distinct, and limited to the specific services the plaintiff had requested. The plaintiff was not a client when she made loans to the firm.

The trial judge also found that no fiduciary relationship arose outside of the solicitor-client relationship. Perez did not relinquish her decision-making power with respect to the loans, and Galambos had no ability to exercise unilateral discretion over her interests. Perez was not vulnerable. Galambos was the boss, and Perez respected and trusted him. However, admiration and respect is not sufficient to create a fiduciary relationship.

Mr. Justice Rice also found that Perez was more knowledgeable than Galambos himself about many aspects of the firm's financial affairs. Aside from the limited retainers, their relationship was one of friendship between employer and employee, which gave rise to a creditor-debtor relationship.

In allowing Perez's appeal, the British Columbia Court of Appeal described the relationship between Perez and Galambos as one of "power-dependency," akin to the relationship in *Norberg v. Wynrib.*[2] Norberg, who was Wynrib's patient, was addicted to prescription drugs. Wynrib persuaded her to provide sexual favours in exchange for drugs. Wynrib's conduct was found to have been a breach of fiduciary duty.

The Court of Appeal held that Galambos took advantage of Perez's trust in him. Perez was in a position of vulnerability in terms of her employment, her knowledge of the firm's prospects and her knowledge of her legal rights and obligations. Perez expected that he would look out for her best interests.

At no point did Galambos suggest to Perez that it was imprudent for her to make advances to the firm that were unsecured, or suggest that she obtain independent advice.

Perez was granted judgment for $200,000, plus interest and costs.

The Supreme Court of Canada allowed Galambos's appeal, and restored the trial judgment.

The Court of Appeal erred in three respects. First, the conclusion that Galambos was in a position of power and influence relative to Perez was directly at odds with the clear findings of fact at trial. The trial judge found that Perez was not vulnerable in her relationship with Galambos, that she probably had more knowledge of the state of Galambos's financial affairs than he did, that she had not relinquished her decision-making power with respect to the loans, and that Galambos had no discretion over her interests that he was able to exercise, unilaterally or otherwise.

Second, the Court of Appeal's analysis went wrong when it found a fiduciary duty without finding an undertaking by Galambos that he would act only in Perez's interests in relation to the loans, and when it based its conclusion that a fiduciary duty existed on Perez's expectations alone.

Third, the trial judge's findings that Perez did not relinquish her decision-making power with respect to the loans to Galambos, and that Galambos had no discretionary power over Perez's interests, were fatal to Perez's claim that there was an ad hoc fiduciary duty on Galambos's part to act solely in her interests in relation to these cash advances.

The trial judge correctly found that Galambos did not breach his duty of care arising from the retainers in the wills and mortgages transactions. Given the very limited nature of those retainers and the

manner in which the advances were made – unsolicited and frequently without advance notice – there was no duty on the firm under negligence principles to give Perez advice about those advances or to insist that she obtain independent legal advice about them.

## The upshot

Had the judgment of the Court of Appeal NOT been set aside, the legal profession would have had reason for concern. For instance, is the relationship between a solicitor and his staff really analogous to that between a physician and his drug-addicted patient, so as to give rise to a fiduciary duty?

More ominously, the Court of Appeal's judgment lent substantial support to plaintiff/clients' attempts to use one or more small, routine retainers as a "hook" on which to allege a continuing, overarching fiduciary duty owed to the client, even after the retainer terminated. A solicitor's subsequent derelictions of duty, perhaps in a business context, could then be described as a breach of the relationship of trust which arose from the prior solicitor-client relationship.

Recently, LawPRO counsel successfully used *Perez v. Galambos* to obtain the dismissal of a bizarre action brought against one of our insureds.[3] Plaintiff A sued his former lawyer for allegedly breaching his fiduciary duties by having sex with A's wife. The plaintiff said that the trauma of seeing his wife having sex with lawyer B caused the plaintiff to embark on a series of criminal acts which in turn resulted in many months of incarceration and the loss of his job.

The plaintiff's action was dismissed. The breach of fiduciary duty claim failed for three reasons: 1) The court found that the lawyer did not have sex with A's wife; 2) Even if B did have sex with A's wife, this did not amount to a breach of fiduciary duty owed to A. The insured was A's lawyer, but his obligations to A stemmed from a routine decision to add A as an FLA claimant in his wife's personal injury action. This retainer was very limited. B had little to no discretion over the legal claim, and A was not vulnerable. If a lawyer has sex with a client (here the wife was the primary client) this would likely be a breach of professional standards of conduct, but did not necessarily amount to a breach of a fiduciary duty that is owed to the husband, even where the husband was also a client. 3) Even if a breach of fiduciary duty could be established, the damages claimed were not recoverable in law.

*Perez v. Galambos* also reiterates that a breach of duty by a fiduciary is not always a breach of fiduciary duty. Such breaches are frequently no more than negligence or breach of contract.

LawPRO has always understood this to be the case. The distinction was extremely important before the *Limitations Act*, 2002 came into force, because the "old" *Limitations Act* prescribed a six-year limitation period for breach of contract and negligence claims, while claims for breach of fiduciary duty were not subject to any limitation period under the *Act*.[4] The distinction is less important now, but some plaintiffs find it worthwhile to frame their claims as breaches of fiduciary duty, in order to potentially obtain a greater measure of damages and costs.

Lastly, *Perez v. Galambos* re-iterates that while Law Societies' *Rules of Professional Conduct* "are of importance in determining the nature and extent of duties flowing from a professional relationship… They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence."

Earlier this year, in *Dinevski v. Snowdon,*[5] LawPRO successfully resisted the plaintiff's attempt to present his claim as a breach of fiduciary duty. The solicitor was allegedly negligent in failing to take proper notes of a meeting. The Court referred to the Law Society of Upper Canada's *Practice Management Guideline*, which states that lawyers should consider implementing and employing systems "to document every meeting, conversation or telephone communication, including telephone messages left and received, by way of dated file notation or memo to file."

The court declined to find that the solicitor's failure to follow this recommendation was negligent. No expert evidence was presented on this issue. In declining to hold that the solicitor had breached any standard of care, the court referred to the above statement from *Perez v. Galambos*.

The fine work of British Columbia defence counsel in *Perez v. Galambos* has presented LawPRO with a useful means to combat 1) attempts by plaintiffs to sue solicitors for actions outside of their retainer, on the basis of some supposed overarching fiduciary duty arising from the retainers; 2) attempts to hold solicitors liable for breach of fiduciary duty, where their actions were at most negligent or in breach of contract; 3) attempts to hold solicitors liable in negligence solely because they breached a rule of professional conduct.

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[1] 2009 SCC48, allowing appeal from 2008 BCCA 91, which reversed [2006] B.C.J. No. 1396 (B.C.S.C.)

[2] [1992] 2 S.C.R. 226

[3] Passarelli v. Startek, 2009 CanLII 63371 (On S.C.)

[4] Frumusa v. Ungaro [2006] O.J. No. 686 (C.A.), affirming [2005] O.J. No. 2412

[5] Dinevski v. Snowdon, 2010 ONSC 2715