E&O claims management:
How remedial action by LawPRO saves the bar millions

Timely efforts by LawPRO to "repair" errors committed by lawyers save the Ontario bar millions of dollars every year.

1 Setting aside Registrars' administrative dismissal orders (Rule 48)

Defended actions (Rule 48.14): Judicial discretion to set aside dismissal is unpredictable

Registrars' orders dismissing actions under Rule 48 have become common. In some cases, we were successful in having these orders set aside. In other cases, we could not overcome the "inexcusable delay" and prejudice to the defendants, which were found to justify the dismissal orders. The court's view about what is or is not "inexcusable delay" has become increasingly strict. Another difficulty is that the court's power to aside Registrars' dismissals is discretionary. When considering whether to move to set aside a dismissal, it can be hard to predict how this discretion might be exercised. The following cases illustrate these points.

The plaintiff in ***Aguas v. Rivard***[1] was injured in a motor vehicle accident on October 5, 2001. The statement of claim was issued two years later. Liability was disputed.

The plaintiff was involved in a second motor vehicle accident in March, 2005. She started action #2. In August, 2005, the plaintiff was examined for discovery in action #1. The plaintiff then changed counsel. Her discovery was continued in April, 2007. In May, 2007, a status notice for action #1 was sent by the court office to the plaintiff's former counsel and to defendants' counsel. In August 2007, the Registrar's order dismissing action #1 was sent to plaintiff's former counsel and to defendants' counsel.

In May, 2008, counsel for the defendant in action #2 wrote to counsel for the plaintiff and for the defendants in action #1, advising that action #1 had been dismissed. In June 2008 and April 2009, discoveries of the plaintiff in action #2 took place; counsel for defendants in action #1 attended on a "watching brief."

In September 2009, the plaintiff retained a new counsel, who discovered the May 2008 letter, and learned for the first time that action #1 had been dismissed. The motion to set aside the dismissal was brought shortly thereafter.

Seppi, J. declined to set aside the dismissal order. The plaintiff gave no reason whatsoever for the slow progress of the matter up to the date of the status hearing notice. And, even though the plaintiff's second counsel did not receive the status notice and the dismissal order, this second counsel should have known that failure to set down the action within the time provided in Rule 48.14 would lead to dismissal of the action.

Seppi, J. accepted that counsel's failure to respond immediately to the status hearing notice and the order dismissing the action was "inadvertent," because this failure to respond was the result of the court's error in sending the notice and order to the former lawyers. However, the plaintiff did not explain why her second counsel failed to act on the letter of May 2008.

While the plaintiff could not be held responsible for the eight-month delay from August 2007 (second discovery date) to May 2008 (date of letter advising of dismissal) because the dismissal order was sent to the wrong lawyer, the 17-month delay from receipt of the letter until the motion to set aside the dismissal was brought was not adequately explained. These facts did not support a finding of inadvertence.

As to prejudice, trial fairness would be affected should the memory of the defendants' only witness to the accident be impaired. Prejudice could be inferred in this type of case. There was also a presumption of prejudice because of the

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[1] (2011), 107 O.R. (3d) 142, 2011 ONCA 494, allowing appeal from 2010 Carswell 10849 (Seppi, J.)

passage of time since the limitation period expired. Seppi, J. held that weighing all four of the *Reid v. Dow Corning*[2], factors, as explained in *Marché D'Alimentation Denis Theriault Ltée v. Giant Tiger Stores Limited.*[3] supported dismissal of the motion. The defendants were entitled to rely on the finality of the Registrar's order.

While we try to be discriminating in choosing which administrative dismissals to appeal, outcomes are difficult to predict in advance, as the Court of Appeal's split decision in this case illustrates.

On behalf of our insured, LawPRO counsel appealed the Superior Court decision. On appeal, Rosenberg, J.A., with whom Feldman J.A. concurred, held that the Registrar's order should have been set aside. The most important factors were: (1) the plaintiff participated in five examinations for discovery with respect to the two actions, before and after the first action was dismissed; (2) the Registrar's notice and order dismissing the first action were not sent to the plaintiff's current counsel by the court; and (3) actions of defendants' counsel's did not support actual prejudice or reliance on finality. *Marché* and *Wellwood v. Ontario*[4] were distinguished on the basis that in *Marché*, plaintiff's lawyer put the file into abeyance, and in *Wellwood*, the plaintiff's lawyer's delay was intentional.

Juriansz, J.A. wrote in his dissenting judgment that unlike the "traditional" approach to litigation, Rule 48.14 gives the Court the right and duty to manage its own docket. When the Court of Appeal disturbs a motion judge's exercise of discretion not to set aside a Registrar's dismissal order, it undermines the scheme of active case management of sluggish cases for which Rule 48 provides.

While we try to be discriminating in choosing which administrative dismissals to appeal, outcomes are difficult to predict in advance, as the Court of Appeal's split decision in this case illustrates. We therefore invest considerable preventative efforts in reminding the Bar of the danger that administrative dismissals represent.

Machacek v. Ontario Cycling Association[5]

The Court of Appeal declined to set aside the dismissal of the plaintiffs' action by the local Registrar pursuant to Rule 48.14. The accident occurred in June, 2002. The statement of claim was issued in February, 2003. In August 2007, the action was dismissed for delay in setting the action down for trial. Between the time of the commencement of the action and September 2006, pleadings were exchanged, some discovery sessions were held, a defence medical examination was completed and various documents were produced.

The plaintiff's lawyer never received the status notice or notice of the dismissal because he left his previous firm, and failed to file a notice of change of lawyer. He learned of the dismissal in February 2008. The plaintiff urged his lawyer to deal with the dismissal. He did not do so. Plaintiff's lawyer finally reported the matter to LawPRO in August 2009. The motion to set aside the dismissal was launched in March 2010, and heard in December 2010. Ricchetti, J. dismissed the application.

The Court of Appeal dismissed the plaintiffs' appeal. Virtually all of the delay between September 2006 and March 2010 was attributable to the failure of plaintiff's counsel to move the action along and take the appropriate steps to set aside the Registrar's order. The Court concluded that the delay and the conduct of the lawyer "tipped the balance" toward the finality principle. Reinstating the action at this point would undermine the finality principle while refusing to reinstate the action does not interfere with the need to ensure adequate remedies. The Court noted that the plaintiffs were not left without a remedy as they had recourse to a lawyer's negligence action.

LawPRO repair counsel often find themselves in a dilemma. The facts of a particular case may suggest that a motion to set aside an administrative dismissal will be hotly contested, with no guarantee of success. They may feel that the success or failure of the motion will ultimately depend on what evidence they can get from the defendants on cross-examination, and what master or judge or appeal panel they may ultimately draw on the application or on the appeal. The panel that heard the *Machacek* appeal chose to focus on the delay rather than on the issue of prejudice; a different panel may well have decided differently.

None of this can be predicted in advance. Should counsel recommend a motion to set aside the administrative dismissal, knowing that LawPRO may be throwing good money after bad? Or should they recommend that no such motion be undertaken, knowing that a negligence claim arising from the loss of the plaintiff's action will inevitably follow? To compound counsel's difficulty, the information needed to make a proper assessment of the value of the plaintiff's claim may be unavailable, or only partially available. There is little time to obtain such information – motions to set aside dismissal must be brought "forthwith." Sometimes it is possible to set aside the dismissal order; sometimes it is not. Unfortunately, *Machacek v. Ontario Cycling* is a "failed" repair.

2 [2001] O.J. No. 23685

3 (2006), 87 O.R. (3d) 660 (C.A.)

4 2010 ONCA 386

5 2011 ONCA 410, dismissing appeal from 2010 ONSC 7065

Undefended actions (Rule 48.15): Rebuttal of presumption of prejudice wins the day

In his lengthy judgment in ***Vaccaro v. Unifund Insurance Co.***[6], Master Dash discusses the test for setting aside the dismissal of an action by the Registrar under Rule 48.15 – that is, where no defence has been filed within 180 days after the issuance of the statement of claim.

The plaintiff was injured in a motor vehicle accident in March, 2005. She received substantial benefits from Unifund Insurance, her accidents benefits insurer, but she claimed to be entitled to additional benefits on the basis that she was catastrophically impaired. Her solicitor issued a statement of claim against Unifund in February, 2010. No effort was made to serve the defendant until November 8, 2010. Service was therefore out of time.

The plaintiff's lawyer failed to get an order extending time for service. The Registrar dismissed the action on November 19, 2010, on the basis that no defence had been served within six months of the issuance of the statement of claim. Plaintiff's counsel notified LawPRO on December 15, 2010 that his client's action had been dismissed. LawPRO retained counsel, who told the defendant that a motion would be brought to set aside the dismissal. The motion was ultimately served on May 30, 2011.

Although he set aside the dismissal, Master Dash took a strict view of the plaintiff's "inexcusable delay" ... The saving grace for the plaintiff was that she clearly and convincingly rebutted the presumption of prejudice

Master Dash concluded that the test is the same as for setting aside dismissals of defended actions: The court must take the contextual approach set out in *Scaini v. Prochnicki*[7], weigh all relevant factors including the four *Reid*[8] factors, and balance the interests of the parties to determine the order that is just in the circumstances of the case, considering also the public's interest in the timely disposition of disputes.

Although he set aside the dismissal, Master Dash took a strict view of the plaintiff's "inexcusable delay" in prosecuting the action. The action was dismissed only nine months after the statement of claim was issued, without the statement of claim having been served. Given the purpose of Rule 48.15 – to prevent delay at the "front end" – such delay is unacceptable. Plaintiffs' lawyers cannot wait until the end of the six-month period for serving the statement of claim. The statement of claim should be served well within the six-month period, so that the defendant will have time to serve and file its statement of defence within the six-month period stipulated by Rule 48.15.

Master Dash also pointed out that Rule 37.14(1) requires that the "notice of motion" must be "served" forthwith. In this case, six months elapsed between when plaintiff's lawyer learned of the dismissal, and service of the motion to set aside the dismissal. The defendant was told that the motion would be brought several months before the notice of motion was actually served. Even so, Master Dash held that a notice of motion should have been served immediately, returnable on a "date to be fixed," if necessary. Master Dash recognized that "extensive investigations" were required on the prejudice issue, but suggested that a supplementary motions record could have been served at a later date.

The saving grace for the plaintiff was that she clearly and convincingly rebutted the presumption of prejudice, which arose because of the passage of the limitation period by the time the action was dismissed. At the return of the motion, counsel on behalf of the plaintiff presented extensive evidence of lack of prejudice. The plaintiff was treated or assessed by 21 different health care practitioners, and all medical reports and records were preserved. The assessments included rehabilitation needs, functional abilities and catastrophic impairment from a number of different specialties. All healthcare providers who assessed and/or treated the plaintiff were alive, still practised in Ontario and were available for trial. Most clinical notes and records had already been received and were preserved. OHIP summaries were available. The plaintiff's education records, employment payroll records and income tax returns were preserved.

The onus then shifted to the defendant to adduce any evidence of actual prejudice. The defendant provided no evidence whatsoever of actual prejudice.

Master Dash set aside the dismissal order. This was an accident benefits claim where the insurer had been assessing the plaintiff's medical condition and claims for benefits almost continuously since shortly after the accident. The complete absence of prejudice and the plaintiff's personal "innocence" in the delay carried greater weight than the nine-month delay in the litigation caused by her lawyer, even combined with the six-month delay in serving the motion. LawPRO's counsel successfully argued that this was not a case where the plaintiff should be forced to seek compensation against her lawyers, rather than the accidents benefits insurer. Had the dismissal not been set aside, and

6 2011 ONSC 5318 (CanLII)

7 2007 ONCA 63 (CanLII), 86 O.R. (3d) 179

8 *Supra* note 2

had the Court accepted that the plaintiff was catastrophically impaired, the negligence claim would have been substantial.

Resort to motions to correct "misnomers" has become increasingly common since the *Limitations Act, 2002* abolished "special circumstances" as a basis for adding parties after the limitation period has expired.

2 Refuting limitations defences

In ***Valesco v. North York Chevrolet Oldsmobile Ltd.***[9], The Court of Appeal found that plaintiffs' counsel's failure to immediately review a Crown brief was not a failure to exercise reasonable diligence. Counsel was entitled to rely on the vehicle ownership information contained in the police report, until the contrary information contained in the Crown Brief actually came to counsel's attention.

The Court of Appeal allowed the plaintiffs' appeal from the judgment of McEwen, J., who dismissed the action as statute barred.

The plaintiff Elizabeth Valesco was seriously injured in 2005 when her car was struck by two other vehicles which may have been racing. The police report indicated that one of the vehicles was owned by Denyer. Denyer's insurer had itself added as a third party, but pleaded that Denyer did indeed own the vehicle.

In 2007, the plaintiffs' lawyer received a Crown brief arising from charges against the two drivers. A law clerk reviewed the brief, but did not notice that it contained a licence plate search disclosing that North York Chevrolet Oldsmobile and North York Chevrolet were in fact the owners of the vehicle. In January, 2009, plaintiffs' lawyer reviewed the Crown brief in preparation for discoveries, and noticed the licence plate search. He issued a statement of claim against North York Chevrolet Oldsmobile and North York Chevrolet four months later. It was not disputed that plaintiffs' lawyer did not actually learn of the true ownership until January, 2009. Once plaintiffs' counsel learned of the true identities of the owners, he spoke with their legal representatives, and was told that should he commence an action against them, they would move to have the action dismissed as statute barred. Plaintiffs' counsel then reported the matter to LawPRO.

North York Chevrolet Oldsmobile and North York Chevrolet successfully moved before McEwen, J. to have the action dismissed as statute barred. While the plaintiffs' lawyer used reasonable diligence up until the time he received the Crown brief, the court held that he should not have closed his mind to the ownership issue, and should have reviewed the Crown brief promptly upon its receipt with a view to determining ownership.

The Court of Appeal allowed the plaintiffs' appeal. Having regard to the information plaintiff's counsel had indicating that Denyer was the owner of the vehicle (namely, references in the police report and in the third party pleadings), it was unreasonable for McEwen, J. to conclude that plaintiffs' counsel should have treated the ownership issue as a live issue upon receiving the Crown Brief. Plaintiffs' counsel acted with reasonable diligence in continuing to rely on that information until contrary information actually came to his attention.

Had the Court of Appeal NOT allowed the plaintiffs' appeal, the negligence claim against their lawyer would have been huge, since one of the plaintiffs was rendered a complete paraplegic by the accident.

3 Correcting misnomers

Resort to motions to correct "misnomers" has become increasingly common since the *Limitations Act, 2002* abolished "special circumstances" as a basis for adding parties after the limitation period has expired. The decision in ***Ortisi v. Doe***[10] followed such a motion. The decision also illustrates the danger in issuing a claim at the last minute as a favour to a client, without doing proper "due diligence."

The plaintiff was allowed to correct a "misnomer" in his statement of claim from "John Doe" to the name of the tortfeasor driver, even though five years had passed since the date of the accident. Just as the action was about to become statute barred, the lawyer acting on the plaintiff's accident benefits claim was persuaded to issue the statement of claim for tort damages. The plaintiff did not provide an accident report, and professed not to remember the name of the other motorist. The lawyer simply issued a statement of claim naming "John Doe" as defendant.

Later, the plaintiff retained new counsel who moved to correct the misnomer. The application was allowed. The insurer received a copy of the police report very soon after the accident. The "litigating" finger pointed to the defendant, since the details in the statement of claim coincided closely with those in the police

[9] (2011), 106 O.R. (3d) 522, 2011 ONCA 522 (CanLII), allowing appeal from 2011 ONSC 85

[10] 2011 ONSC 5354 (CanLII)

report. Therefore, the plaintiff was NOT seeking to add a new party. The defendant suffered no non-compensable prejudice. The police had investigated the accident, and a police report was available. The plaintiff's medical information had been preserved. The plaintiff's health care providers were still alive and practising in Ontario. OHIP records and tax returns were available. There were no independent witnesses to the accident in any event. Ortisi had intermittent contact with the insurer over the years.

Counsel stepped in, at the 11th hour, to draft the claim for the plaintiff. He should have taken steps to properly inform himself – not only for the plaintiff's good but for his own. He ought to have been more thorough, though his was a well-intentioned effort to satisfy a client's last-minute demand. Counsel could have made appropriate inquiries and brought this motion long before it was brought. The plaintiff ought to have properly informed his counsel and, if he received communications from the insurer, he ought to have considered those communications and responded to them. When considered in the context of the whole, though, their failings were not so egregious as to justify the dismissal of the plaintiff's motion.

In successfully having the case reinstated, LawPRO avoided a substantial potential indemnity payment, since the accident in this case led to an amputation.

4 Obtaining relief from non-compliance

Courts are still willing to grant relief from minor non-compliance with court orders, even though the cumulative delays by the plaintiff's lawyers' were described as "disgraceful."

In ***Macaulay v. Mckee***[11] the plaintiffs – a motorcycle accident victim and two dependent claimants – successfully moved for an order setting aside the dismissal of their action and extending the time for compliance with a costs order where they had been a few hours late in satisfying that costs order.

The principal plaintiff was involved in a serious motor vehicle accident in 1999. The action was not prosecuted expeditiously. In April 2009 Justice Stong ordered that the plaintiffs serve and file the trial record within 60 days. For various reasons, this was not done.

The matter came before Justice MacKinnon on October 29, 2010. The trial record had still not been served and filed. The defendant brought a motion to dismiss for delay. Justice MacKinnon observed that the delay by the plaintiffs' various lawyers was collectively disgraceful. But the principal plaintiff's right leg had recently been amputated due to the accident, and Justice MacKinnon wished to give the plaintiffs another chance. He therefore ordered that the trial record be served and filed, and that the plaintiffs pay to the defendant $8,500 in costs by noon on November 24, 2010.

By November 24, 2010, at noon, the costs order of Justice MacKinnon had not been paid, nor had the trial record been served. Justice MacKinnon dismissed the action the following day.

In fact, the plaintiffs had delivered a cheque to defendants' counsel on the afternoon of November 24, 2010, in the amount of $8,660 representing the costs order and interest on the previous costs order. This was several hours after the noon deadline. A trial record was served on December 13, 2010, but could not be filed with the court, because the action had been dismissed.

The dismissal was reported to LawPRO, which retained counsel to act on behalf of the plaintiffs on the appeal from Justice MacKinnon's order.

On appeal, Justice Mulligan was satisfied that the plaintiff had substantially complied with Justice MacKinnon's costs order (which preceded and ultimately triggered the dismissal order). There was no evidence of prejudice to the defendant that could not be compensated for in costs. The delay was not intentional, nor was the file abandoned by the plaintiff or his lawyers.

Relying on *Findlay v. Paassen*[12], Justice Mulligan ruled that the fact that the plaintiff might have a remedy against some or all of the lawyers who had acted for him was not a reason to refuse relief. Costs were awarded to the defendant.

In successfully having the case reinstated, LawPRO avoided a substantial potential indemnity payment, since the accident in this case led to an amputation.

5 Action against underinsured motorist insurer allowed to proceed

In ***Maccaroni v. Kelly and ING***[13], the plaintiff was rear-ended by a car insured by Co-operators. Co-operators alleged that the driver's licence was suspended, and the owner of the vehicle knew or should have known this. Co-operators also alleged that the driver and owner refused to co-operate in the investigation

11 2011 ONSC 6710 (CanLII); 2011 Carswell Ont 14047

12 2010 ONCA 204 at paras 32-33

13 (2011), 106 O.R. (3d) 116, 2011 ONCA 411, allowing appeal from 2010 ONSC 4447

of the claim. Co-operators therefore denied coverage to the tort defendants, and had itself added as a third party under s. 258 of the *Insurance Act*. The Co-operators' policy limits were $1,000,000. Co-operators offered to settle with the plaintiff for $200,000 – representing the statutory minimum limits.

The plaintiff's own OPCF 44R insurer, ING, objected to this settlement. The plaintiff settled with Co-operators anyway, and released Co-operators and the defendant tortfeasors. The plaintiff thought it unfair that she should be required to sue the tortfeasors, and if she got judgment in excess of $200,000, to then sue Co-operators, with ING bearing none of the risk or expense.

ING moved for summary dismissal of the action against it. Plaintiff's solicitor then reported to LawPRO. LawPRO appointed counsel, who, with the plaintiff's consent, resisted ING's motion.

ING was successful before Justice Flynn, who held that it could not be said that Co-operator's limits had been reduced to $200,000 by "operation of law" within the meaning of the OPCF 44R endorsement. There had been no adjudication of whether the tortfeasors were in breach of the Co-operator's policy, nor was there an adjudication of the quantum of the plaintiff's damages. Since Co-operators and the tortfeasor defendants were released, no such adjudication was possible.

The Court of Appeal allowed the plaintiff's appeal. However, the plaintiff must demonstrate in that suit that Co-operators was justified in denying coverage to the tortfeasors, and that her settlement with the tortfeasor's insurer for the minimum policy limits was therefore appropriate. The tortfeasors and Co-operators could be examined as non-party witnesses under the Rules. If the denial of coverage was not justified, the plaintiff cannot recover against ING.

6 Mortgagors' lawyer acts against them in power of sale proceedings

Not all "repairs" are undertaken on behalf of personal injury lawyers. In ***Duffin v. Norina Holdings***[14], a lawyer acted for the mortgagors in arranging four mortgages with Norina Holdings, and against them in enforcing the mortgages.

The mortgages were in default almost from the beginning. When the plaintiffs moved for an interlocutory judgment staying enforcement of the mortgages, the matter was reported to LawPRO. LawPRO retained counsel to defend the lawyer, because had the court held that the mortgages were unenforceable due to the lawyer's acceptance of the enforcement retainer, the lawyer would have faced an action by the mortgage lender.

One of the bases for the plaintiffs' pursuit of a stay of enforcement of the mortgages was the fact that the lawyer who had acted for them in obtaining the mortgages had acted against them, on behalf of the mortgagee, to enforce these mortgages after the plaintiffs defaulted.

Remember, however, that the courts are becoming increasingly strict about plaintiffs' obligations to move actions forward... It is far better to carefully comply with the *Rules of Civil Procedure* than to find yourself involved in a "repair" motion.

The plaintiffs' motion was dismissed. Justice Ramsay held that the lawyer should not have accepted Norina's retainer to enforce the mortgages, nor should he, after getting judgment on the mortgages, have conducted an examination in aid of execution on one of the plaintiffs, his former client. However, Justice Ramsay held that the lawyer did not act fraudulently or oppressively, nor did he use confidential information that he had obtained during the previous lawyer-client relationship.

Norina had not been fraudulent in any way, the plaintiffs owed the money, and they had not paid the money owing into court. While the lawyer should not have acted against the plaintiffs, nothing he did affected the validity of the mortgages. The plaintiffs could have moved to have him removed from the record; they did not do so.

Conclusion

Lawyers make mistakes. However, prompt remedial action can sometimes eliminate, or at least mitigate, the damage done. But as several of these cases illustrate, it is important that dismissal orders be reported to LawPRO promptly. Depending on the circumstances, LawPRO's in-house counsel may simply give you some guidance and in some instances may agree that you personally handle the motion to set aside the dismissal. On more difficult cases, expert counsel may be called on to assist. As the foregoing summaries will attest, LawPRO internal and external counsel have a strong track record of success in having dismissed actions reinstated.

Remember, however, that the courts are becoming increasingly strict about plaintiffs' obligations to move actions forward. Even when successful, remedial motions are expensive. While millions of potential indemnity dollars were saved through the repairs described above, these eight motions cost $425,000. It is far better to carefully comply with the *Rules of Civil Procedure* than to find yourself involved in a "repair" motion. ■

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[14] 2011 ONSC 6431 (CanLII); as to costs 2011 ONSC 6431