E&O claims management:
LawPRO defends lawyers in diverse areas of practice

INTEGRITY VALUE

While it may seem that a large number of LawPRO claims arise from real estate transactions and routine personal injury litigation, we actually defend claims against a broad spectrum of Ontario lawyers – and in courts ranging from the small claims court to the Court of Appeal. Regardless of the forum or area of law, a key focus for our defence counsel is principled resistance to the unjustified expansion of the standard of care applied to the delivery of professional legal services.

In some of the cases we defended in 2011, we were fortunate that the plaintiff arrived at trial without the necessary expert evidence on the standard of practice and/or appropriate evidence as to damages (although we would have preferred not to go to trial at all). In other cases, the scope of the standard of care was subject to more rigorous challenge. In defending these matters, we focused our efforts on keeping the floodgates closed. Success in defending the standard of care requires more effort than ever in the challenging economy since the 2007-2008 market collapse, because some former clients are hurting financially and can make sympathetic plaintiffs.

Summaries of a sampling of LawPRO cases decided in 2011 follow below. As you'll learn, these decisions cover the full range of areas of practice and many different issues pertaining to lawyer liability.

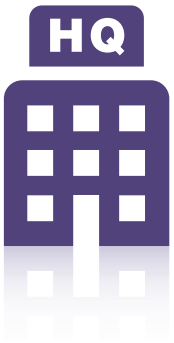
Commercial lawyers

When transactions go badly for clients, they sometimes look for scapegoats. They minutely scrutinize the transaction after the fact, looking for advice the lawyer allegedly should have given, which the clients then allege would have prevented their losses.

Simmons v. Hamber[1]

Lawyer H was the corporate lawyer for Simmons Group Realty. He was instructed by the managing director to prepare documents whereby the president of the company, the plaintiff, would surrender his common shares for cancellation. H was also instructed that a debt allegedly owing to the plaintiff's holding company, Anchordale, would be converted into non-retractable preference shares in Simmons Group.

The plaintiff was on the verge of bankruptcy, and he and the other shareholders were concerned that his creditors would target the company's shares and interfere with the corporation. The company rarely made a profit, so the shares being surrendered were of no value. The indebtedness owing by the realty company to the holding company made it difficult to obtain financing for the realty company. There was also doubt as to whether the loan was *bona fide*.



H prepared the documents as instructed, and explained them in detail to all parties before they were signed. The plaintiff admitted that he read them and understood them.

Six years later, the plaintiff and the other partners had a falling out. He sued them for

1 2011 ONCA 7, dismissing appeal from 2008 CanLII 67908 (ON S.C.)

reinstatement of his shares and the indebtedness previously owed to him, and for wrongful dismissal. He also sued H on the basis that H failed to offer advice that the plaintiff should not surrender his position, but rather find someone to hold his shares and debt until his discharge from bankruptcy.

Pomerance, J. found that the action against H was entirely without merit. To have offered the advice the plaintiff claimed he should have given would have been illegal and unethical, as such a course of action would have been contrary to the *Fraudulent Conveyances Act* and the *Bankruptcy and Insolvency Act*. Even assuming that H owed his client a duty of care, he discharged it by preparing the documentation in accordance with the instructions of the responsible corporate officer, ensuring that the transaction breached no statute in view of the plaintiff's impending bankruptcy, and ensuring that all signatories to the agreement understood it. H could not have done more.

The Court of Appeal dismissed the plaintiffs' appeal. H was entitled to rely on information presented to him by the corporation's managing director and its accountant that the shares had no value and the debt had no substance. There was nothing to suggest that the plaintiff was giving up anything of value, or that he did not appreciate what he was doing. There was no agreement that his shares would be restored after his discharge from bankruptcy. Had there been such an agreement, serious legal and ethical issues may have arisen. The realty group's shares had no value at the time of the transactions. There was no evidence that the shares had value at the time of trial. While it might have been preferable had H recommended ILA to the plaintiff out of an abundance of caution, his failure to do so in these circumstances did not constitute a breach of fiduciary duty or negligence.

Royal Laser v. Rivas[2]

Law firm A acted for Royal Laser Corp. in its purchase of Rivas's interest in Venture Steel. Law firm B acted for Rivas. No one acted for Venture Steel. Before the share purchase transaction closed, all parties were aware that Mr. L had sued Venture Steel on the basis that he had been dismissed without cause, and that his nine per cent shareholding in Venture Steel had been wrongfully cancelled.

Royal Laser obtained an indemnity from Rivas to the extent of $1.4 million to cover any liability on the part of Venture Steel to Mr L. After the closing of the transaction, Mr. L obtained judgment against Venture Steel for a sum in excess of $5 million. Rivas paid the first $1.4 million, as agreed. Venture Steel (and therefore Royal Laser) was responsible for the balance of L's judgment.

Royal Laser Corp sued Law firm A in negligence with respect to its advice on the transaction. Law firm A successfully moved for summary judgment dismissing the action against it. Newbould, J. accepted that law firm A expressly refused to opine that $1.4 million was an adequate indemnity and holdback. The directors of Royal Laser were well aware that Mr. L might obtain a judgment in excess of $7 million; firm A, in a telephone call, advised them to hold that amount back from the purchase price. However, Rivas refused to provide an indemnity of more than $1.4 million.

Royal Laser focused on one paragraph in a memorandum by firm A which seemed to suggest that the value of Mr. L's shares might be calculated as of the date of his termination, based on Venture's book value, rather than on the basis of the purchase price offered by Royal Laser some months later. Newbould, J. accepted that the purpose of this memorandum was only to evaluate whether a $1.4 million indemnity was sufficient. If the memorandum contained a negligent error, which the court expressly did not find, the memorandum was only a work in progress, and it expressly declined to say that $1.4 million was an adequate indemnity.

Royal Laser took the position that it closed the purchase based on this "error." The court noted that NO evidence was adduced from any of Royal Laser's directors who voted to close the share purchase transaction that they saw, read, or relied on the memorandum. Therefore, it was impossible to find that Royal Laser relied on this memorandum in closing the sale purchase on the basis that it did.

The action against firm B has also been terminated.

Family law lawyers

As with commercial lawyers, family lawyers are sometimes sued on the basis that they recommended improvident settlements and agreements. The following summaries are two examples of LawPRO's successful defence of family lawyers.

Elmgreen v. Evans[3]

The plaintiff sued lawyer E, who had represented him in 1985 in drawing a marriage contract. Twenty years later, E represented the plaintiff in divorce litigation. This litigation was settled in 2005, with the plaintiff making an equalization payment to his wife of $185,000, plus support payments of $2,500 per month. The wife had negligible assets and limited earning capacity.

Three years later, the plaintiff sued E. The plaintiff alleged that the settlement was improvident and not in accordance with his instructions. The plaintiff alleged that he instructed E to attempt to uphold the marriage contract at all costs.

2 2011 ONSC 1026 (CanLII); Reversed By Court Of Appeal – 2011 ONCA 655; Summary judgment dismissing action against defendant firm 2012 ONSC 1170
3 2011 ONSC 6674. PDF copies available from debra.rolph@lawpro.ca

Mullins, J. dismissed the action. The plaintiff's instructions were that the divorce litigation should be settled so that the wife was not left destitute, and not to cause distress to their child. E was concerned that the marriage contract might be attacked on the basis that the wife spoke little English and did not receive ILA, although E had advised the plaintiff that she should. The settlement was in accordance with these goals. The plaintiff gave his express and informed consent to the settlement.

No expert evidence was called that E's advice concerning the settlement fell below the required standard of care. The court was satisfied that E's strategy fell within the ambit of judgment calls informed by his legal knowledge and many years experience.

No expert evidence was called in support of the difference between what the plaintiff would have paid under the marriage contract and what he paid pursuant to the settlement. No evidence was adduced that E's alleged negligence caused any damages. No medical evidence was led as to mental distress allegedly suffered by the plaintiff. Furthermore, the claim was statute barred, having been brought more than two years after the plaintiff had knowledge of the facts giving rise to the claim.

Marcus V. Cochrane[4]

The plaintiff Ms. M's action against her family lawyer was dismissed.

The plaintiff alleged that her lawyer failed to meet the required standard of care in the negotiation of the plaintiff's separation agreement with her husband.

The plaintiff and her husband had drafted their own separation agreement. They agreed that Mr. M would purchase the plaintiff's interest in the matrimonial home for $87,000, which was half of the home's net equity. Each would keep his/her own pension and RRSPs, and neither would pay spousal support to the other. The plaintiff was to receive a nominal equalization payment.

The plaintiff then entered into a binding agreement to purchase a property; closing was within a few weeks' time. The mortgage lender insisted that the plaintiff produce a signed separation agreement, providing, among other things, that neither party would claim support from the other, and that the plaintiff would receive $87,000 for her equity in the matrimonial home.

Lawyer C, who was retained by the plaintiff to give ILA, urged Ms. M to not sign the draft agreement, but rather to enter into a partial separation agreement, which would satisfy the mortgage lender but allow for full financial disclosure at a later date. The plaintiff spoke with her husband, who refused to entertain any such arrangement. The original (full) separation agreement was signed, with both parties waiving full financial disclosure.

About one year later, the plaintiff sued her husband to set aside the separation agreement. She also sued her lawyer. In the family law litigation, full disclosure was made. It emerged that the plaintiff was entitled to little more than what she in fact received under the separation agreement. In the malpractice trial, the husband's lawyer testified that his client was never prepared to make additional payments to the plaintiff. He agreed that the outcome in the family law litigation was virtually the same as what the parties had agreed to in the first place.

The expert witness called to give evidence on the defendant lawyer's behalf commented that a lawyer is only able to proceed with full financial disclosure and formal calculation of the parties' Net Family Property if the client is willing to proceed in that direction. The lawyer's role is to advise the client; but if a client is insistent, a lawyer ultimately has to accept the client's instructions. The plaintiff chose not to follow her lawyer's advice to proceed with the partial agreement and to enter into a final agreement only after financial disclosure had been completed.

The plaintiff adduced no expert evidence, either on standard of care or calculation of her damage claim.

In dismissing the plaintiff's action, the court agreed held that the reasonableness of a lawyer's impugned conduct will be assessed in light of the time available to complete the work, the nature of the client's instructions and the client's experience and sophistication.[5] Where a lawyer gives appropriate advice to a client who does not accept such advice, she cannot later assert that the lawyer was negligent for not forcing her to listen.[6] In addition to showing that a lawyer was negligent, the plaintiff must show that but for the negligence of the lawyer, the alleged loss would not have occurred.[7] The plaintiff who alleges that she would have acted differently had she received appropriate advice must show on a balance of probabilities that if properly advised she would have proceeded in a manner that avoided the damages suffered.[8] The plaintiff's claim failed in every respect.

Class action lawyers

Attis v. Ontario (Minister of Health)[9]

This case arose in the context of a class action, but it has implications for all lawyers, and indeed for agents of every type. Had the Court of Appeal not set aside Justice Cullity's

4 2012 ONSC 146
5 *Michiels v. Kinnear*, 2011 ONSC 3826 (ON Sup Ct Jus)
6 *Rose v. Melanson*, [1999] O.J. No. 512, at para 156 and 157
7 *Supra* note 5 paras. 157-170
8 *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.), 2005 CanLII 1403 (ON CA) at para 61
9 2011 ONCA, 2011 Carswell Ont 13940, reversing 2010 ONSC 4508

order, lawyers would have become vulnerable to claims by third parties for breach of warranty of authority. The basis for these claims would have been that the lawyer had no authority to act for his or her client, because the client's consent to the lawyer's actions was in some way not fully informed.

Cullity, J. found lawyer L liable for the attorney general's costs incurred in resisting the plaintiffs' unsuccessful class action certification application. Liability was found on the basis of breach of warranty of authority. L's clients, the class plaintiffs, alleged that their lawyer failed to explain to them the costs consequences of losing the certification application. Justice Cullity held that their consent to L's commencing the class action was not informed consent, and was therefore no consent.

The Court of Appeal disagreed. The defendant lawyer clearly did have his clients' consent to bring the action. If he failed to give his clients adequate advice about the costs consequences should they lose, they had a cause of action against L in negligence. A defendant has no right to inquire into the legal advice given to the plaintiff by the plaintiff's lawyer.

The Court of Appeal further reasoned that even if L had breached his warranty of authority, the attorney general was not entitled to substantial damages. The class plaintiffs were impecunious. If L had proper authority to act for them, as a practical matter, the attorney general could not collect his costs. The attorney general could not be in a better position if L's warranty of authority were false.

Rule 57.07 had no application in this case. L's conduct of the litigation was not criticized, and no Rule 57.07 issue was raised before the judge presiding at the unsuccessful certification application.

The Court of Appeal agreed that while the Court has inherent jurisdiction to control its process, there can be no unfettered jurisdiction to correct all wrongs.

Tax lawyers

Lipson v. Cassels, Brock & Blackwell LLP[10]

Perell J. dismissed the proposed Lipson class action claim against the defendant law firm as statute-barred. The Court held that their cause of action against the defendant law firm, for allegedly providing negligent tax advice, arose when Canada Revenue disallowed their charitable tax credits, not when their litigation with Canada Revenue was settled. The defendant law firm's third party claim against a number of accountants and another law firm was also dismissed.

The would-be class plaintiffs (900 of them) participated in a timeshare program operated by the Athletic Trust of Canada from 2000-2003. The class plaintiffs made a cash donation to purchase time shares, which were then donated to the Athletic Trusts. The participants received charitable receipts for the value of their cash donations, and for the value of the time shares donated to the Trust.

The defendant law firm prepared an opinion that Canada Revenue was unlikely to disallow the tax credits. It was understood that the opinion would be made available to the promoters for dissemination to the participants.

In 2004, Canada Revenue disallowed the plaintiffs' tax credits in their entirety. Many of the class members retained tax firm Thornsteinssons LLP to contest Canada Revenue's disallowance of the tax credits. In 2008, a settlement was reached. Canada Revenue allowed the tax credits insofar as the plaintiffs actually donated cash. The donations reflecting the "lift" in the fair market value of the timeshares were disallowed.

The action against the defendant law firm was commenced in 2009. Justice Perell held that the action was statute-barred. The plaintiffs knew or should have known of the facts giving rise to their claims in 2004, when Canada Revenue disallowed their claims. In concluding that the class members' claims were statute-barred, Justice Perell relied on *Central Trust v. Rafuse Central Trust Co. v. Rafuse*[11]*; Peixeiro v. Haberman*[12], and *Nicholas v. McCarthy Tétrault*.[13] Justice Perell especially relied on *Central Trust v. Rafuse*, where the Supreme Court of Canada held that a mortgage lender's cause of action against the lawyers arose when the validity of the mortgage was first challenged, NOT when the mortgage was first put on title, and NOT when a court finally declared that the mortgage was void.

Had the proposed class action not been statute-barred, Justice Perell would have certified it, but with individual trials on the issue of causation, reliance, and damages.

A notice of appeal has been filed.

Civil litigation lawyers

Litigation counsel are sued from time to time for allegedly conducting litigation in a negligent manner. In response to such claims, we have in some cases successfully argued that the plaintiff's action never had a chance of success, or that the plaintiff failed to prove that the lawyer did not meet the required standard of care.

10 2011 ONSC 6724
11 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147
12 1997 CanLII 325 (SCC), [1997] 3 S.C.R 549
13 2008 CanLII 54974 (ON SC), aff'd 2009 ONCA 692 (CanLII), leave to appeal to S.C.C. ref'd 2010 CanLII 12967 (SCC)

Gresham v. Rohaly[14]

This judgment contains a thorough discussion of *Combined Air Mechanical Services v. Flesch*[15] in the context of a legal malpractice claim arising from the defendant lawyer's alleged negligence in prosecuting medical malpractice litigation.

Lawyer R was retained to prosecute a medical malpractice suit on behalf of the plaintiffs. He approached three physicians seeking an expert opinion that the defendant physicians failed to meet the required standard of care. He was unsuccessful in obtaining an expert opinion from them. The defendant physicians obtained an opinion that the level of operative and post-operative care was well above the standard of surgical care in Ontario.

A second lawyer took carriage of the file from R. He obtained an expert opinion that the plaintiffs did not have a meritorious claim. The Greshams' claim against the physicians was ultimately dismissed without costs.

The plaintiffs then sued R, who successfully moved for summary judgment. Bondy, J. held that this case was one that fell within the third category of case suitable for summary judgment, as set out in *Combined Air Mechanical Services*, and that there were no "genuine issues requiring a trial."

The plaintiffs failed to adduce expert evidence that R was negligent, or that the physicians in the underlying action were negligent. R produced expert medical evidence that the physicians in the underlying action were NOT negligent.

R satisfied the onus of showing that this matter would have "no chance of success" if it went to trial. Once R made this case, the burden shifted to the plaintiffs to prove that their claim "had a real chance of success." They failed to do so.

Moore v. Hollingsworth[16]

This unreported judgment of the Ottawa small claims court contains an excellent summary of the case law relating to the standard of care required of litigation counsel. It contains especially strong statements that the conduct of litigation counsel cannot be judged with the benefit of hindsight.

Lawyer H represented M in litigation with M's ex-business partner. The gist of the claim was that H brought a motion to amend the statement of claim for a third time on the day that one defendant was scheduled to move for summary dismissal. The motion to amend was allowed, but costs of $10,000 were awarded against M. These costs formed the subject of the action against H.

M's action against H was dismissed. Deputy Judge Bansie of the Ottawa small claims court preferred the evidence of the defence expert to that of the plaintiff's expert. The plaintiff's expert's evidence was criticized because: 1) he didn't review the entire file, just what the plaintiff provided to him; 2) his opinion was formed with the benefit of hindsight; 3) he gave evidence as to causation of the plaintiff's loss, based on what the motions judge might have done had H proceeded differently, which is impermissible.

The court accepted the plaintiff's expert's evidence that if H believed that a motion to amend was desirable, and that belief was reasonable on the facts and circumstances as known to her at the time, H was not negligent. It was not appropriate to take into account the course the litigation took thereafter, and the reasons for judgment on the summary dismissal action given one year later, in deciding whether H met the standard of care at the time. Litigation counsel do not have the benefit of hindsight when making a decision; there is no reason why a court should judge counsel's actions with the benefit of hindsight.

Real estate lawyers

Walcott v. De Lucia[17]

The Court of Appeal dismissed the unrepresented plaintiff's appeal from Justice Perell's judgment, which summarily dismissed the plaintiff's action against lawyer D.

Walcott retained lawyer D to collect a $248,000 unsecured loan. The debtors owned a property, but by the time D was retained, the first mortgagee had commenced power of sale proceedings. The property was subject to more than $1 million dollars in encumbrances. D brought the notice of sale to the attention of his client, who then instructed D to register a "lien" against the property; D registered a notice of security interest, and suggested that his client sue the debtors.

Walcott retained litigation counsel for that purpose. About six months after D's retainer was terminated, the power of sale was completed. The sale proceeds were insufficient to pay out the first mortgagee. Walcott lost his entire investment.

Walcott's action against D was summarily dismissed. Walcott's loan was unsecured, so he was not entitled to a lien or security interest. In any event, the security interest was discharged by operation of law when the power of sale was completed.

Walcott's true complaint at the argument of the motion was that D failed to advise him concerning the pending power of sale. Walcott claimed that if he had been properly advised, he would have paid out the first mortgagee, and subsequently sold the property for enough money to recoup his entire outlay. Justice Perell found, and the Court of Appeal accepted, that D

14 2011 ONSC 7652: Court File No. CV-08-12174, November 29, 2011. PDF copies available from debra.rolph@lawpro.ca
15 2011 ONCA 764
16 Court File No. Sc-07Sc101675-0000 (Ottawa Small Claims Court) – June 23, 2011; Costs award July 11, 2011. PDF copies available from debra.rolph@lawpro.ca
17 2011 ONCA 508, dismissing appeal from 2011 ONSC 649

did in fact give Walcott a copy of the Notice of Power of Sale. Walcott made no effort to negotiate with the first mortgagee to pay out that mortgage. There was no evidence that Walcott had the financial means to do so. There was also no appraisal evidence that the property's value was sufficient to pay out Walcott and all prior encumbrances.

There was no basis in law to fix D with responsibility for Walcott's loss.

Lograsso v. Kuchar and Daffern[18]

McEwen, J. held that D and K, lawyers for the purchaser and for the vendor respectively, owed no duty of care to Lograsso, the vendor's execution creditor.

In 1992, Lograsso obtained a judgment against Reinhard Kliczka for $30,000.00 plus $10,266.10 in prejudgment interest and $467.35 for costs. He obtained a writ of seizure, and renewed it from time to time.

In 2006, Kliczka sold a property. D communicated to K the existence of the writ late on the day of closing, just as registration was taking place. To address the issue of the writ, K requested that Kliczka attend immediately at his office, where Klickzka falsely swore a statutory declaration that he was not the judgment debtor described in the writ. This allowed the property to be sold free and clear of the writ. By then, when post-judgment interest was included, the value of the writ exceeded $162,000. Lograsso was unaware of the sale, and received nothing. After learning of the sale, Lograsso ascertained that Kliczka had no assets, as there were no proceeds in excess of the amount required to discharge the mortgage and pay closing costs. Lograsso then sued D and K.

Lograsso's claim against D, lawyer for the purchaser, was that D knew or ought to have known that Kliczka filed a false affidavit, given that Kliczka had an unusual name and that the parties lived in a relatively small community. He contended D was negligent in failing to contact Lograsso to inquire about Kliczka's identity. Lograsso claimed that K, acting for the vendor, ought to have made similar inquiries, and ought thereby to have determined that Kliczka's affidavit (that is, his own client's affidavit) was fraudulent.

Lograsso contended that K and D were not entitled to rely on the provisions of the *Land Titles Act* and its Interpretation Bulletins, because the amount of the writ of seizure exceeded $50,000 at the time of the sale. The Interpretation Bulletins allow for the acceptance of an affidavit by a judgment debtor, where the amount of the writ of seizure does not exceed $50,000. Where the writ exceeds $50,000, an "unequivocal" statement from a lawyer, that the vendor and the execution debtor are not the same, is required.

The court accepted the evidence of the defendants' expert witnesses, Donald Thomson and Stephen Pearlstein, that the $50,000 figure mentioned in the Interpretation Bulletins excludes post-judgment interest. Therefore, Kliczka's affidavit was permissible under the Interpretation Bulletin. The Land Registrar in fact accepted his affidavit.

K followed the accepted procedure when acting for a vendor in closing the real estate transaction. He obtained a name match, then secured the necessary affidavit from his client, Kliczka. K had no reason to disbelieve Kliczka's sworn affidavit. The same was true of D acting for the purchaser.

Furthermore, under common law principles, K and D owed Lograsso no duty of care. While it was foreseeable that negligence on K's and D's parts could cause loss to Lograsso, there was no "relationship of proximity" such that a duty of care could arise.

No previous case held that a duty of care exists in these circumstances. The court declined to find a new duty of care. K and D did not communicate with Lograsso before or during the transaction; they did nothing to indicate to Lograsso that he could rely upon them; they did not voluntarily assume responsibility to Lograsso; and neither of their clients intended to confer a benefit on Lograsso. It is impossible to disclaim or limit liability to the third party as was done in *Hedley Byrne* itself.

More importantly, to find such a duty to a third party potentially or actually places a lawyer in a conflict with the interest of his own client. While fraud may be on the increase, this does not create an additional duty of care where none exists in law. McEwen, J. could not conclude that there was sufficient proximity between the parties so that it would be just and fair to impose a duty of care. Compensation was potentially available to Lograsso from the Land Titles Assurance Fund.

Conclusion

No area of practice is immune from legal malpractice claims. Some clients – personal injury clients, family law clients, and others – have "buyers' remorse" after entering into a settlement. Other clients, sometimes through no fault of their own, have suffered serious losses: The real "bad actors" are judgment-proof, and the clients have no other potential source of recovery. Other clients are unable or unwilling to take responsibility for their own bad decisions. Sometimes, no one is to blame for the disappointing way in which the client's litigation or transaction unfolded, but the client wishes to shift some of the loss. Sometimes, the lawyer has indeed failed to meet the standard of care, but a limitation period has intervened or serious issues arise as to the losses that the lawyer's failure actually caused. LawPRO has seen all of these scenarios, and many more besides. ■

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18 2011 ONSC 5729; 2011 CarswellOnt 15187