Knowing when to take a stand:

LawPRO defends its insureds in 2012

LawPRO pays an indemnity to resolve a claim only in a minority of cases. In the years 2008-2012, LawPRO made an indemnity payment in just 14.5 per cent of files, on average. However, many claims must be actively defended: over that same period, over 42 per cent of claims required the expenditure of external defence costs. Carefully-prepared arguments, when successful, help not only to minimize indemnity costs, but also to create precedents that can assist LawPRO counsel in mounting future defences.

The following summaries illustrate our defence efforts on claims in several areas of law.

Civil Litigation

Civil litigation was a significant "growth" area for claims in 2012. Here are some of the kinds of claims we defended.

Costs against a lawyer personally

The Court of Appeal set aside[1] a trial court order awarding costs to the Township of Russell against a solicitor personally, pursuant to Rule 57.07 of the *Rules of Civil Procedure*.

In allowing the solicitor's appeal, Weiler, J.A. held:

1) When determining whether the imposition of costs against a lawyer personally is warranted, a factor for consideration is whether the lawyer's clients have waived solicitor-client privilege. The Court accepted the solicitor's assertion that he was prevented from responding to some of the allegations because of solicitor-client privilege, and also that he took no step in the proceeding without the instructions of his clients.
2) Lawyers are not liable for costs related to advancing a weak case on their clients' instructions.
3) Hindsight cannot be used to evaluate a lawyer's decision.
4) The lawyer's duty is owed primarily to the client and to the court.
5) Rule 57.07 is not intended to allow the frustration of the opposing party's counsel to be taken out against a counsel personally because he or she went down a series of blind alleys with his or her clients' instructions or approval.

Limited retainers

The Court of Appeal upheld a decision[2] in which LawPRO counsel were successful in defending a lawyer who was retained by a woman injured in a motor vehicle accident. In the trial judgment in *Broesky*, Mackinnon J. dismissed the plaintiff's action after finding that she did NOT retain the solicitor to prosecute her tort action or her SAB claim, but rather only her action for disability

[1] *Galganov v. Russell (Township)*, 2012 ONCA 410, allowing appeal from 2011 ONSC 3065 and 2011 ONSC 5609

[2] *Broesky v. Lust*, 2012 ONCA 701 (CanLII), dismissing appeal from 2011 ONSC 167 and 2011 ONSC 147

benefits. More importantly, Mackinnon J.'s discussion of "limited retainers", confirmation of non-retainers in writing, conflicts of evidence between solicitors and clients, and duty to provide advice outside of a retainer has been extremely helpful to counsel defending solicitors in subsequent cases.

Class actions

Class actions are enormously expensive to defend or settle. This is true even where the merits of the claim against the solicitors are doubtful. To date, every class action claim LawPRO has handled has hit the $1 million per claim coverage limit of the mandatory policy. Two cases summarized here illustrate the mixed success we have had with respect to defending against class actions.

In *Allen v. Aspen Group Resources Corporation*[3], Strathy J. refused to summarily dismiss a class action against a law firm, and held that the law firm may be vicariously liable under the *Partnership Act* for alleged breaches of s. 131 of the *Securities Act* by one of its partners in his capacity as a corporate director.

Strathy, J. indicated that the solicitor/director's activities as director fell within the ordinary course of the law firm's business. The firm expressly permitted its partner to act as director of Aspen, the firm's client, and accepted his directors' fees as part of the firm's revenues.

Strathy, J. held that an argument can be made that partnerships should be held accountable for the actions of those they select to sit on corporate boards. Holding law firms responsible for breaches by a director/partner affords greater protection for the public, results in higher standards and controls, and puts the risk on the party most able to control and insure it. Final disposition of the matter was, however, reserved for trial.

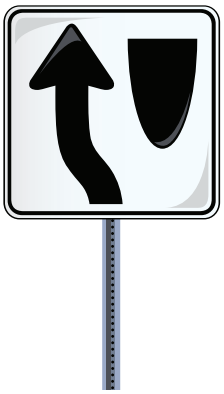
In *Robinson v. Rochester Financial Limited*, the Superior Court approved the settlement of the class action against tax counsel[4].

The class plaintiffs were taxpayers ("donors") who participated in a "leveraged" charitable donation program with the expectation that they would obtain a tax credit in excess of their actual cash outlay. The plaintiffs alleged that the tax opinion provided by the defendant solicitors to the scheme's promoters on the efficacy of the program was negligent, and that the solicitors should have known that the tax credits would be disallowed by the Canada Revenue Agency (CRA).

Strathy, J. approved the proposed settlement of the action for $11 million, of which $7.75 million was designated for class members, and the balance for fees and disbursements of class counsel and for the costs of administration of the settlement.

Some class members thought that the settlement amount was too low. However, the court noted that a significant discount was warranted to reflect the real risk that the claim against the solicitors would fail if it proceeded to trial. The solicitors could then argue that their opinion was consistent with the state of the law as it existed at the time, and that the subsequent hardening of the position of the CRA was not something that could have been foreseen. Another factor supporting a discount was a lingering uncertainty about the extent to which the class members had relied on the solicitors' opinion.

Limitations defences



Often, the simplest defence to a proceeding against a lawyer is to seek a ruling that the proceeding is statute barred. Here are five examples of LawPRO's efforts on this front.

Charette v. Trinity Capital Corporation[5] was yet another claim arising from a "leveraged" charitable donation program. In this case, Trinity Capital was the promoter. Once again, the proposed class representative alleged that the solicitors' tax opinion provided to Trinity was negligent, and that the solicitors should have known that the tax credits would be disallowed by the CRA. The defendant solicitors sought to have the action dismissed as statute barred.

Charette received a notice of reassessment from the CRA in 2006. The defendant solicitors told the donors that the CRA was wrong, and that they had no obligation to pay the taxes the CRA said were owing. By 2008, Charette had retained other counsel. In November, 2009, the Tax Court of Canada released its decision holding that the donors were not entitled to the income tax credits. The donors were assessed penalties and interest, and they incurred substantial legal costs.

The donors sued Trinity Capital, the solicitors and the accountants in March, 2011.

Strathy, J. ruled that a trial would be necessary to determine whether the claim was in fact statute barred, noting that even a "sophisticated taxpayer" could be found at trial to not know that damage had occurred and that a legal proceeding against the solicitors would be an appropriate remedy, especially while the solicitors continued to advise that the CRA was wrong. Also relevant was that there was no evidence that the solicitors

[3] 2012 ONSC 3498

[4] *Robinson v. Rochester Financial Limited*, 2012 ONSC 911

[5] 2012 ONSC 2824 (CanLII)

[6] 2012 ONCA 851 (CanLII), allowing appeal from 2012 ONSC 151. *Ferrara* was recently followed by the Court of Appeal in *Lipson v. Cassels Brock & Blackwell*, 2013 ONCA 165

whom Charette had hired in 2008 advised him that he might have a claim against the defendant solicitors.

In *Ferrara v. Lorenzetti, Wolfe*[6], the majority judgment of the Court of Appeal (Laskin and Sharpe, J.J.A.) held the plaintiff's claim against the defendant solicitor was NOT statute barred.

The factual situation in this case was unusual. The defendant real estate solicitor had represented Ferrara and his company for many years. He acted for Ferrara on the purchase of a property. He drafted the statement of adjustments, after settlement of a dispute with the vendor. Ferrara received a "rollover" credit. The vendor subsequently claimed that Ferrara was not entitled to the credit. The defendant solicitor took the opposite position.

The vendor sued Ferrara to recover the credit. In November 2006, Ferrara retained three high-profile litigation counsel, in succession. The defendant solicitor continued to advise Ferrara throughout the litigation that Ferrara's position was correct. In July, 2009, Belobaba, J. decided against Ferrara.

Ferrara sued the defendant solicitor within two years of this decision, but more than two years from the date that the statement of adjustments was challenged, and from when litigation counsel was retained.

The solicitor moved to have the claim dismissed as statute barred. The solicitor alleged, and Beth Allen, J. accepted, that Ferrara knew or ought to have known of his claim against the solicitor on the date that the statement of adjustments was challenged. This was true notwithstanding that Ferrara had submitted an affidavit asserting that none of his subsequent counsel advised him about a potential claim against the solicitor.

Ferrara appealed, and the majority of the Court of Appeal allowed the appeal, ruling that Ferrara learned of his claim only in July, 2009. In his reasons, Laskin, J.A. held that two circumstances in combination supported his conclusion that Ferrara's claim was not discoverable before July 2, 2009: first, the defendant's repeated assurances that he was right; and second, Ferrara's uncontradicted evidence that no one told him otherwise.

In *Johnson v. Futerman*[7], sprinter Benjamin Johnson brought a malpractice claim against the estate of his former lawyer. The claim was based on various allegations including negligence, breach of fiduciary duty, and breach of trust relating to the lawyer's work on behalf of Johnson via Johnson's business agent. Most of the facts cited in support of the claim occurred between 1988 and 1993.

Carole J. Brown, J. held that the equitable claims were barred by the doctrine of laches. With respect to the allegations of negligence, Johnson argued that he was not aware of the facts in support of his claim until many years afterward. However, the court held that Johnson's business agents were aware of these facts, and that this knowledge ought to be imputed to Johnson. She also refused to allow an extension of the limitation period on the basis that Johnson lacked the mental capacity to discover his claim, noting that Johnson was not represented by a litigation guardian in this action. Johnson had also been involved in other litigation without the intervention of a litigation guardian. There was no admissible evidence of mental incapacity before the Court.

In the 15 years between the facts alleged as the basis of the claim and the bringing of the claim, the defendant solicitor died and his accounting and trust records had been destroyed. Several other witnesses had also died. Johnson's delay was unreasonable, and it prejudiced the lawyer's defence. Brown J. ruled that the claim was statute barred.

In *Chang v. Boulet*[8], more than two years before issuing a statement of claim against his former lawyer, the plaintiff accused the lawyer of altering a share purchase agreement and threatened to sue him.

The defendant lawyer had reviewed a share purchase agreement for a restaurant that was being purchased by two partners, the plaintiff and a Mr. Johnson. The agreement was prepared by the vendor's lawyer. The defendant lawyer's position was that he had acted only for Johnson; the plaintiff alleged that he had acted for both purchasers. The agreement, which the plaintiff signed without reading, provided that Johnson was to receive a 51 per cent share and the plaintiff 49 per cent.

On September 8, 2006, the plaintiff emailed Johnson and the defendant lawyer, accusing them of altering the agreement without his knowledge, and threatening to sue on the basis that the agreement was to have given each partner a 50 per cent interest. The plaintiff retained new counsel in early 2007. On September 24, 2008, the plaintiff filed the threatened statement of claim.

Metivier, J. ruled that the suit was commenced 16 days too late. In doing so, he distinguished *Charette v. Trinity Capital Corp.* (summarized above) on the basis that the plaintiff in this case did not rely on the defendant lawyer in any way after he learned that he had only a 49 per cent interest.

Finally, in *Panther Film Services Inc. v. Fred Tayar & Assoc.*[9], LawPRO counsel successfully convinced Beth Allen, J. to dismiss Panther Film's action against the defendant solicitors as statute barred.

7 2012 ONSC 4092
8 2012 ONSC 6382
9 2012 ONSC 7226

The negligence action was commenced more than two years after Panther Film Services delivered a statement of defence to the solicitor's fee action. The statement of defence's allegations against the solicitor were substantially the same as those in the malpractice action. Panther Film could not point to any new material facts discovered after the two-year limitation period ostensibly expired. Panther Film merely provided additional details of the allegations pleaded in its defence to the fee action.

Once the plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent of the damage nor the type of damage need be known for the limitation period to begin to run.

Vexatious litigants

The final example of civil litigation defences involves the successful effort to have a party declared a vexatious litigant.

These claimants, whose actions typically lack merit but nevertheless require attention and the expenditure of defence costs are a significant drain on resources. The decision in *Teplitsky Colson LLP et al. v. William Malamas*[10] was achieved via the cooperation of 27 different parties adverse to the defendant Malamas. The parties were involved in 14 different actions with respect to the litigant, who had sued 16 lawyers and their partnerships for over $100 million. Malamas' allegations of improper activities on the part of the lawyers included fabrication of evidence, fraud on the court, making intentionally false statements, intentionally misdrafting court orders, and intentionally causing Malamas' court applications to fail.

Newbould, J. found that Malamas was clearly a vexatious litigant. He relitigated issues already decided, made unfounded allegations of fraud and conspiracy, brought 36 unsuccessful motions, persistently brought unsuccessful appeals, sued lawyers who had previously acted against him, and failed to pay costs orders made against him.

Newbould J.'s order forbade Malamas to bring any more actions without leave of the Court, and provided that costs on this action and other actions be paid as a precondition for obtaining such leave. The lawyer defendants were awarded costs totalling $295,000. Malamas has paid nothing to date.

Corporate, commercial and employment law

Alleged Conflicts

In *Sheriff v. Apps* et al.[11], Carole J. Brown, J. summarily dismissed Sheriff's action against the defendant solicitors.

The defendants were Integral's corporate solicitors, and they acted for Integral in the termination of Sheriff's employment. There was no solicitor-client relationship between the defendants and Sheriff at the time of the termination. Sheriff was represented by his own counsel. At no time did Sheriff or his counsel object to the defendants acting for Integral in the settlement negotiations.

Sheriff executed a release in favour of Integral, and, *inter alia*, its agents. Sheriff accepted all payments owing to him under the settlement agreement, and only then sued the defendants, alleging a conflict of interest.

The court observed that if Sheriff believed that the defendants had a conflict in acting for Integral, he should have moved immediately to have them disqualified from acting further. Integral's CEO gave evidence that Sheriff received the maximum amount that Integral was willing to pay to settle with Sheriff. Sheriff had the benefit of independent legal advice throughout. The court also ruled that the solicitors were entitled to the benefit of the release which Sheriff signed, since they acted as Integral's agents in the negotiations.

Client use of lawyers' trust accounts not in connection with legal services

Even though the solicitors in question were successfully defended, two recent cases illustrate the danger of allowing money to be paid into and out of solicitors' trust accounts, divorced from any legal services.

In *Scott v. Valentine*[12], Goldstein, J. reluctantly granted summary judgment to a firm of solicitors, dismissing Scott's action against them.

Scott made four payments totalling $1.3 million into the solicitors' trust account in respect of a share purchase. He did so at the instigation of Valentine, one of the firm's clients. Valentine

[10] 2012 ONSC 3546 (CanLII), as to costs 2012 ONSC 5131

[11] 2012 ONSC 565

[12] 2012 ONSC 6349

promised Scott that the law firm would hold the purchase proceeds in its trust account, pending Valentine's delivery of the shares. Scott was unaware that Valentine had previously been convicted of securities fraud.

After each of the four payments was made into the trust account, the money was immediately paid out at Valentine's direction. The firm rendered no legal services in connection with this trust money, nor did it ask any questions about the source of the funds, the purpose of the transaction, the identity of the people receiving the funds, or even why Valentine needed to use a law firm trust account, rather than a bank, for the purpose of receiving and paying out money.

When Scott received neither the shares nor his money back, he sued Valentine and the law firm.

Goldstein, J. found that the solicitors owed no duty of care to Scott, because they had no actual knowledge that Scott relied on them. Scott never met with, spoke with, or corresponded with any member of the firm. Scott relied solely on Valentine. Scott never gave the firm instructions about what to do with the bank drafts. The only evidence the firm had of Scott's existence was his name on one bank draft.

Even if the firm breached the *Rules of Professional Conduct*, such breaches, if any, do not give rise to proximity that would support a negligence claim, where no proximity exists.

The Court declined to award any costs to the solicitors.

In another trust account decision[13], Kruzick J. summarily dismissed Jaystren Holding's action against a law firm on the basis that no solicitor-client relationship existed, no duty of care existed, and no trust relationship existed.

The plaintiff agreed to loan the defendant $69,000 to be used to purchase a nightclub called Tonic, which was owned by Chat-win Services. Nigel Axton, a convicted fraudster, was a principal of Chat-win. The plaintiff drew two cheques, payable to the solicitors in trust. Axton delivered them to the law firm where they were deposited in the firm's trust account to the credit of Chat-win. They were subsequently paid out to Chat-win, at Chat-win's direction. The plaintiffs never got their money back.

The plaintiffs alleged that the solicitors were trustees of the money for them, and that the law firm owed them a duty of care. Kruzick, J., rejected these submissions. The plaintiffs were not the firm's clients. The plaintiffs did not rely on the firm, or communicate their reliance in any way. They had no communications or dealings with the firm whatsoever. The three certainties to establish a trust relationship for the plaintiffs' benefit were not met, as there was no certainty of intention, property, or objects. When a law firm receives funds in trust from an investor for their client, the funds are held for the benefit of the client, not the investor.

Family Law

No recourse against lawyers re: Party's bad faith exploitation of error

In an important defence effort, LawPRO counsel were successful in convincing a court to rule that a family law party could not look to the defendant solicitors for any shortfall with respect to damages and costs for which the other spouse was found to be liable.

In his reasons[14] Harper, J. held that the defendant solicitors were NOT liable to pay any part of the former wife's costs, even though the solicitors' drafting error in preparing her marriage contract was an important issue in the litigation between the two former spouses. In her instructions for the preparation of the marriage contract, the wife instructed the solicitors that in the event of a marriage breakdown, the husband should receive one-half the value of the matrimonial home. The contract erroneously provided that the husband would receive the full value of the matrimonial home.

The parties separated shortly thereafter. The wife successfully sued to have the marriage contract declared void *ab initio*. The Court found that the husband and his lawyer were aware of the drafting error, and exploited it. The husband's share of the matrimonial home was a fundamental term of the contract, and there was no consensus *ad idem* about it.

The former wife was awarded full recovery costs of $924,057.70 from her former husband.

The Court declined to order that the wife could collect from the defendant lawyers whichever part of her costs award that she could not collect from her former spouse. The lawyers' drafting error was merely the spark that lit the flame, while the husband's bad faith and unreasonable conduct turned this litigation into the massive conflagration it ultimately became.

[13] *Jaystren Holdings Ltd. v. 1660557 Ontario Inc.* Handwritten endorsement, Court File No. CV-09-393687, released January 30, 2012. PDF copies available from debra.rolph@lawpro.ca

[14] *Stevens v. Stevens; Epstein Cole* (Added Respondents), (2012) 109 O.R. (3D) 421 And 2012 ONSC 706; as to costs 2012 ONSC 6881

Lawyer not liable for failing to convince client to follow advice

LawPRO defended a claim brought by a former client who sued her lawyer for failing to prevent her from entering into a final separation agreement before receiving full disclosure from the other party[15].

The client signed the agreement despite the lawyer's advice that she wait for disclosure. A year later, she moved to set aside the agreement and sued the lawyer. In dismissing the action against the lawyer, Warkentin J. held:

1) Where a lawyer gives appropriate advice to a client who does not accept such advice, the client cannot later assert that the lawyer was negligent for not forcing her to listen.
2) 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.
3) 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.

The Court awarded full indemnity costs to the solicitor.

Criminal Lawyers

Arguments about issue estoppel and abuse of process often arise when criminal lawyers are sued by their erstwhile clients for malpractice.

Beuthling v. Hayes[16] was a claim by a party who had been convicted at first instance, had the conviction overturned and a new trial ordered, and against whom the charges were ultimately dropped. The party sued his counsel from the original trial for malpractice.

In his statement of defence, the lawyer alleged that the plaintiff was in fact guilty of the crime for which he had originally been convicted. The plaintiff moved to have the portions of the statement of defence containing this allegation struck out. The court refused, holding that an acquittal, or the ordering of a new trial, is not conclusive of the plaintiff's innocence, and does not give rise to *res judicata*, issue estoppel, or abuse of process, where the defendant solicitor asserts in the malpractice action that the plaintiff was in fact guilty. While the defendant solicitor was a witness on the appeal, he was not a party at the criminal trial or on the appeal.

In another decision involving a claim against criminal counsel[17], Stevenson J. held that the plaintiff's malpractice action against his former criminal defence counsel was an abuse of process.

The plaintiff was found guilty at trial of mischief and forcible confinement arising from a domestic dispute. The defendant lawyer represented the plaintiff at trial. On his unsuccessful appeals to the Superior Court and to the Court of Appeal, the plaintiff did not allege that he had been incompetently represented at trial. However, he went on to sue his lawyer, alleging that the lawyer should have been more aggressive in his attempts to discredit the victim.

Stevenson, J. noted that these issues had been before three levels of court in the criminal proceedings, and all three courts had reached the same conclusion. He held that the criminal law itself creates the proper forum for overturning criminal convictions, and that the plaintiff's proper strategy should have been to raise the issue of quality of representation in the course of his criminal appeals. ■

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[15] *Marcus v. Cochrane*, 2012 ONSC 146, as to costs 2012 ONSC 2331

[16] 2012 ONSC 4299

[17] *Brown v. Lee*, 2012 ONSC 4154