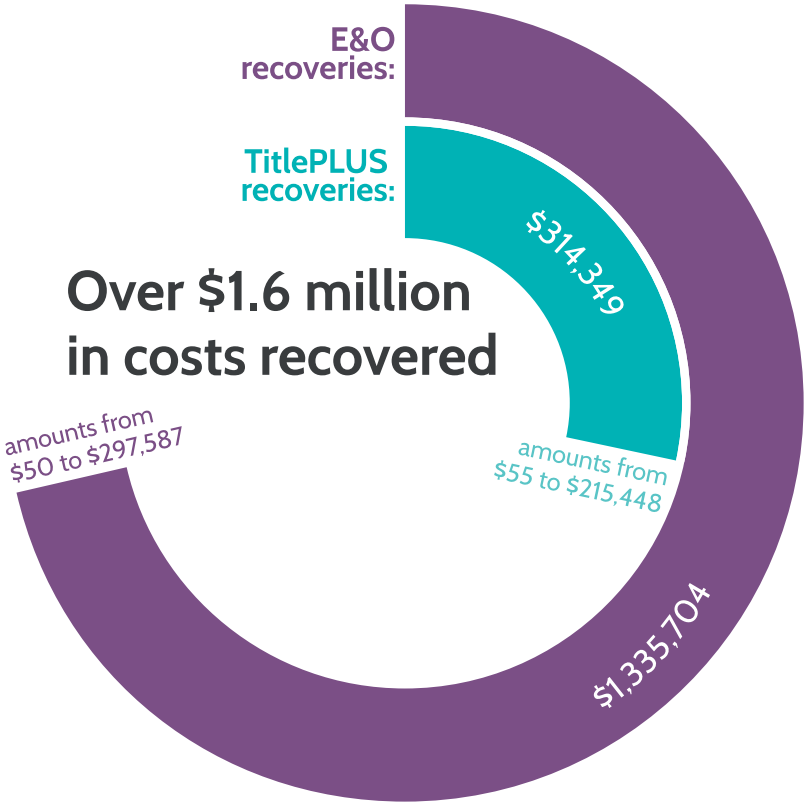
Recoveries:

Persistence and patience to recover costs

LawPRO staff actively pursue recovery costs throughout the year. In some cases, a party other than the insured is found liable for all or part of a loss that is the subject of a claim. We take all reasonable steps to obtain reimbursement from these parties, no matter the amount, because the recovery of these costs reduces our claims expenditure. In 2013, LawPRO was successful in recovering over $1.6 million in costs. ■



Repairs:

Keeping rights of action alive keeps claims costs down

When assessing newly reported claims, LawPRO carefully considers the potential for a repair to avoid or extinguish a claim, or at least to reduce any damages created by the lawyer's error. Many of the claims that LawPRO handles involve an error that can be repaired. These repairs are important to LawPRO's bottom line as they help reduce the cost of claims.

In the litigation area, a repair often involves reviving or preserving a client's right of action. This article highlights some of our successful litigation repairs from 2013. They involved 1) restoring actions to the trial list; 2) dealing with limitation periods; and 3) amending pleadings.

Restoring actions to the trial list

Test for restoring actions to trial list confirmed

In a 2013 case[1], the Court of Appeal confirmed the appropriate test for restoring actions to the trial list. It's a two-part, conjunctive test: the plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation; AND that, if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice.

Fairness will allow reinstatement in the absence of prejudice

A plaintiff brought a multi-million dollar lawsuit against a financial services company, alleging that it gave her negligent investment advice.[2] The action was set down for trial, but later struck off the

[1] 2013 ONCA 361 (CanLII), canlii.ca/t/fxrbr

[2] 2013 ONSC 7685 (CanLII), canlii.ca/t/g2dg6

trial list due to the inaction of the plaintiff's first lawyer. She retained a second lawyer, who delayed in moving to have the action restored to the trial list. When the second lawyer eventually did bring the motion, Master Graham dismissed both the motion and the underlying action.

Newbould, J. set aside Master Graham's orders, and held that in considering whether to restore an action to the trial list under Rule 48.11, Rule 48.14(13) should be applied flexibly. The court must consider, above all, whether it would be fair to dismiss the action. In the context of this case, the court noted that:

- There was sufficient explanation for the delay, where the plaintiff always intended to proceed and instructed her lawyers to do so. Neither the plaintiff nor her solicitors intentionally delayed the matter.
- The delay was understandable, where the solicitor encountered personal problems, and therefore failed to deal with the file.
- The expiry of a limitation period ought not to be relevant to the issue of presumed prejudice, especially now that the limitation period is two years.
- The defendant ought to adduce affirmative evidence of prejudice, because there are limits to a plaintiff's ability to speculate about what prejudice the delay may have caused the defendant. In this case, there had been extensive discoveries and documentary evidence, and no suggestion that defence witnesses were unavailable and could not refresh their memories with the available documents. The plaintiff demonstrated that if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice.
- The law will not ordinarily allow innocent clients to suffer the irrevocable loss of their actions because of the inadvertence of their solicitors. The fact that there is an outstanding solicitors' negligence action ought not to be relevant. In any event, the potential value of the claim greatly exceeded the solicitors' E & O policy limits.

Court can consider entire history of delay

Justice Firestone found that there was a "satisfactory explanation for the delay," where the claim arose in 2006, and the 48.11 motion was brought in late 2011.[3]

Justice Firestone held that:

- From the time this action was commenced (2007) right up until the pre-trial (2008), it proceeded without delay.
- At the pre-trial, the matter was struck from the trial list so that additional parties could be pursued.
- The registrar did not serve the parties with a status notice. Such notice might have alerted plaintiff's counsel to take steps to restore the action to the trial list much earlier than he did.
- Through inadvertence, this case fell out of the plaintiff's counsel's diary.
- Defence counsel never brought a motion under Rule 24 to dismiss this action for delay.
- It is open to the court to consider the entire history of delay.

The defendants participated in documentary disclosure, examinations for discovery, mediation, and a pre-trial. The interests of justice required that this action be restored to the trial list, BUT the plaintiff was disentitled to pre-judgment interest from the date the action was struck from the trial list, until the date of the judgment.

Limitations

LawPRO considers motions which contest that actions are statute barred to be "repair" motions, because a negligence claim is averted if a court finds that the plaintiff's action is not statute barred.

Where contract repudiation not accepted, limitation period runs from date of performance failure

A plaintiff's action was NOT statute barred where the plaintiff refused to accept the defendant's position that it intended to pay a lesser rate of commission than that stipulated in the contract.[4] Instead, the plaintiff continued to call upon the defendant to honour its bargain. The plaintiff's action was brought more than two years after the defendant announced that it would not pay commission at the agreed-upon rate, but less than two years after the date at which the defendant was obliged to pay the commission.

Because the plaintiff refused to accept the defendant's repudiation, the limitation period ran from the date on which the commission was payable.

No contracting out of *Limitations Act, 2002* for consumer auto insurance contracts: Court of Appeal

The Court of Appeal held that where the plaintiff was injured in an accident in July, 2006, the limitation period for his claim against his OPCF 44R insurer was governed by ss. 4 and 5 of the *Limitations Act, 2002*, NOT the 12-month limitation period set out in para 17 of the OPCF 44R change form.[5] Nor could the "discoverability" criteria used in para 17 be imported into s. 5 of the *Limitations Act, 2002*. The two-year limitation period provided by s. 4 of the

[3] 2013 ONSC 6433 (CanLII), canlii.ca/t/g1p04

[4] 2013 ONCA 733 (CanLII), canlii.ca/t/g26b9

Limitations Act, 2002 ran from the day after the plaintiff requested payment from the insurer under the OPCF 44R endorsement.

The motion judge's endorsements made it clear that the plaintiff was a "consumer." S. 22 of the *Limitations Act 2002* therefore prohibited any contracting-out of that statute. In any event, the accident occurred before October, 2006. No contracting-out at all was permitted before that date. The writer believes this analysis should apply to uninsured/unidentified motorist claims.

Real Property Limitations Act 10-year limitation period applies to constructive trusts in family law

A plaintiff's claim for a constructive trust on her ex-partner's real property was NOT statute barred.[6]

The 10-year limitation period found in section 4 of the *Real Property Limitations Act* governs a claim for a remedial constructive trust on real property, brought in connection with an unjust enrichment claim in family law litigation. An alternative claim for a monetary award also shelters under the 10-year limitation period.

Ordinarily, the claim should be taken not to have been discovered until the parties have separated and there is no prospect of resumption of cohabitation.

In *obiter dicta*, the court said that a claim for a constructive trust over personal property is governed by the *Limitations Act 2002*.

Express written agreement not essential to toll action during mediation

In another case, the limitation period was suspended for 18 months pursuant to s. 11 of the *Limitations Act 2002*, where the parties agreed to mediate the claims arising from the collapse of a building. It was held that an express, written agreement was not essential.[7]

Amending pleadings

LawPRO obtains amendment to preserve construction lien claim

LawPRO counsel were successful, in another case, in salvaging a lien action even though the statement of claim did not claim enforcement of a lien, or mention the lien registered on title.[8] Rather, it claimed damages for breach of contract, unjust enrichment, and *quantum meruit*. However, on the Court Information Form, "construction lien" was ticked off.

The defendants alleged that the statement of claim was ineffective to preserve the lien, and that the lien claim should be vacated.

Whalen, J. dismissed the defendant's motion, and ordered the plaintiff to deliver an amended statement of claim. The law requires a generous and liberal interpretation of the lien claimant's pleading. The plaintiff was attempting to perfect and preserve its lien. Many of the details in the statement of claim were the same as those underlying the registered lien claim – including the identification of the parties, the project, the roles of the parties in the project, the time frame of the work and the amount claimed. ■

Debra Rolph is director of research at LawPRO.

[5] 2014 ONCA 88 (CanLII), canlii.ca/t/g2xl6, affirming 2013 ONSC 4298 and 2013 ONSC 7140.The motion judge's two endorsements were never reported on CanLII. Visit practicepro.ca/magazinearchives to access the documents. Leave to appeal to the SCC filed April 4, 2014.

[6] 2014 ONCA 86 (CanLII), canlii.ca/t/g2wrf, dismissing appeal from 2013 ONCA 948, 113 O.R. (3d) 727

[7] 2013 ONCA 434 (CanLII), canlii.ca/t/fzcks, dismissing appeal from 2013 ONSC 658

[8] 2013 ONSC 4500 (CanLII), canlii.ca/t/fzhsj

LawPRO defends lawyers:

2013 highlights

LawPRO defends a wide variety of cases in any given year. In almost 80 per cent of the claims files we handle, there is ultimately no finding of negligence against the lawyer that was the subject of a claim.

Occasionally, our work on a lawyer's behalf is made easier by having compelling facts on our side. But even where the facts are more balanced, LawPRO counsel strive to put forward rigorous and well-supported defences on the part of our insured – not only to avoid a loss in any particular case, but also in the interest of creating precedents and standards of care that are fair to all lawyers. Here is a sampling of some the cases we successfully defended in 2013.

No negligence where lawyer relies on client's waiver of searches[1]

A lawyer acted for a client in the purchase of a condominium and associated retail business. The client instructed the lawyer not to search for work orders. Title insurance was purchased.

After closing, a work order was found. The client settled with the title insurer with respect to the work order, and proceeded to sue the lawyer in negligence.

The action was dismissed, and the title insurer was ordered to indemnify the lawyer for his defence costs.

While the client's failure to prove harm to her business interests or to mitigate her losses was in itself sufficient to justify the dismissal of the claim, Van Rensburg, J. also held that the client had produced no expert evidence that the lawyer was negligent. The court was unwilling to infer negligence where the lawyer was instructed not to search for work orders and title insurance was purchased. The fact that the lawyer failed to keep extensive file notes was not negligence.

Failure to insist on ILA not negligent where transaction clearly benefits client[2]

In 1992, a father transferred his shares in a business to his daughter and son-in-law, receiving a promissory note in exchange. One lawyer represented all the parties: mother, father, daughter and daughter's husband, none of whom obtained independent legal advice.

Many years later, the mother sued the daughter and son-in-law on the promissory note, and the couple third-partied the original lawyer, alleging that he should have insisted that they obtain independent legal advice before proceeding with the transaction.

After reviewing the details of the transaction, the court dismissed the claim against the lawyer. Glithero, J. found that the lawyer: 1) had no obligation to insist that the younger couple get independent legal advice; 2) that the younger couple understood the transaction; 3) that the transaction was beneficial to the younger couple; 4) that there was no better advice an independent solicitor could have given to them; and 5) that the lawyer did not cause the couple's loss.

The court rejected an expert opinion to the contrary because it was based on false assumptions: that the lawyer had failed to inquire into the business background and purpose of the transaction, and that he failed to appropriately explain the transaction to the younger couple.

Lawyer not liable for transaction client completed after lawyer's retainer ended[3]

A lawyer acted for a client with respect to an attempt to sell a property held by a joint venture in which the client was a participant. The sale attempt was unsuccessful; in its wake, the lawyer closed his file.

Unbeknownst to the lawyer, the client entered into a new sale agreement with another party several months later. The lawyer received a telephone call from another lawyer, who simply asked the original lawyer about proper service of notice of sale under the joint venture agreement. The original lawyer gave the requested information. He heard nothing more.

Eventually, the client was sued for failing to properly complete that transaction. He third-partied his original lawyer.

Wilton-Siegel, J. summarily dismissed the client's third party claim against his first lawyer on the basis that there was no retainer and no

[1] 2013 ONSC 6242 (CanLII), canlii.ca/t/g0x7b, (2014) 36 R.P.R. (5th) 256

[2] 2013 ONSC 4437 (CanLII), canlii.ca/t/fznzg

[3] 2013 ONSC 421 (CanLII), canlii.ca/t/fx8jv appeal dismissed 2014 ONCA 98

basis for finding a duty of care. The court rejected an expert opinion to the contrary.

Wilton-Siegel, J. accepted that the telephone call did not constitute a retainer to advise about the new sale agreement. None of the indicia of a solicitor-client relationship were present. No one told the original lawyer that he was retained in respect of the new transaction. The original lawyer did not provide legal advice regarding the sale agreement, nor was he asked to do so. He was not given a copy of the agreement. He did not send either an account or a reporting letter, nor was he asked to do so.

The fact that the original lawyer had acted for the client in the past did not create a solicitor-client relationship in respect of all future dealings with the property. The reality of practice is that clients choose different lawyers for different transactions, even involving the same property.

Lawyer owed no duty of care to non-client intermediary that paid out funds against client's forged instrument[4]

A lawyer represented a client, who turned out to be an impostor, in obtaining a mortgage.

After receiving the mortgage proceeds, the impostor client used them to purchase a bank draft. He forged an endorsement on the draft, and presented it to the claimant intermediary (a "payday loan" – type company). The intermediary paid the impostor cash on the note.

The forgery was discovered, and the issuing bank reversed the payment. The intermediary's account was debited. The intermediary sued the impostor's lawyer (among others).

The court held that the lawyer, who acted for the mortgage lender and the purported mortgagor, owed no duty to the intermediary. Justice Stinson rejected the intermediary's contention that a lawyer in a mortgage transaction owes a duty of care to parties who subsequently negotiate a cheque or bank draft purchased with the proceeds of the mortgage to ensure that the transaction was legitimate and that the cheque or bank draft was valid and negotiable. Because the client's endorsement was forged, and therefore entirely ineffective to convey title to the bank draft, the intermediary converted it. The courts have so far refused to import negligence considerations into the strict liability regime governing the conversion of bills of exchange.

Opponent's satisfaction is not standard of care in separation agreement drafting[5]

A lawyer drafted a separation agreement for a client. It included no provision for spousal support for the client's former spouse.

After the agreement was signed, the client's income increased sharply. The former spouse, who had dissipated the settlement funds, moved to have the agreement set aside. The client paid a substantial sum to settle the litigation, and brought an action in negligence against the lawyer.

The action was dismissed. McEwen, J. found that the lawyer met the standard of a family law expert in drafting the agreement, and in advising the client about it. The lawyer made it clear to the client that there was a possibility that it could be set aside. The client's evidence to the contrary was rejected as he was found not to be a credible witness.

The court further held that the only other advice the lawyer could have given the client which might have prevented the former spouse from attacking the settlement agreement was that the client give the former spouse everything he owned. The client would not have accepted this advice, and even if he had, the payment would have cancelled out the money which he subsequently paid to settle the litigation. ■

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[4] 2013 ONSC 7181 (CanLII), canlii.ca/t/g1zgf

[5] 2013 ONSC 6600 (CanLII), canlii.ca/t/g2dh1