

# DEFENCES:

Standing up and  
stepping in for licensees



Sometimes a client's accusations can't be resolved without litigation. When a licensee has a viable defence to malpractice accusations, and the claim cannot be resolved out of court, LAWPRO steps in to provide lawyers with an effective legal defence.

LAWPRO's claims management philosophy is aimed at quick resolutions in situations where there is liability, defend vigorously if the claim has no merit, and avoid economic settlements. In 2018, LAWPRO won six of the seven matters that the company took to trial and on which a decision was rendered, was successful on the one appeal the company argued, won 23 of 29 summary judgment applications, and won seven of 10 summary judgment appeal decisions.

Here are a few examples of defences successfully advanced by LAWPRO in 2018 on behalf of licensees.

## Family law

Even when a lawyer provides excellent legal services, things don't always go the client's way. A client disappointed with results may seek to place the blame on ineffective counsel, even when the lawyer

does everything in their power to advance their client's cause. In such situations, LAWPRO defends the choices and actions taken by the licensee.

For example, in a recent child protection matter,<sup>1</sup> two sisters were declared wards of the Crown after their parents were convicted of manslaughter in the death of the family's third child. The parents then appealed the child-protection order, partially on the basis of allegedly ineffective assistance of counsel. Because the licensee was accused of negligence, LAWPRO stepped in to defend the licensee's interests on the appeal.

The parents alleged on the appeal that their lawyer prevented them from testifying, despite their wishes to the contrary; did not call key witnesses; did not put forward a chosen cousin as a proposed alternate placement option; did not permit the parents to dispute certain facts respecting the circumstances of the death of their third child; and was incompetent due to inexperience in child protection law.

LAWPRO counsel successfully assisted the licensee in arguing that there were no acts or omissions on the part of the lawyer that amounted to incompetence, and the parents could not demonstrate any ineffective representation that impugned the fairness of the trial. The appeal judge rejected all of the allegations put forward by the parents, including the allegations of ineffective legal representation.

## Tax law

While LAWPRO makes efforts to assist licensees in repairing potential losses from missed limitation periods when there is an accusation of error on the part of the lawyer, it's important to remember that limitation periods are intended to protect defendants from the unfairness inherent in delayed lawsuits. This protection extends to licensees facing stale malpractice suits.

One such example from 2018 involved a claim against tax lawyers by former clients alleging negligent advice regarding legal strategy in a tax appeal.<sup>2</sup> The plaintiffs retained the defendant lawyers to provide advice on the tax matter in question in 2008. The plaintiffs claimed that they pursued an expensive tax appeal on the initial advice of the defendants, who allegedly led the plaintiffs to believe the appeal was likely to succeed. The plaintiffs claimed that this advice changed in 2010, when the defendants allegedly altered their position to state that the appeal was, in fact, very weak. The plaintiffs retained new counsel at that point, but continued with the tax appeal.

The plaintiffs claimed they would not have commenced the appeal in 2008 if the defendants had told them at that time that the appeal was weak. However, the plaintiffs continued to pursue the appeal through 2014, to both the Tax Court of Canada and the Federal Court of Appeal, where it was eventually dismissed. The plaintiffs commenced their action against the defendants for negligent advice in November 2012.

LAWPRO assisted the defendants in successfully arguing that the claim was statute barred, as the defendants themselves informed the plaintiffs that they were unlikely to succeed on their appeal in 2010—more than two years before the plaintiffs commenced their action. The claim against the licensees was therefore dismissed.

## Real estate law

Lawyers need to be careful about providing legal advice to multiple parties involved in a single matter. Conflicts of interest can arise if a lawyer appears to provide advice to parties that are not explicitly clients, or when multiple clients have conflicting interest. Advising non-clients to seek out and obtain independent legal advice is always good practice management.

However, unreasonable accusations sometimes arise from non-clients claiming to be impacted by a lawyer's legal advice. One such situation arose in a recent case<sup>3</sup> involving alleged fraud in the context of a private mortgage, where a claim of negligence was advanced by the *lender* against the *borrower's* lawyers.

The transaction involved a second mortgage on real property in Ontario. The deal was brought to the lender by the lender's lawyer—a separate individual from the borrower's lawyers—who also represented the lender in the transaction.

After the mortgage agreement was completed, the lender discovered that the information provided to it by its own lawyer regarding the transaction was inaccurate, and documents provided to the lender affecting the property and mortgage transaction had been forged.

The lender commenced litigation in response to the misrepresentation. But, in addition to suing their own lawyer and the borrower, the lender sued the borrower's lawyers in negligence, alleging that the borrower's lawyers owed a duty of care to the lender. LAWPRO stepped in and successfully argued that the claim against the borrower's lawyers disclosed no reasonable cause of action, as the borrower's lawyers did not owe a duty of care to the lender. The judge agreed that a lawyer owes an undivided duty to their own client, not to an already represented opposing party.

<sup>1</sup> 2018 ONSC 1589

<sup>2</sup> 2018 ONSC 4804

<sup>3</sup> 2018 ONSC 3254

## Personal injury litigation

When a client regrets agreeing to a proposed settlement or resolution to a dispute, second thoughts can sometimes lead to second lawsuits—against their former lawyer. One recent example involved an allegation that a licensee had pressured his former client into agreeing to an improvident settlement in a personal injury claim flowing from a motor vehicle accident.<sup>4</sup>

There were notable elements of weakness within the plaintiff's original personal injury case. For one, multiple assessors, including a psychiatrist, two neurologists, two orthopedic specialists, and a kinesiologist, determined that the motor vehicle accident did not cause any of the plaintiff's alleged impairments. Additionally, the plaintiff had continued working after the accident, and only stopped working because of a conflict with her employer. This reduced the potential damages available.

The licensee represented the plaintiff at a pre-trial conference, where the defendant agreed to increase the size of their settlement from \$40,000 to \$125,000. The judge presiding over the pre-trial conference recommended to the plaintiff that she accept the settlement offer. The licensee even offered to reduce his fees to increase the share of the settlement that would be received by the plaintiff.

Although the plaintiff agreed to accept the settlement offer, she subsequently contacted the licensee to inform him that she felt pressured into taking the settlement and wanted to rescind the agreement. The licensee responded that he would not be able to represent her if she broke the settlement agreement. The plaintiff was referred to independent legal advice at that time. The plaintiff subsequently sued her lawyer for negligence and for pressuring her to accept an improvident settlement.

At trial, LAWPRO assisted the licensee in providing an expert report that confirmed the licensee had provided competent legal advice and the settlement, in fact, exceeded the expectations of all parties involved. The claim was dismissed, and the licensee was vindicated.

## Criminal law

Accusations of undue pressure on the part of the licensee can also arise in the criminal law context. In one such recent example, the plaintiff alleged that his lawyer coerced him to plead guilty to criminal charges brought in the U.S.<sup>5</sup> The plaintiff also alleged that his Canadian lawyer (the licensee) provided negligent advice on U.S. law, failed to obtain complete discovery from the

U.S. Government, and failed to consider concerns raised by one of the plaintiff's American attorneys with respect to the proposed guilty plea.

After pleading guilty, the plaintiff entered into a co-operation agreement with the U.S. prosecutors, and in exchange for that co-operation, the plaintiff's guilty plea was sealed and sentencing was delayed until after the co-operation period.

The co-operation period lasted for multiple years until 2012, when the plaintiff was scheduled to return to the U.S. for sentencing. The plaintiff sent a letter to his probation officer at that time, alleging ineffective counsel on the part of the licensee. The plaintiff then retained additional American attorneys who reached an agreement with the U.S. Government to withdraw the plaintiff's guilty plea. The charges against the plaintiff were subsequently dropped by the U.S. Government.

Following the dismissal of the charges, the plaintiff sued the licensee, alleging that his Canadian lawyer coerced him into pleading guilty and provided negligent legal assistance.

LAWPRO successfully represented the licensee in defending the allegations of negligence brought by the plaintiff. The judge found that the licensee was not responsible for providing advice on U.S. law, as the plaintiff had retained American lawyers that were already doing so. The judge also found that the licensee gave the concerns raised by one of the plaintiff's American attorneys regarding the guilty plea complete consideration, and discussed those concerns with the plaintiff's other American attorney. Finally, the judge rejected the plaintiff's allegations of negligence on the grounds that the plaintiff failed to provide any expert evidence proving the licensee had failed to meet the standard of care in the situation.

## Lawyers for lawyers

LAWPRO's commitment to a strong defence has meant that 86 per cent of reported claims are closed without any indemnity paid. In our annual survey, 97 per cent of our insured were satisfied with the work done by our claims professionals, and almost nine in 10 felt that LAWPRO received good value for the dollars spent on their defence.

A malpractice claim doesn't necessarily mean a lawyer made a mistake, but a defence may still need to be raised. LAWPRO is there to provide effective assistance and defend our licensees. ■

<sup>4</sup> 2018 ONSC 4803

<sup>5</sup> 2018 ONSC 4483