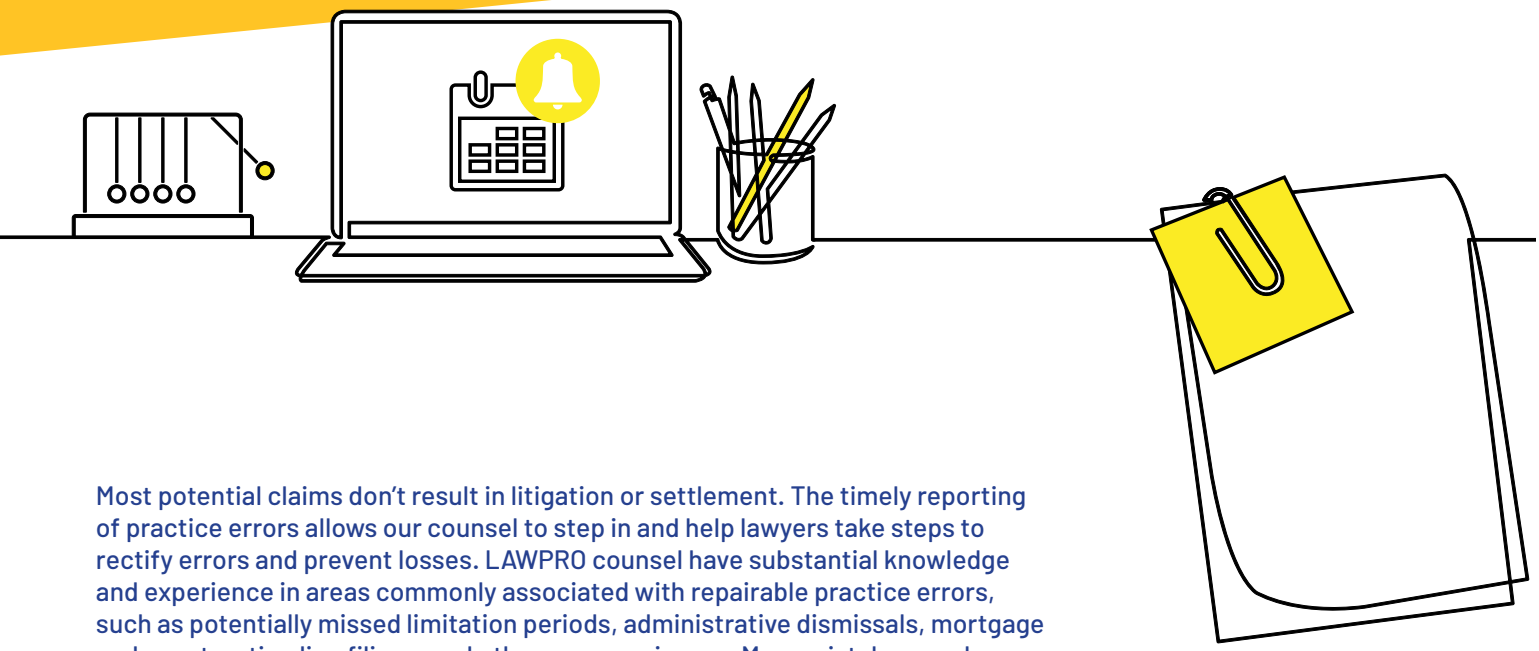
REPAIRS:

The best defence is ensuring a defence isn't needed



Most potential claims don't result in litigation or settlement. The timely reporting of practice errors allows our counsel to step in and help lawyers take steps to rectify errors and prevent losses. LAWPRO counsel have substantial knowledge and experience in areas commonly associated with repairable practice errors, such as potentially missed limitation periods, administrative dismissals, mortgage and construction lien filings, and other common issues. Many mistakes can be fixed, and repair efforts reduce the impact of a potential claim to lawyers as well as their clients. In 2018, 36 per cent of all reported claims were closed without any defence or indemnity costs being incurred.

Here are a few examples of cases where LAWPRO successfully repaired potential losses in 2018.

Limiting claims from limitation periods

Potentially missed limitation periods are a common source of malpractice claims, but are also often repairable. In one 2018 example of such a repair, LAWPRO successfully assisted a licensee in opposing an application for summary judgment brought by defendants on the basis that the licensee's client's claim was brought out of time and was statute barred.[1]

This case involved allegedly negligent financial advice provided by financial planners (the defendants) regarding the validity of an Individual Pension Plan (IPP) scheme. The plaintiff was advised by the defendants that transferring her pension to a particular IPP would allow an earlier retirement while still being acceptable to the CRA. In reliance on this advice, the plaintiff transferred her pension from her employer's plan to the recommended IPP in November 2008.

[1] 2018 ONSC 4489

In early 2009, the plaintiff was advised by multiple persons unaffiliated with the defendants that the IPP may not comply with requirements for registration by the CRA, and may have its registration revoked. At that time, the plaintiff retained counsel, who wrote to the defendants seeking confirmation that the IPP complied with relevant legal requirements. The defendants confirmed at that time that the IPP was legally valid.

In September 2011, the CRA notified the plaintiff that her IPP did not, in fact comply with the regulations and would be deregistered. The plaintiff issued a Statement of Claim against the defendants in June, 2012.

The defendants sought summary judgment on the basis that the plaintiff should have known she had a claim against the defendant in 2009, when she was advised by multiple parties that the IPP was invalid. The plaintiff argued in response that the her claim was uncertain and didn't accrue until the CRA informed her that the IPP was invalid. Before that, despite the plaintiff's concerns, damages had not crystalized. This uncertainty was exacerbated by the defendants continued assurances through 2011 that the plan was valid.

The judge agreed with the plaintiff that her limitation period did not begin until the CRA informed the plaintiff in 2011 that her IPP would be deregistered. Therefore, the limitation period had not expired before the Statement of Claim was issued and the plaintiff's claim was not statute barred. Since the plaintiff's lawsuit was permitted to continue, any potential claim against the plaintiff's lawyer for failing to comply with the applicable limitation period was eliminated.

Adding parties... fashionably late

Even when there are no questions as to whether a statement of claim has been issued within the relevant limitation period, problems can still arise if new parties need to be added down the road.

In another 2018 case, LAWPRO assisted a plaintiff and his counsel in successfully adding additional defendants to an action when the defendants claimed the relevant limitation period had already expired.[2]

This case involved a medical malpractice claim against a chiropractor for treatment that allegedly caused serious injury to the plaintiff in 2011. The action was commenced against the chiropractor in 2013, within the limitation period. In 2014, the defendant added third parties to the suit: the plaintiff's family doctor, a massage therapist, and a nurse who provided medical care subsequent to the allegedly tortious 2011 chiropractic treatment.

In 2016, the plaintiff sought leave to add the third parties as additional defendants. The third parties opposed the application for leave on the basis that the limitation period against them had already expired.

The plaintiff successfully argued that the claim was not discovered and could not have been reasonably discovered prior to the filing of the defendant's third party claim in 2014. The plaintiffs' motion to add defendants was therefore filed within the limitation period and was not statute barred.

Now and then, we can validate service *now for then*

Limitation periods are often unforgiving. Properly diarizing deadlines for the filing of claims and other key steps in the litigation process is an integral element of a well-managed litigation practice. Missing a deadline, as we often emphasize, can have serious repercussions for a client and can lead to malpractice claims.

But mistakes happen, and sometimes, with the assistance of LAWPRO counsel, damage from an inadvertently missed deadline can be fixed.

One such example arose this year in the context of a missed deadline for serving a Notice of Claim.[3] The case involved a property insurance claim for water damage to the plaintiff's place of business. The plaintiff held an insurance policy offered by the defendant, which contained a one-year limitation period for claims made under the policy.

The property damage in question occurred in the summer of 2015. In accordance with the policy, the plaintiff immediately notified the defendant of the loss and provided relevant documents over the following five months. The defendant provided a proof of loss for certain elements of the plaintiff's insurance claim, but other portions of the plaintiff's claim remained outstanding at the one-year point.

Shortly before the expiration of the limitation period, the plaintiff issued a Notice of Action against the defendant on the unsettled portions of the insurance claim. However, at that time, the plaintiff and defendant were still engaged in settlement negotiations, which the plaintiff was optimistic could be resolved without litigation. In an effort to not upset the status of those negotiations, the plaintiff refrained from immediately serving the Notice of Action.

[2] 2018 ONCA 979

[3] 2018 ONSC 3402

The procedural rules required service on the defendant within six months after filing a Notice of Action, and, unfortunately, the plaintiff's lawyer forgot to diarize that deadline. By the time it came to the lawyer's attention that he had neglected to serve the defendants with the Notice of Claim, it was two months late.

LAWPRO stepped in to assist the plaintiff's lawyer in repairing the error, and a motion to extend the time period for service *nunc pro tunc* was filed. Fortunately, although the defendant had not been properly served within the relevant period, the Notice of Action had been brought to the defendant's attention shortly after it was filed. As well, all the relevant evidence had already been provided to the defendant insurer shortly after the initial property damage in accordance with the plaintiff's insurance policy. This meant the missed deadline had caused no actual prejudice to the defendant.

The judge determined that the plaintiff did not intentionally fail to serve the Notice within the time period stipulated by the rules, and plaintiff counsel's failure to do so was mere inadvertence. Since no actual prejudice was created, the order validating service on the defendant was granted, the plaintiff's insurance claim was not struck, and the plaintiff's lawyer was spared from an unfortunate potential malpractice claim.

Fixing defaults so no one's held at fault

Judges are generally loathe to provide a party with relief or remedy absent submissions from the opposing party. As such, it is sometimes possible to set aside default judgments if expedient steps to do so are taken and there is a reasonable explanation for the failure to file a defence.

The test for setting aside a default judgment under the rules of practice is well-established. But the availability of equivalent relief under the *Family Law Rules* used to be less clear. LAWPRO's assistance brought clarity to that issue in another 2018 decision.[4]

The case involved divorce proceedings between a man and a woman where the distribution of family assets was at issue. The man's father owned property in Florida through a holding company managed by his lawyer. The woman sought a declaration in the Ontario divorce proceedings that the Florida property was held in trust for her and her husband and was therefore family property.

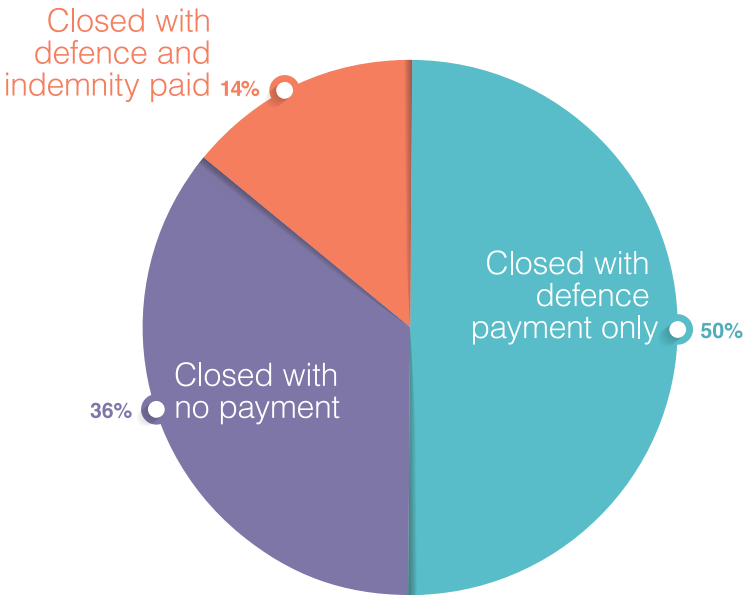
The man's father's lawyer was served in Florida with notice of the motion brought by the woman. He retained counsel in Ontario (the licensee), who notified the woman's lawyer that they would not be filing an immediate response in order to avoid attorning to the Ontario jurisdiction. Unfortunately, the woman still proceeded to obtain the declaration sought by way of default judgment.

LAWPRO was notified of the situation and assisted the licensee in setting aside the default judgment. In doing so, the court confirmed that the *Family Law Rules* allow for a "principled, flexible approach" to setting aside default judgments, similar to the approach used under the standard rules of procedure.

A stitch in time

Immediately notifying LAWPRO of potential errors or omissions means steps can be taken to resolve the situation before it develops into a malpractice claim. If you are aware of a real or potential claim, don't try to resolve the problem on your own. A call to LAWPRO means we can provide expedient and experienced advice and assistance. ■

Claims by disposition (outcome)



[4] 2018 ONSC 5964