

Defending lawyers in court

LAWPRO tries to resolve unfounded accusations without litigation, but sometimes claims can only be resolved in court. When a reasonable defence is available, LAWPRO will step in to help licensees assert their rights.

A few examples of defences successfully advanced by LAWPRO in 2019 on behalf of insureds are described on the next few pages.

Real estate – Claims by non-clients

The solicitor-client relationship is the foundation for most negligence suits against lawyers. Claims brought by non-clients are the exception, but they still must be defended when they arise.

In a recent real estate dispute, LAWPRO successfully represented a Licensee in a case brought by a non-client, which affirmed the high bar such plaintiffs must reach and the narrow circumstances in which such negligence claims will be allowed.

The Plaintiff was the alleged victim of mortgage fraud. The plaintiff claimed this fraud was perpetrated by the Licensee's client. The underlying transaction involved a primary mortgage through an institutional lender, which required that the remainder of the purchase price be paid by the Licensee's client personally. However, the client made clandestine arrangements for the Plaintiff to provide these funds as a secondary private mortgage lender, in contravention of the primary mortgage agreement.

The Plaintiff never received the promised equitable mortgage interest in the property, and was unable to seek restitution against the alleged fraudster client. The Plaintiff sued the Licensee for negligence on the grounds that he either owed a duty of care to the Plaintiff as a third party, or, in the alternative, that they had established a solicitor-client relationship through two short pieces of correspondence.

LAWPRO successfully assisted the defendant in having the claim dismissed. The judge agreed the Licensee's communications with the Plaintiff included language that presumed the Plaintiff would obtain independent legal representation and advice. There was therefore no solicitor-client relationship. As well, the Licensee could not be responsible for professional negligence to the Plaintiff as a third party, as the lawyer had no actual knowledge that the plaintiff would rely on any legal advice they provided.

Real estate – A bad deal doesn't mean bad legal advice

Clients who enter into improvident deals will sometimes cast about for someone to blame. Often, their lawyer is an easy target. But lawyers must do the best with the hand they're dealt, and sometimes bad outcomes are beyond the lawyer's control.

In a recent real estate matter, a Plaintiff negotiated and signed a deal to sell property to a purchaser. The Plaintiff was in dire financial straits, as their mortgage on the property was in arrears and foreclosure was imminent. The purchaser was aware of the Plaintiff's financial situation, and used this lack of bargaining power to negotiate a very "one sided" deal, as described by the judge. In the end, the Plaintiff never received any money from the transaction.

The Plaintiff sued the purchaser for fraud, conspiracy, negligent misrepresentation, and breach of contract. The plaintiff also sued their own lawyer in professional negligence for allowing the deal to complete. The Plaintiff alleged that the Licensee should have advised them to terminate the agreement.

The Licensee maintained that by the time they were retained, the agreement had already been signed, and they had no ability to improve the deal at that point. The Plaintiff's lack of bargaining power prevented any renegotiation.

One potentially damaging issue that arose in the trial was the Licensee's minimal contemporaneous notes of conversations and meetings. Judges will often favour the client's testimony over their lawyer's when supporting documentation is not available. However, in this case, the judge found that the Licensee's testimony was more reliable than that of the Plaintiff. The judge noted that, in multiple instances, the Plaintiff's testimony-in-chief was contradicted by other evidence provided in cross-examination and examinations for discovery. As such, the Plaintiff's general lack of credibility led the judge to depart from that expectation.

LAWPRO successfully assisted the Licensee in proving that they met the standard of care, even with a paucity of supporting notes and documentation. The judge found that the Licensee advised the Plaintiff to obtain additional valuations for the property before closing, and this advice was ignored. The judge also found that the Licensee had made efforts to improve the deal for the Plaintiff, but the buyer had made clear there was no room to negotiate because of the Plaintiff's dire financial situation.

As well, the judge found that even if the Licensee had breached the standard of care, there would have been no damages in this case, because the Plaintiff would not have been in a better position if they had terminated the deal before closing. There was no evidence that another buyer was available, and the Plaintiff faced imminent foreclosure and personal liability on any shortfalls from the mortgage.

Personal injury – Second guessing a settlement

Unfortunately, settlements don't always put an end to disputes. In a recent personal injury case, a Plaintiff brought a second cause of action after settling the original claim on the basis that the settlement agreed to by the parties was a product of fraud, and the defendant's lawyer (the "Licensee"), doctor, and insurer conspired to deny them information that would have led to a more generous settlement.

The Plaintiff had been involved in a vehicular accident and sued for personal injury. The defendant's insurer arranged for the Plaintiff to be assessed for the purposes of a neuropsychological medical report. No report was delivered before a settlement offer made by the Plaintiff was accepted.

Approximately 16 months after the settlement was finalized, the Plaintiff brought a new claim against the Licensee and other parties. The plaintiff alleged that the medical report was required to be disclosed under the *Rules* and, had they been provided with the report, they would have been able to obtain a more generous settlement.

The claim was founded on, *inter alia*, the tort of conspiracy, and alleged the Licensee conspired with the doctor and insurer to injure the Plaintiff through suppression of the report, either using lawful or unlawful means.

LAWPRO successfully assisted the Licensee in having the claim in conspiracy dismissed as disclosing no reasonable cause of action. To succeed under the tort of conspiracy, the Plaintiff was required to show that the defendants' predominant purpose was to injure the Plaintiff. The judge found that this could not be made out on the pleadings.

While the Plaintiff also pleaded "unlawful act" conspiracy, the judge found that this also could not be made out, as a failure to comply with the *Rules* was not an "illegal act" in this context, because there were additional remedies under the *Rules* to compel compliance or address failure to deliver a medical report.

Wills and estates – Collateral attacks

Legal fees are often the basis for client disputes—sometimes with the other side's client.

In a recent will dispute, the testator's widow and accountant were originally named trustees of the estate. One of the testator's children (the "Challenger") challenged the validity of the will, and retained litigation counsel (the "Licensees") accordingly. The will challenge was settled through mediation, and the terms of the settlement provided for the payment of both parties' legal fees from the estate's assets.

Two months after the settlement was approved, the estate trustees sought invoices from the Licensees supporting their legal fees. The Licensees refused to provide these invoices on the basis that the estate had not been their client, and was therefore not entitled to such documents.

Eighteen months after that, the estate brought a claim for an accounting of the Challenger's lawyers' fees under the *Solicitors Act*, on the basis that the estate was entitled to an accounting pursuant to section 9 of the *Act* as a "party not being the principal" that paid a bill of costs.

The Licensees sought summary judgment to dismiss the claim because it had been brought more than 12 months after the bill was issued and paid, there were no special circumstances to justify

the accounting, and the claim constituted a collateral attack on the court-approved settlement.

LAWPRO counsel successfully assisted the Licensees in having the claim dismissed. The judge found there were no special circumstances that justified an accounting more than 12 months after the bill was issued for various reasons, including: the estate was represented by sophisticated counsel; there was no patent evidence of overcharging; there was no explanation for why the estate waited so long to bring their claim; and, the terms of the settlement were generally quite favourable to the beneficiaries of the estate. The judge also agreed that the claim was an impermissible collateral attack on the court approved settlement, which foreclosed the parties from "renegotiating" its terms, including legal fees.

LAWPRO subsequently successfully assisted the lawyers in having an appeal of this decision dismissed, for the same reasons found by the lower court judge.

Lawyers for lawyers

A malpractice claim doesn't necessarily mean a lawyer made a mistake, but a defence still needs to be raised. Of the 12 matters taken to trial in 2019, LAWPRO won nine, with two more under reserve. LAWPRO was also successful on 16 of 19 summary judgment motions and won all three summary judgment appeals brought by claimants. LAWPRO provides effective assistance and prides itself on defending licensees. ■

In 2019



SUCCESSFUL ON
SUMMARY JUDGMENT MOTIONS

16 out of 19

SUCCESSFUL ON
SUMMARY JUDGMENT APPEALS

all 3

SUCCESSFUL ON
MATTERS TAKEN TO TRIAL

won 9 out of 12