

Managing more

responsibility

Repairs

When potential claims are expeditiously reported to LAWPRO, we are often able to rectify the problem and prevent actual claims from arising. Our counsel know how to best address issues such as missed limitation periods, rectifications of powers of attorney, and misnomer amendments.

Here are a few examples of cases where LAWPRO successfully repaired potential losses in 2019.

Will interpretation: One win; countless winners

A single decision that dramatically alters the common law can have ramifications for countless non-parties that rely on the status quo. Such was the case with 2018's *Milne Estate (Re)* decision in the Ontario Superior Court.

In that case, two testators had structured their affairs using primary and secondary wills that gave their executors discretion to divide the distribution of the estate between the two wills in whatever manner they best saw fit (and would avoid unnecessary probate fees or other costs). This was a common estate-planning technique that had been adopted by numerous other estate lawyers in Ontario.

In the original decision, the probate judge questioned the validity of this approach. Specifically, the judge found that the discretion granted to the executors to determine which assets fell in which will was invalid, and meant one of the two wills was a nullity for lacking certainty of subject matter.

This decision threatened not only the estate seeking probate, but countless other estates in Ontario where a lawyer had used similar language to divide assets between a primary and secondary will. This could potentially lead to an untold number of professional negligence claims in the future if those estate planning documents all became nullities.

Thankfully, the estate, with the assistance of LAWPRO, appealed the probate judge's decision to a panel of the ONSC Divisional Court, and LAWPRO was successful in having the probate judge's original decision overturned. The panel agreed that it was an error of law for the probate judge to apply the trust principles of "certainty of subject matter" to estate planning documents that were not, in fact, trust documents themselves. The common practice of using both a primary and secondary will and granting discretion to executors to divide certain assets between the two wills was affirmed as appropriate, to the benefit of numerous other Ontario wills & estate lawyers.

Limitation periods: Filing a day late, but not an appeal short

There is sometimes an itch at the back of a litigator's mind: Does that limitation period expire tomorrow or today? The potential for small mistakes to lead to big consequences means missed limitation periods are some of the most common causes of claims LAWPRO sees.

In this case, a licensee inadvertently filed a notice of appeal one day after the expiration of the 30-day limitation period. The Respondent was not willing to consent to an extension of the limitation period,

and took the position that the error barred pursuing the appeal any further. The error was reported to LAWPRO, and steps were immediately taken to rectify it.

A motion was filed to extend time to deliver a notice of appeal. The Respondent took the position that they would be prejudiced by granting an extension to the limitation period. The Respondent pointed to the time and costs associated with continued litigation, and the risk that they would not be able to recover any judgment or costs awarded against the Appellant, who was not a resident of Canada. The Respondent also pointed to the Appellant's pattern of breaching court orders throughout the litigation.

LAWPRO and the Appellant argued that it was only the prejudice that would arise because of the one-day delay in filing the notice of appeal that was relevant, not any prejudice caused by the appeal itself. Since the Appellant had a bona fide intention to appeal, a reasonably meritorious claim, and there was no relevant prejudice to the Respondent, the extension should be allowed.

The court agreed with LAWPRO and the Appellant that there was "clearly no merit to [the Respondent's] prejudice argument." The failure to file the notice of appeal within the time limit was not the fault of the Appellant, and was due to inadvertence on the part of counsel. The court also found that the Appellant's pattern of default and breached orders was irrelevant in this case, as the Respondent had previously been able to secure payment for previous cost orders and rectify those past defaults. The court affirmed that denying a motion such as this due to a lack of merit was a very high bar.

With LAWPRO's assistance, the extension was allowed, the error was rectified, and the appeal was allowed to continue.

Misnomers: A defendant by any other name

When a plaintiff is unsure of the identity of the person or persons that caused them harm, it is common practice to file suit against unnamed defendants using placeholder names in order to avoid looming limitation periods.

In this case, the Plaintiff suffered harm from allegedly negligent medical care during a series of procedures. The complications from these procedures included a temporary coma and negative reactions to certain drugs that were administered. Because of sedation and the Plaintiff's comatose state during a portion of their medical stay, they were unsure of the identity of all persons that contributed to the alleged medical malpractice.

The original Notice of Claim, therefore, included allegations against an unnamed "Dr. Doe" and "Nurse Doe." During the discovery period, the Plaintiff identified six additional medical professionals

that were potential defendants in the suit. However, instead of amending the original Notice of Claim to add these defendants and substitute their names for the placeholder pseudonyms, the Plaintiff brought a second claim against the new defendants.

After some additional discovery, the Plaintiff then brought a motion to substitute the names of the new defendants for the pseudonyms included in the original Claim. The new defendants objected to this process, alleging that the motion to address the “misnomer” in the original claim (that being the placeholder pseudonyms) was an abuse of process, as they were not provided with notice of the original claim and were already defendants in the second claim brought by the Plaintiff.

Although the judge found that the process by which the new defendants were brought into the lawsuit was not optimal (such as the existence of the second, parallel claim), it was not an abuse of process as it was within the Plaintiff’s rights to take prophylactic steps to ensure their claims against the new defendants were not statute barred.

The judge allowed the misnomer application and agreed with LAWPRO that the original pleadings adequately pointed the “litigation finger” at all but one of the new defendants that the plaintiff sought to now explicitly name in the original Claim. It was not relevant whether the new defendants had been given actual notice of the pleadings, but rather whether, if presented with those pleadings, the proposed defendant could reasonably see that they were a potential subject of the allegations raised.

Easy fixes are easier (and safer) with LAWPRO’s assistance

A typographical error in an important legal document can, thankfully, often be resolved without serious harm or headache. Particularly if there is no party opposing its rectification. However, it’s still important for counsel to alert LAWPRO to the existence of these fixable errors, as LAWPRO counsel can ensure the most efficient and effective steps are taken to put things as they are intended.

In one recent case, it was discovered that a continuing power of attorney document inadvertently made reference in the appointment clause to the attorney being appointed “for personal care.” This, despite the fact that the document was intended to provide the attorney with the power to deal, not with personal care, but with property. The erroneous language made the document ineffective for its purpose.

By the time this error was discovered, the client had become incapacitated, and the document could not be rectified without court approval.

LAWPRO was alerted and quickly assisted the licensee in obtaining a court-approved rectification, removing the erroneous reference to “personal care,” and replacing it with the word “property.” The order was stated to be effective *nunc pro tunc*, and additional negative cost and consequences flowing from the mistake were avoided.

An ounce of prevention is worth a pound of cure

Every year, LAWPRO resolves potential claims before they become actual claims. In 2019, 86 per cent of claims were closed without any indemnity payment, and 35 per cent of claims were closed without any defence costs whatsoever.

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 make an error, or believe you could be accused of making an error down the road, 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)

