

# Defending lawyers in court



**Despite any attempts to resolve claims without litigation, sometimes court is inevitable. Every year, LAWPRO steps in to defend licensees from unwarranted lawsuits and accusations.**

**Here are a few examples of defences successfully advanced by LAWPRO in 2020 on behalf of insureds.**

## Contract law – Claims against alleged partners of debtors

Partners in a legal firm can be held liable for the business debts incurred by other partners as part of the partnership. In some circumstances, it may be unclear whether lawyers are practising in partnership, or as sole practitioners in “association” with one another.

That was the situation in this case, where a solicitor Debtor had practised in association with a Litigation Firm for many years, sharing things like office space and holiday parties, and whose name was included in the name of the litigation firm.

The Debtor, however, kept separate finances and files and was not included in the Litigation Firm’s partnership agreement.

The Debtor incurred a substantial amount of business debt from multiple parties and eventually defaulted on it. The Creditors

sought judgment against the Litigation Firm and its Partners as being liable for the amounts owing by the Debtor.

The Partners argued that the Debtor was not part of their firm, as the Debtor kept separate finances with a different banking institution, did not work with the Litigation Firm on business matters, and was not included in the Partnership Agreement, which expressly stated that the Debtor was *not* defined as a founding partner of the Litigation Firm.

The Creditors argued that the Debtor's name was included in the name of the Litigation Firm, that the Debtor was listed as a partner and member of the Litigation Firm in multiple online summaries of the Litigation Firm, and the Debtor was held out as a partner either explicitly or implicitly on multiple occasions. In the alternative, the Creditors argued that the Partners were responsible for the debts pursuant to the *Partnership Act*, since the Debtor was held out as a Partner and the Creditors relied on that representation when advancing loans to the Debtor.

The court found that the Debtor was not a partner in the Litigation Firm, as the parties practised independently and the Debtor was not included in the Partnership Agreement. Further, even if the Debtor was held out as a Partner, the Creditors could not prove that they relied on that alleged relationship when advancing funds to the Debtor, and therefore the Litigation Firm and its Partners could not be held liable for the unpaid debts. The claim against the Litigation Firm and its Partners was dismissed.

## Criminal law – Ineffective representation and collateral attacks

When alleging that counsel's negligence led to a criminal conviction, the appropriate forum for litigating such a claim is an appeal of the conviction itself. Pursuing a separate claim of negligence after losing an appeal case is a collateral attack on the conviction and is impermissible.

In this case, Lawyers represented the Plaintiffs in defending a proceeding before the Ontario Securities Commission. The defence was unsuccessful, and the OSC found the Plaintiffs guilty of securities fraud.

The Plaintiffs appealed the OSC's decision, alleging ineffective representation by counsel. The Lawyers were granted intervenor status and provided evidence in the appeal to dispute the Plaintiffs' arguments about ineffective representation. The appeal was dismissed.

Before the appeal was even argued, however, the Plaintiffs commenced this civil action against the Lawyers for professional negligence. After the appeal was dismissed, the Lawyers moved to also have the civil action dismissed as a collateral attack on the conviction.

The motion judge dismissed the Plaintiffs' claims against the Lawyers, as the negligence allegations were *res judicata*. The Plaintiffs appealed.

LAWPRO successfully assisted the Lawyers in having the appeal dismissed. The appeal court agreed that the civil claim was as a collateral attack on the conviction. The proper forum for arguing ineffective representation is an appeal of the conviction itself, which the Plaintiffs had already unsuccessfully pursued. A civil claim was therefore inappropriate.

## Corporate law – Conflicts of interest

Circumstances will sometimes arise where lawyers find themselves asked to represent multiple sides in a transaction; or, alternatively, representing one side before later representing another. These situations place the lawyer in a conflict of interest and should be avoided unless all parties agree to the situation and all ethical rules are complied with.

This case involved the sale of a medical equipment distribution business. The Plaintiff owned both the distribution business and a manufacturing counterpart for many years before selling the distribution arm to an American corporation. The Plaintiff maintained ownership of the manufacturing arm and entered into a supply agreement with the American Purchaser. The Plaintiff's In-House Lawyer represented the Plaintiff in this transaction.

After the transaction was completed, the Plaintiff's In-House Lawyer took a position with the American Purchaser.

The supply agreement was unsuccessful, as the Purchaser failed to satisfy many of the terms of the Agreement, including minimum purchase amounts. The Plaintiff sued the Purchaser in response. This claim was brought to arbitration, where the Plaintiff was represented by the Defendant Law Firm. In this arbitration, the In-House Lawyer was part of the Purchaser's legal team.

The arbitration was settled, and a new supply agreement was made between the Plaintiff and the Purchaser. Unfortunately, this new agreement led to further struggles for the Plaintiff's business, and the Plaintiff was eventually forced to wind down the business.

By this point, the former In-House Lawyer was no longer working with the American Purchaser, but was now practising with the Defendant Law Firm. This put both the Defendant Law Firm and the former In-House Lawyer in a conflict of interest with respect to the ongoing dispute between the Plaintiff and the Purchaser, as the former In-House Lawyer had formerly worked with both parties on matters central to their dispute. The Plaintiff had never provided informed consent to the Defendant Law Firm with respect to this conflict of interest.

The Plaintiff sued the Defendant Law Firm and the former In-House Lawyer for breach of fiduciary duty. The Plaintiff alleged that had they known about the former In-House Lawyer's conflict, they never would have agreed to the arbitration settlement and would have avoided subsequent business losses.

The court found that both the Defendant Law Firm and the former In-House Lawyer had breached their fiduciary duties to the Plaintiff, as the actions of the former In-House Lawyer constituted a conflict of interest to which the Plaintiff never provided consent.

However, the court also found that this breach of duty was not causative of the business failure, nor could the Plaintiff connect any actual business losses to this breach. Therefore, the court only awarded nominal damages to the Plaintiff in the amount of \$2,000.

## Tort law – Negligent representation

Unsuccessful clients can sometimes direct follow-up lawsuits to their former counsel, regardless of the merits of such claims.

In this case, the Plaintiffs had been sued by their former employer, who alleged the Plaintiffs had stolen confidential and proprietary information. In response, the Plaintiffs retained the Defendant Lawyers and pursued an aggressive litigation strategy in hopes of motivating their former employer to settle. The strategy was unsuccessful, and the Plaintiffs were found liable to their former employer.

The Plaintiffs then retained new counsel and sued the Defendant Lawyers, alleging professional negligence in the conduct of their unsuccessful litigation strategy.

The trial judge found in favour of the Defendant Lawyers and dismissed the claim. The Plaintiffs appealed.

LAWPRO successfully assisted the Defendant Lawyers in defending the appeal. The court agreed that the Defendant Lawyers took steps to communicate all relevant information and advice to the Plaintiffs, who considered the information and provided instructions to the Defendant Lawyers to pursue a specific course of action. The Plaintiffs were advised of the risks associated with the litigation, and the Defendant Lawyers were not professionally negligent.

## Real estate law – No duty of care to opposing parties

This case arose in the context of a failed real estate transaction. The Plaintiff agreed to purchase a particular property from the Vendors. After signing the Agreement of Purchase and Sale, the Plaintiff assigned their rights in the Agreement to the Defendant Purchaser. The Vendors then failed to close the transaction and subsequently sold the property to alternate buyers. The Defendant Purchaser responded with an action against the Vendors for specific performance.

The Plaintiff then sued the Defendant Purchaser as well as the Defendant Purchaser's Lawyer for failing to inform the Plaintiff of the failure to close the transaction. Specifically, the Plaintiff alleged that the Lawyer was negligent in allowing the Defendant Purchaser to breach the assignment agreement.

The Lawyer sought a dismissal of the Plaintiff's claims against them as disclosing no cause of action.

LAWPRO successfully assisted the Lawyer in having the claim against them dismissed. The court agreed that the Plaintiff was always adverse in interest to the Lawyer's client, both before and after signing the Assignment Agreement. As well, the Plaintiff did not allege that it placed any reliance on the Lawyer.

Further, the only evidence of negligence advanced by the Plaintiff was that the Lawyer had made a false statement in pleadings filed in other proceedings against the Vendors. The court found that this could not be used against the Lawyer as the statement was subject to the doctrine of absolute immunity.

Therefore, the Lawyer had no duty of care to the Plaintiff, there was no evidence of negligence or misconduct, and the claim was dismissed as disclosing no cause of action and an abuse of process.

## Lawyers for lawyers

A malpractice claim doesn't necessarily mean a lawyer made a mistake, but a defence still needs to be raised. LAWPRO provides effective assistance and prides itself on defending licensees.