

What
we
did
in
2022



DEFENDING LAWYERS IN COURT

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

DEFENDING LAWYERS

Here are a few examples of defences successfully advanced by LAWPRO in 2022 on behalf of insureds

Tax and contract litigation – Allegedly failing to follow explicit client instructions

Lawyers themselves can sometimes make for challenging clients. As backseat drivers, they may feel they know more or are better qualified to make strategic and procedural decisions than the lawyer they have retained.

In this case, a Lawyer-client (the “Plaintiff”) retained an Ontario law firm to handle a complex tax and contract dispute between the Plaintiff and the Plaintiff’s son. The dispute between the two parties was complex, with multiple mostly unrelated suits being pursued simultaneously in different jurisdictions.

The Ontario lawsuit involved a dispute over taxes owing to the CRA by the estate of the Plaintiff’s father. The Plaintiff had arranged for their son to be the beneficiary of the Plaintiff’s father’s estate, in name only, so as to avoid various creditors. The Plaintiff was also the executor and trustee of their father’s estate, and was responsible for paying taxes and other fees. The CRA, claiming the taxes were unpaid, demanded payment from both the Plaintiff and the Plaintiff’s son.

The Plaintiff’s son maintained that he did not, in fact, receive the proceeds of the estate, as he was beneficiary in name only, and sought indemnification from the Plaintiff. The Plaintiff maintained that the CRA was mistaken and all relevant taxes were paid.

Unfortunately, the dispute between the Plaintiff and the son came to litigation, and the Plaintiff retained the Defendant Lawyers to handle the case. After the conclusion of litigation between the Plaintiff and their son, the Plaintiff sued the Defendant lawyers for malpractice and breach of the terms of the retainer, seeking an order returning all legal fees paid as well as an order that the Defendant Lawyers pay all costs ordered and legal fees incurred pertaining to the legal dispute between the Plaintiff and their son.

The Plaintiff alleged that it was an implied term of their retainer with the Defendants that the more senior lawyer handling the file would attend all court appearances personally. As well, the Plaintiff alleged that they had explicitly instructed the Defendants to “immediately” proceed with a motion for security for costs, as it would pressure the Plaintiff’s son into dropping the case. Finally, the Plaintiff alleged that the Defendants were negligent by failing to advance a claim for subrogation, assignment, and/or carriage of the CRA tax proceeding.

LAWPRO successfully assisted the Defendant Lawyers in refuting the Plaintiff’s allegations. The court found that it was not an express or implied term of the retainer that the more senior lawyer would attend all court appearances personally--while the Plaintiff had expressed a desire for this, the more senior Defendant had never assured the Plaintiff it would occur. With regards to the alleged strategic failures, the court found that the Plaintiff had accepted the timing of the procedural matters brought forward by the Defendants during the course of the retainer, and had not expressly instructed the Defendants to pursue a motion for security for costs immediately. Finally, the Plaintiff conceded during testimony that they had not, in fact, instructed the Defendants to advance a claim for subrogation, assignment, and/or carriage of the tax proceeding “other than by implication.” Because the Defendant lawyers had reasonably followed the Plaintiff’s instructions, the court rejected the claim of negligence.

Real estate purchase and sale agreements – Allegedly bad legal advice

A client involved in litigation often has one question above all others: What are the chances they’ll win? Although lawyers will often use statistical language to describe potential outcomes (a “50/50 chance”, a “60% chance of success”, a “long shot 25% chance of winning”), giving a reasonable answer is more of an art than a science.

It's natural to want to express confidence against daunting odds, especially to a client that has put their faith in a lawyer's abilities, but expressing unreasonable confidence to a client can be dangerous if it encourages the client to proceed with a weak claim.

In this case, the Plaintiff had entered into two residential real estate purchase and sale agreements in the Greater Toronto Area. A subsequent drop in real estate prices, coupled with the identification of potential negatives regarding the properties after the agreements had already been signed, led the Plaintiff to seek advice from the Defendant Lawyer on extricating himself from one of the agreements.

According to the Plaintiff at trial, the Defendant Lawyer had initially informed the Plaintiff that there was a "100 to 120% chance" that they could extricate the Plaintiff from the unwanted deal. Unfortunately, although there were a few initial avenues of exploration for potential ways to vitiate the contract, it soon became clear that there was no viable way to walk away from the agreement.

For their part, the Defendant Lawyer denied expressing any such absolute confidence in success.

The Plaintiff failed to close the deal and was sued by the vendors for breach of contract. The Plaintiff eventually paid a settlement amount and sought damages from the Defendant lawyer for negligent legal advice.

LAWRO successfully assisted the Defendant Lawyer in rebutting the Defendant's accusations. Although a client's testimony and recollection of events is often given greater weight in determining what advice was or was not given, the trial judge found the Plaintiff's testimony to be unreliable due to the Plaintiff's admission that they had made various false statements, including as to whether or not they had the funds to close the disputed real estate transaction in the first place. Additionally, the Defendants Lawyer's own notes and written correspondence with the Plaintiff supported the Defendant's position that they had warned the Plaintiff that the chances of success were low. The court rejected the allegation that the Defendant Lawyer fell below the standard of care.

Criminal law – Ineffective counsel accusations

Ineffective assistance of counsel claims, as an independent basis for appeal, can sometimes arise against defence counsel after unsuccessful criminal trials, regardless of their possibly tenuous basis. Criminal trials are complex beasts, and Defendants can sometimes be overwhelmed by the stakes involved and

confused by the procedural and strategic nuances. Nevertheless, it is incumbent on the lawyer to ensure that their client makes informed decisions about key elements of their case, to a reasonable standard of care.

In this case, the Defendant had been convicted of impaired driving and driving with a blood alcohol content over the legal limit. The driver was initially not present at the scene of the accident, and the damaged vehicle was discovered abandoned on a grassy median. Shortly after the police arrived at the scene of the accident, the criminal Defendant arrived on the scene by foot. During this period the Defendant also made a 9-1-1 call to report the accident. Officers at the scene described the Defendant as "walking very, very slowly", "stumbling", and "out of balance", and amphetamines and oxycodone were found in the vehicle.

The Defendant initially denied driving the car, although over the course of conversations at the scene of the accident the Defendant allegedly changed their position to saying they were driving the car, before correcting themselves to again say that they were not the driver.

The Defendant was arrested for impaired driving and retained a Lawyer to defend the case. The Defendant continued to claim that they were not driving the vehicle in question, and pressed their Lawyer to present evidence to that effect. The Defendant provided the Lawyer with the name of a potential witness that could corroborate this story.

The Lawyer, on reviewing the case, determined that this proposed witness would be unreliable and unhelpful. Further, the Lawyer advised the Defendant that they should not testify at their own trial, as their story had changed multiple times during not only their conversations with attending police officers, but during the recorded 9-1-1 call itself. The Defendant agreed with the Lawyer's assessments and declined to testify.

The Defendant was found guilty and appealed the case on the grounds of, among others, ineffective assistance of counsel. The Defendant alleged that they were not permitted to testify in their own defence, that the Lawyer did not follow their instructions, and that the Lawyer had failed to pursue strong arguments, including an allegation of excess force against an arresting officer when the officer took the Defendant's phone out of their hand at the scene of the accident.

LAWPRO successfully assisted the Lawyer in showing there was no ineffective counsel or negligence in the conduct of the trial. The judge found that the Defendant had been properly informed of the reasons against testifying and had agreed with the Lawyer's recommendation. Further, the court found that the Lawyer "provided clear and reasonable advice to [the Defendant] from the commencement of [their] retainer" and provided "reasonable and appropriate" recommendations.

Family law – Claims against adverse lawyers

It is difficult for a client to pursue a claim against the opposing party's lawyer. In this case, the Plaintiff was unhappy with her matrimonial settlement. She alleged that the opposing party's lawyers conspired with her adult children to commence and advance divorce proceedings when her former husband lacked capacity and allegedly "did not want to be divorced."

The Defendant lawyers argued that the correct venue to argue as to whether or not the divorce proceedings were a "sham", so to speak, was the divorce proceeding itself. Once that proceeding concluded by way of settlement, it was an abuse of process to attack it. Additionally, the Defendants maintained that they owed no duty of care to the Plaintiff.

LAWPRO successfully assisted the Lawyer in defending the claim. The court agreed that the matter was an abuse of process and an attempt to relitigate the divorce proceedings. The Plaintiff was aware of the questions regarding her husband's capacity, and could have advanced the conspiracy and tort claims against her children during the divorce proceedings. The court also agreed that the Defendant Lawyers owed no duty of care to the Plaintiff as the opposing party in the divorce proceedings.

Corporate law – Limitation periods, settlements, and abuse of process

Limitation periods exist to give peace of mind to would-be-defendants and avoid the dangers of deterioration of evidence and memories over time. This can sometimes be frustrating for plaintiffs who discover new evidence or information down the road that could have strengthened an abandoned case.

Those were the alleged facts in this matter. The dispute involved the finances of a closely held family business. The business was built by two brothers over many years. After one of the brothers passed away, the deceased brother's family (the "Plaintiffs") took issue with the way the remaining brother (the "Defendant Brother") was running the business and suspected potential misappropriation of funds. In 2006, the Plaintiffs initiated a lawsuit against the Defendant Brother.

However, primarily due to the costs of pursuing the lawsuit, the Plaintiffs eventually settled with the Defendant Brother, who was bought out of the company as part of the settlement. Many years later, in 2019, the Plaintiffs pursued a new action against the Defendant Brother along with other parties, including the Defendant Brother's lawyers (the "Lawyer Defendants"). This new claim advanced many of the same claims as the original 2006 lawsuit, with the addition of claims of conflict of interest and bad faith against the Defendant Lawyers.

One of the foundations of the new, 2019 claim was the apparent discovery of evidence suggesting that the Lawyer Defendants were acting in a conflict of interest during the 2006 period by representing both the Defendant Brother in his personal capacity as well as the family business.

The Defendants all alleged that this matter was barred by the settlement agreement concluding the 2006 action, which expressly waived all claims against the Defendant Brother and his representatives. The matter was also statute barred by the expiration of the 2-year limitation period, since the events at issue had all occurred prior to 2006. Finally, the Defendant Lawyers claimed that they owed no duty of care to the Plaintiffs, as the Plaintiffs were not and never had been their clients.

LAWPRO successfully assisted the Defendant Lawyers in having the claim dismissed on summary judgment. The court found that the Plaintiffs had discovered these claims prior to the 2006 action, and they were now statute barred. The discovery of new evidence that could potentially bolster the case does not extend the running of the limitation period, as it did not lead to the discovery of a new claim. Further, the settlement of the 2006 action barred any future suits on the same facts as an abuse of process. The court found that the Plaintiffs were also barred from pursuing the claim against the Defendant Lawyers, as the Plaintiffs could not evade the abuse of process claims by simply adding a new defendant.

Additionally, the court agreed that the Defendant Lawyers owed no duty of care to the Plaintiffs, as the Plaintiffs were not their clients.

Standing firm

A malpractice claim doesn't necessarily mean a lawyer made a mistake, but a defence still needs to be raised. LAWPRO was successful on five of seven claims taken to trial in 2022, as well as 20 of 22 summary judgment motions and five of eight summary judgment appeals. LAWPRO provides effective assistance and prides itself on defending licensees.