

# WHY HAVE CLAIMS FROM Inadequate investigation

## risen almost 300% since 1998?

The devil is in the details, and it's the details that appear to be creating issues for lawyers when it comes to the underlying causes of many claims.

Back in 1998, “inadequate discovery of fact or inadequate investigation” was the fifth most common cause of a claim (178 claims or 9%) when we looked at the reasons a claim was made against a lawyer.

By 2011, this category of errors had more than doubled in frequency to 371. Moreover, claims resulting from inadequate investigation or discovery of facts also increased proportionately in terms of all LAWPRO claims, rising to 15% of errors reported from 8%.

By 2021 these claims had doubled again to 686 claims, or 24% of all LAWPRO claims.

These claims go to the very core of what lawyers are supposed to do for their clients – give legal advice – and basically involve the lawyer not taking extra time or thought to dig deeper and ask appropriate questions on the matter.

Claims arising out of the failure of a lawyer to properly investigate the facts also cost much more to defend and investigate. In fact, the cost of these claims has nearly tripled to just under \$14 million in 2021 from just over \$5 million in 1999.

And while it's true that all claims and claims costs have increased over that time as the number of practicing lawyers grew, errors resulting from inadequate investigation have increased disproportionately when all LAWPRO claims are considered.

### Areas of law where inadequate investigation claims happen most

LAWPRO has seen an increase in claims resulting from inadequate investigation in three particular areas of law: real estate, wills and estates, and plaintiff litigation.

## Real estate

The economic realities of real estate practice, including the pressure to reduce fees in the face of increased competition, may be one factor prompting real estate lawyers to take on more files and spend less time on each file. LAWPRO sees 140-180 claims a year in real estate related to inadequate investigation even with the widespread use of title insurance. Examples of inadequate investigation in a real estate deal include:

- not delving into the client's long-term plans for the property, and then failing to follow up on appropriate zoning or bylaw searches to ensure the client can use the property as intended
- not ensuring the client has capacity or is not under undue influence when transferring property
- failing to review a condo status certificate and bring deficiencies to the client's attention
- on a condo purchase, failing to ensure that the parking space and locker specified in the agreement of purchase and sale are actually for sale and that the legal description of both units is correct
- not doing a title search on a commercial lease
- giving an undertaking to discharge a mortgage as vendor's solicitor, but failing to carefully review and ensure the accurate scope of the discharge statement – in particular, failing to ensure that the statement reflects all sources or types of indebtedness owing by the vendor to the lender that are secured by the mortgage.

While title insurance may address some of the scenarios above and lawyers may not be required to do certain searches when a policy is purchased, a claim can still be an inconvenience for clients and financial compensation may still leave them disappointed if they cannot use the property the way they had expected.

## Wills and estates

LAWPRO is seeing a significant increase in inadequate investigation claims in the wills and estates area. From 1998 to 2007, there were about 18 claims a year. Since then, the average grew to 95 a year, with a high of 131 claims in 2021. This reflects the growth of wills and estates in general and the increase in the value of estates due to skyrocketing property values.

On a will or estates planning matter, an inadequate investigation claim might involve:

- not asking the testator what their assets and liabilities are
- not asking about the existence of a prior will

- not asking about dependents, including disabled children
- not digging into more detail about the status of past marital relationships, other children or stepchildren, or whether a spouse is a married spouse or common law spouse
- not enquiring about beneficiaries named in RRSPs, life insurance policies and pension plans
- when an elderly client wants to make major changes to their will, not taking steps to ensure testamentary capacity and that the client is not under undue influence
- not doing due diligence to verify that the information a client provides about their assets or liabilities is accurate. It may not be the lawyer's job to confirm all the details but if disputes break out among unhappy beneficiaries they could attempt to blame the lawyer
- not taking the time to search out the existence of all blood relatives in the event that a person dies intestate.

## Plaintiff litigation

From 1998 to 2008 there were, on average, 62 inadequate investigation claims a year in this area. Since then, the average has doubled to 112 claims a year, with a high of 130 claims in 2018. In plaintiff litigation claims, we see the following kinds of inadequate investigation claims:

- failing to show due diligence and reasonable efforts to discover all the parties to a lawsuit within the limitation period – for instance, not ordering a police report in a motor vehicle collision case
- failing to identify and sue the correct defendant in an occupier's liability case
- when acting for the plaintiffs, failing to name all potential plaintiffs, using their correct corporate names, (e.g., both a principal shareholder and their corporation, where both have a cause of action)
- failing to note and comply with an order requiring that a truly independent other lawyer is present when an Anton Piller order is executed.

To avoid these claims, take the time to read between the lines so you can identify all appropriate issues and concerns. Ask yourself: What does the client really want? Does everything add up? Are there any issues or concerns that should be highlighted for the client? If something doesn't add up – dig deeper. ■

practicePRO's checklists (<https://www.practicepro.ca/practice-aids/checklists/>) can also help ensure the right questions have been asked in areas such as real estate, construction liens, providing independent legal advice, and commercial transactions).