

Defending lawyers in court

Despite 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 2024 on behalf of insureds.

Real estate – Allegations against lawyers for mortgagees by the mortgagors

Lawyers hold a duty of care with respect to their clients. They rarely hold a duty of care with respect to someone else's clients—whether they be someone on the other side of a dispute or parties on the other side of a contract.

Despite this, LAWPRO often sees cases where lawyers are sued by individuals who are not their clients. In these cases, LAWPRO is quick to mount a full defence of lawyers in circumstances where no duty of care was owed.

One such recent case involved a Couple that obtained two private mortgages as part of an agreement to purchase property. The Couple alleged that they were misled as to various elements of the mortgage agreements. The Couple alleged a conspiracy by the private mortgagees, the mortgage broker, the lawyers representing the mortgagees, and others to defraud the Couple and misrepresent the terms of the mortgages.



The Couple proceeded to stop payment on all interest and principals owed under the mortgages, which then went into default. The mortgagees sued the Couple for defaulting on the agreements, and the Couple counterclaimed with respect to the alleged fraud.

The lawyers for the mortgagees moved to have the claims against them dismissed for disclosing no cause of action.

LAWPRO successfully assisted the lawyers for the mortgagees in establishing that there was no genuine issue for trial against them. The judge found that there was no evidence that the lawyers owed a duty of care to the Couple or that the Couple relied on the lawyers for the mortgagees to perform any services for them. In fact, the lawyers for the mortgagees had no dealings or communications with the Couple, and their role was simply to prepare the paperwork required for the mortgages.

For these reasons, the case was dismissed as against the lawyers for the mortgagees.

Civil litigation – Alleged improvident settlement

In civil litigation, a reasonable settlement will often reflect the estimated value of the Plaintiff's damages adjusted to reflect the probability of success. Thus, the weaker the Plaintiff's case, the more likely a lawyer is to advise their client to accept a settlement valued at notably less than the alleged damages. And when determining the strength or weakness of a personal injury case, a key factor to consider is whether the Defendant actually was negligent or whether the Plaintiff actually may have been the cause of their own misfortune.

In a recent matter defended by LAWPRO, the Plaintiff pursued a claim against various parties in negligence after a motor vehicle accident wherein the Plaintiff crashed their vehicle into the rear of a tractor-trailer stopped on the shoulder of a highway. The Plaintiff suffered serious injuries from the accident, including a traumatic brain injury.

In investigating the facts of the case, Plaintiff's Counsel reviewed the police report of the incident, spoke with independent witnesses to ascertain their observations, reviewed the medical records, obtained an expert medical report and income loss report, spoke with an accident reconstruction expert on two occasions, and personally visited the accident scene. After doing so, Plaintiff's Counsel advised the Plaintiff to accept the settlement offered by the Defendants—a settlement the Plaintiff would later claim to be unreasonably deficient.

Years later, the Plaintiff sued their lawyer for recommending the improvident settlement, claiming it was negligent to do so and a breach of the solicitor-client contract.

LAWPRO successfully assisted Plaintiff's Counsel in defending the claim of alleged solicitor negligence. The court affirmed that an allegation of improvident settlement required the Plaintiff to conduct a "trial within a trial" to determine the likelihood of success in the original claim. The Plaintiff did not adduce evidence to do so, claiming that too much time had passed since the original incident. The court therefore could not determine the settlement was improvident.

Regarding the allegations of negligence on the part of the lawyer generally, the court found that the Plaintiff did not produce any evidence to show that the Defendants in the original case, including the driver of the tractor-trailer, were negligent in temporarily stopping the trailer on the shoulder of the highway, nor did the Plaintiff adduce any evidence to rebut the presumption that it was the Plaintiff who was solely negligent in driving their vehicle into a stopped trailer that was not on the driving portion of the highway.

The court therefore dismissed the claim.

Real estate law – Alleged failure to adduce key testimonial evidence at trial

Lawyers can make for difficult clients. It is not uncommon to see claims where a lawyer-cum-client has taken issue with their own lawyer's alleged failure to follow specific strategies or instructions when pursuing an ultimately unsuccessful claim. These lawyer-clients know how they would have pursued the case and often believe, rightly or wrongly, that they would have done a "better" job.

In a recent claim defended by LAWPRO, the Client, a retired lawyer, was selling a double lot in Toronto. The Client sought zoning changes necessary to permit the construction of 18 townhouses on the property. Before the necessary zoning consultations concluded, the Client sold the property to a development company (the "Purchaser"). The contract of sale included a vender take back mortgage with an adjustment clause that reduced the purchase price if the potential and pending zoning changes approved the property for fewer than 18 residential units.

Ultimately, zoning approval was not obtained for any townhouses. The Client pursued litigation (the "Underlying Litigation") against the Purchaser for the full amount owing under the contract, claiming that the failure to secure zoning approval was solely due to the Purchaser's alteration of the proposed development plans. The Client retained the Defendant Lawyer to represent them in the Underlying Litigation.

The Client was unsuccessful in the Underlying Litigation. Subsequently, the Client pursued a claim against the Defendant Lawyer for breach of contract and negligence stemming from the Defendant Lawyer's failure to call a particular city counsellor as an Alleged Key Witness—an individual that the Client believed would provide key evidence by supporting the Client's position that the development project was on track for approval prior to the Purchaser altering the development plans.

LAWPRO successfully assisted the Defendant Lawyer in defending the claim. The Defendant Lawyer testified that they spoke with the Alleged Key Witness and determined that their potential evidence would not advance the Client's case. The Defendant Lawyer testified that they had discussed this with the Client and the Client had agreed with the decision not to pursue that witness's testimony.

At trial, the court heard the Alleged Key Witness's potential testimony and agreed it would not have advanced the Client's case. The Alleged Key Witness would have testified that they, as city counsellor, had initially supported the Client's proposed development, but this support was contingent upon an eventual endorsement by City Staff. The court found that such an endorsement would never have been provided due to underlying density concerns with an 18-unit development. Therefore, the Alleged Key Witness would not have ultimately supported the proposal even absent the Purchaser's alterations to the development plan.

The court found there could be no causation between the failure to call the Alleged Key Witness and the outcome of the case. Therefore, negligence or breach of contract against the Defendant Lawyer could not be established.

Criminal law – Allegations of ineffective assistance of counsel

In this case, the Defendant was convicted of sexual assault with a minor. At the time of the assault, the Defendant was 22 and the victim was 14.

According to the Defendant's testimony at trial, the victim arrived at the Defendant's home on the night in question seeking a place to stay after running away from a youth justice facility. The Defendant claimed to have never met the victim prior to that night.

According to the Defendant, the victim suggested they engage in sexual activity. The Defendant testified at trial that they then asked the victim for their age and the victim replied that they were 18. The Defendant testified that they asked the victim for their age three times and asked for documentary evidence of their age, but the victim did not provide such evidence.

At trial, the Defendant and Defendant's Counsel relied on the defence of mistake of age. The trial judge rejected this defence on the basis that the Defendant's own testimony supported a finding of guilt. Specifically, by testifying that they asked for the victim's age three different times and then asked for documentary evidence, the Defendant conceded that they suspected the victim was underage but proceeded with sexual activity anyway. The Defendant did not take sufficient steps to assuage that suspicion after the victim failed to produce the requested documentary evidence.

The Defendant was found guilty and sentenced to 12 months.

On appeal, the Defendant argued ineffective assistance of counsel on two bases. First, that Defendant's Counsel failed to adduce expert evidence as to the Defendant's "mild intellectual disability" and its impact on the Defendant's decision making on the night in question. Second, that the Defendant's Counsel failed to cross examine the victim on a past incident where they lied about being the victim of a sexual assault.

LAWPRO successfully assisted the Trial Lawyer through the Criminal Defendant's appeal. The appeal panel agreed that the alleged errors by Defence Counsel did not result in any prejudice to the Defendant. First, the trial judge was aware of the Defendant's intellectual disability. Second, the trial judge expressly questioned the victim's credibility and account of the events in question. The judge stated that the finding of guilt was not based on the victim's account, but was explicitly predicated on the Defendant's own testimony regarding their doubts as to the victim's age. Therefore, the alleged errors by Defence Counsel could not have resulted in a different outcome of the trial.

The appeal court therefore dismissed the Criminal Defendant's appeal, and there was no remaining potential claim against the Trial Lawyer.

Immigration law – Alleged ineffective representation in pre-removal risk assessment

Refugee claims in Canada require the applicant to meet certain legal standards in order to avoid deportation or rejection of said claims. One such legal requirement is the “internal flight alternative.” That is, even if an applicant can show that they are not safe if returned to their city or town of origin, they must also show that there is no practical alternative safe harbour within their country of origin.

In this case, the Application Lawyer represented the Applicant in their pre-removal risk assessment Application. The Application was rejected after an Immigration Officer determined that an internal flight alternative existed within Mexico, the Applicant’s country of origin.

According to the Immigration Officer, the Applicant did not have a profile such that they would be targeted by cartels even after relocating within Mexico. There was no evidence that a cartel or other group had shown an interest in pursuing them to another location. The Immigration Officer also determined that it would not be unreasonable for the Applicant to relocate within Mexico.

The Applicant sought judicial review based on ineffective representation by the Application Lawyer. The Applicant alleged that the Application Lawyer did not understand the relevant law pertaining to the application, failed to file material evidence during the application, failed to file to re-open an appeal based on alleged new evidence, and failed to understand the nature of the Applicant’s claims generally.

The Application Lawyer took the position that there was no negligence, and that they understood both the law and nature of the Applicant’s claims.

LAWPRO successfully assisted the Application Lawyer in having the Applicant’s claims dismissed. The judge found that this was not an “extraordinary circumstance” warranting a finding that the Application Lawyer was incompetent, or a breach of natural justice had occurred.

The judge determined that the evidence the Application Lawyer allegedly failed to adduce would either have not displaced the Immigration Officer’s findings, or, alternatively, was already before the relevant decision makers. The evidence actually showed that the Application Lawyer made reasonable arguments and submissions pertaining to the availability of an internal flight alternative, and no evidence supported a finding of incompetence.

The application for judicial review, and a potential claim against the Application Lawyer, were therefore dismissed.

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.