REPAIRS

When LAWPRO is quickly alerted to potential claims, we can often rectify the problem and prevent losses and further lawsuits from arising. Our counsel know how to best address issues such as limitation periods, actions that have been struck from the trial list, breach of court-ordered timetables, and other repairable matters.

Here are some examples of cases where LAWPRO successfully repaired potential losses in 2025.

1. Arguing the right limitation period

Q: If a claim against an estate is restricted to an interest in real property, does the 2-year limitation period under the *Trustee Act* apply or does the 10-year limitation period under the *Real Property and Limitations Act* (RPLA) apply?

A: The 10-year limitation period under the RPLA applies.

The dispute in this case is whether the husband held a 50% beneficial interest in a residential property formerly owned by his late wife. The estate trustees/children of the wife's estate disagreed with the husband and said 100% of the property formed part of the estate. The husband's claim was commenced more than two years after his wife's death. The estate trustees brought a motion to dismiss the husband's action, on the basis that the claim was statute-barred under the 2-year limitation period in the *Trustee Act*.

LAWPRO assisted the insured lawyer in successfully arguing that the 10-year limitation period under the *RPLA* applied in this case, not the 2-year limitation period under the *Trustee Act*. The court agreed and the estate trustees' motion was dismissed.

The estate trustees relied on a recent decision of the Ontario Court of Appeal, *Ingram v. Kulynch*, that stands for the proposition that a claim against an estate, for constructive or resulting trust, as against all estate assets, is subject to a 2-year limitation period under the *Trustee Act.*

The court distinguished the *Ingram* decision where the equitable trust claim in that case was not just with respect to real property, but with respect to **all estate assets**. The husband was only claiming an interest in real property, and so the 10-year limitation period under the *RPLA* applied.

The estate trustees have appealed the decision.

2. Offer and acceptance - not that simple

In this family law case, the issue was whether an offer to settle made by the wife, was open for acceptance by the husband and if so, whether there was a binding agreement after the husband purported to accept her offer. The court found that the wife's offer was not open for acceptance because under the common law rules, the husband's counteroffer extinguished his ability to accept her offer. Here's what happened.

A married couple separated. The insured lawyer represented the wife and made an offer to settle on behalf of the wife. The husband made a counteroffer which was not accepted. A year later, the husband attempted to accept the wife's initial offer which had not been explicitly withdrawn. The wife said her offer was not open for acceptance. The husband insisted that he accepted the wife's initial offer and brought a motion for summary judgment and for a declaration that there was a binding settlement.

The parties and the court agreed that although Rule 18 of the *Family Law Rules* (FLR) governs offers to settle in family law matters, the wife's offer was not compliant with the formal requirements of Rule 18, and so the FLR did not apply to her offer. Since the FLR didn't apply, the husband took the position that Rule 49 of the *Rules of Civil Procedure* (RCP) applied to the wife's offer. He argued that since she did not accept his counteroffer, and she did not explicitly withdraw her offer, her offer was open for him to accept. The wife relied on the common law principle that making a counteroffer prevents the counter-offering party from returning to accept an earlier offer.

LAWPRO stepped in, acted as agent for the wife, and opposed the husband's motion for a declaration that there was a binding settlement.

The court rejected the argument that Rule 49 of the RCP automatically applies simply because Rule 18 of the FLR does not apply. Unless the court deems it appropriate to engage Rule 49 of the RCP, if Rule 18 of the FLR does not apply, the common law principles apply. The wife's initial offer to settle was not available for acceptance. The court dismissed the husband's motion and awarded costs to the wife.

3. Whose delay is it, anyway?

The insured lawyer represented the plaintiff with respect to an accident between a motor vehicle and a bicycle. The action was commenced on October 24, 2013, and proceeded in a timely manner. The plaintiff set the action down for trial on December 14, 2017. The insured lawyer received the Certification Form in February 2018 but failed to complete and file it until April 2019. Unbeknownst to the insured lawyer, the action was struck from the trial list on December 21, 2018.

The defendants' lawyer discovered the action was struck from the list in April 2019 but did not disclose this to the insured lawyer until June 2021. The plaintiff immediately brought a motion to restore the action. The defendants eventually brought a cross-motion in 2023 for an order dismissing the action for delay.

LAWPRO successfully argued the motions on behalf of the insured lawyer. The court granted the motion to restore the action to the trial list and dismissed the defendants' motion to strike the action for delay, awarding costs to the plaintiff.

The court found that the insuredlawyer was responsible for the initial 14 months of the delay from February 2018 (when the Certification Form was received) to April 2019 (when the insured lawyer completed and filed the Certification Form). The remainder of the delay after April 2019 was the responsibility of the defendants and the court. In particular, the miscommunication and mishandling of filed material on behalf of the court, and the defendants' failure to disclose to the plaintiff that the action had been struck, the changing position of the defendants throughout the motion, and the defendants' delay in corresponding with the plaintiff, all contributed to the majority of the delay. The court concluded that "it was the defendants and the court who were responsible for about 75% of the relevant delay" after February 2018. The court also found that the defendants had not suffered prejudice from the delay and awarded costs in favour of the plaintiff.

4. The status of missed deadlines

Consent timetable deadlines were missed. Opposing counsel is not agreeing to amend the timetable. The action is at risk of being dismissed by the court for delay. A status hearing is requested. Sound familiar? LAWPRO will often step in to assist the insured lawyer to ensure the matter does not go down the wrong path during the status hearing or lead to a claim.

The insured lawyer commenced a medical malpractice action on behalf of the Estate and other family members of a deceased woman. The claim was issued on January 21, 2016. Pleadings closed, discoveries were completed, expert reports were served in 2022. On June 6, 2022, the court ordered a timetable, on consent, for the remaining steps to be completed, which included mediation by January 31, 2023, and the action set down for trial by February 15, 2023.

The insured lawyer moved firms in July 2022 and there were delays moving the action forward as a result. In June 2023, well after the January and February 2023 court ordered dates, the insured lawyer attempted to schedule the mediation. In July 2023 the defendants responded that they were not agreeable to proceeding with mediation and declared that the "action is at an end." The plaintiffs continued, and served their reply expert report in August 2023, 10 months after the deadline.

In April 2024, the plaintiffs served a Notice of Change of Lawyer as the insured lawyer became ill and could no longer act for the plaintiffs. The plaintiff's new lawyer tried to discuss the timetable and mediation with defence counsel, but the defendants counsel responded that the action had been at an end for more than a year, there was no existing timetable to adjust, and no "live" dispute to mediate. As a result, the plaintiffs scheduled a motion for a status hearing.

LAWPRO stepped in and successfully argued the status hearing motion on behalf of the plaintiffs. The court found that the action progressed reasonably from the time pleadings closed (March 2017) to the consent timetable order (June 2022). The remainder of the delay was adequately explained, and the plaintiffs had no intention of abandoning the action. The court also found that this was not a case where there had been multiple breaches of court orders. Interestingly, the defendants argued that a dismissal of the action would not leave the plaintiffs without a remedy, because the plaintiffs would have a cause of action against their former lawyer. The court did not agree that was a relevant consideration.

The court found that the plaintiffs provided an acceptable explanation for the delay and ordered that the action proceed.

5. Disclosing settlements

The insured lawyer acted as co-counsel to the plaintiffs in a proposed class proceeding.

The plaintiffs settled the action with one of the named defendants and brought a motion in part, to approve the settlement, which is a requirement pursuant to the *Class Proceedings Act* (CPA).

The non-settling defendant opposed the motion to approve the settlement and brought its own motion to stay the entire action, taking the position that the settlement was not disclosed to it in a timely manner, and as a result, changed the adversarial landscape. The non-settling defendant relied on the rule of disclosure established in *Handley Estate v. DTE Industries Limited* (Handley Estate), that requires immediate disclosure of any agreement between or amongst parties to a lawsuit that changes the landscape of the litigation.

LAWPRO stepped in and successfully argued the motion to settle and the motion to stay on behalf of the plaintiffs.

The court found that the Handley Estate rule of disclosure (protecting non-settling defendants from prejudice caused by secret settlements in conventional multi-party litigation) does not apply to settlements in class actions because the CPA already provides significant statutory protection to non-settling parties. In addition, the non-settling defendant was advised that discussions were taking place and was also kept apprised of the status of those discussions. The court found that despite the fact the Handley Estate rule was not applicable to this case, there was no untimely disclosure or non-disclosure to the non-settling defendant in any event.

The court approved the settlement agreement and dismissed the motion to stay.

The non-settling defendant has appealed the decision.

Small fixes now prevent big problems later

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.

DEFENCES

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 some examples of defences successfully advanced by LAWPRO in 2025 on behalf of insureds.

WILLS & ESTATES LAW

When time may or may not be on your side

Case #1

The insured lawyer prepared a Will for the testator who died shortly thereafter. The estate trustee and beneficiaries became aware of a potential drafting error in the Will. Despite this, the estate trustee applied for and obtained a Certificate of Appointment of Estate Trustee with a Will (CAETW), on notice to the beneficiaries, and no one filed notice of objection. After the CAETW was granted, one of the testator's sons started an action on behalf of the testator's grandchildren, against the insured lawyer claiming that as a result of the insured lawyer's negligent drafting, the grandchildren were deprived of gifts the testator intended for them to receive.

LAWPRO assisted in bringing a successful summary judgment motion to dismiss the action against the insured lawyer. The issue for the court was whether the plaintiffs could pursue a negligence action against the insured lawyer after the CAETW was granted. The court found that the application for a CAETW is not just a procedural step in estate administration. When the court grants a CAETW, the court affirms that the testator knew and approved the contents of the Will, and that the Will is valid in all respects.

The negligence action was found to constitute an impermissible collateral attack (and therefore an abuse of process) because it effectively sought to undermine the probate grant by asserting that the Will did not reflect the testator's intentions. The court emphasized that the appropriate procedural course was to raise the drafting error during the probate process, by objecting to the application and seeking a rectification of the Will, rather than pursuing a post-probate negligence action.

The court dismissed the action against the insured lawyer and awarded costs.

The decision was appealed, and LAWPRO was also successful in arguing against the appeal. The Court of Appeal upheld the motion Judge's decision to dismiss the action against the insured lawyer.

The Court of Appeal stated that the negligence action against the insured lawyer was an abuse of process since the error in the Will could have been rectified during the process of obtaining the CAETW. The Appellate court also clarified that not all negligence actions are barred once a CAETW has been granted, however "where a solicitor makes a drafting error that could be rectified in the certificate process, and the party harmed by that error takes no steps to have the will rectified, then the doctrine of abuse of process may prevent the harmed party from subsequently bringing an action against the solicitor for damages..".

The appeal was dismissed with costs payable.

Case #2

The insured lawyer drafted a Will for the testator which was signed in 1991. The testator died in 2018. In 2020, beneficiaries commenced actions against the insured lawyer alleging that as a result of the insured lawyer's negligent drafting, the beneficiaries received less than the testator intended. The insured lawyer argued the 15-year ultimate limitation period pursuant to the *Limitation Act, 2002* applied from when the Will was drafted and as a result, the beneficiaries' actions were statute-barred. The beneficiaries argued the limitation period only started to run in 2018 when the testator died, because that is when they discovered the problem.

The court focused on the language of the statute. The issue was whether "the day on which the act or omission on which the claim is based" is the day the insured lawyer negligently drafted the Will in 1991 or if it is the day the Will came into force when the testator died in 2018.

The beneficiaries' claims were based on the negligent Will drafting that took place in 1991, not an act or omission that occurred in 2018. The court concluded that the limitation period therefore expired on January 1, 2019, which is 15 years after the ultimate limitation period came into force on January 1, 2004.

LAWPRO defended the insured lawyer and successfully brought a motion to dismiss the negligence actions as being statute-barred pursuant to the 15-year ultimate limitation period.

The court rejected the beneficiaries' position that the limitation period should commence when the testator died, and acknowledged that applying the ultimate limitation period means "that in any case where a testator survives for 15 years after signing a negligently drawn will, the beneficiaries will lose their ability to sue the drafting lawyer for negligence even before they have the right to do so."

The court said that it cannot create exceptions to the ultimate limitation period, and any unintended consequences should be addressed by the Legislature.

FAMILY LAW

Similar to life, in litigation, there are no guarantees

Litigation can be a risk. One party is usually disappointed with the outcome. This can often lead to unsuccessful litigants subsequently suing their lawyer, claiming the lawyer was somehow negligent in their advice or recommendations during the litigation.

In this family law matter, the client retained the insured lawyers to bring a motion to change an existing consent parenting order. The client wanted more access to his children because his employment had changed, which

allowed him more time to parent. The change in employment was considered a material change that could warrant success on a motion to change. During the course of the motion, settlement offers were made but not accepted.

The court found that the client's oral testimony contradicted his affidavit evidence and concluded there was no material change to warrant a change to the parenting order. The client was unhappy with the outcome of the hearing and sued the insured lawyers alleging they failed to properly investigate the facts, they failed to warn about the weakness of the case and potential cost consequences and failed to ensure the client fully understood the legal advice. Additionally, the client claimed the insured lawyers breached their fiduciary duty.

LAWPRO represented the insured lawyers, and after a 9-day trial, secured a dismissal of the claim, and a finding that the insured lawyers were not negligent and there was no breach of fiduciary duty.

The court found that the client was informed of and knowingly undertook the risks involved in bringing the motion. The court made the point that "the lawyer is not an insurer of success," clarifying that the issue is whether there was a breach of the standard of care owed to the client, rather than if the motion to change should have succeeded. The court found that the insured lawyers did not breach the standard of care or fiduciary duty and found no causation.

This case affirms that the client must establish that any negligence by the insured lawyers' (breach of the standard of care) caused the client's injury. Here, even if the court had found the insured lawyers negligent (which was not the case), most of the damages claimed by the client were not compensable because they were not caused by any of the alleged failings of the insured lawyers. It was clear to the court that the client was intent on proceeding with the motion to change, regardless of the advice of the insured lawyers.

REAL ESTATE LAW

Have funds, will close

Clients will often blame their lawyers when a real estate transaction fails: the lawyer allegedly didn't take certain steps, didn't provide certain information, or misled the client, all leading to a negligence claim against the solicitor. This is one reason it is important to document your work and make sure to retain a fulsome file that can be relied upon down the road.

The plaintiffs retained the insured lawyer to act on the purchase of a residential property. The purchase did not close, and the plaintiffs lost the opportunity to buy the house. The plaintiffs sued the vendor for specific performance. The court found that the transaction did not close because the plaintiffs did not have the funds to close on time and the plaintiffs' action was dismissed. The plaintiffs then sued the insured lawyer claiming that the failed transaction was a result of his negligence and that the insured lawyer was responsible for the plaintiffs' failure to deliver closing funds to the insured lawyer.

After a 19-day trial and effective work challenging the plaintiffs' credibility, LAWPRO successfully defended the insured lawyer, resulting in the plaintiffs' negligence claim for failing to close the real estate purchase being dismissed.

The court concluded that the transaction failed because the plaintiffs could not obtain financing in time due to an issue with the property, the plaintiffs withheld key information from the insured lawyer regarding the status of their funds, and that the insured lawyer "worked to close the deal and took all steps required by him to ready the matter for closing."

The court commented that although the file was not well documented, it accepted the insured lawyer's version of events and found that the plaintiff's evidence was inconsistent and not reliable. The plaintiffs also retained a very qualified standard of care expert, but the court found that the expert was neither impartial nor independent and could not be relied upon.

The plaintiffs claimed $4,852,457 in damages, however the court stated that even if the plaintiffs were successful, their damages would be limited to $1,400.

The court determined the insured lawyer was not negligent and did not breach his fiduciary or statutory duty. The negligence action was dismissed. The plaintiffs have appealed.

PERSONAL INJURY LAW

Causation and mitigation for the win

Sometimes lawyers do make mistakes. LAWPRO is careful when assessing a matter and determining the best strategy, including whether a defence is available under the circumstances, and where there is a defence, LAWPRO will defend.

The plaintiff was driving her minivan with a trailer attached and was injured when the trailer started to sway and hit the sides of her minivan. The plaintiff retained the insured lawyer to represent her in her tort claim as well as her claims for accident benefits payable pursuant to the *Statutory Accident Benefits Schedule* (SABS). The plaintiff settled her SABS claims for $25,000 at a mediation in 2014. That same year she retained new counsel to pursue her tort claim against the manufacturer of the trailer hitch. Her symptoms worsened and by 2016 she had stopped working. In 2020 the plaintiff settled her tort claim for over $1.5 million. The plaintiff brought a negligence action against the insured lawyer for recommending an improvident settlement (settling the action before her prognosis was clearer) of her claims for SABS. She argued that because she became much worse after the settlement, she likely could have settled her SABS claims for a much higher amount.

LAWPRO defended the action and successfully argued that the plaintiff failed to prove causation and mitigate her damages.

While the court found that the insured lawyer's advice fell below the standard of care, the plaintiff failed to prove that the insured lawyer's negligence caused her any damages. The court found that the plaintiff provided no evidence as to what she would have done differently if she had been properly advised by the insured lawyer. The evidence showed that she was experiencing financial difficulty and she was eager to resolve the matter. She also did not take any steps to set aside the settlement when she retained new counsel and had an opportunity to do so. The plaintiff did not establish that the insured lawyer's negligence caused any loss of enhanced benefits. She also failed to establish that but for the insured lawyer's negligence she would have received a better recovery of SABS claims with no corresponding reduction from the tort settlement.

The court also held that the plaintiff cannot sue the insured lawyer and claim negligence without taking any steps to mitigate her damages. The plaintiff cannot recover losses she could have reasonably avoided. The plaintiff failed to mitigate her damages by not attempting to set aside the settlement both before and after retaining new counsel. The plaintiff's inaction broke the chain of causation and caused her losses.