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Recent Developments in Estate Solicitor's Negligence

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Introduction

It is well established that lawyers in Canada are potentially liable, at the suit of their clients, in an action for negligence for their errors in the advice or lack thereof, as the case may be.[1] The law has evolved since Justice Krever's ruling in *Ungaro*, yet the responsibility is unchanged – lawyers in Canada owe a duty to their clients, and in discharging that duty must meet a requisite standard of care.

When accepting a retainer to provide legal services, estate lawyers, like all lawyers, agree to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of their tasks.[2] If a lawyer fails to act with the skill, prudence and diligence of a lawyer of ordinary skill and capacity in discharging their duties to a client, the lawyer has fallen below the standard of care. Should a lawyer fall below such a standard, they may be liable in tort for solicitor's negligence.

This paper examines recent developments in the law of solicitor's negligence with a particular emphasis on cases relevant to the estates and trusts contexts. Part I discusses the solicitor's standard of care. Part II addresses the question: in what situations is a duty of care owed to a non-client? Part III demonstrates that a court may dismiss a solicitor's negligence action if the claimant causes undue delays in prosecuting the claim. Part IV considers the extent to which absolute privilege protects a solicitor from a negligence claim. Part V discusses limitations issues in solicitor's negligence actions.

Part I: The Standard of Care

(a) Key Jurisprudence

To ground an action in solicitor's negligence, the plaintiff must prove that:

a) the solicitor owed the plaintiff a duty of care, created by a relationship of sufficient proximity;

b) the solicitor's actions fell below the standard of care expected of him or her;

c) the plaintiff sustained damages; and

d) the solicitor's failure to meet the standard of care was causative of the damages suffered by the plaintiff.[3]

In *Ristimaki v Cooper*,[4] the Ontario court of appeal outlined the standard of care for all lawyers as follows:

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[1] *Ungaro v Demarco*, 1979 CarswellOnt 671, 8 CCLT 207 [*Ungaro*].
[2] *McCullough v Rigger*, 2010 ONSC 3891, 76 CCLT (3d) 71 at para 46, citing a paper presented by Ian Hull at the Law Society's 2009 Continuing Education Program Annual Estates and Trusts summit.
[3] *Duckett v McKinnon*, 2012 BCSC 2147 (CanLII) [*Duckett*] at para 27; see also *Central & Eastern Trust Co v Rafuse*, 1986 CanLII 29 at paras 49, 58-59 & 63 [*Rafuse*].
[4] 2006 CarswellOnt 2373.

a) A solicitor must bring reasonable care, skill and knowledge to the professional service which he or she has undertaken; see *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at 208;

b) For a solicitor who holds himself or herself out as having particular expertise in a given area of the law, a higher standard of care applies; see *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992), 29 R.P.R. (2d) 271 (Ont. Gen. Div. [Commercial List]), varied on other grounds (1996) 88 O.A.C. 398 (Ont. C.A.); and

c) A lawyer who does not adequately or diligently protect the client's interests will be found negligent: see Stephen M. Grant and Linda R. Rothstein, *Lawyers' Professional Liability*, 2nd ed. (Markham: Butterworths, 1998) at 23.[5]

In a frequently cited passage from *Millican v Tiffin Holdings Ltd*,[6] the obligations of a lawyer in discharging his or her duty to act reasonably and competently were outlined as follows:

1. to be skillful and careful;

2. to advise the client in all matters relevant to the retainer, so far as may be reasonably necessary;

3. to protect the interests of the client;

4. to carry out the client's instructions by all proper means;

5. to consult with the client on all questions of doubt which do not fall within the express or implied discretion left to him or her; and

6. to keep the client informed to such an extent as may be reasonable necessary, according to the same criteria.[7]

(b) Recent Developments

Duckett v McKinnon

In *Duckett*, the Supreme Court of British Columbia found a solicitor liable in negligence on a summary motion. The solicitor was retained by a vendor to paper a business asset sale transaction. The solicitor was found negligent on three grounds: (i) failing to clearly document the retainer; (ii) failing to create an enforceable security interest in the business's assets in favour of the vendor; and (iii) failing to properly advise the vendor about an insurance issue related to the sale.

The plaintiff, Duckett, was an unsophisticated vendor who agreed to sell his business by signing an Offer to Purchase with proposed terms of purchase and sale. The purchaser was unable to pay the full purchase price so the vendor loaned the purchaser $50,000 secured by a promissory note. The vendor

[5] *Ibid* at para 59.
[6] (1964), 50 WWR (NS) 673 at 675 (Alta SC), aff'd 1967 CanLII 51 (SCC), [1968] SCR 183 [*Milican*].
[7] See e.g. Duckett, *supra* note 3 at para 37; *Meier v Rose*, 2012 ABQB 82 at para 19.

then hired a solicitor, McKinnon, to complete the sale and to secure the loan against the business's assets.[8] A formal retainer agreement was never signed.

McKinnon prepared a purchase and sale agreement, a promissory note to secure the loan and a financing statement, and filed a financing statement with the Personal Property Registry in British Columbia.[9] The parties then executed the agreement and promissory note. At or around this time, the purchaser obtained an insurance policy for the business on which the vendor was not a named payee.[10]

A fire occurred at the business's office after the purchase and sale agreement was executed, destroying most of the business's material assets. Duckett sought to make a claim under the purchaser's insurance policy on the basis that he had a registered security interest in the damaged assets.[11] Duckett was later advised by independent counsel that the security interest was defective and so he abandoned his insurance claim. As a result, the purchasers collected the full amount under the policy. Shortly thereafter, the purchasers defaulted on the promissory note.[12]

Duckett sought recovery from McKinnon for the balance owing by the purchasers on the basis of negligence and breach of contract. He argued that the documents McKinnon prepared and filed on his behalf failed to create a proper security interest in the business's assets and that McKinnon failed to advise him that he should ensure he was named as a first loss payee on the purchaser's insurance policy.[13] McKinnon argued that she had a limited retainer and, based on the client's insistence, was only responsible for papering the transaction.[14]

McKinnon acknowledged that she was retained by Duckett and therefore owed him a duty of care. At issue was whether McKinnon fell below the standard of care. Gaul J noted that in order to determine if a lawyer has fallen below what an ordinarily competent lawyer would do in a particular circumstance the court must ascertain how an ordinarily competent lawyer would act under the same circumstance. To do so, Gaul J considered an expert report that was tendered into evidence by the plaintiff.[15]

It is established law that when professional negligence is alleged, opinion evidence of an expert witness who can testify about the standard of care and demonstrate how the conduct of the professional fell below the standard is necessary to prove a breach of the standard of care.[16] There are two carve-outs from this rule: (i) cases where the court is faced with non-technical issues; or (ii) if the actions of the solicitor are so egregious that a breach is obvious.[17] Neither carve out applied to the case at bar.

The expert in the case at bar noted that a prudent solicitor in a business asset sale would register a 'purchase money security interest' ("PMSI"). PMSIs, if registered properly and in a timely way, entitle the holder of an interest to a super priority and, according to the expert, provide the best method of securing a secured creditor's interest. Unfortunately for the vendor, McKinnon did not register a PMSI. The expert also stated that the solicitor should have advised the vendor that he should be named as a payee on the

[8] Duckett, *supra* note 3 at paras 4-6.
[9] *Ibid* at paras 7 and 9.
[10] *Ibid* at para 8.
[11] *Ibid* at para 10.
[12] *Ibid* at para 11-12.
[13] *Ibid* at para 16.
[14] *Ibid* at paras 18-20.
[15] *Ibid* at para 41.
[16] *Krawchuk v Scherbak*, 2011 ONCA 352 at para 130.
[17] *Ronald Gunraj v Chris Cyr*, 2012 ONSC 1609 (CanLII) at para 67.

insurance policy.[18] The expert also found that the documents prepared by McKinnon did not create a security interest enforceable against a third party.[19] Gaul J concluded that the report was credible as the expert's opinions were considered and objective.[20] As such, the expert's opinion demonstrated that McKinnon had fallen below the standard of care owed to Duckett.

Justice Gaul was also critical of McKinnon's approach to her dealings with Duckett. For example, he noted that the parties had few if any in-person meetings, including when the Offer to Purchase was delivered to McKinnon. He was especially critical of the fact that there existed "no formal retainer agreement or letter… describing what [McKinnon] understood [Duckett] wanted and needed her to do, nor… any documentation explaining in any detail what she would be doing on his behalf". According to Gaul J, these "omissions constitute deficiencies on the part of Ms. McKinnon as a solicitor".[21]

Causality was made out as well. Justice Gaul noted that Duckett was an unsophisticated seller who relied on the solicitor's expertise. She caused damage to Duckett by failing to adequately create a security interest in the assets at issue and to ensure that Duckett had an enforceable claim under the purchaser's insurance policy.[22]

The court found McKinnon liable for the amount outstanding on the loan, additional legal expenses incurred by Duckett as a result of her negligence and interest.[23]

Kopp v Halford

In the recent Saskatchewan Court of Queen's Bench decision in *Kopp v Halford*,[24] the Court found a solicitor negligent for failing to advise a client about the importance of the date on which a divorce petition is filed[25] and for failing to inform the client that he could file a petition to advance a divorce.[26]

Kopp approached the solicitor, Halford, in early 2002 seeking a divorce from his wife. The couple had been separated for twelve months and, at the time that Kopp retained Halford, there were no disputes as to property or child support. The parties never signed a retainer agreement, though Halford kept some brief notes about their initial meeting on the backside of a piece of 'scrap' paper.[27] According to Halford, he only agreed to act if the divorce was uncontested.[28] It was Kopp's belief that Halford accepted a general retainer to obtain the divorce.[29]

Halford made two attempts to affect the divorce by mailing letters to Kopp's wife, Natalie. The first, sent in May 2002, did not elicit a response.[30] Natalie responded to the second, sent approximately six months thereafter, requesting that Halford call her. Halford contacted Natalie, which resulted in an allegedly

[18] Duckett, *supra* note 3 at para 43.
[19] *Ibid* at para 53.
[20] *Ibid* at para 54-55.
[21] *Ibid* at para 46-47.
[22] *Ibid* at para 62.
[23] *Ibid* at para 60.
[24] 2013 SKQB 128 [*Kopp*].
[25] *Ibid* at para 127.
[26] *Ibid* at para 130.
[27] *Ibid* at para 13.
[28] *Ibid* at para 18.
[29] *Ibid* at para 110.
[30] *Ibid* at para 23.

contentious phone conversation.[31] Halford claims that, after the conversation with Natalie, he informed Kopp that the matter was contentious and so he would not pursue the case.[32] Kopp denied that Halford said he would no longer act for Kopp.

At the time the retainer was entered in to, Kopp had some farm assets but was nearly insolvent, leading Halford to conclude that family property concerns were not an issue. In May 2003 Kopp's situation changed when he won a lottery home. Unfortunately, Halford never got Kopp the divorce that he sought. Had the divorce been filed before the lottery, Natalie would have had no claim to share the windfall. However, no petition was filed and the lottery home became family property, giving Natalie rights in the house. Kopp then terminated his retainer with Halford, retained new counsel, and paid to settle Natalie's claim in the family property.[33]

Kopp argued that Halford was negligent by failing to advise him that the lottery windfall would be subject to division with his ex-wife if a divorce petition was not issued.[34] Halford responded by arguing that he provided proper advice under the circumstances because the lottery win was unforeseeable and there was no reasonable expectation that Kopp's financial situation would otherwise improve. Halford also alleged that he terminated the retainer months prior to the lottery win.[35] Kopp sought judgment in the amount of $62,500 – the cost of his settlement with Natalie.

Justice Barrington-Foote began by citing *Rafuse* and *Tiffin*.[36] The Court then summarized several duties, established by jurisprudence, owed by solicitors to their clients:

- to warn the client of the risks of pursuing a particular course of action;[37]
- to be aware of the goal of the client in undertaking a particular transaction;
- to advise a client if instructions are required from the client, and why;
- the implied term of a retainer to proceed promptly; and
- to not only give good advice, but make the reasons for that advice sufficiently clear to enable the client to make an informed judgment.[38]

According to Berrington-Foote J:

> these duties… apply to every retainer, so far as may be reasonably necessary... The steps that must be taken to carry out these duties in a particular case depend on what the lawyer has been retained to do. That reflects the fact that the lawyer is, as is noted in *Rafuse*, obliged to bring reasonable care, skill and knowledge to the performance of "the professional service which he has undertaken".

[31] *Ibid* at paras 27-28.
[32] *Ibid* at para 29.
[33] *Ibid* at paras 1-3.
[34] *Ibid* at para 4.
[35] *Ibid* at para 5.
[36] *Ibid* at para 92
[37] *Ibid* at para 90.
[38] *Ibid* at para 91.

> [Furthermore,] it is also necessary to take account of the nature of the client.[39]

Of particular importance to Barrington-Foote J was the scope of the retainer and the sophistication of the client. The retainer and its alleged termination were unclear, and the Court noted that Kopp lacked a sophisticated understanding of the law and was therefore reliant on Halford to handle the divorce.[40]

Justice Barrington-Foote found that Halford breached the standard of care. Based on expert evidence, the Court held that Halford properly began the retainer by assessing the value of the family property. However, his conduct fell short in other regards. First, Halford failed to properly advise Kopp on all matters relevant to the retainer. The fact that he was nearly insolvent did not exculpate the solicitor from explaining how family property is allocated in a divorce. Kopp therefore should have been advised of the potential impact of failing to file the petition within a reasonable time.[41] The fact that the lottery win was unforeseeable did not matter and, as such, Halford breached his duties almost immediately after being retained.[42]

Second, Halford was negligent by failing to advise Kopp that he could file a petition to advance the divorce. Justice Berrington-Foote explained:

> It would be inconceivable that a lawyer retained by an unsophisticated client to provide advice about getting a divorce and to represent him for that purpose would not be obliged to advise the client of the basic steps involved in that process… he should have advised Mr. Kopp that he had the right to file a petition, and that if there was no progress within a reasonable time and he wanted to advance his case, he should consider doing so. In the absence of any progress, he should have sought further instructions.[43]

The Court inferred that if Halford had provided such advice, Kopp would have commenced an action well before the lottery windfall occurred.[44]

The court also held that Halford failed to properly terminate the retainer.[45] The court noted that the conversation was short, the language was unclear and nothing was put in writing.[46] Ultimately, the lack of a written retainer or adequate records turned out to be factors weighing in favour of a finding that Halford was negligent. As Berrington-Foote J cautioned, "[i]f the practice of confirming [his] advice in writing had been followed, there would have been no room for any misunderstanding".[47]

Broesky v Lüst

Broesky v Lüst,[48] a solicitor's negligence action, recently came before the Ontario Court of Appeal. The case provides a useful counterexample to *Duckett* and *Kopp* because, unlike the solicitors in those cases, the solicitor in *Broesky* was not liable on account of having a clear written retainer.

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[39] *Ibid* at paras 92-93.
[40] *Ibid* at para 112.
[41] *Ibid* at paras 128-29.
[42] *Ibid* at para 129.
[43] *Ibid* at para 117.
[44] *Ibid* at para 131.
[45] *Ibid* at para 132.
[46] *Ibid* at para 121; 132
[47] *Ibid* at para 132.
[48] 2011 ONSC 167 [*Broesky*]; aff'd 2012 ONCA 701.

The client suffered an injury in an automobile accident and approached the solicitor to represent her in a claim against an insurer. Over their initial discussion the solicitor suggested that the plaintiff sue the driver of the vehicle that she was in, which she refused to do. The parties agreed that no retainer had been entered into at this point.[49] Approximately one month later the lawyer had not received further instruction from the client, so he wrote a letter requesting clarification on whether or not he was being retained.[50] The client replied requesting that the solicitor issue a claim against the insurer.[51]

A dispute later arose over the scope of the retainer. The solicitor argued that, based on the terms of the abovementioned letters, he was retained only to pursue an action against the insurer.[52] The client claimed that the letters were only part of the retainer and that the solicitor agreed to represent her in all matters related to the accident.[53]

At trial, Mackinnon J found that the retainer between the parties was "set out in writing in the [two] letters" and that the "retainer is clear and unambiguous".[54] Next, Mackinnon J considered whether the lawyer was required to put confirmation of his non-retainer with respect to other matters into writing, concluding that there is no legal duty to put a non-retainer in writing.[55] As such, failing to send a letter for non-retainer did not amount to a breach of the standard of care.[56] The plaintiff's claim was dismissed accordingly.

Part II: The Duty of Care

The general rule is that a solicitor owes no duty of care other than to his or her client.[57] However, in certain cases courts have recognized that a solicitor may owe a duty of care to a non-client.

(a) Duty of Care

Vincent v Blake, Cassels & Graydon LLP

This issue recently arose in a summary judgment motion in *Vincent v Blake, Cassels & Graydon LLP.*[58] The plaintiff argued that the solicitors who drafted his mother's wills were negligent because (i) she lacked capacity; (ii) his sister exerted undue influence over his mother in drafting the wills; and (iii) the solicitors did not follow his mother's intentions in the executed wills. Stevenson J held that the question as to whether the solicitors owed a duty of care to the plaintiff beneficiary was a triable issue.

In *Vincent* the defendant solicitors were retained by the plaintiff's mother to draft two wills and an estate freeze of the shares of a Corporation held by her company, the Vincent Group. The Vincent Group held a 50% interest in the Corporation, with the plaintiff's sister holding the other half. The Corporation held a 50% interest in Fundata Canada Ltd. and the plaintiff's sister held the remaining 50% interest in Fundata.

[49] *Ibid* at para 4-5.
[50] *Ibid* at para 7.
[51] *Ibid* at para 8.
[52] *Ibid* at para 9-10.
[53] *Ibid* at para 11.
[54] *Ibid* at para 50.
[55] *Ibid* at para 55.
[56] *Ibid* at para 56.
[57] See e.g. *Fockler et al v Eisen et al*, 2012 ONSC 5435 at para 30, citing *Baypark Investments Inc v Royal Bank of Canada*, 2002 CanLII 49402 (ON SC) [*Baypark Investments*].
[58] 2013 ONSC 980 (CanLII) [*Vincent*].

In February 2005 the mother entered into the Estate Freeze, which fixed the total redemption value of the Corporation's shares at $2.5 million. The mother signed the wills on the same day that she signed the Estate Freeze. The wills included legacies to her grandchildren that were not made in a prior will and divided the residue equally between her son, the plaintiff David, and her daughter, Janice. The wills also transferred the Vincent Group's shares in the Corporation to Janice and Janice's one-half share in the residue of the estate was reduced by the value of those shares ($2.5 million).[59] Disputes over the wills led to a litany of litigation, most of which is not relevant to the case at bar. What is material, however, is that an action concerning the wills was settled on a without prejudice basis, explicitly permitting David to pursue his claim in the case at bar.[60]

The defendant solicitors had a longstanding relationship with Janice. David argued that, on this basis and given that Janice was a principal beneficiary under the Estate Freeze and the wills, the defendants should have recommended to his mother that she obtain independent legal advice and an independent valuation of the shares.[61] Furthermore, David argued that his mother had clearly communicated to the solicitors, in a 2004 letter, that both of her children should be treated equally under her wills.[62] David also argued that the Estate Freeze at $2.5 million artificially undervalued the shares. Subsequent to the Estate Freeze the other 50% interest in Fundata was sold for $15 million. David also obtained an independent valuation of the Corporation, which valued it at approximately $12.75 million.[63]

The defendant argued that the only issue is a question of law regarding whether the defendants owed David a duty of care, and therefore the claim was without merit because the defendant solicitors cannot owe a duty to David.[64] David was a third party beneficiary and, according to the defendants, the law is settled that solicitors do not owe a duty to third party beneficiaries in respect of testamentary capacity or undue influence.[65] Notably, the defendant relied on the 2004 Alberta Court of Appeal decision in *Graham v Bonnycastle*,[66] amongst others, to support its position.

Justice Stevenson held that there was a genuine issue for trial as to whether the solicitors owed David a duty of care. He began by distinguishing between the case at bar and the jurisprudence that the defendants relied on, noting that the majority of those cases involved situations where the plaintiff was a disappointed beneficiary who was challenging the validity of a subsequent will. In such instances, the interests of the testator and the beneficiary are divergent. According to David and the evidence he submitted, his mother intended for David and Janice to be treated equally under the will. If that was indeed his mother's intention then David's interests were not in conflict with the testator's.[67]

The Court distinguished *Bonnycastle* on two grounds. In that case, the parties settled an action where the validity of the will at issue was challenged. The court then dismissed a separate action against the solicitor on the basis that the plaintiff chose to settle the issue. Similarly, David had initiated an action with respect to the will's validity, which was ultimately settled. However, "the terms of settlement in *Graham v Bonnycastle* did not include a term allowing the beneficiaries to continue to pursue their claim against the professionals as in this case. [Moreover, in *Bonnycastle*,] there [was] no allegation of a conflict of

[59] *Ibid* at paras 11-14.
[60] *Ibid* at para 29.
[61] *Ibid* at para 23.
[62] *Ibid* at para 24
[63] *Ibid* at paras 25-26.
[64] *Ibid* at para 30.
[65] *Ibid* at para 32.
[66] 2004 ABCA 270 [*Bonnycastle*].
[67] *Vincent*, *supra* note 58 at para 44.

interest".[68] Justice Stevenson also noted that *Bonnycastle* did not rule out the possibility that a solicitor could owe a duty of care to a third party beneficiary, and in fact contemplated "that there may be other situations where a solicitor could owe a duty of care to a beneficiary".[69]

Justice Stevenson concluded that several of the matters at issue were, as yet, unanswered. Questions included: whether the testator understood the value of the shares in the Estate Freeze and the Wills; whether the testator had cognitive impairments; whether there was a conflict of interest as a result of the solicitor's relationship with Janice; whether the solicitors should have recommended that the testator obtain an independent valuation of the Corporation; and regarding the scope of the defendant's duties.[70] Facts were also in dispute, including: the acts and conduct of the defendants; the failure to obtain an independent valuation of of shares of the Corporation; the value of the shares; and the solicitor's failure to follow the testator's instructions to treat her children equally under her wills.[71]

The Court pointed out that "in situations where solicitors would be placed in a direct conflict with their duty owed to a testator client, a beneficiary cannot assert a claim against the testator's solicitor".[72] As it was unsettled whether David's interests were aligned with his mother's and whether her intentions were reflected in the estate's distribution, the court found that the solicitors may owe a duty to David and so a trial was required.

(b) Proximity

Scott v Valentine

Another summary judgment motion to dismiss a solicitor's negligence claim by a non-client came before the Ontario Superior Court of Justice in *Scott v Valentine*.[73] In *Valentine*, the non-client could not establish that proximity existed to establish a duty of care and so the claim against the defendant law firm was dismissed.

The plaintiff, Scott, was approached by Valentine about investing in a mobile advertising company that Valentine was promoting. Scott agreed to invest $1.3 million in the company. Scott was instructed by Valentine to pay the funds into the trust account of the defendant law firm. Scott paid the funds into trust in three instalments,[74] which constituted the extent of his dealings with the defendant law firm.

Unfortunately for Scott, Valentine was an unscrupulous promoter with a history of securities fraud. He was also prohibited from trading securities in Ontario at the time of the transaction.[75] Despite having past dealings with Valentine and admitting to knowing Valentine's wife and family 'for years', the court found no evidence that the defendant law firm was aware of Valentine's past. In any event, Valentine caused the money to be disbursed from the trust account without Scott's knowledge and never transferred any

[68] *Ibid* at para 55.
[69] *Ibid* at para 48; See also *Bonnycastle*, *supra* note 66 at para 59.
[70] *Ibid* at para 49.
[71] *Ibid* at para 50.
[72] *Ibid* at para 46.
[73] 2012 ONSC 6349 [*Valentine*].
[74] *Ibid* at paras 8-10.
[75] *Ibid* at para 5.

shares to Scott.[76] $4500 of the funds was used to pay Valentine's outstanding account at the defendant law firm.[77]

The funds paid in trust were not earmarked to a particular matter. Valentine was a client of the firm but had not retained the defendant law firm to provide advice, prepare documents or do anything else in relation to the stock Valentine promoted to Scott. It was a finding of fact that the defendant solicitor made no inquiry into the source of the funds, purpose of their receipt, identity of who was receiving the funds, or why Valentine was using the firm's trust account.[78] On the evidence, the defendant firm was a dupe used by Valentine as a conduit to transfer the funds.

Scott sued Valentine, a corporation directed by Valentine, the defendant law firm and an individual solicitor and partner of the firm. The actions against the firm and solicitor were for negligence and breach of trust.[79]

Justice Goldstein found that the defendant solicitor and law firm were not negligent because they did not owe a duty of care to Scott. First, Goldstein J cited the general rule that a lawyer only owes a duty of care to his or her own client, and only in limited circumstances might they owe a duty to a third party.[80] Next, the Court noted that instances where a duty is owed by a lawyer to a third party typically require that the lawyer put him or herself in a position where the third party relies on them.[81]

Ultimately, Goldstein J could not find sufficient proximity between Scott and the defendant solicitor and law firm to establish a duty.[82] In this case, the defendant solicitor "did not know of Scott's existence, let alone meet with him".[83] Furthermore, if Scott relied on the defendant solicitor and law firm, such reliance was not reasonable. As Goldstein J pointed out, even if the defendant solicitor and law firm ought to have known that Scott was relying on him, it would be insufficient to create a duty as, under the circumstances, "Scott's reliance would have been unreasonable… [and when reliance is unreasonable] actual knowledge is a pre-requisite for finding a duty of care".[84] The defendant law firm therefore owed no duty to Scott to ensure that the consideration agreed to with Valentine was received.

The plaintiff also argued that the Rules of Professional Conduct establish a duty of care. This argument was rejected as, "in and of itself a breach [of the rules] does not generate proximity where none exists".[85]

Hamid v Milaj et al

The decision in *Hamid v Milaj et al*[86] was decided on similar grounds to *Valentine*. In *Hamid*, the third party defendant solicitor brought a motion to strike the third party negligence action initiated by a non-client against the solicitor and his law firm.

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[76] *Ibid* at para 10.
[77] *Ibid*.
[78] *Ibid* at para 11.
[79] *Ibid* at para 15.
[80] *Ibid* at paras 21-22, citing *Baypark Investments*, *supra* note 57; *Hedley Byrne & Co v Heller and Partners Ltd* (1963), 2 All ER 575 (HL).
[81] *Ibid* at para 24.
[82] *Ibid* at para 30.
[83] *Ibid* at para 29.
[84] *Ibid* at para 30.
[85] *Ibid* at para 34-35 (S.C.J.)
[86] 2013 ONSC 2104 (CanLII) [*Hamid*].

The plaintiff and defendants/third party claimants in the main action were collectively elected National Officers of the Canadian Airport Workers Union, and were employees of Garda, an airport security provider. Garda retained the third party defendant solicitor and his law firm as legal counsel.[87] The plaintiffs sued the defendants for defamation on account of two libelous publications sent to members of the Canadian Airport Workers Union. The defendants/third party claimants commenced a third party action against the employer, Garda, and its legal representatives.

The third party claim against the solicitor and his law firm was based on an alleged negligent misrepresentation made by the solicitor to the defendant's counsel. The defendant alleged that their counsel relayed this information to the defendant, and that the defendant relied on it in publishing the libelous statements at issue.[88]

The solicitor argued that the claim should be dismissed as the claim did not disclose a reasonable cause of action. In short, he submitted that no *prima facie* duty was owed to the non-client defendants and that the exceptions to the general rule that non-clients are not owed a duty did not apply.[89] Furthermore, relying on the Supreme Court decision in *Hercules Management*[90] the third party solicitor argued that the third party claimants could not demonstrate sufficient proximity between the parties for a duty of care to exist.[91] The third party claimants argued that the third party defendant solicitor communicated facts to their counsel and that their reliance third party claimants statements was reasonably foreseeable.[92]

The Court noted that a lawyer acting for one party in a proceeding does not owe a duty to the opposite party and that such claims should be dismissed.[93] In the case at bar, the court concluded that the defendant's reliance was neither reasonable nor foreseeable.[94] In other words, there was no proximity between them and third party defendant solicitor. The third party claimants had their own counsel and as such had no reason to rely on statements made by one solicitor, who was counsel for an opposing party.[95]

Justice Brown concluded that the third party claim was "untenable" in light of the facts that the third party claimants were independently represented and that the statements they claimed to have relied on were made to their solicitor. As such, their pleading was 'factually hopeless'.[96] The court held that the third party claimants' negligence claim against the third party solicitors could not be supported. The claim raised no triable issue and was therefore struck summarily without leave to amend.

Part III: Delay tactics may result in the dismissal of a solicitor's negligence action

Cardinal v Tassone

The decision in *Cardinal v Tassone*[97] demonstrates that a court will dismiss a solicitor's negligence action for delay by the claimant if the delay is inordinate and prejudicial. The case suggests that any delay in a

[87] *Ibid* at paras 2-3.
[88] *Ibid* at para 6.
[89] *Ibid* at para 12.
[90] *Hercules Management Limited v Ernst & Young*, [1997] 2 SCR 165.
[91] Hamid, *supra* note 86 at para 14.
[92] *Ibid* at para 21.
[93] *Ibid* at para 29.
[94] *Ibid* at para 32.
[95] *Ibid* at para 33.
[96] *Ibid* at para 35.
[97] 2013 BCSC 609 [*Cardinal*]

solicitor's negligence action may be prejudicial given the potential effect of such allegations on a solicitor's practice.

Romans died in 2007 leaving a will in which he named Cardinal as the executor and sole beneficiary of his estate. The property at issue was the last remaining asset of significant value remaining in the estate at the time of the litigation. The property was conveyed to Tassone by the Deceased in 2002, with the Deceased maintaining a limited interest in the property for ten years thereafter. The Executor occupied the property after Romans' death and Tassone sought conveyance of the property from the Executor, who refused to vacate. The Executor then commenced actions against Tassone and the solicitor who represented the Deceased in the real property transaction, Murray

As against solicitor, the Executor asserted negligence on the basis that the solicitor fell below the standard of a reasonably competent solicitor; failed to recognize that the Deceased was being unfairly taken advantage of; failed to competently represent the Deceased' interests; failed to recognize the Deceased's mental impairment; failed to recognize the Deceased's incapacity and that he was therefore unable to enter into binding legal contracts; and negotiated and drafted the contract without inquiring into fair value or consideration for the property.[98]

The actions against the solicitor and Tassone had been stayed in a prior proceeding, pending the executor proving the will in solemn form. The Executor adopted several tactics to delay the probate action. The solicitor then applied to have the stay lifted and to dismiss the action against him for want of prosecution.

The court was concerned by the extent of the delays in prosecuting the action. The plaintiff had six months to commence the probate action to prove the will, yet waited until three days before the deadline to commence it.[99] By the time of the case at bar, more than three years later, she still had not filed a statement of claim or taken any other steps to prove the will.[100]

Justice Savage applied a three part test for determining whether to grant an application to dismiss the claim for want of prosecution: (1) whether the delay is inordinate; (2) if the delay is inordinate, whether the delay is inexcusable; and (3) whether the delay is likely to cause serious prejudice to the defendant.[101] The third prong of this analysis is most relevant to the context of this paper.

The defendant solicitor satisfied the court that he was prejudiced by the plaintiff's delays. A key consideration was the fact that the solicitor's negligence allegation sat dormant for five years while the plaintiff did nothing to advance a resolution of the issue. The court expressly noted that allegations of solicitor's negligence are serious and should be prosecuted expeditiously:

> As Gropper J. said in *Bawtinheimer v McEachern*, 2011 BCSC 1807 at para. 17: "[a]n allegation of solicitor's negligence… is serious and affects the reputation of a professional and his firm, his and their credibility, his and their standing at the bar, and his and their practice[;] starting an action and not pursuing it diligently exaggerates the negative effect on the defendant and his firm".[102]

[98] *Ibid* at para 8.
[99] *Ibid* at para 33.
[100] *Ibid*.
[101] *Ibid* at para 41, citing *Azeri v Esmati-Seifabed*, 2009 BCCA 133 at para 8.
[102] *Ibid* at para 56.

The action was dismissed accordingly.

Part IV: Is witness immunity/absolute privilege a defence to a solicitor's negligence allegation?

Amato v Welsh

In *Amato v Welsh*[103] solicitors were sued for, amongst other things, negligence. In the statement of claim, the respondents relied on statements allegedly made or omitted by the appellants during the course of examinations for an Ontario Securities Commission ("OSC") investigation involving another client of the solicitors.[104] The solicitors sought to have those paragraphs struck on the basis of absolute privilege.

The appellants had been used to facilitate a Ponzi scheme that the respondents invested in.[105] At the urging of the Ponzi scheme's directing mind (the "non-party"), the respondents retained the appellants to provide an opinion on whether the relationship between the non-party and the respondents complied with applicable securities laws.[106] Subsequently, the non-party was the subject of an OSC investigation in relation to the scheme. The appellant represented the non-party during this investigation.[107]

The respondents argued that the appellants, having been retained by the respondents, had a duty to inform the OSC about the respondent's investments in the scheme. The respondents alleged that if they had done so, the OSC would have been aware of the size of the scheme and might have chosen to take action against it. According to the respondents, action from the OSC would have increased their chances of recovering their investment. As such, the respondents asserted that, but-for the appellants' breach, they would not have suffered the same extent of damages.[108]

The solicitors argued that their statements and actions in the course of the OSC investigation were protected by absolute privilege.[109] They asserted that there are no exceptions to absolute privilege attaching to a lawyer's statements in court[110] and that there is no justification for recognizing any exception to the privilege.[111]

Writing for the Ontario Court of Appeal, Cronk JA pointed to a longstanding rule that negligence actions in respect of an advocate's conduct in litigation are not protected by absolute immunity in Ontario.[112] This principle has been well established since the 1979 decision in *Ungaro*, where the court concluded that it would be against the public interest to deprive clients of recourse for the negligent conduct of their lawyer.[113] Justice Cronk was clear: in Ontario, "the doctrine of absolute privilege has never been treated as a rationale for protecting lawyers from negligence suits by their own clients… [and indeed,] lawyers can be sued by their clients for their negligent conduct".[114]

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[103] 2013 ONCA 258 [*Amato*].
[104] *Ibid* at para 5.
[105] *Ibid* at para 8.
[106] *Ibid* at para 10.
[107] *Ibid* at para 9.
[108] *Ibid* at para 13.
[109] *Ibid* at para 6.
[110] *Ibid* at para 27
[111] *Ibid* at para 28.
[112] *Ibid* at para 50.
[113] *Ibid* at para 52.
[114] *Ibid* at para 54.

Cronk JA held that the solicitors in this case were not immunized from liability by absolute immunity. The court made several rulings about the scope of absolute privilege in general as well as the scope of the rule from *Ungaro*:

- where the duty of loyalty comes in conflict with absolute privilege, "the conclusion that absolute privilege necessarily overtakes the lawyer's duty of loyalty is not inevitable".[115] As such, absolute privilege may not immunize statements made in situations where, in making the statements, the lawyer is representing a different client than the one alleging the breach of a duty;[116]

- the appellant argued that the rule in *Ungaro* only permits a case to be brought against a lawyer on account of their conduct and does not extend to statements made by the lawyer.[117] The Court held that the rule extends to what the lawyer says in court,[118] and is not confined to procedural steps or advocacy tactics;[119]

- the appellant also argued that *Ungaro* is limited to the proposition that an advocate's immunity does not bar a client from suing their lawyer on the basis of negligent conduct while representing that same client in court.[120] Justice Cronk held that this interpretation was overly restrictive, pointing out that whether a client ("A") may bring a claim against their lawyer based on a statement or conduct undertaken on behalf of another client ("B") was not before the court in *Ungaro*;[121] and

- absolute privilege may immunize negligent statements and conduct, but does not apply to negligent omissions or silence.[122]

Part V: Limitations Issues

Ferrara v Lorenzetti, Wolfe Barristers and Solicitors

The appellant in *Ferrara v Lorenzetti, Wolfe Barristers and Solicitors*[123] sued his former lawyer for negligence for providing an incorrect opinion in a real estate transaction. At issue was whether the appellants' negligence action against his former solicitor was statute-barred. The Ontario Court of Appeal held that the action was not statute-barred. The case turned on the discoverability principle in section 5 of the *Limitations Act, 2002*.[124]

In 2004 the appellant agreed to purchase a one-half interest in a property. The appellant agreed with the seller to an arrangement in the statement of adjustments to reduce the land transfer tax (the "Rollover Credit").[125] Greenbelt legislation was passed shortly before the February 2005 closing date that adversely affected the property's development potential and the purchasers refused to close.[126] The seller brought

[115] *Ibid* at para 69.
[116] *Ibid* at para 67.
[117] *Ibid* at para 75.
[118] *Ibid* at paras 78.
[119] *Ibid* at para 77.
[120] *Ibid* at para 75.
[121] *Ibid* at para 82.
[122] *Ibid* at paras 71-73.
[123] 2012 CarswellOnt 15101 [*Ferrara*].
[124] SO 2002 Chapter 24 Schedule B [*Limitations Act*].
[125] Ferrara, *supra* note 123 at paras 7-8.
[126] *Ibid* at para 9.

an action that was settled by the parties; however a dispute subsequently arose over the Minutes of Settlement and the Rollover Credit.[127] As a result, the parties became embroiled in more litigation. The second action was found in favour of the seller, despite the fact that the respondent solicitor repeatedly assured the appellant that he was entitled to the Rollover Credit.[128] The appellant then commenced the action for solicitor's negligence against his lawyer. The claim was dismissed for being statute-barred.

Writing for a majority of the Court, Epstein JA noted that there were three possibilities for the date on which the claim was discoverable by the Claimant: (i) on the date the statement of claim was issued in the second action; (ii) on the date the Claimant retained litigation counsel in the second action; or (iii) July 2, 2009, the date of the decision in the second action. The Court held that the negligence of the respondent solicitor was only discoverable by the Claimant on the date of the decision in the second action.[129]

Epstein held that the following factors were relevant in determining when the limitations clock started running:

(i) the fact that the appellant was an unsophisticated client;

(ii) the long-standing relationship between the solicitor and client;

(iii) continuous and repeated assurances by the solicitor that his opinion was correct;

(iv) the solicitor having never advised the appellant that he may have been wrong or made a mistake;

(v) the failure of the lawyer to inform his client of his possible error, which is required by rule 6.09 of the Rules of Professional Conduct;

(vi) evidence from the appellant that none of the three lawyers he retained in relation to the matter after the solicitor recommended suing him for negligence;

(vii) the fact that the solicitor continued to represent the client throughout the second action; and

(viii) the action against the solicitor was commenced within two years of the decision in the second action.[130]

The *Limitations Act* stipulates that a claim must be commenced within two years of being discovered. The appellant maintained that he was unaware of a potential claim against his former solicitor until the decision in the second action.[131] Epstein JA continued:

> My colleague relies on Mooly J.'s comment in *Kenderry – Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger* (2001), 53 O.R. (3d) 208 (Ont. S.C.J.), at para 19: "The date upon which the plaintiff can be said to be in receipt of sufficient information to cause

[127] *Ibid* at paras 10-11
[128] *Ibid* at para 68.
[129] *Ibid* at paras 66-67.
[130] *Ibid* at para 68.
[131] *Ibid* at para 70.

> the limitation period to commence will depend on the circumstances of each particular case."
>
> I agree with this comment. In the present case, two "circumstances" in combination support my conclusion that the claimant's claim against the solicitor was not discoverable before July 2, 2009: the solicitor's repeated assurances that he was right; and the claimant's uncontradicted evidence that nobody told him otherwise.[132]

The longstanding relationship between the parties along with the evidence that the claimant's subsequent lawyers never told him that he had a potential claim in negligence against the solicitor were also mitigating factors.[133] Notably, Epstein JA also pointed out that the solicitor could have cross-examined the claimant on the advice he received, or subpoenaed the subsequent lawyers for examination, but chose not to do so.[134]

Lipson v Cassels Brock & Blackwell LLP

In *Lipson v Cassels Brock & Blackwell LLP*,[135] a law firm was sued in a class action for providing a negligent opinion in respect of a tax matter. Several taxpayers donated cash and resort timeshare weeks to registered athletic associations during a four year period between 2000 and 2003.[136] In return, they anticipated receiving tax credits worth more than their financial outlay. The firm provided an opinion, which was used in promotional material for the program, indicating that it was unlikely that the Canada Customs and Revenue Agency ("CCRA") could successfully deny the donors the anticipated tax credit.[137] As it turns out, the tax credits were disallowed by the CCRA, with the claimant receiving notice of this in 2004.

Two donors launched test cases in 2006 to challenge the denial. The test cases were settled in 2008. At or around this time, the claimant and other donors entered into similar arrangements with the CCRA. The claimant commenced the proposed class action in April 2009, nearly five years after receiving his notice of disallowance from the CCRA.[138] In the class action, the claimant sued the firm for negligence and negligent misrepresentation. The action was dismissed on a motion for certification on account of the limitations period having lapsed.

The motion judge found that the limitation period lapsed on the basis of *Rafuse*, holding that the clock started when the validity of the opinion was challenged.[139] The Court of Appeal disagreed with the motion judge.[140] According to Goudge and Simmons JJA, the claim did not commence when the CCRA challenged the tax credits, nor did it commence when class members challenged the CCRA's denial of the tax credits.[141] At these points, the court could not find that the class members reasonably ought to have known that they had suffered a loss as a result of the solicitors' negligence.[142] Instead, when the limitation period began to run for each class member "may be an issue that must be determined

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[132] *Ibid* at paras 71-72.
[133] *Ibid* at para 73.
[134] *Ibid* at para 80.
[135] 2013 ONCA 165 [*Lipson*].
[136] *Ibid* at para 2.
[137] *Ibid* at para 3.
[138] *Ibid* at paras 5-7.
[139] *Ibid at para 61.*
[140] *Ibid* at paras 73 and 77.
[141] *Ibid* at para 82.
[142] *Ibid*.

individually" for each member.[143] Factors that might affect when the clock started include: the position the firm took in response to the CCRA challenge; the notice the firm gave to class members of their position on the CCRA challenge; and what each class member was told by their own professional advisors.[144]

Interestingly, the claimant's claim was allowed to stand despite some questionable admissions by the claimant testifying:

> [he] testified that he did not read the Cassels Brock opinion; that he interpreted the existence of the opinion as meaning the [tax credit] was legal and not subject to challenge; and that, when the CCRA challenged the tax credits, he knew he had a problem and that he would not obtain what Cassels Brock promised.[145]

However, the court noted deficiencies in how the opinion was worded that may have mitigated in the claimant's favour. In particular, the opinion did not promise that CCRA would not challenge the tax credit, but rather than it was unlikely that CCRA could successfully challenge the tax credit. Justices Goudge and Simmons then noted: "[t]o the extent that his interpretation of the opinion may weaken his claim for reliance in relation to his negligent misrepresentation claim, in our view, that will be an issue for the trial judge".[146]

With respect to the negligence claim, the claimant alleged that the firm fell below the standard of care of a reasonably competent tax solicitor in rendering its opinion and that the opinion contained material misrepresentations. Furthermore, he argued that the firm knew that donors would rely on the existence of the favourable tax opinion in deciding whether to donate.[147] He claimed that but for the opinion, the program would not have been successfully promoted.[148] Furthermore, he said that he and other class members suffered damages as a result of the firm's negligence and misrepresentations.[149]

The motion judge found that, for both negligence allegations, the issue of whether the breach caused class damage was not a common issue but had to be answered on an individual basis for each class member. On appeal, the Court found that causation for simple negligence should be certified as a common issue.[150] The Court held:

> the claim in simple negligence is distinct from… [the] claim in negligent misrepresentation, which required proof of reliance…
>
> Framed in this way, the cause of action in simple negligence does not require a showing of reliance… The allegation is that class members suffered damage because they participated in the program, which, but for the law firm's negligent opinion, would not have been marketed by the promoters and thus not available to class members.[151]

[143] *Ibid* at para 84.
[144] *Ibid*.
[145] *Ibid* at para 89.
[146] *Ibid* at para 90.
[147] *Ibid* at para 38.
[148] *Ibid* at para 39.
[149] *Ibid* at para 40.
[150] *Ibid* at paras 94-95.
[151] *Ibid* at paras 97-98.

Part VI Conclusion

The cases discussed in this paper illustrate that there are several simple steps a lawyer can take to reduce their exposure to being held by a court to have fallen below the standard of care.

1. Retainers should be clearly outlined and, preferably, reduced to writing.

2. Lawyers should ensure clear communication when discussing matters with their client.

3. Lawyers should maintain clear, concise and detailed notes of their interactions with clients.

4. Lawyers should be especially careful in dealing with unsophisticated clients, as courts may apply a heightened standard for such clients.

In any event, by communicating clearly and plainly with clients, being thorough and maintaining a clear record, the risk of misunderstandings is reduced as is the likelihood of falling below the standard of care.

Table of Authorities

Cases

Legislation

Limitations Act, 2002, SO 2002 Chapter 24 Schedule B