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Recent Developments in Solicitor's Negligence

By: David M. Lobl*

DENTONS CANADA LLP

*David M. Lobl is a Partner at Dentons Canada LLP. David Lobl gratefully acknowledges the assistance of Andy McDonnell, Articling Student and Ginevra Saylor, at Dentons Canada LLP, with the preparation of this paper.

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In the year or so since I last wrote on this topic, the courts have not added materially to the jurisprudence on the duty counsel owe their clients or the standard to which counsel are expected to conduct themselves to satisfy that duty. That being said, the courts have been called upon to determine issues of great importance to counsel when advising clients. In particular, over the last twelve months courts have expounded on how limitations periods apply in various circumstances, with discoverability being a focal point. In Part I of this paper, we look at several cases that discuss limitations and discoverability, as well as the interplay of limitations with other issues, like capacity and Summary Judgment. In Part II, we examine a range of cases that consider the validity of the negligence claim before the court.

Part I Limitations Period

A. Discoverability

Over the past year, the courts have been asked to interpret just how discoverability affects the tolling of limitations periods in a wide range of circumstances. Section 5 of the *Limitations Act* 2002[1] [the Act] (as set out below) defines the point at which a potential plaintiff has or ought to have discovered a claim. In some instances, claims are deemed statute barred because the plaintiff failed to take the necessary steps to enforce the claim within the statutory limitations period. Discoverability and limitations periods are critical when advising clients of their rights regarding a claim and practitioners must take care not to run afoul of these principles as the consequences to both clients and counsel can be severe. Section 5 provides as follows:

> **5.** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched.B, s.5(1).

[1] S.O. 2002, CHAPTER 24
SCHEDULE B

> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched.B, s.5(2).
>
> (3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made. 2008, c. 19, Sched. L, s. 1.

Under sections 6 and 7, the limitation period does not run for any period while the person with a claim is a minor or incapable of commencing a proceeding due to a physical, mental or psychological condition respectively and not represented by a litigation guardian in relation to the claim. On the other hand, if a litigation guardian has been appointed, section 8 provides that the limitation period runs as if the litigation guardian were the person with the claim.

***Ziomek v. Miokovic*[2]**

In *Ziomek v. Miokovic*, the court considered several issues in deciding a motion for summary judgment in an action brought under the simplified procedure. The action arose when the parties' father, Bronislaw Ziomek, died in 2007 leaving an estate worth approximately $173,000. Under the deceased's will, plaintiff would receive nothing from the estate, while Lily and Christine Ziomek would share 20% and defendant Christine Miokovic would receive 80% of the estate.

According to plaintiff, the deceased had created a secret trust in favour of plaintiff, with defendant as Estate Trustee. The plaintiff alleged that the secret trust required 40% of the total value of the deceased's estate be paid to plaintiff out of defendant's 80% of the estate under the will. Alternatively, plaintiff claimed that a promissory note signed by defendant in plaintiff's favour obliged defendant to pay plaintiff that same amount.

During the course of the proceeding, plaintiff cancelled two scheduled examinations for discovery, notifying defendant of the second cancellation the same day. The defendant moved for summary judgment on the basis that plaintiff (a) made no case for a secret trust and (b) failed to establish a promissory note or, in the alternative, any claim arising from the promissory note was statute barred. In deciding the motion, the Court addressed whether:

1. any issues requiring trial rendered the case inappropriate for summary judgment,
2. a secret trust could be established under the circumstances, and
3. the promissory note was enforceable.

Allowing defendant's motion and dismissing the action, the Court found no secret trust existed and that plaintiff could not rely on any of the evidence purportedly establishing a promissory note's existence. But, the Court found that had plaintiff's claim been grounded, that claim would not have been statute barred.

Regarding the first issue, the Court noting his full appreciation of the issues based on the evidence submitted, cited the decision in *Sweda Farms v. Egg Farmers of Ontario* [3]with approval as the basis for deciding no trial was needed. In *Sweda Farms,* the court considered the Supreme Court's decision in

[2] 2014 ONSC 5126
[3] 2014 Canlii 1200 (ONSC)

Hryniak v. Mauldin[4], which established the test for summary judgment as, "whether the court's appreciation of the case is sufficient to rule on the merits fairly and justly without trial, rather than the formal trial being the yardstick by which the requirements of fairness and justice are measured." Noting that *Hryniak v. Mauldin* had not changed earlier law, the Court observed that courts will assume that parties have presented their best case and the record contains all evidence the parties would rely on at trial. As the moving party in the case at hand, defendant did have the burden of demonstrating no genuine issue for trial, but plaintiff was also obliged to present his best case. And because plaintiff himself aborted the attempts at examinations for discovery, he could not claim that allowing summary judgment before holding examinations for discovery would be unfair.

As to the final question of whether the deceased had created a secret trust, the Court found that plaintiff Failed to establish the four factors needed to create a secret trust, namely that the creator intended to create a trust, the creator communicated the intention to the Trustee, the Trustee accepted the trust, and the terms and objects of the trust were certain.

***Leibel v. Leibel*[5]**

Another estates case, *Leibel v. Leibel* addresses the Act's operation in the context of estates litigation, while also considering solicitor's negligence in drafting wills. In *Leibel*, the testatrix's son challenged her will, alleging that she was mentally incapable and subject to her husband's undue influence at the relevant time. The testatrix suffered from lung cancer that had metastasized in her brain, causing her son to express concerns about her capacity. Immediately after the testatrix died, the son discovered that she had recently executed a new will. Although he obtained a copy of the will at that time, the son waited over two years to challenge the new will. The Court rejected the son's application on all grounds.

The son first argued that he was entitled to relief under s.16 (a) of the Act, which provides for no limitation period when a plaintiff seeks only declaratory and no consequential relief. Yet in this case, the son sought not only a declaration that his mother's will was invalid, but also removal of his sister and brother-in-law as Estate Trustees, a passing of accounts, and appointment of an ETDL. Seeking these additional orders precluded the son from relying on s.16(a). The son also sought disclosure of his mother's medical and legal records and declarations regarding revocation of her earlier wills, both of which the Court likewise rejected.

Next considering discoverability and the limitation period under ss. 4 and 5 of the Act, the Court found that the son clearly knew of a potential claim immediately following his mother's death, having obtained a copy of the new will. The limitation period started running from the point he obtained the new will, which he had looked for precisely because he was concerned about his mother's mental capacity. For some reason, the son chose not to challenge the will for over two years after the death, by which time the Estate Trustees had distributed virtually all of the assets. The Court observed that setting the will aside would substantially prejudice the Trustees in circumstances where the son had both benefitted from and co-operated with the Estate's administration before challenging the will. Accordingly, the son was estopped from later challenging the will.

Finally, the Court refused to order that the will to be proved in solemn form. While courts will scrutinize a will's validity in contests over testamentary capacity, no real concern presented in this case. Instead, the Court found the will itself to be sensible and fair regarding all concerned. The Court admonished the son

[4] 2014 SCC 7
[5] 2014 ONSC 4516

for standing by and benefitting from the will's administration for nearly three years before alleging undue influence and suspicious execution of the will.

After dismissing the application as statute barred, the Court noted that, with regard to the defendant solicitor who drafted the will, the son would be hard pressed to demonstrate that he suffered any loss from the solicitor's alleged negligence given the son's participation and co-operation in, not to mention benefitting from, the estate's administration under that will.

Longo v. MacLaren Art Centre[6]

In *Longo v MacLaren Art Centre*, the Ontario Court of Appeal considered the application of discoverability in a case involving damage to the *Walking Man* sculpture, believed to be the work of Auguste Rodin. The plaintiff in *Longo* had purchased the sculpture in 1998 intending to donate it to defendant art centre and receive a substantial tax credit. The sculpture was loaned to MacLaren in 2000 and exhibited once in September 2001 before being placed into storage. In 2004, MacLaren wrote to plaintiff advising that the art centre could no longer afford to store and insure the sculpture. In response, plaintiff's agent requested more information and documentation to facilitate the sculpture's return to plaintiff. Although the parties disagreed over whether MacLaren was required to and did provide the requested information and documentation, the dispute was rendered irrelevant by legal proceedings the Musée Rodin initiated over purported Rodin works on loan to MacLaren. In that proceeding, the Ontario Superior Court enjoined MacLaren from moving or disposing of purported Rodin works to allow an expert to inspect them.

The inspection of *Walking Man* and the other works was invasive and, along with packing and unpacking, damaged *Walking Man* extensively; the parties agreed the damage occurred sometime between 2004 and 2007. Although plaintiff's agent and defendants communicated about the damaged sculpture at some point between 2007 and 2008, neither party confirmed whether the exchanges concerned the extent, cause, and timing of the damage or who would bear responsibility for the loss. In early 2008, plaintiff's agent inspected *Walking Man* and determined that the damage was extensive enough to render the sculpture worthless. In late 2009, plaintiffs brought an action against MacLaren seeking damages for breach of contract, negligence, and bailment.

In their motion for summary judgment, defendants argued that plaintiff started its action after the limitation period expired; in the alternative, defendants argued that plaintiff failed to establish damages and that defendants' behaviour fell below the appropriate standard of care. Agreeing with defendants, the Court found that the limitation period started running as early as October 2007 as plaintiff knew or should have known that *Walking Man* was damaged when MacLaren first notified plaintiff's agent that some damage had occurred then. The plaintiff appealed and the Ontario Court of Appeal set the decision aside.

Observing that the factors in s.5 (1) (a) are conjunctive, the Court of Appeal ruled that the limitation period does not start running until plaintiff actually becomes aware of all factors or a reasonable person of similar abilities and in similar circumstances first ought to have known of all factors. Allowing that plaintiffs must act with due diligence in determining whether they have a claim, the Court noted that a limitation period deos not stop while a plaintiff takes no steps to investigate. Though some action clearly is required, the nature and extent of the action depends on all surrounding circumstances. As noted in *Soper v. Southcott*[7], "Limitation periods are not enacted to be ignored. The plaintiff is required to act with due

[6] 2014 ONCA 526 (Canlii)
[7] 1998 Canlii 5359 ONCA

diligence in acquiring facts in order to be fully apprised of the material facts upon which a negligence or malpractice claim can be based…"

Even though *Soper* was decided under prior legislation, the reasoning applies because the former and current legislation are entirely consistent. In determining whether a plaintiff has acted reasonably, courts must analyze not only the nature of the potential claim, but also the particular circumstances of the plaintiff (para 43). In *Longo*, the Court suggested that certainty as to defendant's responsibility for the act or omission that caused or contributed to the loss was not required; rather, plaintiff's having prima facie grounds to infer that defendant's acts or omissions caused the damage was sufficient.

***Slack v. Bednar*[8]**

Slack v. Bednar gives an excellent review of discoverability and due diligence. In *Slack*, the defendant performed spinal surgery on plaintiff after plaintiff was injured in a skiing accident in March 2006. The day after the surgery, defendant told plaintiff that an incident during the surgery caused further damage; plaintiff suffered bowel and bladder problems following the surgery. In September 2006, plaintiff's solicitors received medical records confirming the exacerbating incident during surgery; plaintiff and counsel discussed possibly suing defendant, but filed an action against only the ski resort. The plaintiff took no action against defendant until March 2011, when plaintiff's lawyers received an expert opinion from the ski resort's medical expert opining that defendant's use of an overly large instrument during surgery fell below the appropriate standard of care. The defendant brought a motion for summary judgment on the grounds that plaintiff's claim was statute barred.

The plaintiff argued that the claim against defendant became discoverable only when the ski resort's expert opinion was received. Rejecting this argument, the Court found that the medical records that the ski resort's expert relied on had been equally available to plaintiff and plaintiff's counsel. Further, plaintiff and counsel knew from the outset that defendant had accidentally injured plaintiff during the surgery and had both discussed and rejected the idea of suing defendant. In granting the motion and dismissing the action, the Court found that plaintiff and counsel had not exercised the required due diligence in pursuing the claim against defendant. That standard is found in the Supreme Court's decision in *Peixeiro v. Haberman* [9], where the court stated, "Once the plaintiff knows that some damage has occurred and has identified the tortfeasor… the cause of action has accrued. Neither the extent of damage nor the type of damage need be known." The Supreme Court made it clear in *Peixeiro* that the threshold is relatively low for determining whether a plaintiff knew or ought to have known that he or she had a claim.

In *Slack*, the plaintiff clearly was aware of a potential claim against the defendant, but consciously decided to sue only against the ski resort. In addressing plaintiff's idleness, the Court cited the decision in *Barry v. Pye*[10] , which warns, "Limitations are not to be ignored…. The plaintiff need not be certain that the defendant's act or omission caused or contributed to the loss in order for the limitation period to begin to run. The limitation begins to run from when the plaintiff had, or ought to have had, sufficient facts to have prima facie ground to infer that the defendant's acts or omissions caused or contributed to the loss." Ultimately, counsel must make all the necessary inquiries to determine against whom any possible claims may be brought within the limitation period.

[8] 120 OR (3d) 689
[9] [1997] 3 S.C.R. 549, para 18.
[10] [2014] ONSC 1937

***Landrie v. Congregation of the Most Holy Redeemer*[11]**

In *Landrie v. Congregation of the Most Holy Redeemer*, the Court analyzes s.7 of the Act, which stops the limitation period from running during a plaintiff's incapacity. The Court also considered s.7's operation in light of a similar provision in the former *Limitations Act*. The plaintiff in *Landrie* injured her ankle on November 19, 2008, when she slipped and fell leaving the defendant church. At the time, plaintiff suffered no head injuries and did not lose consciousness. The plaintiff was sedated on the day of the injury and on November 24, when the bones in her ankle were reset. She underwent surgery on November 27 and was released from hospital December 5. Between November 19 and December 3, plaintiff was heavily medicated, disoriented, and confused much of that time, though conscious.

About two years later, plaintiff decided to file a claim against the defendant and mistakenly advised her counsel that the injury happened on November 24, 2008. Her lawyers filed a Statement of Claim November 22, 2010 and defendants moved for summary judgment to dismiss the action as statute barred. The plaintiff countered that because she had been heavily medicated following her injury, she was mentally incapacitated and s.7 of the Act applied to extend the limitation period.

In finding that plaintiff was incapacitated by an adverse physical, mental, or psychological condition immediately following her injury and surgery, the Court ruled that s.7 of the Act extended the limitation period for the period of incapacity. Noting that new s.7 is broader than its predecessor, the Court observed that the former Act required plaintiffs demonstrate serious mental incapacity that rendered them unable to commence an action. By contrast, s.7 of the new Act does not require mental incapacity to stop the limitations period from running; rather, plaintiffs need only demonstrate that they are incapable of commencing action by virtue of incapacity. The new wording clearly is more generous. Under the circumstances, the Court found that plaintiff was incapable of commencing an action while heavily medicated, even though she provided no expert evidence on point. Applying *Hryniak*, the Court found no genuine issue for trial and dismissed defendant's motion.

***Schmitz v. Lombard*[12]**

The question of how discoverability applies in cases involving underinsured motorist insurance was considered in *Schmitz v. Lombard*. Here, plaintiff was injured in a car accident in 2006 and claimed against the other driver in 2007. Though the other driver's insurance policy covered plaintiff's injuries up to only one million dollars, plaintiff had additional coverage through Lombard for up to two million dollars in any collision with another driver with insufficient coverage. The plaintiff brought action against defendant insurer for the excess damages in 2010 and defendant moved to dismiss the action as outside the twelve-month limitation period in paragraph 17 of the OPCF 44R. The plaintiff argued that the limitation period in s.4 of the Act applies, rather than that in paragraph 17 of the OPCF 44R, and s.5 of the Act overrides paragraph 17.

The lower court dismissed the motion and defendant appealed. On appeal, although conceding that the Act's s.4 was the appropriate limitations period, defendant argued that s.5's discoverability principles override paragraph 17 of the OPCF 44R on when the period starts running. In defendant's view, the period started running from the time the plaintiff knew or should have known that the claim would exceed one million dollars. The Court of Appeal rejected this argument, ruling that the period did not start running until plaintiff demanded payment from defendant. Defendant sought leave to appeal to the Supreme

[11] 2014 ONSC 4008
[12] 2014 ONCA 88

Court of Canada arguing that the ruling is unfair to insurers in giving plaintiffs unlimited time to bring claims. The Supreme Court did not grant leave; as the Court of Appeal noted, paragraphs 14 and 15 of the OPCF 44R adequately protect insurers.

B. Other Limitations Developments

***Chahine and Al-Dahak v. Grybas*[13]**

The Court in *Chahine and Al-Dahak v. Grybas* cited *Schmitz* in allowing a plaintiff to amend a Statement of Claim to add an insurance company as a defendant. In this case, plaintiff's vehicle was rear-ended by defendant driver on December 16, 2010. Believing that only two cars were involved, plaintiffs filed a claim December 13, 2012, against only the defendant driver.

In fact, the attending police officer's report indicated that a third unidentified motorist had in fact rear-ended defendant driver's car. In July 2013, defendant driver's counsel alerted plaintiff's counsel to unidentified third driver's existence from the complete police report and plaintiff's counsel moved for leave to add plaintiff's under- and uninsured motorist insurance provider, Primmum Insurance, as a defendant. Primmum responded that plaintiff's claim was statute barred because plaintiff knew or should have known about the unidentified third driver within two years of the accident. Primmum relied on *Wilkinson v. Braithwaite* [2011] O.J. No. 1714, where a court refused to add an insurance provider in similar circumstances, finding that plaintiff had not exercised due diligence. Arguing that *Schmitz* applies equally to under-insured and unidentified drivers, plaintiff urged that the limitation period started running only when plaintiff sought indemnification from Primmum.

The Court agreed that under *Schmitz* the proper question is exactly when plaintiff knew or should have known a loss was caused by Primmum's omission. Therefore, the limitation period did not begin to run until plaintiff sought indemnification from Primmum and was refused.

***Skrobacky v. Frymer*[14]**

The difference in outcomes where a plaintiff wishes to amend a Statement of Claim under Rule 26.01 instead of adding a party under Rule 5.04 of Ontario's *Rules of Civil Procedure* (the Rules) in circumstances where a claim may be statute barred is illustrated by *Skrobacky v. Frymer*. In this case, plaintiffs moved to amend their Statement of Claim under rule 26.01 to add new claims against a defendant accountant. The Court granted the motion and defendant sought leave to appeal to the Divisional Court on the grounds that plaintiff's claim was statute barred. Comparing the moving party's burden in applications under rules 5.04 and 26.01, the Divisional Court found slight differences. The moving party under rule 5.04 must establish why the identity of the party to be added could not be discovered with due diligence before the limitation period expired; though the moving party must adduce some evidence of steps taken to ascertain the individual's identity, "not very much" is required. On the other hand, a party moving under rule 26.01 need only give a reasonable explanation for why the new claims were not disclosed in previously available material, the party need not adduce evidence of steps taken.

In the case at hand, the Court found that the original documents did not disclose the nature and extent of defendant's involvement in the conduct underlying the new claims. Turning to the issue of discoverability,

[13] 2014 ONSC 4698
[14] 2014 ONSC 4544

the Court noted that the moving party must show why discoverability is an issue and failure to do so can result in dismissal. In so holding, the Court affirmed that where a triable issue of discoverability exists, leave to amend a statement of claim should be granted, with leave to the other party to plead that the claim is statute barred.

Patterson v. Ontario (Transportation) [15]

In the tragic *Patterson v. Ontario (Transportation)* case, a multi vehicle accident in 2004 claimed one life and seriously injured two others. Patterson was driving with two passengers when Daniel Gagnon crossed into Patterson's lane from the opposite side, causing a three car crash. The police report named Gagnon as the car's owner and driver, which Gagnon later admitted to in his Statement of Defence. Four actions were brought against Gagnon, two under the Family Law Act (FLA) by Patterson's survivors and two personal injury actions by the injured passengers.

In their Statements of Claim, all of the plaintiffs' lawyers relied on the police report and Gagnon's admission. One counsel performed a Plate/VIN by date search, but never reviewed the report when received. During examination for discovery, Gagnon indicated that the vehicle was in fact leased from Daimler Chrysler, the actual owners. All plaintiffs then commenced actions against Daimler Chrysler, which moved that the claims be dismissed as statute barred.

Rejecting Daimler Chrysler's motion, the Court noted that special circumstances allowed Patterson's survivors' claims under the FLA, despite s.38 of the *Trustee Act*. The Court found it reasonable for plaintiffs' lawyers to mistakenly believe that Gagnon owned the car as they reasonably relied on both the police report and Gagnon's admission. A reasonable explanation justified plaintiffs' delay in bringing the action and both Daimler Chrysler and its insurer knew about this serious accident from the moment it happened. The Court then found that the Daimler Chrysler's identity as owner was not reasonably discoverable by plaintiffs' counsel. Noting that counsel were retained in 2004, due diligence did not require counsel to perform searches to determine ownership; rather, counsel had fulfilled their due diligence obligations as they existed at that time. In 2004, the lawyers were entitled to rely upon Gagnon's admission and the police report.

Daimler Chrysler unsuccessfully appealed to the Court of Appeal. That Court upheld the lower court's reasoning as sound and carefully considered, agreeing that appellants suffered no prejudice given they were well aware of the accident from the outset. Giving due regard to equitable considerations, neither court would allow Daimler Chrysler to escape the proceedings given its full knowledge throughout and the gravity of the accident.

Part II: Validity of the Claim

McLaughlin v. McLaughlin[16]

A squabble among several siblings in *McLaughlin v. McLaughlin* centred on a series of changed and revoked wills that culminated with a negligently drafted final will. In their application for rectification, applicant siblings provided overwhelming supporting evidence of an error in the will not reflective of the testatrix's clear intent. The respondents contested rectification and relied on the mistake in the will to voice their concerns over the testatrix's relationship with the Trustee. Starting in 1991, the testatrix

[15] 2014 ONCA 487
[16] 2014 ONSC 3162

executed several wills that ended with her excecuting primary and secondary wills in 2010. All of the wills were all drafted by the same lawyer.

In the 1991 will, the testatrix left the residue of her estate to be divided equally among her surviving children. In 1994, the testatrix asked her lawyer to amend the will to exclude the respondent siblings from whom she was estranged and had no relationship with for many years. The lawyer included these instructions in his notes when he changed the will. The 1994 will also made the following significant changes that further demonstrate the testatrix's intention:

1) her grandchildren would receive $2,000 each, if alive at her death,

2) her daughter-in-law would receive $5,000, and

3) Daniel and Debora McLaughlin would be paid the balance in her RBC account.

Following the death of one of her sons, the testatrix had her lawyer change her will in 2002 and reiterated her intent that respondents receive no part of her estate. Again, the lawyer recorded the instructions in his notes. The new will provided bequests of $2,000 each to fifteen named grandchildren, if alive at the time of death, and $5,000 to another daughter-in-law. In 2010, the lawyer advised the testatrix that her estate would pay less in probate tax if she used multiple wills; so, testatrix revoked the 2002 will and had her the lawyer draft a primary will addressing the bulk of the estate and a secondary will disposing of her house. As in the past, the lawyer noted the testatrix's instructions regarding the respondents' exclusion from her wills in his notes.

Unfortunately, when drafting what would become the final wills, the lawyer omitted the residue clause from the secondary will and inadvertently repeated bequests to the grandchildren and daughters-in-law. The first paragraph of both the primary and secondary will stated, "I hereby revoke all wills made before this will, but not the Will made the 16th day of June 2010 to dispose of real property located at 78 Wellington Street East, Brampton, Ontario." This effectively revoked the primary will, leaving only the secondary will. Worse still, this caused intestacy that, in turn, resulted in all surviving children benefitting from the estate equally, contrary to the testatrix's expressed intent.

The applicants asked the Court to rectify the will and introduced as evidence the drafting lawyer's affidavit admitting to his drafting errors and a transcript of his cross-examination. The respondents offered evidence that they were not estranged from their mother, but were instead estranged only from their brother and his wife because of the pair's adverse influence over the testatrix.

In granting the application, the Court observed that although no ambiguity appeared on the face of the secondary will, the surrounding circumstances make the mistake readily apparent given:

1) the drafting lawyer's admission of errors in the secondary will,

2) evidence of a trusting and loving relationship between the testatrix and the family members named in the primary will,

3) uncontested fact that the respondents had not spoken to their mother for several years,

4) 1994, 2002, and primary wills all had a residue clause naming beneficiaries,

5) 1994 and 2002 wills and lawyer's notes from 1994 through 2010 confirm that the lawyer had not been instructed to duplicate the bequests to the beneficiaries listed in the secondary will,

6) testatrix clearly instructed the lawyer to bequeath to each of her named grandchildren $2,000 and nothing more, and

7) the only reason for drafting the primary and secondary wills was to allow the estate to benefit from favourable tax relief.

Accordingly, the Court granted rectification, relying on *Robinson Estate v. Robinson*[17].

***Chaudhry and 5 Star v. Falconer Charney*[18]**

The facts of *Chaudhry and 5 Star v. Falconer Charney* should remind solicitors just how important it is to keep complete files. The case also confirms that to succeed, plaintiffs must produce evidence establishing that they suffered quantifiable damages as a result of the defendant lawyer's negligence.

In *Chaudhry*, plaintiff claimed that the defendant law firm negligently discharged its duties in representing Chaudhry and 5 Star in two litigation matters; Chaudhry was the principal of 5 Star at all material times. The first litigation arose from a dispute between Chaudhry and a former business partner who sought an injunction against Chaudhry and 5 Star on short notice. The defendant firm successfully resolved this dispute for Chaudhry on favourable terms. When the former business partner next filed an action, the defendant firm brought a motion to strike the Statement of Claim. The plaintiffs, however, contend that they never instructed defendant law firm to bring the motion to strike on their behalf. The defandant law firms's file was not helpful in resolving this question. The plaintiffs claim they suffered damage because defendants delayed filing a Statement of Defence for four months.

The second action concerned plaintiffs' contract dispute with a Pakistani popstar. The plaintiffs entered into an agreement for the popstar to play two concerts in Canada in May 2005. The concerts never happened and plaintiffs sued the popstar for breach of contract. In 2008, two settlement conferences were held, one in May and the other either the first week of September (according to defendant law firm) or first week in August (according to plaintiffs). The defendant law firm's file was silent as to the correct date. The plaintiffs contend that the second conference led to a settlement agreement between plaintiffs and the popstar; the defendant law firm contends that no settlement was reached because plaintiff Chaudhry fundamentally disagreed with some material terms. Notably, the defendant law firm's file contained an invoice referencing a final settlement agreement sent to the popstar's lawyers. When the plaintiffs contacted the popstar's lawyers in June 2010 to ask whether the defendant law firm had sent the draft agreement before the agreed November 28, 2008 deadline, plaintiffs were advised an agreement had never been received. The plaintiffs claim damages as a result.

The Court found that, while inconsistencies over what actually happened are best decided by the trier of fact, the inconsistencies here were irrelevant as plaintiffs produced no evidence of damages. Concerning the first litigation, the plaintiffs argued that they were entitled to have their legal costs for the unauthorized motion returned; however, plaintiffs owed the defendant law firm an amount equal to those costs.

[17] 2011 ONCA 493
[18] 2013 ONCA 6175

Likewise, plaintiffs failed to establish that the delay in filing their defence caused them to suffer any damage.

Regarding the second litigation, the Court noted that plaintiffs established no evidence of:

1) efforts made and impediments to settle the action since 2009,
2) their pursuing settlement in accordance with that reached in principle in 2008,
3) settling on terms similar to the 2008 agreement in principle is no longer possible,
4) the popstar action and damages sought, including costs from 2005, have been abandoned or the loss can no longer be remedied (in fact, evidence suggested that the action remained live),
5) the popstar is no longer popular and would not attract an equal fan-base as he would have in 2009 (in fact, evidence suggested that the popstar remained popular),
6) concerts needed to be held in 2009 or never, and
7) concerts would not be as profitable today as in 2009.

In granting defendant's motion for summary judgment, the Court relied on *Combined Air Mechanical Services Inc. v. Flesch*[19], which obliges both parties in a summary judgment motion to put their best evidence forward. On appeal, the decision was upheld with little commentary. The result may seem a bit generous for defendant law firm in that the Court acknowledged evidence of defendant law firm's negligence and breach of contract and dismissed the action only for want of damages. But, as noted from the outset, this case serves as a cautionary tale for counsel to always keep complete files.

Chaudhry v. Falconer Charney

The same parties crop up in in the unreported *Chaudhry v. Falconer Charney* case in July 2, 2014. Here, plaintiff Chaudhry retained the defendant law firm to recover money from the Law Society's Compensation Fund on grounds that another lawyer allegedly misappropriated plaintiff's money. In a letter dated April 8, 2008, the Law Society declined to recommend payment as it was not prepared to accept that the lawyer had misappropriated funds.

When the defendant firm sent a draft response to the Law Society's letter to plaintiff for review, a dispute arose over the response's wording. The defendant firm tried to arrange a meeting with plaintiff to discuss the wording, but a meeting was never arranged and no response was sent to the Law Society. The matter lay dormant until November7, 2008, when plaintiff formally complained to the Law Society, ending the retainer with the defendant firm.

After investigating the matter, the Law Society found that the defendant firm failed to meet the required professional standard of service by neither meeting with plaintiff, nor returning plaintiff's telephone calls.

[19] 2011 ONCA 764

In a later action, the Court summarily dismissed plaintiff's claim, ruling that despite the Law Society's finding, no evidence established that the defendant firm's actions caused plaintiff any loss. The Court also held that breach of professional standards alone does not substantiate a negligence claim in the absence of an expert opinion. Interestingly, the Court found no negligence because plaintiff had produced no evidence on point. Yet, the Law Society's finding arguably could be seen as equal to an expert opinion. On receiving a complaint, the Law Society must make a finding on the lawyer's conduct based on the standard of the reasonable, prudent, and competent lawyer. So, it may be difficult to articulate how the Law Society's finding would materially differ from an expert opinion at trial. In the case at hand, however, the distinction was of no consequence as plaintiff produced no evidence of damages.

***Dhillon v. Jaffer*[20]**

In the factually extraordinary *Dhillon v. Jaffer* case, plaintiff returned to Canada only to learn that his wife and son had sold his home using a forged power of attorney (POA). With the forged POA purportedly authorizing the wife to sign sale and transfer documents on her husband's behalf, the wife entered into an agreement to sell the home and later tried to pull out of the agreement. The defendant lawyer represented the wife in later litigation that resulted in an order for specific performance requiring sale of the home. The defendant lawyer negligently released the entire proceeds of the home's sale, $187,000, to the wife.

The plaintiff filed an action against the defendant lawyer seeking to recover the proceeds negligently paid to the wife and damages for mental distress. Notably, plaintiff received title to another house the wife purchased with $101,000 of the proceeds. Even though plaintiff had obtained title to the new house, the trial court found defendant lawyer liable in negligence for the entire proceeds of the sale and awarded plaintiff $40,000 for mental distress and $5,000 for loss of opportunity regarding the house to which he was granted title (plaintiff argued that he could have either paid less for the new property or found a better deal than his wife had).

On the defendant lawyer's appeal to the British Columbia Court of Appeal, the Court agreed that the defendant lawyer had been negligent, but ruled that the trial judge erred in awarding plaintiff the entire proceeds from the home's sale given that plaintiff had already been compensated $101,000 in value through title in the new house. The Court observed that allowing the plaintiff to recover the full $187,000 and title in the new home would violate the rule against double recovery, citing *Mahesan S/O Thambiah v. Malaysia Govt. Officers Co-op Housing Soc.*[21] and *United Australia Limited v. Barclays Bank Ltd.*[22] The Court added that under the *Family Relations Act*, the wife was entitled to half of the proceeds from the matrimonial home's sale, meaning plaintiff was slightly overcompensated by receiving full title to the house purchased for $101,000. Accordingly, the Court found that plaintiff's full loss had been remedied.

Finally, the Court set aside the $40,000 award for mental distress, holding that such claims are not available for legal malpractice unless a plaintiff establishes evidence of foreseeable psychiatric injury. Here, the Court relied on the Supreme Court decision in *Mustapha v. Culligan of Canada Ltd.*[23] While the defendant lawyer was negligent in paying out the entire proceeds to the wife, the wife and son were the actual wrongdoers for forging the POA that allowed the sale. The defendant lawyer became involved only in defending the wife against specific performance and, as such, had no reason to doubt that the wife was acting in concert with her husband in trying to avoid the sale.

[20] 2014 BCCA 215
[21] [1979] AC 374, (Privy Council)
[22] [1941] AC 1
[23] 2008 SCC 27

***Harris v. Levine*[24]**

The appellate court in *Harris v. Levine* upheld a lower court's order striking out a plaintiff's malpractice claim as an abuse of process. In the case, plaintiff had been convicted of criminal harassment and assault causing bodily harm in a criminal proceeding, where he was represented by the defendant lawyer. Following his conviction, plaintiff retained new counsel for his appeal. In his Notice of Appeal, plaintiff alleged, among other points, that the defendant lawyer was negligent in representing him on the criminal charges. However, plaintiff abandoned the negligent representation claim before the appeal was heard. When the criminal appeal was dismissed, plaintiff filed an action against the defendant lawyer in negligence and breach of contract, seeking $1.1 million in general, special, punitive, and exemplary damages. In his Statement of Claim, plaintiff contends that but for the defendant lawyer's breach of contract and negligence, plaintiff "would have been found not guilty of the offence(s) charged and would have been acquitted by the court." Plaintiff claims that the defendant lawyer's negligence jeopardized his immigration status, damaged his reputation within the community, and caused depression, low self-esteem, and loss of enjoyment of life.

In particular, plaintiff claims that the defendant lawyer failed to:

1) marshal evidence to establish plaintiff's alibi defence,
2) call character evidence and put character in issue though crucial to the defence,
3) call a witness who would have testified that the allegations against plaintiff were untrue and establish a motive for the false charges,
4) call another witness who would have testified that plaintiff lacked a motive to commit the alleged offences,
5) prepare witnesses for trial,
6) call a community police officer to establish that plaintiff sought a restraining order against the victim and the victim had made false allegations against plaintiff,
7) object to the introduction of similar fact evidence,
8) produce a critical document,
9) obtain through disclosure documentation that would have disproved the extent and nature of the victim's injuries,
10) call expert evidence establishing that the injuries were inconsistent with plaintiff's alleged conduct, and

[24] 2014 ONCA 608

11) introduce evidence of plaintiff's immigration status that might have resulted in the conviction not being registered.

The lower and appellate courts both ruled that plaintiff's claim was a collateral attack on his convictions. In both courts' view, "the objective of the plaintiff's litigation against Levine is and necessarily must be to prove that Harris was innocent and that but for Levine's negligence, Harris would not have been convicted." To succeed, the plaintiff would need to have demonstrated that on a balance of probabilities, he would have been acquitted but for his lawyer's negligence. The plaintiff had the opportunity to raise the defendant lawyer's negligence in his appeal of the criminal convictions, but ultimately decided against this. The appeal was the proper forum to raise these issues.

***Himel v. Molson*[25]**

With a name quite familiar to most Canadians, the defendant lawyer in *Himel v. Molson* was found liable for mortgage fraud as the linchpin in engineering an "Oklahoma" mortgage. In an Oklahoma mortgage, a lender is deceived into advancing more money for a mortgage than the property is worth. Here, defendant in concert with others deceived plaintiff into lending $100,000 for the purchase of property plaintiff believed to be worth double that amount.

Credibility was a big issue for the court hearing this case. Acting as the property's purchaser and borrower was one Dr. Toth, who had a prior conviction for OHIP fraud and incidentally died before trial. Plaintiff's son, a disbarred lawyer, acted as the transaction's mortgage broker and provided some paralegal services. The defendant lawyer acted for the both the borrower and plaintiff on the financing; he also acted for borrower in the purchase and sale. Both the mortgage and purchase and sale closed on July 27, 2006. Under the purchase and sale agreement, Toth purchased a vacant cottage lot for $200,000. Plaintiff's interest in the property was secured by a first mortgage, with a one-year term and annual interest at a 9% rate. Although the mortgage was not repaid when it came due, monthly interest continued to be paid into 2008. Eventually, the property was sold under power of sale for roughly a quarter of what the plaintiff had invested.

The mortgage broker gave evidence that the defendant lawyer had acted on several past transactions for his mother. Since all of the past transactions had been successful, the mortgage broker had no reason to suspect anything was awry when the defendant lawyer approached him this time. But, when he noticed that no real estate agent was listed for the transaction, the mortgage broker questioned defendant who explained that the parties knew each other and the sale was private and friendly.

Toth gave evidence that he agreed to act as the "straw purchaser" for defendant lawyer, as he had done on three other occasions. In fact, because defendant lawyer's bank accounts had been frozen in the past due to allegations against him, Toth had operated numerous accounts for defendant lawyer. Toth contended that he never met plaintiff or the property's sellers and never paid principal or interest for the property.

The defendant lawyer declined to testify and the Court drew an adverse inference from defendant's failure to deny his role in the fraud under oath and refusal to be cross-examined. The Court specifically looked at a letter from vendor's counsel to defendant stating that $90,000 should stay in defendant lawyer's trust account to fund purchases of other properties. Describing this as extraordinary, the Court found this to be a clear sign of fraud in the absence of any explanation. The Court awarded plaintiff damages equal to the

[25] 2014 ONSC 3155

amount lost on the transaction, along with punitive damages of $30,000 and fixed costs on an indemnity basis at $50,000.

***Stewart v. Hosak*[26]**

The final case in this paper, *Stewart v. Hosak*, involves a dispute between a client and her law firm of many years. Plaintiff had a long-standing relationship with the defendant firm and claimed to be on friendly terms with some of the individual lawyers. The firm had represented plaintiff in commercial and real estate matters and arguably had a few matters open with her when one of the firm's lawyers accepted a retainer from a woman charged with making a death threat against plaintiff.

Before accepting the retainer to defend the death threat charge, the lawyer did not run a conflicts check, set up an ethical wall, or ask about plaintiff's client status though he knew her to be a past client. To make matters worse, the lawyer who took on the retainer co-owned the pub where the death threat was not only made, but also apparently recorded on security tapes. More still, the pub refused to turn these tapes over to the Crown as evidence for a long time.

Shortly after accepting the defense retainer, defendant law firm fired plaintiff as a client ostensibly for her failure to pay an outstanding account in a matter she had earlier transferred to another law firm more specialized in the relevant area of law. Plaintiff denied having an outstanding account and later learned that the invoice had been sent to the other firm to settle up with the defendant firm only when plaintiff's case concluded.

Plaintiff complained to the Law Society and filed an action against the defendant law firm for breach of fiduciary duty and conflict of interest, seeking damages for emotional distress and punitive damages. The defendant firm moved for summary judgement dismissing the claim entirely and asked the Court to give the plaintiff's case its highest due in deciding the motion; accordingly, the Court accepted all of plaintiff's evidence. Nevertheless, the Court granted summary judgment and dismissed the case.

Citing the principles in *Hryniak v. Mauldin*[27] as governing, the Court found no genuine issue for trial as it had no difficulty making the necessary findings of fact on the material before it. The Court did find that plaintiff was the defendant firm's client at the time, the new retainer did create a conflict, defendant firm did treat plaintiff badly, and defendant firm did breach its duty of candour to plaintiff by firing her as a client to avoid conflict. But, the Court did not find compensable damages and plaintiff's claim therefore failed to present a genuine issue for trial.

Regarding plaintiff's claim for damages for nervous shock, the Court cited *Mustapha v Culligan of Canada Ltd*[28]for the proposition that, "[P]sychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness. The law does not recognize upset, disgust, anxiety, agitation, or other mental states that fall short of injury…it must be serious and prolonged and rise above the ordinary annoyances that people living in society routinely, if sometimes reluctantly, accept." Though plaintiff may well have been rightly annoyed and disgusted, she presented no evidence rising to the level of personal injury.

[26] 2014 ONSC 563
[27] Ibid at note 4
[28] 2008 SCC 27, [2008] 2 SCR 114

As for punitive damages, the Court cited the Supreme Court of Canada's ruling in *Whiten v. Pilot Insurance Co.*[29] to remind that punitive damages are the exception rather than the rule, not meant to compensate plaintiffs, and imposed only for "high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." The Court noted that any conflict in the present case was one over which reasonable people might disagree and defendant firm engaged in no behaviour rising to a level warranting punitive damages.

[29] 2002 SCC 19, 2002 SCC 18, [2002] 1 SCR 595

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