Cases to note for litigation counsel

The Court of Appeal has recently delivered two judgments which deprive litigation counsel of their ability to rely on the "egregious error" standard in defending malpractice actions against themselves. While the distinction between "egregious error" and "reasonable competence" may sound dramatic, it remains to be seen whether this distinction gives rise to different outcomes where a trial on the merits takes place. Two superior court judgments discussed in this column illustrate the point.

In a third judgment, the Court of Appeal refused to characterize criminal defence counsels' alleged errors as breaches of fiduciary duty.

In a refreshing judgment, a superior court judge refused to hold a solicitor liable for his ex-client's mishandling of his own trial, one year after the solicitor got off the record.

"Egregious error" standard is gone

The most striking development for litigation counsel in 2005 was the Court of Appeal's judgment in *Folland v. Reardon*, (2005) 74 O.R. (3d) 688, which held that litigation counsel no longer have the benefit of the "egregious error" standard of care.

The defendant solicitor represented the plaintiff at a criminal trial where the plaintiff was convicted of sexual assault. The conviction was subsequently set aside on the basis of fresh evidence.

The Court of Appeal declined to summarily dismiss the action against the solicitor. Mr. Justice Doherty, on behalf of the Court of Appeal, held that, given the ubiquitous presence of the reasonableness standard in negligence law, criminal defence counsel should be held to the standard of a reasonably competent counsel acting in a criminal proceeding. Courts should avoid using phrases such as "egregious error" and "clearest of cases" when describing the circumstances in which negligence allegations will succeed against lawyers.

On April 21, 2006, the Ontario Court of Appeal handed down its judgment in *Ristimaki v. Cooper*, [2006] O.J.No.1559. The trial judge had dismissed the action against Cooper; the Court of Appeal ordered a new trial.

Ristimaki alleged that Cooper failed to diligently and competently prosecute her claim for an equalization payment from her husband. One of the issues in the lawsuit was Cooper's settlement of a motion to compel financial disclosure by the husband. The trial judge referred to the well known passage from the judgment of Mr. Justice Anderson in *Karpenko v. Paroian, Courey, Cohen & Houston*, (1980) 30 O.R. (2d) 776 (HCJ), where the Court observed at p. 791 that to establish negligence against a lawyer in respect of his or her advice concerning the settlement of a case, proof of an egregious error is required.

Mr. Justice Armstrong, who wrote the reasons of the Court of Appeal, held that in light of *Folland*, the standard of reasonableness, rather than egregious error, must apply. He also wrote that the difference between the standard of reasonableness and the standard of egregious error is significant.

It has been LawPRO's experience that while in theory there may be a substantial difference between the "standard of reasonableness" and "egregious error," in practice there is little real difference between them. LawPRO has always proceeded on the basis that a trial judge will NOT dismiss an action against a lawyer who had fallen below the standard of a reasonably competent civil litigator, because his or her error(s) were nevertheless not "egregious."

It should also be noted that in accepting the "reasonably competent lawyer" standard in *Folland*, Mr. Justice Doherty did not detract from the caution against characterizing errors in judgment as negligence. Mr. Justice Doherty noted at paragraph 44 that lawyers make many decisions in the course of a lawsuit. Those decisions require the exercise of judgment. Inevitably, some of those decisions, when viewed with the benefit of hindsight, will be seen as unwise. The standard demands that the lawyer bring to the exercise of his or her judgment the effort, knowledge and insight of the reasonably competent lawyer. If the lawyer has met that standard, his or her duty to the client is discharged, even if the decision proves to be disastrous. Absent the "egregious error" language, this passage sounds very much like *Karpenko*.

Other improvident settlement cases

Rivait v. Monforton, [2005] O.J. No. 4698 (S.C.J.) post-dates *Folland*. The Court

found that a lawyer was not negligent in settling his client's personal injury claim for $110,000 before a firm prognosis was available. The client had a poor pre-accident work record, and suffered from a pre-existing injury. She was receiving WCB and CPP benefits at the time of her injury. A jury may have concluded that she never would have returned to work even if there had been no accident. The tortfeasor was entitled to a credit for the no-fault benefits she had and would have received. These would have substantially reduced her claim, had it settled at a later date. Had the action not settled and proceeded to a jury trial, the plaintiff would not have received a more favourable recovery.

See also *Lioris v. Mahler*, [2005] O.J. No. 59 (Ont.S.C.J.) The plaintiff Lioris unsuccessfully sued his solicitor Mahler on the basis that Mahler consented to the dismissal of Lioris's personal injury action without Lioris's consent.

Justice Horkins found that Lioris did agree to the dismissal of his action. While Mahler should have confirmed these instructions in writing, his failure to do so did not mean that Mahler was negligent.

The Court was satisfied that Mahler discharged his retainer with the skill of a prudent solicitor.

A prudent solicitor must recognize that not every claim is a viable one, and exercise sufficient judgment to advise a client when the time has come to abandon a hopeless case. Mahler did so. It would be inappropriate to second-guess Mahler who knew that a favourable medical opinion could not be obtained and that the client was concerned about incurring costs.

In any event, Lioris failed to demonstrate "some reasonable probability" or a "substantial chance" that damages could have been recovered. There was no medical evidence to show that Lioris could have satisfied the OMPP threshold test, had the action not been dismissed.

In *Kuzyk v. Fireman*, [2005] O.J. No. 1840 (S.C.J.), the plaintiff's action against the law firm which settled his personal injury action was dismissed.

Plaintiff alleged that the solicitors were negligent in failing to "ensure" that plaintiff recovered $525,000, "net" of all outstanding fees and disbursements. The plaintiff had been represented by four other solicitors before retaining the defendants. The Court accepted the defendants' position that the $525,000 was to be "net" of the defendants' fees, not of the other four lawyers' fees. Those fees remained the responsibility of the plaintiff. The plaintiff conceded that the $650,000 all-inclusive settlement negotiated by his solicitor was an excellent one. The plaintiff would not have done better had he proceeded to trial.

The plaintiff signed an authorization to settle which stated that the plaintiff would "net" $525,000. The authorization was not a contract with the defendant law firm "guaranteeing" a recovery of $525,000 net of all expenses. The obligations between the plaintiff and the law firm were governed by the original retainer. The plaintiff gave no fresh consideration to support a new contract.

The defendant was not negligent in failing to resort to the *Solicitors' Act* to compel one of the previous solicitors to render his account. The defendant had expressed the view, before settlement, that this solicitor's account would be in the range of $5,000 – $10,000. After settlement, the solicitor delivered an account in excess of $57,000. It had neither been assessed nor paid prior to the trial of the malpractice action. It was unknown whether the plaintiff would actually pay more than the $5,000 – $10,000 suggested by the defendant. The plaintiff owed money to the earlier solicitor, and there was no more money to be had from the defendants in the underlying action.

The defendant did not breach its fiduciary duty to the plaintiff in using $75,000 of the settlement money to pay directly the outstanding disbursements. The plaintiff alleged that the money should have been paid over to him, and he would have paid the disbursements. Justice Archibald found that the solicitor's actions were reasonable. The defendant received about $50,000 on account of its own fees. There was no breach of fiduciary duty in failing to take less on account of its fees in order that the plaintiff might recover more. There is no need to send a client out for independent legal advice where, in order to settle a claim, both the plaintiff and the plaintiff's solicitor reduce their respective recoveries. In this case, the fees taken by the defendant were considerably less than what they were entitled to under the retainer agreement.

The plaintiff led no evidence to establish that he had any chance, let alone a substantial chance, to recover more if the action had gone to trial, or if the trial had been adjourned and a second mediation held.

Counsel not liable for client's errors

In *Nicolardi V. Daley, Daley, Byers and Fanjoy* [2005] O.J. No. 2346, Nicolardi's negligence action against solicitor Fanjoy, who had represented him in a motor vehicle accident claim, was dismissed. Fanjoy was removed from the record one year before the plaintiff's action was tried. After Fanjoy got off the record, Nicolardi retained a new solicitor, but fired that solicitor. In doing so, Nicolardi was unreasonable and the cause of his own loss. The plaintiff represented himself at trial. Cameron, J. held that Fanjoy was not responsible for the manner in which Nicolardi conducted his own trial.

Alleged errors by criminal defence counsel NOT breaches of fiduciary duty

In *Frumusa v. Ungaro* et al.,[2006] O.J. No. 686 (C.A.); affirming [2005] O.J. No. 2412,

Lawyer who used ILA Checklist vindicated at trial

In *Webb v. Tomlinson*, [2006] CanLII 18192 (ON S.C.), LawPRO successfully defended solicitor James Tomlinson. Fortunately for Tomlinson, he had used the independent legal advice (ILA) Checklist prepared by Philip Epstein, Q.C., and publicized by LawPRO.

Tomlinson gave ILA to Jean Webb. Webb had agreed to mortgage her home in order to loan $100,000 to her ex-husband, who wished to purchase an auto wrecking business. Unfortunately, the business did not prosper, and the husband declared bankruptcy. Webb sought to recover her loss from Tomlinson.

At trial, Tomlinson testified that he followed the ILA Checklist recommended by LawPRO. He produced the Checklist that he had filled in during the course of the meeting. Tomlinson's checkmarks and written inserts indicated the items he discussed with Webb. Tomlinson also produced four pages of handwritten notes which he made during and at the conclusion of the meeting. The notes showed that Tomlinson discussed and explained the nature and consequences of the mortgage loan, particularly that Webb risked losing her home if her ex-husband were unable to pay. The notes gave a start and stop time for the meeting, which last 45 minutes.

Justice Belobaba accepted Tomlinson's version of the advice given at the meeting, based on the Checklist and notes. Justice Belobaba held that the law is clear that lawyers providing ILA are generally not required to go beyond the mortgage transaction to assess the financial feasibility of how the mortgage funds will be used. Lawyers giving ILA are not required to give business advice. In any event, Tomlinson did explain to Webb that Webb could lose her home if the mortgage were not repaid.

This excellent outcome was possible because Tomlinson gave advice based on the items suggested in the Checklist, and conscientiously documented that advice.

The ILA Checklist is available at practicepro.ca/ilachecklist


independent legal advice checklist

the Court of Appeal resisted an invitation to expand the ambit of counsel's liability for breach of fiduciary. The plaintiff alleged breaches of fiduciary duty because his claims for breach of contract and negligence were statute barred.

The plaintiff alleged that his criminal counsel failed to zealously represent his interests, and thereby committed breaches of fiduciary duty. He alleged that the defendants failed to give proper advice, were not diligent, failed to lead necessary evidence, failed to properly attack Crown witnesses, and failed to call the plaintiff as a witness.

The Court of Appeal agreed with the following passage from the reasons of Herman, J.:

> "A breach of fiduciary duty occurs where the relationship of trust and loyalty between the lawyer and the client has broken down, that is, situations in which the lawyer has been dishonest, is in a position of conflict of interest or has divided loyalties. The breach of fiduciary duty does not otherwise extend to situations in which the quality of advice or representation is at issue."

The plaintiff's breach of fiduciary duty claims were struck out.

As of the date of this writing, *Rivait v. Monforton*, [2005] O.J. No. 4698 (S.C.J.), *Kuzyk v. Fireman*, [2005] O.J. No. 1840 (S.C.J.) and *Nicolardi v. Daley, Daley, Byers and Fanjoy* [2005] O.J. No. 2346 (S.C.J.) are under appeal.

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