The Law Society of Upper Canada
Le Barreau du Haut-Canada

ERRORS & OMISSIONS

A periodic update from the Lawyer's Professional Indemnity Company

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Notes to file: A tale of two claims

The next time you think that you are too busy to make a note to a file, keep these two cases in mind.

Both matters were tried recently; the first in October 1993, and the second in December 1993. In the first case, we were unable to defend the lawyer. In the second case we were successful in defending the lawyer, and we were awarded party and party costs. What was the difference?

In the first matter, the clients were parents who had agreed to assist their son in various business ventures. The parents and the son's company jointly owned 10 lots of land. The parents' intention was to divide the property so that they owned five lots, and the son's company owned five lots. The son could then deal with the property as he wished. The lawyer acted in transferring the title as requested. Unfortunately, there was a previous mortgage which encumbered all 10 lots. The parents had to pay $136,650 to free their land.

They brought an action against the lawyer alleging negligence in the course of his representation of them. The damages claimed — $136,650. The lawyer indicated that his retainer was a limited one that did not involve certification of title.

The following are comments made by the judge:

> My principal task is to assess the credibility of material witnesses in the trial. In assessing the credibility of these witnesses, a number of factors has been significant to me and it is important that I expressly state them in giving these reasons for judgment.
>
> The lawyer and secretary have testified without the assistance of notes, memoranda or other written materials made at times proximate to the events in question. The events occurred in August 1981 during the course of a busy practice that involved the opening and processing of approximately 350 to 400 files per year. The events as they unfolded would have been relatively routine ones for the defendant and his secretary, whereas they would have been significant ones for the plaintiffs.
>
> The differences between the testimony of the defendant and the secretary are material. They differed with one another as to the length of the meeting, the conversations with the parents, and the amount of time the secretary was out of the room.
>
> Although each of these factors does not in and of itself necessarily prove the unreliability of the testimony of the defendant, each of them is capable of being interpreted as a factor against reliability. Individually they may not be significant. Collectively, they rationally support a conclusion that his testimony (the lawyer's) ought to be rejected in its material respects. Consequently, I do so.

The second case involved a plaintiff claiming for losses sustained in an investment. The lawyer prepared several draft agreements for the client's benefit. The client indicated he was negotiating matters personally. The lawyer released the agreements to his client. Without further consultation, the client closed the transaction. The investment was unsuccessful and the client lost $62,500. The client alleged that the lawyer was negligent in not properly advising him on how to protect himself on closing. The

lawyer indicated that he did not address the issues of closing because he simply had no idea one was in the offing.

The following are quotes from the judgement:

> Although I believe all the witnesses directly connected to this matter did their best to recall the details of what they experienced, I was particularly impressed with the manner in which the lawyer gave his evidence, and where his evidence supported by his dockets and notes is at odds with the evidence of others, I accept his evidence.
>
> The lawyer docketed his attendances meticulously, and there are no docket entries for these attendances (alleged by the client). All of that is consistent with the lawyer's evidence that he learned at the end of July that a deal had been consummated.

What lessons can we learn?

- If you are operating under a limited retainer *document* that fact with the client.
- The strength of our defence of you may well rest on whether or not you have dockets, memos, notes and letters to support you.

Take the extra few seconds to dictate a note to file or to write a note confirming a telephone conversation.

Bill requires insurers be notified within seven days

Bill 164, which became effective January 1, 1994, has a new requirement for notifying insurers of claims involving injured parties.

With respect to policies of insurance entered into or renewed on or after January 1, 1994, the Statutory Conditions included in Bill 164, call for the following:

1) An insurer must be provided with *written notice* of all available particulars of any accident involving loss or damage to person or property and of any claim made on account of the incident. This provision appears to apply not only to claims for Statutory Accident Benefits, but also to uninsured and unidentified motorist claims.

2) This notice is to be given within *seven days* of the incident. (If the insured is unable because of incapacity to give the notice within that time, notice shall be given "as soon as possible thereafter".)

If you are acting for an injured client, be sure to satisfy this new notice provision. Failure to comply may result in a denial of coverage to your client and a potential claim against you.

Therefore, it might be advisable to alter your practice and either encourage your client to co-operate with his or her insurer in its investigation or, alternatively, provide the necessary information to that insurer yourself.

John Cannings