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LOSS PREVENTION BULLETIN

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Bulletin #74

Claim for loss of a chance of future earnings survives death

Since the Supreme Court of Canada has refused to consider the Alberta Court of Appeal's decision in *Duncan* v. *Baddeley*, Alberta lawyers should note that even children and adults without dependants have a claim for loss of a chance of future earnings that survives their death. Lawyers in other jurisdictions, too, will need to consider the possibility of such claims. Across Canada, acts like Alberta's Survival of Actions Act are based on the Uniform Survival of Actions Act. Only two provinces, British Columbia and Saskatchewan, specifically prohibit the recovery by an estate of damages for a deceased person's loss of future earning capacity.

Besides ensuring that they claim for this loss, lawyers will have to deal with the complication of overlapping claims by dependants under the Fatal Accidents Act and claims on behalf of the wronged party under the Survival of Actions Act, as well as with the increased difficulty in calculating the loss.

See *Duncan Estate* v. *Baddeley et al.* (1997) 196 A.R. 161; 145 D.L.R. (4th) 708 (Alta.C.A.)

Bulletin #75

Where there's a will there's a duty to beneficiaries

In a September 1997 decision, the Saskatchewan Court of Queen's Bench recognized a lawyer's liability in negligence to disappointed intended beneficiaries under a badly drafted will, even though the loss claimed was purely economic.

The will was intended to pass certain sections of Saskatchewan farm land to a variety of beneficiaries, some of them not the testator's relatives. But the lawyer didn't make the necessary inquiries to discover that these lands were beneficially owned by a company, which had been incorporated by a previous lawyer to help the testator save on taxes. When the previous lawyer was called to the bench, the defendant lawyer took over his files, including that of the testator's corporation. The defendant had supervised the filing of corporate returns for two years before the testator came to him and asked him to make a will. Other circumstances also should have alerted the lawyer to the fact that this was a complicated will-drafting exercise with considerable tax consequences: the estate was large, the testator was a bachelor, and a substantial bequest was to his elderly mother who was likely to predecease the testator.

In coming to his decision, Mr. Justice Zareczny followed the reasoning in the recent decision of the House of Lords in *White* v. *Jones,* which held that lawyers do have a duty of care and are therefore liable to intended beneficiaries who, as a result of the lawyer's negligence, have failed to receive the benefit which the testator intended they should receive:

> To suggest that it is sufficient discharge of a solicitor's duty to a testator in circumstances such as these to simply inquire of him what he wishes and then to record and thereafter prepare the will without anything further is to [make] a solicitor and his obligations comparable to . . . a parts counterman or order taker. The public is entitled to expect more from the legal profession.

See *Earl et al.* v. *Wilhelm et al.* Sept. 26, Sask. Court of Q.B., 324/921, 4668/921

Bulletin #76

When are you retained on a new matter for a 'multiple-file' client?

A lawyer represented a busy salesman on several commercial matters including some litigation files. During meetings to discuss his commercial files, the client mentioned he'd been involved in a car accident and complained about the trouble he was having getting his insurer to pay for the damage to his car.

The client recalled that he 'may have' asked the lawyer to call the insurer to 'flush things out' and that, before the limitation date expired, he showed the lawyer some documents indicating that the insurer would not acknowledge the client's claim. The lawyer, on the other hand, recalled that although they did discuss the insurance problem generally, she was given no details. She said the client formally retained her to resolve the claim against his insurer five days after the limitation date expired. Only then did she open a file and receive documents. In fact, the client thought he had retained the lawyer to help on his insurance matter a full two months before the lawyer thought she was hired.

The moral? If your multiple-file client casually brings up a new matter, be alert. Clarify whether or not you are retained on that new matter. Then memo the file.

Bulletin #77

Caution: friends and relatives ahead

Lawyers often report a potential insurance claim on a matter they have taken on for a friend or relative. These are among the most embarrassing claims for the lawyer and among the most difficult to defend for the insurer. Be especially wary if friends or relatives approach you to act in areas of law where you don't practice. Taking on an unfamiliar kind of legal matter requires extra time and greatly increases your chance of committing an error.

If you do decide to act for friends or family members, even for free, you owe the same duty of care to them as you do to paying clients. To avoid problems, don't talk about the file at social occasions or around the dinner table. Make these clients come to your office. Open a file. Send them letters, including an opening letter setting out the terms of your professional relationship and what you will and will not undertake for them. Include whether you will bill them and, if so, on what basis. Make clear the amount of disbursements you anticipate and who will pay for them. Report to your clients periodically, in writing, on the status of the file. If you meet with them on the matter, make notes for your file. Include notes of conversations you inadvertently have in your living room or at a football game. Make sure their file data makes its way into your office conflicts system and into your limitations system. Not getting paid will not relieve you of your professional responsibilities.

Bulletin #78

When a lawyer retires

Lawyers who retire but continue to hang around the office can pose a liability risk both to themselves and to their old firms. As the baby boom generation hits retirement age, more lawyers will find it attractive to keep an office at their old firm, so they can continue to mingle with former clients and fellow lawyers. But consider the prospect of a former client mistaking some friendly chat as advice about her legal situation and acting on it to her detriment. If she sues, the retired lawyer—who will have no malpractice insurance—may have to pay his own legal bill, which could wipe out years of hard-won earnings. The bottom line is that lawyers who are not insured must not dabble in law.

Bulletin #79

Case on advising guarantor overturned on appeal

Bulletin #72 (July, 1996) told of a lawyer who was found negligent for not explaining the effect of a personal guarantee to his client. The Saskatchewan Court of Appeal recently reversed that decision, saying the trial evidence of two bank employees demonstrated that the client did know his guarantee meant he would be personally liable if his company defaulted. Although the outcome has been reversed, the loss prevention point remains. Had the lawyer kept file notes to back up his contention that he explained the guarantee fully, the case might never have come to trial in the first place.

Bulletin #80

Would your file notes save you?

In *Texas Industries Ltd.* v. *Siewert and Siewert Bothwell*, the plaintiff alleged that he had retained the defendant lawyer. The defendant denied this. Following is a passage from the judgement of Dea J.:

> The defendant is a careful real property solicitor. He kept notes of calls and telephone conversations on the file including such calls and conversations with McPeak. The defendant's file on the Storey purchase is quite complete. He is knowledgeable and careful in his work and conscientious in carrying out his legal duties. I am satisfied that had he been retained by McPeak or had McPeak even asked him to represent the plaintiff that he would have recorded the matter. His file has several occasions disclosing the defendant advising Storey of McPeak's conditions, advising Storey and taking Storey's instructions on the matters. On this issue respecting McPeak's allegation that the defendant was asked to be the plaintiff's lawyer and by his conduct agreed to do so or left that impression with McPeak there is not one iota of confirmatory evidence. There is no file opened, no past record of any kind between them, no record kept, and no bill sent. On top of everything else the defendant categorically denies the allegation and says that had McPeak said anything of the sort it would have been important to him and he would have noted it. The defendant is a person who would have recorded such a matter had it arisen.

Do you make notes of all calls, conversations, etc. so that if the allegation was made against you, the judge would make the same finding? Think about it.

Bulletin #81

Claim all damages arising from one accident in one suit

Two recent Alberta Court of Appeal decisions are reminders that clients have but one claim for their accident injuries. In *Malcolm* v. *Carr and Chapton* the Court struck out a statement of claim because the claimant's insurer had already obtained judgement in Small Claims Court for the subrogated property damage claim. In *Dahl* v. *Alberta (Motor Vehicle Claims Act Administrator)*, an injured plaintiff accepted an offer of judgment against the unsatisfied judgment fund. When she tried to continue the action for additional damages against her insurer, the Court said that the judgment against the fund extinguished her entire claim for damages.

See *Malcolm* v. *Carr and Chapton* (1997) 200 A.R. 53; *Dahl* v. *Alberta (Motor Vehicle Claims Act Administrator)* [1997] A.J. No. 733