

Lawyer's Beware: Extending the Duty of Care beyond the Scope of the Retainer

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1 March 2017

The recent case of *Meehan v Good*, 2017 ONCA 103, has some unsettling implications for lawyers, as the case leaves open the possibility of extending a lawyer's duty of care beyond the scope of the written retainer agreement even where the lawyer has advised the client to seek legal advice regarding the issue in question.

Meehan involved an appeal from the dismissal of the appellants' claims against one of their former lawyers, Mr. Cardill, following Mr. Cardill's motion for judgment.

The appellants in this case had brought claims against three of their former lawyers, including Mr. Good and Mr. Cardill. Mr. Good was initially retained by the appellants to represent them with respect to settling the appellants' tort claims arising out of a car accident; Mr. Cardill was retained by the appellants to represent them in an assessment proceeding involving Mr. Good's accounts. One of the allegations against Mr. Cardill was based upon his alleged failure to advise the appellants of the limitation period for commencing a negligence action against Mr. Good.

In dismissing the appellants' claims against Mr. Cardill, the motion judge held, based on the evidence before her, that Mr. Cardill "was neither retained nor owed the appellants a duty of care to either pursue or provide them with legal advice regarding the possible negligence action [against Mr. Good], including the applicable limitation period," thereby confining the duty of care to the "four corners" of the retainer agreement. The motion judge found that Mr. Cardill **had advised the appellants on a number of occasions to seek legal advice regarding the negligence issue, Mr. Meehan [one of the appellants] confirmed that [the appellants] had received this advice, and the acknowledgment that the appellants signed...supported this fact"**

The sole issue on appeal was whether or not the motion judge erred in determining that there was no genuine issue requiring trial with respect to the issue of whether or not Mr. Cardill owed the appellants a duty of care to advise them of the limitation period *only*, in relation to the possible negligence action against Mr. Good. This issue was answered in the affirmative by the Court of Appeal.

In allowing the appellants' appeal, the Court of Appeal indicated that the motion judge relied too heavily on the written retainer agreement in determining that Mr. Cardill's duty of care was confined to the assessment proceeding for which he was originally retained, as opposed to considering all of the changing facts and circumstances. The Court emphasized that, where there is an allegation that the "duty of care arises out of and extends beyond the scope of the retainer...the court must meticulously examine all of the relevant surrounding circumstances, including but not limited to, the form and nature of the client's instructions and the sophistication of the client, to determine whether a duty is owed beyond the four corners of the retainer." The Court found that the motion judge did not engage in the foregoing analysis, which is why she determined that Mr. Cardill did not owe a duty of care to advise the appellants of the limitation period.

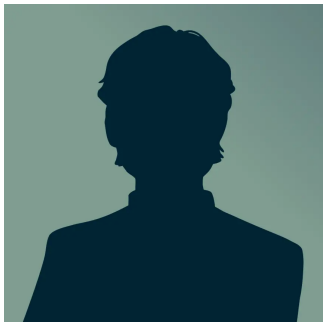
In reaching this conclusion, the Court made mention of the fact that the motion judge did not make a finding of fact in terms of whether or not Mr. Cardill had in fact advised the appellants of the limitation period based on the record before her, stating "if the motion judge in the present case was confident that the record would enable her to decide whether Mr. Cardill had told the appellants about the limitation period, **such a determination would have proved most valuable on appellate review.**"

It will be interesting to see how this issue is resolved at trial.

This case can be found at: <http://www.canlii.org/en/on/onca/doc/2017/2017onca103/2017onca103.html>

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