

Professional negligence claim dismissed against lawyer despite conflict of interest and breach of the standard of care

Litigation | Litigation & Dispute Resolution | Rules of Professional Conduct

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"There is no such thing as negligence in the abstract," notes Regional Senior Justice Calum MacLeod in *Maisonneuve v. Langlois*, 2021 ONSC 3587 (CanLII). Plaintiffs pursuing professional negligence claims would do well to remember those words.

The plaintiffs, a husband and wife, sued their former lawyer, who had been disbarred by the time of the hearing. Their claim had nothing to do with allegations of missing trust funds or dishonesty which led to the lawyer being disbarred. Rather, it was a claim for professional negligence and breach of retainer.

The male plaintiff was a shareholder, director and Chief Financial Officer of a business known as Maplesoft Group. By 2011, he and his wife had loaned approximately \$3.7 million to Maplesoft by way of shareholder loans. The defendant lawyer had no involvement with those loans.

In mid-2011, the lawyer was asked to prepare documents in order to secure the outstanding loans from the plaintiffs. The lawyer prepared a General Security Agreement (GSA) over the assets of Maplesoft and registered the security under the Ontario *Personal Property Security Act* (PPSA). The plaintiffs were not directed to obtain legal advice, and the lawyer did not obtain written consent to the joint retainer or otherwise comply with the rules concerning conflicts of interest as required by Rule 3.4 of the Law Society of Ontario's *Rules of Professional Conduct*.

Over the course of 2011 to 2014, further transactions between the plaintiffs and Maplesoft occurred. Some amounts were paid to the plaintiffs on account of the original loans. By the end of 2014, the plaintiffs had been repaid by over \$1 million.

In the fall of 2013, Maplesoft asked the plaintiffs to surrender their shares. Two other lawyers were consulted by the plaintiffs at the time, and they advised the plaintiffs that their security under the GSA may be deficient as they should have obtained a promissory note from Maplesoft confirming the debt.

Notwithstanding this potential issue, the plaintiffs continued to negotiate with Maplesoft and by December 2014, they had reached an agreement for surrender of their shares in exchange for a promissory note in the amount of \$2.7 million. This promissory note was secured by the GSA.

The plaintiffs' debt was paid down thereafter by more than \$1.4 million. In April 2017, a fresh promissory note for \$1.3 million was provided by Maplesoft's successor corporation. The plaintiffs were paid interest on the promissory note thereafter but were not repaid the principal when the note became due in April 2019.

The plaintiffs then sued their lawyer for failing to protect their interests in 2011. They alleged that his failure to prepare a promissory note at the time prejudiced them in their subsequent negotiations with Maplesoft.

At first blush, it may have appeared that the plaintiffs had a strong claim. There was no doubt that their lawyer had acted in a conflict of interest and had failed to document the consent and instructions of his various clients. The lawyer admitted that he should have prepared a promissory note in 2011 in order to "paper the

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loan.” There was little doubt that the lawyer’s actions and omissions were careless and fell below the standard of care required of a reasonable and prudent lawyer in the circumstances of the retainer.

None of this was sufficient, however, to establish liability for negligence.

In that regard, the plaintiffs failed to show how the lawyer caused their alleged damages. Proof of loss is an essential element of an action for professional negligence. As stated by Justice MacLeod, “there can be no liability for negligence unless some consequential damage has been suffered by the plaintiff.”

Similarly, conflict of interest is not an independent cause of action without proof of damages resulting therefrom: *Lacroix v. CMHC and McCann v. CMHC*, 2016 ONSC 2641 (Div. Ct.).

Based on the evidence filed on a motion for summary judgment brought by the plaintiffs, Justice MacLeod determined that the plaintiffs had failed to prove that they had sustained a loss flowing from the acts or omissions of the lawyer.

Firstly, the accounting evidence filed by the plaintiffs was vague and Justice MacLeod was left with “considerable uncertainty” as to how much money was actually loaned by who and to whom, and what amounts were repaid and when.

Secondly, it was not clear how the lawyer’s conflict of interest gave rise to any losses. The male plaintiff negotiated directly with the CEO of Maplesoft and there was no evidence that the plaintiffs had relied on the lawyer for business or financial advice. The male plaintiff had signed a release and subordination of security interest at Maplesoft’s request without seeking any advice from the lawyer before doing so.

Further, Maplesoft had never resiled from the original loans provided by the plaintiffs prior to the lawyer’s involvement in 2011. Those loans had been partially repaid by 2014 and were replaced by a new promissory note for \$2.7 million which was properly secured. Payments were made on that note until 2017 when the debt was assigned and a new promissory note was provided for the outstanding balance of \$1.3 million.

While the plaintiffs claimed that they suffered “diminished bargaining power” with Maplesoft as a result of the lack of a promissory note securing their loans in 2011, there was no evidence that Maplesoft had ever denied the existence of the debts or quibbled with the amounts stated to be owing. At least one other provincial court had concluded that a claim for “loss of bargaining power” is too speculative to quantify: *Saskatchewan Federation of Labour v. Saskatchewan*, 2016 SKQB 365 at para. 51.

In the case at hand, there was no evidence that the potential lack of security resulted in a competing priority claim or other challenge to the debt that affected the plaintiffs. Rather, the plaintiffs renegotiated the amount owing, sold their shares, postponed debt, and signed releases. There was no evidence that the lawyer was involved in Maplesoft’s affairs to the detriment of the plaintiffs.

Further, as a matter of law, Justice MacLeod was also not persuaded that the GSA or registration of security was invalid because of the absence of a promissory note. The lawyer’s failure to prepare a promissory note did not render the plaintiffs’ debt unenforceable or invalidate their rights as a secured creditor.

And again, the plaintiffs failed to show how a direct loss flowed from the lawyer’s omission – Maplesoft had provided a new promissory note which was secured by the GSA, thereby curing any prior deficiency. There was no evidence that Maplesoft knew of the potential deficiency in the security or took advantage of that fact in negotiations with the plaintiffs.

As a result of the above, Justice MacLeod not only dismissed the plaintiffs’ motion for summary judgment but granted “boomerang” summary judgment in favour of the lawyer dismissing the plaintiffs’ action in its entirety. There was no genuine issue requiring a trial notwithstanding the lawyer’s conflict of interest and breach of the standard of care in failing to carry out instructions to prepare a promissory note. Such failures were not fatal to the security and the plaintiffs failed to prove that they suffered any compensable loss.

The decision affirms the principle that a finding of a breach of a duty of care or conflict of interest by a professional does not end the question of whether the professional was negligent or caused the plaintiffs any losses. Negligence requires proof of foreseeable damages that result from the alleged error or omission. Plaintiffs who focus on the alleged error or omission without taking steps to quantify and prove the damages that allegedly result therefrom may face a summary dismissal of their claim. A PDF version is available to download [here](#).

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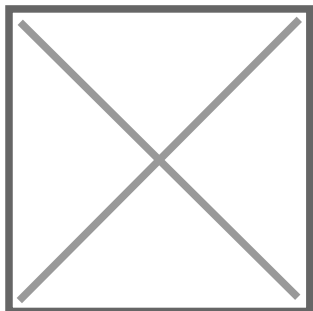
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