

Settler's remorse: Professional negligence claim against litigation lawyer dismissed

By **James R.G. Cook**

Law360 Canada (June 21, 2024, 1:24 PM EDT) -- In *Kiselbach v. DeFilippi*, 2024 YKSC 7, the Supreme Court of Yukon dismissed a professional negligence claim against a litigation lawyer who acted for the plaintiffs in a dispute with their former U.S. business partner. While the plaintiffs' lawyer was found to have breached the applicable standard of care in failing to advise them about a potential settlement option, the plaintiffs nevertheless failed to establish that the lawyer's error was the legal cause of any damages.

The individual plaintiff (Craig Kiselbach) was a businessman who provided services through the plaintiff corporation to a company known as Yukon Stone, owned by a U.S. citizen (Aaron Florian). Yukon Stone operated an outfitting business on a concession in Yukon. Under Yukon law, a concession could only be operated by a Canadian citizen or permanent resident.



James R.G. Cook



Svitlana Unuchko: ISTOCKPHOTO.COM

In 2012, Yukon Stone offered the position of outfitter to Kiselbach, who qualified as an outfitter whereas Florian did not. Kiselbach accepted the offer and held the concession in his name, purportedly subject to a trust declaration by which he agreed to hold the concession in trust for Yukon Stone and to surrender the concession upon Yukon Stone's request. He also became a director of Yukon Stone.

Kiselbach's responsibilities thereafter involved the management of guided hunting trips as well as the overall planning and management of marketing and booking and other activities for the business.

In 2016, Kiselbach sought to either become a majority partner in Yukon Stone or move on. He also started to look to acquire rights to another outfitting concession. Florian took the position that Kiselbach was in breach of his fiduciary duties to Yukon Stone by doing so.

Litigation ensued, with Yukon Stone seeking an order enjoining the plaintiffs to comply with the terms

of their trust declaration and to surrender the concession.

The plaintiffs retained the litigation lawyer and his firm for the dispute and sought an injunction to restrain Florian and Yukon Stone from interfering with their operation of the concession until the end of the 2016 hunting season.

At an initial hearing in August 2016, the parties agreed that the main dispute would be adjudicated after the injunction was addressed. The injunction was reserved for a decision to be given orally on Sept. 2, 2016.

On Sept. 1, 2016, the plaintiffs' lawyer made a proposal for settlement of the claims in exchange for payment by the defendants of \$550,000. The offer was open for acceptance up to one minute before the injunction decision was released.

On Sept. 2, 2016, the court released its decision in writing by email to the parties' counsel. The plaintiffs' lawyer sent them an email advising, "We won. Report to follow." Five minutes later, Florian's lawyer sent an email to the plaintiffs' lawyer purporting to accept the settlement offer of Sept. 1, 2016. The plaintiffs' lawyer rejected the acceptance of the settlement offer by email on the basis that such acceptance was too late.

A dispute then arose whether the plaintiffs' offer had been accepted before it expired. Kiselbach and Florian exchanged a number of texts that were not copied to the plaintiffs' lawyer, wherein Florian conveyed that he was still prepared to accept the offer. The plaintiffs instead made a further settlement offer of \$650,000.

In December 2016, the plaintiffs' lawyer withdrew as their counsel. The plaintiffs eventually settled their claim for \$250,000 payable by Florian and Yukon Stone over five years.

The plaintiffs then sued their former lawyer for negligence, arguing that they ought to have achieved a better result. They alleged that the lawyer failed to advise them, in a timely manner, of Florian's late acceptance of the \$550,000 offer and that they could have agreed to the belated acceptance.

The lawyer counterclaimed for unpaid legal fees of more than \$70,000, arguing that the professional negligence claim was a case of "settler's remorse."

At trial, the lawyer did not dispute that he owed a duty of care to the plaintiffs. The court had to determine whether the standard of care was breached, whether the plaintiffs suffered a loss or damages and whether that loss or those damages were caused in fact and in law by the lawyer's alleged breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 3.

The court agreed with the plaintiffs' position that lawyers have a duty to inform and advise their clients of all relevant matters, including all settlement offers, referring to *Pelky et al. v. Hudson Bay Insurance Co. et al.*; *McKittrick, Erickson, Jones (Third Party)*, [1981] O.J. No. 3203. In the trial judge's view, the lawyer breached his duty because he did not inform the plaintiffs of Florian's late acceptance in a timely manner, and he never informed the plaintiffs that Florian's late acceptance could be considered a "new" offer that they could accept, or not, without involving the courts.

In a professional negligence action, however, the trial judge noted that "[i]t is not enough for a plaintiff to demonstrate that their lawyer breached the duty of care they owed to them to find liability. The plaintiff must also establish that the breach is the cause of the plaintiff's loss or damages."

In that regard, Kiselbach's evidence was not credible to establish his assertion that he did not understand that he could accept Florian's belated response to his offer, nor to prove his claim that he would have agreed to settle for \$550,000 even after the injunction had been decided in his favour.

The trial judge referred to the principle that in cases of professional negligence, "a bare assertion that a client would have behaved differently if he or she had received proper advice should be viewed with some skepticism": *Fong v. Lew*, 2015 BCSC 436, at paragraph 35, affirmed *672496 B.C. Ltd. v. Lew (c.o.b. Chuck Lew & Co.)*, 2016 2016 BCCA 67.

Kiselbach's contemporaneous correspondence was not consistent with someone who wanted to settle but believed he could not do so. Rather, the correspondence was consistent with someone who was not interested in a settlement at \$550,000 after winning an injunction that allowed him to open Yukon Stone's books and to manage the concession for the 2016 hunting season without any interference from Florian. Kiselbach appeared to believe that he was in a good position to obtain a higher amount based on his success in winning the injunction.

The trial judge therefore concluded that plaintiffs had not established, on a balance of probabilities, the element of causation. The claim of professional negligence was dismissed and the lawyer's counterclaim for unpaid legal fees was granted.

The decision demonstrates the requirement to establish causation in a professional negligence claim. While the legal services provided by the lawyer to the plaintiffs were, in the trial judge's words, "not without fault," the lawyer was not the cause of any losses or damages. Based on the evidence, the plaintiffs believed that they were in a good position to obtain a higher amount than that being offered as a settlement. The fact that this did not turn out to be the cause was not due to any negligent legal advice by their lawyer.

James R.G. Cook is a partner at Gardiner Roberts LLP and has been with the firm since he articulated there in 2002. As a litigator in the firm's dispute resolution group, he has experience in a broad range of commercial, real estate and professional liability litigation.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, LexisNexis Canada, Law360 Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437-828-6772.