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MITIGATION #2

The case of Davy Estate v. Egan, (2009) 97 O.R. (3d) 401 caught our attention because it summarises mitigation principles – so that we no longer have to rely on a 1932 English case – and deals with a lawyer's potential liability.

Pleadings

The plaintiff was the estate trustee of her father's estate. She alleged that an investment advisor allowed her father to transfer his shares into a joint account with her mother, who then transferred the shares into an account solely in mother's name with another investment advisor. The plaintiff alleged that, at the time of the transfer, the investment advisor knew that father was mentally incapable of giving those instructions. Of course, the advisor denied everything, but this is not relevant to the decision.

What is important is that the advisor commenced a third party action against the plaintiff's lawyer. The advisor alleged that the lawyer knew of the transfer into the joint account, demanded that the investment advisor freeze the account, but did nothing to obtain a court order freezing the account to prevent mother from taking the shares. The lawyer moved to strike the third party claim as demonstrating no cause of action.

Duty

A British Columbia

Court of Appeal case [Adams v. Thompson, Berwick (1987), 39 D.L.R. (4th) 314] had stated that *"a third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff"*. The court agreed with this principle. What is the point of dragging in another person if the actions of that person will be attributed to a person who is already a party?

The court distinguished a situation in which a lawyer is alleged to have caused the loss along with another. The advisor did not allege that the lawyer's advice or lack of it caused the loss. Rather, the advisor claimed that the lawyer ought to have acted to reduce the loss that the advisor was alleged to have caused. If there were a loss, it arose because the advisor allowed the father to do something he did not have capacity to do.

The court concluded that the lawyer did not owe the advisor a common law duty of care in this case. Therefore, the only claim that the advisor had was under the Negligence Act, which applies if two or more persons caused or contributed to the damages. A claim of mitigation is simply a claim to reduce damages, rather than a determination of liability. There was no joint cause of the damages. The advisor was alleged to have caused the damages; the lawyer only came along after the loss.

But But ...

The advisor argued that it had to join the lawyer because its claim of insufficient mitigation might fail against the plaintiff - even if the lawyer was negligent in advising the plaintiff not to bring an action to freeze the investment account.

The court noted that the standard for mitigation is low. It quoted with approval from Banco de Portugal v. Waterlow, [1932] A.C. 452 (H.L.): *"the law is satisfied if the party placed in a difficult situation...acted reasonably in the adoption of remedial measures and he will not be held disentitled...merely because the party in breach can suggest...other measures less burdensome."* The Court summed up the prior law as follows, *"As those statements of principle suggest, a plaintiff whose rights have been violated is not required to undertake burdensome or risky measures to mitigate the loss he or she has suffered. No doubt, a solicitor would take that into account when advising a plaintiff and indeed, a solicitor who failed to do so would be negligent."*

In essence, the Court agreed with the advisor that, regardless of the lawyer's possible negligent advice, the advisor would have a difficult time demonstrating that the plaintiff herself acted unreasonably. Did the Court care? No. It indicated its distaste for the advisor's arguments and its satisfaction with the result as follows: *"I would add that there appears to me to be strong underlying policy reasons that support this result. The defendant is, after all, a wrong-*

doer who caused the plaintiff loss, and a plea of mitigation does not excuse or justify the wrong, nor does it rest on the attribution of partial responsibility for the wrong to some other party. Obvious mischief arises from allowing one party to sue another party's solicitor.

The Court dismissed the appeal of the order striking the advisor's third party action.

Query

Do you think that the plaintiff gets along well with her mother?

IRONY

The Nipissing Law Association and LSUC have waged a long battle against Maureen Boldt, a paralegal and former North Bay councillor, who was practising law without a licence. As part of that battle, The Honourable Madam Justice Hennessy found Boldt in contempt of court regarding an order that Boldt cease her practise of law.

A year or so later, Boldt commenced an action joining, among others, LSUC, the NLA, Justice Hennessy, and the Province of Ontario. The defendants brought a motion to dismiss her action against them. However, before the motion was heard, Boldt discontinued the action and then commenced a new action against the same and two other defendants. The statements of claim in the two actions were almost identical.

No doubt, the new action will provide the impetus for new motions and decisions. However, in the meantime, the defendants

in the old action brought a motion for their costs of the discontinued action: Boldt v. Law Society of Upper Canada 2009 CarswellOnt 5719.

Award

It seems that Boldt discontinued the old action because:

a) she learned that the action was a nullity against the Province of Ontario; it had been named improperly and notice of the action was not given pursuant to the Proceedings Against The Crown Act; and

b) she had discovered additional evidence.

The motions judge pointed out that Boldt could have achieved her goal by giving appropriate notice to the Province and then moving for

leave to deliver a fresh amended statement of claim, properly joining the Province and the other defendants.

Upshot

The judge did not want to compensate the defendants fully for their costs thrown away because some of the costs would also have been incurred in the new action. Accordingly, he awarded immediate costs for the duplicated work only and ordered that the other costs be in the cause of the new action. In aggregate, he ordered Boldt to pay approximately \$5,800 in the old action and \$12,000 in the cause in the new action.

So what is ironic? Boldt happily played lawyer to her clients, but when she acted for herself, her mistake cost her money.

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