Chapter 1D

Main Areas of Professional Liability Exposure in Motor Vehicle Litigation

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§ 1D:1 Communication Is Paramount

Starts with the retainer

Written Retainer Requirement

A written retainer is required for a contingency fee or limited scope retainer. Is it compliant? See LSO website pages. Changes to *Solicitors Act* (July 2021) implemented Standard Form Contingency Agreement (now allows calculation on fees).[1]

Who do you represent?

Plaintiff counsel to consider *Family Law Act* claimants and be clear who you are AND are not acting for

Plaintiff counsel should be mindful of conflicts and ensure these are addressed up front with a possible waiver ex. on for driver and passenger.

Defence counsel to clarify retainer especially where coverage or consent issues (i.e., defending owner and not operator) or possible defence of leasing company and confirm in writing. Defence counsel to also remember they are acting for the insured and should confirm their retainer to the insured also with an introductory call and letter.

Scope of the retainer?

What is the scope of the retainer? AB, tort, CPP, LTD, WSIB? Ensure clear communication and the client understands the limits

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[1]*Solicitors Act,* Contingency Fee Agreements, O. Reg. 563/20, s. 7.

of the retainer.[2] Do not delegate this job and confirm scope in writing. Courts will go beyond the written retainer and examine the entire circumstances.[3] Be mindful of conflicts and ensure these are addressed up front.

A good practice is to have clients initial/sign specific parts of the retainer indicating you are not retained for LTD or AB or tort (not just at the bottom of the page or end of the retainer but dedicated boxes or areas in middle of retainer document and/or appendixes to retainer).

Changes to relationship/dealing with difficult clients

Avoid services outside scope of retainer. If necessary, amend the retainer or execute a new retainer. Example: decide the claim is not threshold and do not intend to act in tort.

Consider ending the relationship and ensure proper termination of the relationship. Get off the record and/or document non-engagement/termination of services (written instructions or direction to abandon); avoid unilateral disengagement letters; ensure letters are sent to the correct address and are traceable (by email or registered mail). It is good practice to pre-empt the termination with a meeting and consider a sign back or helping them find a new lawyer or file a notice of intention to act in person.

Maintain good communications during the file handling

We have all had difficult clients, but they do not usually start out that way.

Remember your role and consider whether you have given the file sufficient attention and compassion. Do not let your file languish or avoid/relinquish files that you view as low value or where your client has a different view.

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[2]*Boudreau v. Lavery, De Billy LLP*, 2022 ONCA 691. The application judge applied the correct legal principles in relation to interpretation of contracts, referring to the decision of the Supreme Court of Canada in *Sattva*. He also recognized that because a solicitor-client relationship imposes fiduciary duties on a lawyer, solicitor-client retainers are contracts that carry duties for lawyers to communicate clearly so that the client understands the terms of the retainer. **If there is any ambiguity in a solicitor-client retainer, it is to be construed against the drafter – that is, the lawyer.**

[3]The current authority in determining whether a solicitor owes a duty of care to a client when such scope is outside a written retainer is *Meehan v. Good*, 2017 ONCA 103: To determine whether a lawyer owes a duty of care to a client or non-client requires the court to examine **all of the surrounding circumstances that define the relationship** between the lawyer and the person to whom the duty of care may be owed. Defining the scope of the lawyer's retainer is an essential element of this analysis: *Broesky v. Lüst*, 2011 ONSC 167, 330 D.L.R. (4th) 259, at para. 69; aff'd, 2012 ONCA 701, 356 D.L.R. (4th) 55. However, it is not the end of the analysis where, as here, it is alleged that the lawyer's duty of care arises out of and extends beyond the retainer. **Where such an allegation is made, 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: *Connerty v. Coles*, 2012 ONSC 2787, at paras. 12 to 15; *Moon v. Chetti*, 2007 CanLII 12710 (ON SC), at para. 1.

Avoid catering to your clients' views. You are the expert and have a professional obligation to provide a reasoned and informed opinion. Document your views especially where there is disagreement.

Communicate material information in a timely way and get **written** instructions on important decisions including jury notice, FLA claims, disclosure of important information (offers, productions that changes assessment, retainer of experts, decision not to pursue CAT, withdrawal of LAT application). Consider having the client review draft claims/defences/offers/mediation briefs. Report on electronic productions and discovery evidence in a timely way. Carefully review surveillance. Do not proceed to a mediation, pretrial or trial without a review of all productions.

Good practice: secure email and residential addresses at the start, document clear communications re: scope of retainer, do not delegate this discussion, follow up with confirming letter, address language barriers, ensure important decisions are communicated (in person and confirmed in writing), significant letters should be traceable and if possible signed back on.

§ 1D:2 Failure to Investigate/The Importance of Proper Investigation

Be mindful of the presence of unidentified, uninsured motorists. Understand uninsured and 44 coverage (have you named the correct insurers). Be wary of any excluded driver endorsements.

What claims are available to your client (AB/CAT, LTD, CPP)? Know the impact of a failure to apply for collaterals; Section *4(1)* and *4(1)(b)* of the *SABS* and Section *267.8(22)* of the *Insurance Act* provide the grounds for an accident benefit insurer and tort defendant, respectively, to obtain a credit/deduction for collaterals. In *McBeth v Allstate Canada*, 2022 ONLAT 20-007407/AABS the applicant failed to apply (in a timely way) for LTD and as a result the 'applied and denied' rule was not in force for his IRB claim and the insurer received a credit for LTD despite the applicant not recovering any LTD;[1] Section *267.8(21)* of the *Insurance Act* denies collateral deductions if a plaintiff has made an application that was subsequently denied for the purposes of Subsections (1), (4), or (6). However *Section 267.8(22)* provides three grounds when the deduction does not apply; when the plaintiff has impaired his or her entitlement.[2]

What defences are available? WSIB bar, breach of *Compulsory Automobile Insurance Act*, limitation periods, presence of unidentified motorists, collateral benefits/improvident settlement claims, other potential defendants, consent, etc.

[Section 1D:2]

[1] *McBeth v. Allstate Canada*, 2022 CanLII 65584 (ON LAT).

[2] *Insurance Act*, R.S.O. 1990, c. I.8, s. 267.8(21).

Ensure early investigation. For example, nail down the location of the incident. Is it a highway? Are there road maintenance issues? Consider municipal defendants? Does the reverse onus apply?

Consider ways to preserve evidence ex. talking to witnesses, retention of vehicles, photographs, CCTV footage, WAGG motions.

Consider liability experts early on especially if there is some municipal liability exposure. They can assist with discovery questions.

Ensure you have the full facts before making any admissions and specify any admission of liability does not include arguments of contributory negligence.

Slip and fall claims are a big source of error; nail down the location and be wary of notice provisions. s. *44(10) Municipal Act* (duty to repair and maintain roads); cannot maintain an action for damages unless notice within 10 days; (no standard form; good practice to give name, date, time, place).[3] s. *6.1(1) Occupiers Liability Act (OLA)*- amendment (January 28, 2021) 60 days' notice to occupier/contractor for claims for snow or ice (except death claims).[4] Notice to include date, time, location; served personally or registered mail. *OLA* places an obligation on the recipient to put others on notice (no deadline). FAILURE TO GIVE NOTICE NOT A BAR WHERE REASONABLE EXCUSE AND NO PREJUDICE.

Reasonable excuse to be given a broad and liberal interpretation and to consider all the circumstances *Crinson v City of Toronto* and *Seif v City of Toronto*.[5] For example, when was the extent of the injury not known. Prejudice? Was there investigation? Photos? Statements?

§ 1D:3 The Importance of Time Management/Proper Diarizing

Ensure a good tickler system with buffer.

Do not forget notice letters.

Statement of Claim to be issued within two years for personal

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[3] *Municipal Act*, 2001, S.O. 2001, c. 25, s. 44(10).

[4] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, s. 6.1.

[5] The Court of Appeal addressed "reasonable excuse" in the case of *Crinson v. City of Toronto*, 2010 ONCA 44 (CanLII), where it was found that an individual being so incapacitated as to be unable to provide notice constitutes a reasonable excuse. **This may include an individual who suffers a severe injury requiring hospitalization, surgery, and/or the use of medication.** In 2015, the Court of Appeal arguably broadened 'reasonable excuse' in *Seif v. Toronto (City)*, [2015] O.J. No. 2458. The Plaintiff in *Seif* sued the City after a trip and fall caused by a sidewalk lip. The incident occurred in August 2011. The Plaintiff broke her wrist and received treatment the same day. She initially had no intention of filing a claim. In November 2011, the Plaintiff's physician advised that the pain and limitations associated with the fracture were ***permanent***. The municipality succeeded on a SJM to dismiss. **However, the Court of Appeal overturned the decision and affirmed that the proper test was whether it was reasonable for the Plaintiff not to give notice until she did. A broad and liberal interpretation of "reasonable excuse" supported a finding that it was reasonable for the Plaintiff not to provide notice until she became aware of the severity of her injury.**

injury under the *Limitations Act* AND **one year** for auto property damage (*s. 259.1 Insurance Act*).

Do you have the correct jurisdiction if the MVA is out of province?

Investigate all proper defendants including Municipal defendants. A notice of action with a placeholder buys time but pitfalls include a failure to file statement of claim within 30 days (will require consent or leave) and notice of action may lack particularity. Use of placeholders discussed in *Loy-English v Ottawa Hospital*;[1] must be used appropriately; not if someone later discovered; clearly to have intended to sue the proposed defendant; sufficient particulars that with generous reading clear litigation finger pointing; Rule 5.04 (2).[2]

Motor vehicle accidents/discoverability caselaw is forgiving;[3] defence counsel to be wary about strong opinions the case is out of time. Regardless, plaintiff counsel (especially in non MVA cases) should not wait until the last minute to start an investigation or send out requests such as who was the maintenance provider; need to show due diligence for discoverability argument. See *Reimer v. City of Toronto*.[4]

Unidentified/uninsured/underinsured claims. Pursuant to *Rooplal v Fodor* and *Schmitz v Lombard*; the time is not triggered under *s. 265 Insurance Act* or OPCF 44R until insurer fails to satisfy demand for indemnification).[5] However, do not wait until the last minute to issue claims.

Defence counsel at risk. Examples of error in include failure to file a jury notice by close of pleadings (Rule 47.01), failure to advance claim for contribution and indemnity (*s. 18* of the *Limitations Act*)[6] and subrogated claims (dependent on and derived from insured's right of action. For subrogated claims, do not forget to consider and address uninsured losses; clarify what you are being retained to advance).

Do not forget to diarize procedural deadlines such as the delivery of expert reports (90,60,30 days before PTC). Be cognizant of the

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[Section 1D:3]

[1]*Loy-English v. The Ottawa Hospital et. al.*, 2019 ONSC 6075 (CanLII).

[2]*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 5.04(2).

[3]Longstanding jurisprudence that the limitation period for personal injury claims arising from motor vehicle accidents begins when a plaintiff reasonably believes that he or she has sufficient medical information to meet the requirement of s. 267.5(5) of the *Insurance Act* of having sustained a "permanent serious impairment of an important physical, mental or psychological function". In *Pereira v. Contardo*, 2014 ONSC 6894, *Fennell v. Deol*, 2016 ONCA 249, *Farhat v.* Monteanu, 2015 ONSC 2119, and *Musslam v. Hamilton General Hospital*, 2022 ONSC 1243.

[4]*Reimer v. City of Toronto*, 2023 ONSC 484.

[5]*Rooplal v. Fodor*, 2021 ONCA 357 (unidentified); *Schmitz v. Lombard*, 2014 ONCA 88 (OPCF44).

[6]*Limitations Act*, 2002, S.O. 2002, c. 24, Sch B, s. 18.

Rule 53 amendments (March 2022). Under *Rule 53.08* leave to admit evidence "**may** be granted" (used to be shall) where reasonable explanation and no prejudice/undue delay. Counsel to consider benefits of timetable (*Rule 53.03 (2.2)*). Be proactive and schedule defence medicals ahead. Courts are growing increasingly critical of the practice of late service. See *Agha v. Munroe* and *Khan v. Baburie*.[7]

Dismissal for Delay motions (current trend where failure to file trial record) (*Rule 24*[8] and *Rule 48*).[9]

For plaintiff's counsel. Do not wait for the registrar. If you have not filed a trial record by the five-year anniversary or taken steps to restore a matter to the trial list, then be proactive and get a timetable OR if no consent bring motion for status hearing. At a status hearing, the plaintiff is to establish reasonable explanation for the delay and that there is no non-compensable prejudice. Explanation only needs to be **passable**. Defence conduct will be part of the analysis and defence counsel should not invite delay and then ambush with a motion.

Covid Emergency suspension *Regulation 73/2020*[10] under *the Emergency Management and Civil Protection Act*[11] which suspended time limits effective March 16, 2020 to September 14, 2020 (182

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[7]*Khan v. Baburie*, 2021 ONSC 1683. In *Agha v. Munroe*, 2022 ONSC 2508, Justice Edwards refused an indulgence to file late expert reports as no reasonable explanation was offered. The case involved an accident that occurred in 2013, with the pretrial having taken place in August of 2018. An Order was made at the pretrial that expert reports were to be served by January 2019, with responding reports to be served by April 2019. The jury was selected on April 4, 2022. At that time, Edwards J. inquired into the absence of any expert reports to substantiate the plaintiff's claim for income loss, med/rehab and housekeeping needs. **The plaintiff initially stated that she could not afford the cost of expert reports; then decided that expert reports could be obtained but their late admission would necessitate the adjournment of the trial.** The defendant opposed the plaintiff's request for late filing of expert reports. The failure to serve expert reports cost the plaintiff in this case dearly. **Not only was she not allowed to call any experts, but Edwards J. would not allow any jury questions regarding loss of income, med-rehab needs and housekeeping expenses. With regard to expert reports, Edward J. noted that the new *Rule 53.03*, which came into effect on March 30, 2022 removed the previous "escape clause" in *Rule 53.03* which basically made granting leave for the late filing of expert reports almost mandatory.** Whereas under the previous *Rule 53.08*, "*leave **shall** be granted*", the new *Rule 53.03* states that "*leave **may** be granted*", a significant change in wording signalling that the days of nonchalant non-compliance are a thing of the past. **Under the new Rule 53.08, the onus is on the party seeking leave to provide a *reasonable explanation* why an expert report could not be filed in time. In this case, the plaintiff's financial inability to fund the reports was not considered a "reasonable explanation".**

[8]*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 24.01.

[9]*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 48.14.

[10]*Limitation Periods*, O. Reg. 73/20.

[11]*Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9.

days) upheld recently in *Cascades Canada ULC v 222985 Ontario Inc.;*[12] suspended the running of the trial record filing time.

Best practice: investigate the loss up front, conduct proper searches/exercise due diligence, have client clearly identify the area of the accident, have the client review the statement of claim, clear conflicts, do not delegate critical deadlines, have backup tickler systems with buffer, do not rely on band aids (notice of action, covid suspension, etc.), be proactive; sue the right person, plead with specifics for John Doe placeholders; diarize procedural matters

§ 1D:4 Avoid Improvident/Bad Settlements

Growing area of lawyer's negligence claims is "bad settlement" cases

To consider; was there a recommendation, clear instructions, was the settlement reasonable

Test is not perfection; "reasonably competent lawyer" and courts reluctant to interfere[1] or apply hindsight when looking at a lawyer's exercise of judgment

To avoid these claims:

- Ensure all offers are communicated
- Ensure sufficient information to make a recommendation
- Ensure clear, informed, and documented instructions
- Meet with client to get clear ORAL and WRITTEN INSTRUCTIONS, document when the client goes against your recommendation
- Do not make recommendation if in a conflict (i.e., did not give notice, failure to name FLA)
- Make sure the client knows the net settlement amount and there are no capacity issues
- Have a witness/translator present for instructions to avoid duress or comprehension arguments
- Consider and explain the wording of the release (do not delegate); ensure the release is not overly broad (ex. tort defendant's insurer); on AB claims ensure they know what they are giving up
- Do not delegate this discussion

Tort defence counsel to consider what collateral benefits were received or "available" (i.e., if applied and denied pursuant to *s. 267.8 (21) Insurance Act* then not available for deduction). Otherwise, to prove improvident settlement you must establish

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[12]*Cascades Canada ULC v. 222985 Ontario Inc.*, 2022 ONSC 4694.

[Section 1D:4]

[1]*Di Martino v. Delisio*, 2008 CanLII 36157 (ONSC). *Folland v. Reardon*, 2005 CanLII 1403 (ONCA) has set out the "reasonableness standard" to be applied in regard to allegations of negligence arising out of the conduct of litigation."

bad faith per *Peloso v. 778561 Ontario Inc. (c.o.b. J.L. Maintenance Services)*.[2]

Best practice: do not delegate, document your file, ensure no duress or language defences, make sure you have sufficient information, do not recommend a settlement when in a conflict; ensure billing is accurate and in compliance with the retainer.

§ 1D:5 Conclusion

Most mistakes and disgruntled clients can be avoided with proper attention, diligent investigation and clear instructions.

Set the stage for clear and documented communication, be clear about the scope of the retainer, do not dabble, ensure the client understands your advice and recommendations, maintain open lines of communication, investigate early and fully, advance the file, have a proper tickler system, minimize delegation, ensure informed and sufficient information to make recommendations, consider all claims available including collaterals, read and explain the release carefully and document all instructions.

Most importantly if you make a mistake. Do not panic. We all make mistakes, and many can be rectified.

Be certain to promptly report any suspected errors to Lawpro and avoid delay and/or self-repair.

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[2]*Peloso v. 778561 Ontario Inc. (c.o.b. J.L. Maintenance Services)*, [2005] O.J. No. 2489, paras. 422-26, there should be no reduction of the plaintiff's potential tort recovery by virtue of an improvident settlement of the SABS claim.