Liability of an Attorney for Damages to the Opposing Party

By Stuart Busse, Q.C., Linda Jensen and Bottom Line Research

Introduction

As a general rule, lawyers do not owe either a duty of care or a fiduciary duty to the party opposite in interest to their client. This rule has received widespread recognition in case law and commentary, and there are a significant number of decisions striking claims or allegations asserting a cause of action of this nature.

In addition, case law also asserts quite clearly that ethical duties owed by lawyers or duties arising from their role as an officer of the court are public duties, owed to the court or the law society, and not to private interests, including opposing parties. This rule has also been consistently applied by the courts.

However, some limited exceptions to the above rules are recognized. There may be an exception for cases where the lawyer has committed an intentional tort such as abuse of process, interference with economic relations, conspiracy or fraud. A number of cases have explicitly recognized the existence of a valid cause of action brought against a lawyer by the opposing party where the elements of one or more of these intentional torts are demonstrated.

The General Principle

It is a well-established principle of Canadian law that a lawyer does not owe a general duty of care or a fiduciary duty to an opposing party. The authorities are clear in this regard. *Halsbury's Laws of Canada* – Legal Profession, V.5.(3)(a), puts the matter this way:

> "**Generally, a lawyer owes no duty to anyone other than his or her client**. **A lawyer specifically owes no duty to an opposing party** or to a non-client who neither spoke to nor relied on the lawyer in any way, even remotely, as an intended beneficiary […]."[i] (Emphasis added)

In the leading English case of ***Al-Kandari v. J.R. Brown & Co.***, [1988] 1 Q.B. 665, [1998] 1 All E.R. 833 (CA), Lord Donaldson provided the following rationale for this general rule:

> "I would go rather further and say that, in context of "hostile" litigation, public policy will usually require that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless relitigation of disputes: Rondel v. Worsley [1969] 1 A.C. 191" [ii]

Canadian case law is to the same effect. In the seminal Alberta Court of Appeal case of ***German v. Major*** (1982), 62 A.R. 2, allegations of malicious prosecution and negligence by a prosecutor were struck, with the court saying:

> "… The trial–as–a–contest of which I speak requires, in our tradition, a champion. The loyalty of counsel to client traditionally has no bounds save to be honest and respectful. It would be a remarkable alteration in the adversary system for counsel for one party in litigation to be accountable to the other party for the conduct in good faith of the litigation. The duty of counsel is to represent his client's interests; the law should not impose a conflicting duty upon him."[iii]

Haines J provided a similar explanation in ***Hillier v. Hutchens***, 2012 ONSC 5988, [2012] O.J. No. 6367 (SC):

> "The imposition of a duty of care to the opposite party would give rise to an untenable conflict between a lawyer's duty to the client and the need to protect themselves from potential lawsuits initiated by their client's opponent. As has been observed in other cases the recognition of such a duty could lead to an endless re-litigation of disputes."[iv]

The general rule has been consistently reiterated and applied by Canadian courts. For example:

- ***Shuman v. Ontario New Home Warranty Program***, [2001] O.J. No. 4102, 2001 CarswellOnt 3666; affirmed [2002] O.J. No. 5972; leave to appeal refused, [2002] S.C.C.A. No. 366:

  > "25 Moreover, as to claims against them in negligence, or breach of fiduciary duty, there is no legal authority to support the proposition that a solicitor for a party owes a duty of care to an opposing party. Therefore, there is no basis for a claim in negligence or fiduciary duty against these defendants […]. Moreover, it has been held that complaints relating to an opposing solicitor's

> allegedly unethical conduct during proceedings do not provide a basis for a cause of action […]. Therefore, the claims against these defendants cannot succeed in law, and should be dismissed."

- ***Geo. Cluthe Manufacturing Co. v. ZTW Properties Inc***., [1995] O.J. No. 4897, 23 O.R. (3d) 370:

> "28 The plea of negligence is not valid in law and should be struck out. There is no authority to support the proposition that a litigant, or his solicitor, owes a duty of care to an opposing party. Ordinarily, to state the obvious, the interests of opposing litigants are in conflict. I adopt the following statements in English authorities cited by Mr. Rolls:
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> > The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd.
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> (Per Scott J. in Business Computers International Ltd. v. Registrar of Companies, [1987] 3 All E.R. 465 at p. 472, [1987] B.C.L.C. 621 (Ch. D.))
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> > In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb "properly", that duty is a paramount duty. The solicitor owes no such duty to those who are not his client. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he has served his client.
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> (Per Sir Robert Megarry V.-C. in Ross v. Caunters, [1979] 3 All E.R. 580 at p. 599, [1979] 3 W.L.R. 605 (Ch. D.))
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> > A solicitor acting for a party who is engaged in "hostile" litigation owes a duty to his client and to the court, but he does not normally owe any duty to his client's opponent (see Business Computers International Ltd. v. Registrar of Companies, [1987] 3 All E.R. 465). This is not to say that, if the solicitor is guilty of professional misconduct and someone other than his client is damnified thereby that person is without a remedy, for the court exercises a supervisory jurisdiction over solicitors as officers of the court and, in an appropriate case, will order the solicitor to pay compensation.
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> (Per Lord Donaldson of Lymington M.R. in Al-Kandari v. J.R. Brown & Co., [1988] 1 All E.R. 833 at p. 835 (C.A.).)"

- ***Thompson v. Merchant***, 2010 SKQB 64, [2010] S.J. No. 102:

> "17 Mr. Thompson argues that Mr. Merchant failed to carry out his client's instruction to send the offer to settle, thereby failing to confer that benefit on Mr. Thompson. He states that he was a person within Mr. Merchant's direct contemplation as someone who was likely to be closely and directly affected by his acts or omissions that he could reasonably foresee Mr. Thompson would be injured by those acts or omissions. (see Ross v. Caunters, supra) Mr. Thompson argues that he should have been within the direct contemplation of Mr. Merchant as someone who would be likely injured by his failure to act on the instructions of his client, Ms. Thompson.
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> […]
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> 19 **Mr. Thompson's argument, however, cannot be reconciled with the longstanding authority against finding a duty to an opposing party**. The cases relied upon by Mr. Thompson are examples of a lawyer held responsible to non-clients, whose interests are not in opposition to the lawyer's client. In Tracy v. Atkins, supra, the Court found that the lawyer had undertaken to perform work for the non-client, thus creating a duty to the non-client. The Alberta Court of Appeal, in Hanson v. Hanson, supra, addressed the distinction between this situation and a lawyer's responsibility to an opposing party.
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> […]
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> 21 **In contrast, the cases referred to by counsel for the applicant are clear. There can be no duty to an opposing party other than as an officer of the court**. (see Garrant v. Cawood, supra) Mr. Thompson\s claim for damages in paragraph 21 of the statement of claim should be struck as disclosing no reasonable cause of action." (Emphasis added)

The case law is equally clear that the breach of a professional/ethical duty, in and of itself, does not impose upon a lawyer a duty of care or a fiduciary duty *vis-à-vis* a third party. The lawyer as an officer of the court owes his/her duty to the court and to the administration of justice; those duties, however, do not extend to the opposing party. In ***MacDonald v. MCAP Service Corp.***, 2013 ONSC 4473, [2013] O.J. No. 3053 (SC), Mr. Justice Lofchik put the matter this way:

> "15. There is no duty upon a lawyer to, or in favour of an opposing party to act ethically. That is a duty which is owed to the court. As the duty is not owed to a plaintiff he cannot bring an action based upon it.

> *Brignolio v. Desmarais, Keenan*, 1995 CarswellOnt 4761 (Ont. Gen. Div.) at paras. 15-18
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> 16. A lawyer, acting for one party in a proceeding does not owe a duty of care or a fiduciary duty to the opposite party. Therefore complaints relating to an opposing solicitor's unethical conduct or negligence do not provide a basis for a cause of action.

In ***Martel v. Spitz,*** [2005] A.J. No. 176, 2005 ABCA 63 (CA), leave to appeal refused, [2005] S.C.C.A. No. 177 (SCC), this position was applied specifically to allegations that the lawyer had filed affidavits which were false and misleading:

> "12. […] Doubtless a lawyer owes a duty to the court not to offer into evidence an affidavit that he knows to be false or misleading. However, that does not mean that a lawyer must believe what his client swears to; still less does it mean that a lawyer has a duty to investigate to determine whether or not what his client states to be true is, in fact, true or false. Further, **the duty to the court is a public duty and owed as an officer of the court to the court and not a private duty owed to the opposite side in the lawsuit. There is ample authority that the duties that a lawyer owes to the opposing party are viewed very restrictively**: *German v. Major* (1985), 62 A.R. 2 (C.A.). **There are good policy reasons for this in the adversarial system. If it were otherwise, the conflicting duties owed by a lawyer would make the adversarial system impossible**." (Emphasis added)

Thus, as these authorities indicate, the general rule, clearly established in Canadian law, is that a lawyer does not owe a duty of care or a fiduciary duty to the opposing party; nor does the duty owed as an officer of the court extend to private parties, including the opposing party. An action launched on these bases, without more, faces a high probability of been struck for failing to disclose a cause of action.

The Exceptions

The general rule discussed above, however, has exceptions. *Halsbury's Laws of Canada* - Legal Profession, V.5.(3)(a), describes them as follows:

> "[…] A lawyer may [however] be liable to third parties in certain circumstances and may also be vicariously liable for the acts of his or her agents. For example, **a solicitor may be liable for an intentional tort,**

> **notwithstanding he or she was acting within the scope of a retainer**."[v] (Emphasis added)

Case law confirms these exceptions. For example, in ***Laiken v. Carey***, 2011 ONSC 5892, [2011] O.J. No. 5376; affirmed 2013 ONCA 530, 116 O.R. (3d) 641; leave to appeal granted, [2013] S.C.C.A. No. 431, Roberts J stated:

> "55 There are a few well established exceptions to the general rule that a lawyer owes no duty to opposing or third parties, including:
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> > i. Where a lawyer gives an undertaking to the Court or the opposing or third parties and fails to perform it, the lawyer may be ordered to do that act or make good the loss flowing from the failure to perform the undertaking.
> >
> > ii. Where a lawyer is implicated in intentional torts, including fraud, slander of title, false imprisonment, malicious prosecution, abuse of process and civil conspiracy, **those intentional torts are not defeated by the rule that a lawyer owes no duty of care to the opposing party in litigation**." (Emphasis added)

In ***Jensen v. MacGregor***, [1992] B.C.J. No. 467, 89 D.L.R. (4th) 68 (S.C.), Prowse J acknowledged the existence of an exception where the lawyer undertakes responsibility for certain acts which he knows will be relied on by the opposing party:

> "In certain circumstances, however, the Courts have recognized that a lawyer may step outside his or her role as solicitor for their client and accept responsibilities towards their client and other parties (Al-Kandari v. J.R. Brown & Co. (supra)).
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> > For example, such a situation existed in the Al Kandari case, in which the lawyer for the husband undertook to the wife that he would hold the husband's passport in trust and that therefore she need have no concerns that when the husband exercised access to their children that he would take them out of the country. The lawyer was tricked by the husband (his client) into returning his passport to him. The husband then absconded with the children. The wife successfully sued the husband's lawyer as it was established that by undertaking directly to the wife to hold the passport, the husband's lawyer had stepped outside the role of solely providing legal advice to the husband and had formed an actionable relationship with the wife.

> In other circumstances, a lawyer may owe a duty of care to a non-client claimant when it is clear to both the lawyer and the claimant that the claimant was relying on the special legal skill and knowledge of the lawyer, and that the lawyer knew or ought to have known that the claimant was relying on this skill or knowledge (Tracy v. Atkins (1979), 105 D.L.R. (3d) 632 (B.C.C.A.), Kamahap v. Chu (1989), 40 B.C.L.R. (2d) 288, and Hedley Byrne & Co. Ltd v. Heller and Partners Ltd, [1964] A.C. 465 (H.L.)).
>
> In these instances, a fundamental element is the lawyer's knowledge that the party (other than the client) is reasonably relying on the lawyer's skill and knowledge, and is likely to suffer serious loss if the lawyer acts negligently (Klingspon v. Ramsay et al. unreported, January 9, 1985, No. C821075, Vancouver Registry (B.C.S.C.))."

In ***Lawrence v. Peel (Regional Municipality) Police Force***, [2005] O.J. No. 604, 250 D.L.R. (4th) 287, Sharpe JA affirmed the existence of an exception for conduct constituting an intentional tort:

> "6 The appellant pleads intentional and malicious conduct precisely directed at him by the respondent. In my view, those facts are at least arguably capable of implicating the respondent in several intentional torts, including false imprisonment, malicious prosecution, abuse of process, and civil conspiracy. **These intentional torts, unlike negligence, are not defeated by the rule that a lawyer owes no duty to the opposing party in litigation**." (Emphasis added)

In ***Lawrence v. Peel (Regional Municipality) Police Force***, the plaintiff sued the defendant lawyer and police force for damages arising from his arrest, detention and trial, on charges from which he was ultimately acquitted. He alleged that the defendant lawyer, who represented his wife in the couple's divorce proceedings, had advised his wife to make false allegations of criminal conduct, give false evidence, and to file false complaints with the police. The Court of Appeal reversed the lower court decision on a preliminary objection to strike the action, finding that the allegations, if proven, would constitute a valid cause of action. Ultimately, on the merits, the action was dismissed as there was no evidence to support the allegations against the lawyer ([2009] O.J. No. 1684; affirmed [2010] O.J. No. 5102, 2010 ONSC 6317 (Div. Ct.)), and a substantial costs award resulted against the plaintiff ([2009] O.J. No. 2247). However, the

preliminary judgment confirms the existence of a valid cause of action, where supported by the facts, which overcomes the normal rule that a lawyer owes no duty to the opposing party:

> "1 R.J. SHARPE J.A.: - In his statement of claim, the appellant alleges that his spouse Carol Lawrence falsely and maliciously accused him of criminal misconduct while the couple was going through a bitter divorce. He claims damages arising from his arrest, detention, and trial on those charges, of which he was acquitted. This appeal arises from the claim the appellant asserts against the respondent, who was the solicitor for Carol Lawrence in the divorce proceeding. The motion judge struck out the statement of claim pursuant to Rule 21 on the ground that it failed to disclose a reasonable cause of action. For the following reasons, I would allow the appeal and permit the matter to proceed to trial.
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> 2 The statement of claim makes the following allegations against the respondent:
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> * Seeking an advantage in the divorce proceedings, the respondent advised Carol Lawrence to fabricate allegations of criminal conduct against the appellant, which the respondent knew to be false or which she ought to have known to be false and was oblivious as to whether or not they were false (para. 9).
>
> * The respondent counselled, directed, advised, and instructed Carol Lawrence to make complaints to the police that caused the police to lay seven criminal charges against the appellant on May 15, 2001 (para. 9).
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> * The respondent directed Carol Lawrence to lay three additional charges against the appellant on separate occasions between May 15 and September 2002. On each occasion, police attended at the appellant's residence and then left without taking further action or laying charges (para. 12).
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> * On October 5, 2001, police charged the appellant with two additional offences because of charges laid by Carol Lawrence upon the advice and direction of the respondent (para. 13).
>
> * The respondent advised and coached Carol Lawrence to give false evidence against the appellant in the criminal proceedings in order to gain an advantage in the matrimonial litigation (para. 19).
>
> * The respondent acted with purposeful and malicious intent (para. 20).

> * By advising Carol Lawrence to make false allegations and to give false evidence "with reckless disregard for the truth and consequences of such conduct", the respondent is responsible in law for the harm suffered by the appellant (para. 23).

> 4 **In my view, the motion judge erred in finding that the facts pleaded in the statement of claim disclose no reasonable cause of action. I am far from persuaded that it is "plain and obvious" that if those facts were proved at trial, the appellant's claim would be dismissed as unfounded in law**.
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> 6 The appellant pleads intentional and malicious conduct precisely directed at him by the respondent. **In my view, those facts are at least arguably capable of implicating the respondent in several intentional torts, including false imprisonment, malicious prosecution, abuse of process, and civil conspiracy.** These intentional torts, unlike negligence, are not defeated by the rule that a lawyer owes no duty to the opposing party in litigation.
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> […]
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> 8 I recognize that in this case it is not pleaded that the respondent had any direct contact with the police, who imprisoned and prosecuted the appellant. **However, no established legal principle prevents a third party from being considered liable as an instigator of an intentional tort**. The torts of abuse of process and civil conspiracy are still developing, and their outer limits have not been defined. The legal issues this case raises would be best considered on a full record after trial." (Emphasis added)

Lawrence v. Peel Regional Police Force was distinguished in Alberta in ***ESA Holdings Ltd. v. Shea Nerland Calnan LLP***, 2007 ABQB 78, 406 A.R. 142, an action to strike the statement of claim as an abuse of process. The claim alleged that the lawyers misled the trial judge by failing to correct certain statements made by their client's principal, thereby breaching their duty of care and resulting in abuse of process. The action to strike was successful. ***Lawrence v. Peel Regional Police Force*** was distinguished, with Gill J stating:

> … Although this claim [***Lawrence v. Peel Regional Police Force***] involved allegations of maliciously committing intentional torts, including false imprisonment, malicious prosecution, and civil conspiracy, it must be noted that the Court of Appeal found that the tort of abuse of process is still developing, without its outer limits having been defined. This contributed to the decision to allow the claim to proceed to trial.

> However, I disagree with this approach as it is contrary to the principles expressed in the Alberta cases.…[vi]

A different approach was taken in the more recent Alberta case of ***F.N. v. McGechie***, 2009 ABQB 625, 79 C.P.C. (6th) 383, a decision of Master R.P. Wacowich (In Chambers). This was an application to strike the statement of claim on the basis of failure to disclose a cause of action, and abuse of process. The plaintiff alleged that the lawyer counselled his client not to deposit child-support checks provided by the plaintiff so she could misrepresent her financial circumstances to Legal Aid and obtain legal aid funding. Further, it was alleged that counsel assisted his client in misrepresentations against the plaintiff regarding sexual abuse of their daughter. ***Martel v. Spitz*** was distinguished on the basis that McGechie was alleged to be participating in putting forward perjured evidence which amounted to the intentional tort of conspiracy. Master Wacowich stated that he would reluctantly allow the claim for conspiracy to go forward.

Similarly, in ***Big Bear Hills Inc. v. Bennett Jones Alberta Ltd. Liability Partnership***, 2010 ABQB 764, 507 A.R. 21, Marceau J acknowledged that a valid action for conspiracy to commit the tort of intentional interference with economic relations and the tort of abuse of process (including by making false statements to the court) could be asserted against the lawyers representing the opposing party. The court ultimately struck the action after concluding that the necessary elements of the torts were not made out; before doing that, however, Marceau J clearly held that the facts alleged, if proven, would constitute a valid cause of action.

> "12 While the acts of BJ and their lawyers complained of cannot easily be characterized as distinct causes of action based on the somewhat confusing pleadings, I believe the causes of action alleged are:
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> 1. The tort of defamation, both slander and libel.
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> 2. The **tort of conspiracy to commit the tort of unlawful interference with the contractual and commercial interests** of BBH and Chomistek.
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> Included as sub-heads under this general heading are:

> (a) the **tort of unlawful interference with the contractual and commercial interests** of BBH and Chomistek;
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> (b) the **tort of abuse of process by pursuing the action not for the purposes indicated in the Statement of Claim** in that action but for the ulterior motive of interfering with the rights of BBH and Chomistek, and
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> (c) the **tort of abuse of process by making false statements to the Court** in the Griffin action and at further Court proceedings as well as at hearings of the AEAB and the DAB.
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> [...]
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> 32 **The allegation in the Statement of Claim that the lawyers of the BJ law firm conspired, with the predominant intent and purpose to damage the reputation of the Plaintiffs, to shut down the activities of the BBH peat site and to harm the personal and business interests of the Plaintiffs in the peat farming community is an allegation which, if proved, would result in a successful outcome at trial for the Plaintiffs.** ..." (Emphasis added)

In ***Geo. Cluthe Manufacturing Co. v. ZTW Properties Inc***., [1995] O.J. No. 4897, 23 O.R. (3d) 370, the Court refused to strike an action alleging that the defendant lawyer had committed the torts of intentional interference with contractual relations and abuse of process. In addition, the decision confirms that it is not necessary for the action in which the abuse allegedly occurred to have been determined in the plaintiff's favour in order for a valid cause of action to exist:

> "25 It is not clear to me that the pleading of the torts of intentional interference with contractual relations and abuse of process should be struck. **If the commission of one or both of those torts is proved, Feldman could be liable as a tortfeasor, even if he acted only as solicitor for ZTW**." (Emphasis added)

The decision in ***New Solutions Extrusion Corp. v. Gauthier,*** 2010 ONSC 1037, [2010] O.J. No. 661, affirmed 2010 ONCA 348, [2010] O.J. No. 1988, is to the same effect. In that case, Karakatsanis J recognized that a valid claim for conspiracy could be brought against counsel for the opposing party. (Ultimately the claims of conspiracy and interference with economic relations were not supported by the evidence, and were struck).

> "22 The Statement of Claim asserts that this was a conspiracy to effect an illegal trespass and illegal disablement, for the purpose of causing the plaintiff economic harm in order to force the plaintiff to pay all the client's claims and settle the outstanding lawsuit. The Statement of Claim asserts that the defendant lawyers conspired with each other and with their client for their own pecuniary interests (in order to satisfy their client and for professional fees.) It also pleads that the defendants planned, arranged and co-ordinated with the bailiff and the technician the entry onto the premises and the disablement of the machine. It pleads that the lawyers took steps to actively mislead the bailiff to believe that the action was lawful under s. 62 of the PPSA. In addition, the Statement of Claim rests upon the assertion that the defendants knew the acts were illegal and "constituted both civil wrongs and criminal offences." The lawyers' "plan was akin to extortion;" "to withhold the plaintiff's means of operating until they paid whatever was demanded."
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> […]
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> 27 **To the extent that the Statement of Claim pleads that the lawyers intentionally conspired with their client to knowingly effect an illegal trespass and disablement of the machine so that the plaintiff would have to abandon its legitimate defence, and they did so for their own enrichment, it is at least arguable that the lawyers could be found to be joint tortfeasors with their client assuming all the facts pleaded were true. I am not prepared to find that a claim of conspiracy cannot be brought against lawyers in the circumstances as pleaded**." (Emphasis added)

The decision in ***Hillier v. Hutchens***, 2012 ONSC 5988, [2012] O.J. No. 6367, applied the same reasoning in refusing to strike allegations of fraud committed by opposing counsel. In that case, Haines J held that the plaintiffs had failed to provide sufficiently detailed allegations to substantiate their claims, but granted them leave to amend their statement of claim in order to correct the deficiency. The reasons of Haines J allude to allegations of improper conduct by the lawyer in relation to an *ex parte* injunction application:

> "29 **I am satisfied that the statement of claim does disclose a reasonable cause of action in fraud or deceit against Meisels** but fails to do so with sufficient particularity to meet the requirement of Rule 25.06(8)….
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> […]
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> 31 I am satisfied on a generous reading of the pleadings that malice and bad faith are implicit in the allegations in paragraphs 76 and 77 which include the assertion that Meisels knew Hutchens was a "fraud artist" and that Meisels was

> a participant in the fraud. Immunity cannot extend to counsel acting in a legal proceeding that was brought to suppress information about a fraud to which that counsel was a party as is alleged in this case. I would, accordingly, not strike these allegations." (Emphasis added)

Based on the above decisions, it appears that there is good authority supporting the existence of a valid cause of action against counsel for an opposing party, where facts and evidence can be adduced to substantiate the commission of an intentional tort.

END

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[i] QL at para. HLP-238
[ii] LEXIS, at p. 5 of 9
[iii] At para. 57
[iv] QL at para. 18
[v] QL at para. HLP-238
[vi] At para. 20