

# Negligence Claims Resulting from Decisions Related to Settlement Offers and Other Judgment Calls – Is there Really a Case Against Counsel and is an Expert Report Necessary?

By Melvyn L. Solmon

Every counsel representing a client in litigation is invariably faced with the same question: Should you recommend that the client make an offer to settle - or - should you recommend to the client to accept the opposing party's offer to settle - or - should you go to trial?<sup>1</sup>

As we all know, ~~that~~ making the call on offers to settle ~~be it your or the other side's, on may~~ can be difficult. Not only that, but recently, it has also become the subject of negligence claims.

An example will demonstrate the difficulties faced by counsel. The client goes to trial and loses or receives an amount significantly less than the opposing party's settlement offer. The client then brings an action for negligence against counsel for not encouraging the client to accept the settlement offer.

In this article, we will discuss the standard of care required of counsel in the context of litigation, including with respect to settlement offers, and discuss whether an expert is needed to opine on whether the standard of care was met.

## THE STANDARD OF CARE

The test for determining whether litigation counsel (or a "barrister" as commonly used in England) is "negligent" was stated by the Honourable Mr. Justice Krever in the leading case of *DeMarco v. Ungaro* (1976), 21 O.R. (2d) 673, at page 693:

*"Indeed I find it difficult to believe that a decision made by a lawyer in the conduct of a case would be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a court will conclude that it is negligence."*<sup>2</sup>

Requiring "egregious" conduct and not a mere error in judgment was followed by the Honourable Mr. Justice Borins in *Blackburn v. Lapkin* (1996) 28 O.R. (3d) 292, where the court held that an error in judgment will not constitute negligence.

---

<sup>1</sup> This may place counsel in the most difficult of situations where fiduciary obligations to the client may conflict with personal interest. One decision may result in settlement and the end of legal costs to the client, whereas a decision to go to trial may result in substantial fees.

<sup>2</sup>. This was followed in *Sherman v. Ward*, [1998] A.J. No. 512 and *Karpenko v. Paroian, Courey, Cohen and Houston* (1980) 30 O.R. (2d) 776. The *DeMarco* case was a pleadings motion. *Karpenko* was a trial in which expert evidence was called. In the case of *Boudreau v. Benaiah* (2000), 46 O.R. (3d) 737 reversing (1998) 37 O.R. (3d) 686, expert evidence was called as to the negligent conduct of criminal counsel.

On July 20, 2000, the House of Lords decided *Arthur J. S. Hall & Co. v. Simons and Barratt et al* [\[2000\] H.L.J. No. 43, \[2000\] 3 All E.R. 673 \(H.L.\)](#) In that case, the immunity of barristers from claims for negligence and the conduct of litigation was eliminated. In *Arthur J.S. Hall & Co.*, the House of Lords dealt with a case similar to our example where the client claimed negligence against its barrister for failing to encourage settlement. The House of Lords followed the principles discussed by the Honourable Mr. Justice Krever in *DeMarco v. Ungaro*, supra. Interestingly, ~~this case has not been cited only in anyone in all of the reported decisions~~ from a computer search of Quicklaw and eCarswell<sup>3</sup>. This highlights that there are few decisions where barristers have been sued for negligence.

In *Arthur J. S. Hall & Co.* the House of Lords recognized the validity of such claims and stated:

*It will not be easy to establish negligence against a barrister. The Courts can be trusted to differentiate between errors of judgment and true negligence.*

To further magnify the problem, in *Karpenko v. Parorian, Courey, Coher & Houston* (1980), 30 O.R. (2d) 776, the Honourable Mr. Justice Anderson confronted the mirror image of *Arthur J. S. Hall & Co.* In *Karpenko* the client complained that the lawyer encouraged settlement when a case should not have been settled and sued counsel for negligence in advising to accept the settlement rather than go to trial.<sup>4</sup> The Honourable Mr. Justice Anderson dismissed that action.

In general, most matters involving the conduct of counsel are, and rightly so, judgment calls in the heat of battle.<sup>5</sup> The House of Lords discusses this:

*No matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made.*

The House of Lords went on to write that the common law makes allowance for the circumstances in which professional judgments are made and acted upon:

*Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the*

---

<sup>3</sup> [2Scurry-Rainbow Oil \(Sask\) Ltd. v. Taylor \[2001\] S.J. No. 479 SaskCA - 2001 Aug 10. There is a reference to the Court of Appeal decision by the Ontario Court of Appeal in \*Wernikowski v. Kirkland\* \(1999\) 50 O.R. \(3d\) 124.](#)

<sup>4</sup> Experts were called in *Karpenko*. The plaintiff's expert's opinion was rejected. The other expert's opinion, it is submitted, was probably not necessary.

<sup>5</sup> The House of Lords also states that the determination of negligence will be affected by when the settlement offer arose, i.e. if it arose ten hours before trial, the analysis would be different.

*other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. ... In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome.*

Another example is the situation where a client instructs counsel to do something, counsel uses her judgment not to take that step in the litigation and the client, in the end, is unsuccessful. As stated in *Arthur J. S. Hall & Co.*:

*...[A] barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case...It cannot be stressed too strongly that a mere error of judgment on his part will not expose him to liability for negligence.*

The court concluded that it is only when, with all allowances made, an advocate's conduct of court proceedings is "quite plainly unjustifiable", that it would be appropriate to find against the barrister. Likewise, in Canada the standard for counsel is an egregious error.

It is worth noting that there is a distinction between the standard applied to the conduct of a barrister and the conduct of a solicitor.

The difference between a barrister and solicitor is clear in England where there is a separate bar. It is, obviously, less clear in Canada. There is no doubt that lawyers are liable for negligence for true "solicitor's work". However, where the conduct is related to the litigation process, such as pleadings, discovery, motions, trial preparation, trial strategy, the trial, settlement, and appeal, barrister-related conduct - the standard is an egregious error. On the other hand, "solicitor's" conduct in relation to an action such as missing a limitation period or failing to warn of risk would arguably be subject to a reasonable solicitor standard<sup>6</sup>. Needless to say, there are gray areas that **would-will** be developed over time in the jurisprudence. The distinction is, however, important in determining the standard of care and the resulting liability for negligence.

## **EXPERT REPORTS**

---

<sup>6</sup> *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 C.P.C. (3d) 456, (2000) 138 O.A.C. 28 (O.C.A.), leave to appeal to the Supreme Court of Canada granted.

Is an expert report necessary to prove negligence against counsel? If the conduct is “egregious”, should, as stated by the House of Lords, in *Arthur J.S. Hall & Co.*, the Courts be trusted to differentiate between errors in judgment and true negligence without an expert report? If an expert is used, what would the expert opine on – that the conduct was not an error in judgment but was an error “such as no reasonably well informed competent member of the profession could have made.”<sup>7</sup> Would an expert report demonstrate a lack of “trust” in the courts?

The circumstances would usually involve a judgment call based on counsel’s perception of the likelihood of success. How can the expert opine on such a matter unless the opinion was that the case was hopeless? Does the expert opine on that too, and based on what information (without using hindsight)? This was the issue that the House of Lords allowed to proceed to trial in the of *Arthur J. S. Hall & Co. v. Simons and Barratt et al.* case.<sup>8</sup>

Unfortunately, there is no consensus of opinion as to whether an expert’s opinion is required. Indeed, in *Blackburn v. Lapkin*, supra, the Honourable Mr. Justice Borins commented upon the lack of an expert report.

An expert report on behalf of the plaintiff should probably not be necessary and may be counterproductive, for if the plaintiff is arguing that the error was egregious, then an expert report likely will not be of assistance. But it is probably advantageous for the defendant/counsel to obtain an expert report, if possible, to opine that the conduct did not amount to negligence.

The important strategic decisions to be made in relation to expert reports are:

1. Is a report required;
2. How to assess the opposite party’s report; and
3. How to discredit the opposite party’s report

Topics such as the following may give rise to the need of an expert, including the failure to:

- a) canvass settlement properly and fully with the client;
- b) plead all necessary defences;
- c) ask basic questions on discovery;

<sup>7</sup> *Arthur J. S. Hall & Co. v. Simons and Barratt et al.* *Arthur J. Hall v. Simons* at page \_\_\_\_\_

<sup>8</sup> “The essence of the case made by Mr. Simons against his solicitors is that they should have advised him at the outset that he should settle on the terms which he was ultimately forced to accept after much unnecessary delay and expenditure or that they should have prepared for trial so that he could pursue his case with unimpaired prospects of success”. In the other cases heard with *Arthur J. S. Hall & Co.*, the suit was on the basis that an expert valuation was not obtained or advised to be obtained before dealing with settlement. There were other allegations including that there was incorrect advice given about the possibility of setting aside an *ex parte* order. There was also an allegation of a failure to take proper instructions prior to settlement.

- d) ensure all documents are properly produced and properly put before the court in evidence;
- e) provide the proper notices related to documents prior to trial;
- f) call a witness;
- g) retain an expert.

Simply put, if conduct is egregious it should be obvious and no report should be necessary. The most reliable ammunition to protect against such claims is to use your dictaphone immediately and confirm in writing to the client setting out your instructions, recommendations and reason for your advice and conduct. Even if counsel is wrong, there is less likelihood of liability if there is clear evidence that judgment was exercised and the basis for it.

In the result, it is probably advisable to call expert evidence in such circumstances even if it is unnecessary, until the jurisprudence provides some direction. The diverse experiences of members of the Bench dictate a cautious approach.<sup>9</sup> Furthermore, new methods of carrying on the practice of law, in light of changing technology, may result in new or elaborate standards being developed within the profession, that may not be known to the court.

## CONCLUSION

Strategically, it appears that it would be easier to be a defendant litigator in such cases. Assuming that you are able to obtain a litigation lawyer who can give an expert opinion and report as to a barrister's conduct, it would be difficult to say that such conduct is "egregious". However, if the expert says that the issue under scrutiny involves a "judgment call", then *Arthur J. S. Hall & Co. v. Simons and Barratt et al.* suggests that the Court can be trusted to deal with that issue, and therefore no expert opinion is necessary.

Obviously these comments do not deal with the issue of whether or not the result of the litigation would have been different if the advocate's conduct was not "egregious". This is a further reason why cases of negligence against barristers conducting civil litigation are few and far between.

---

<sup>9</sup> See for example, *Wernikowski v. Kirkland* (1999) 50 O.R. (3d) 124 where the Court of Appeal allowed a cause of action for negligence against criminal counsel and the conduct of the defence to criminal charges to proceed to trial, even though it will likely involve a relitigation of the correctness of the criminal conviction. See also *Boudreau v. Benaiah* (2000), 46 O.R. (3d) 737 reversing (1998), 37 O.R. (3d) 686