

From Denial to Acceptance: Advising the Insured Through a Professional Liability Claim

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OVERVIEW

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- Regulation of professions
- Civil Liability

Part II: Advising the Insured

- The tripartite relationship
- Coverage and limits issues
- Consent to settle and deductible issues
- Interplay between civil suits and regulatory matters

OVERVIEW

Part III: Experts:

- Types and Timing of Expert Reports
- Oral vs. Written?
- Selecting An Expert
- Communicating with Experts: *Moore v. Getahun*

PART I

THE BASICS

- Who is a professional?
 - The traditional learned professions were law, medicine and theology.
 - “Professionals” now include a wide range of occupations running the gamut from home inspectors, lawyers, social workers, appraisers, naturopaths, financial advisors to funeral directors.
 - The essence of a “professional” is the holding out of a “special skill” and the “exercise of considered judgment in the application of those skills”.

PART I

THE BASICS

Regulation of Professions:

- Provinces in Canada generally regulate professions.
- The structure is regulated in a number of legislative provisions
 - *The Regulated Health Professions Act*
 - *The Law Society Act*
 - *The Professional Engineers Act*
 - *The Architects Act*
 - *The Financial Services Commission of Ontario Act*
 - *The Real Estate and Business Brokers Act*
 - *The Securities Act (Ontario).*

PART I

THE BASICS

- Regulations of Professions:
- Self-regulating professions have elected bodies who set rules for admission and exercise the authority to discipline their members.
- These regulatory bodies are statutorily mandated to protect clients and the public and many actively exercise their mandates.
- The types of occupations regulated by provincial legislation have expanded greatly in the last century and the distinctions between professional and technicians have become blurred.

PART I

THE BASICS

Civil Liability:

- Professional liability claims can be framed in contract or in tort, or both.
- Concurrent liability: where a plaintiff proves more than one cause of action, the plaintiff can choose the cause of action and remedy most advantageous.
- Claims against medical professional have always tended to be expressed in tort rather than in contract (primarily because tort, not contract, defines the standard of care).
- Claims against other professionals are often framed in breach of contract.

PART I

THE BASICS

Civil Liability: Contract:

- Who are the parties? What are the contractual terms?
- If the contract is in writing it may be detailed enough to set out the scope of the duty of care, if not the Court may imply terms.
- It is generally accepted that there is an implied term that the professional will carry out its services with reasonable skill, care and diligence.
- Although professional retainers increasingly contain limitation of liability clauses, courts are reluctant to enforce contractual terms which reduce the expected standard of care.

PART I THE BASICS

Civil Liability: Negligence:

- Four Part Negligence Test:
 - 1) The existence of a duty of care: A duty of care will generally be between a professional and a client. In special circumstances a duty of care will be found to be owed by a professional to non-clients.
 - 2) Breach of duty: Did the conduct fall below the standard of care?
 - 3) Were the damages caused by the wrongful act or omission of the professional?
 - 4) Were the damages foreseeable / not remote?

PART I THE BASICS

Civil Liability: Negligence:

- Standard of Care:
 - Professionals are not required to be perfect, they are merely required to exercise reasonable care and due diligence.
 - Mistakes happen and not ever momentary lapse of judgment or skill will give rise to liability.
 - Standards change over time – a professional is expected to keep on top of new developments and technology.
 - Inexperience is not a defence.
 - A professional who holds themselves out as a specialist is subject to the elevated duties associated with the specialization.
 - A general practitioner may be negligent where he fails to consult with or seek the advice of a specialist where appropriate.

PART II

ADVISING THE INSURED

- The Tripartite Relationship: The underlying concept of the tripartite relationship is that the insurer, the insured and defence counsel must work together to reach a favourable and mutually beneficial result.



PART II

ADVISING THE INSURED

The Tripartite Relationship:

- While defence counsel is retained by the insurer, **both** the insurer and the insured are clients of defence counsel and defence counsel owes legal and ethical duties to both.
- Although the tripartite relationship defines all insurance claims, it often is front and centre in professional liability claims.
- Professional insureds are generally very involved in the defence of the claim against them. Their personal and professional reputation is at stake and they have a vested interest in the proceedings and in the outcome.

PART II

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The Tripartite Relationship:

There are several issues which arise frequently in professional liability claims which can make the tripartite relationship difficult to navigate:

- 1) Coverage and limits issues
- 2) Consent to Settle
- 3) Deductibles
- 4) The interplay between civil claims and regulatory matters

PART II

ADVISING THE INSURED

Coverage/Limits Issues:

- While defence counsel cannot be involved in coverage issues which arise as between the insured and the insurer, it is important that defence counsel know if there are aspects of the claim which are not or may not be covered.
- Common coverage issues which arise in professional liability claims include:
 - No coverage for certain services or products – where they are either specifically excluded or where the insured did not purchase coverage;
 - No coverage for intentional acts
 - No coverage for punitive damages
 - Late reporting of claims

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Coverage/Limits Issues:

- Where there are coverage issues, it is important that the scope of coverage be understood by the Insured from the outset. A good coverage letter / reservations of rights letter is important, and should be followed-up by a call to the Insured to ensure they understand.
- Where there are portions of the claim which are clearly not covered and there is a real possibility that the Insured has personal exposure, this should be made known to the Insured and defence counsel.
- Defence counsel can help prepare the insured for the reality that he may have to contribute to any settlement.

PART II

ADVISING THE INSURED

Coverage/ Limits Issues:

- Similarly where there are limits issues, it is important that same be identified to the Insured with a “over limits” letter.
- The Insured may opt to retain its own counsel where there are limits issues, or where the Insured has excess insurance, excess counsel may be appointed. Defence counsel may have additional reporting obligations.

PART II

ADVISING THE INSURED

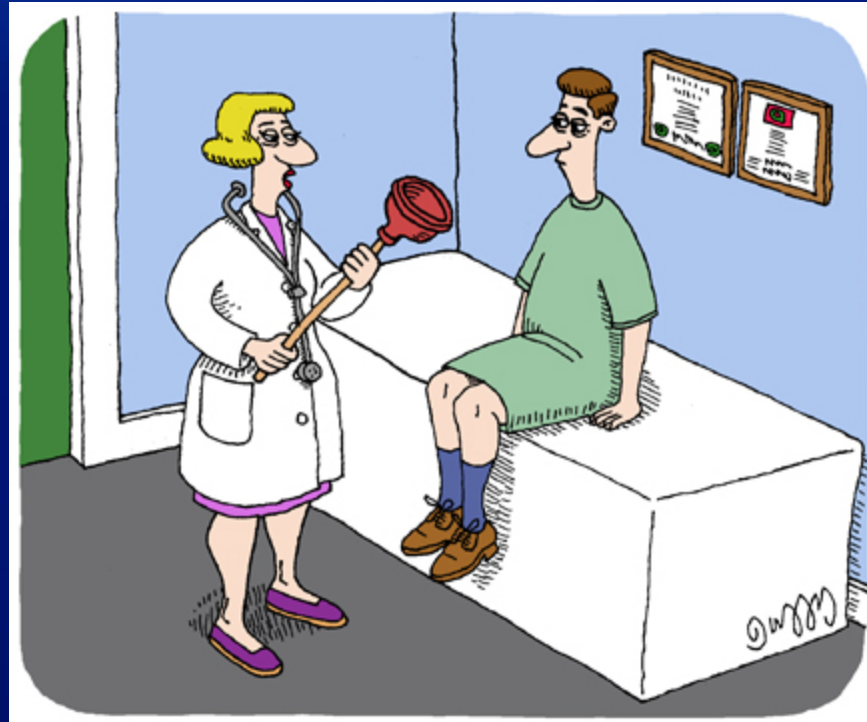
Coverage/Limits Issues:

- Coverage/limits issues may from time to time require defence counsel to seek instructions from both the insured and the insurer and there is the possibility that these instructions may conflict.
- Where there are limits or coverage issues and the insured has personal exposure, it may be in the interest of the insured to bring Third Party proceedings (even where the third parties are also insured by the same insurer).
- Where there are limits issues, the insured may wish to accept an offer from Plaintiff's counsel within policy limits, even if the claim is defensible or the offer is too rich for the insurer, rather than proceed to trial where the damages awarded may exceed policy limits.

PART II

ADVISING THE INSURED

Getting the Insured's Consent to Settle



PART II

ADVISING THE INSURED

Consent to Settle:

- Does the policy require the Insured's consent to settle? If not, is it the insurer's practice to get the Insured's consent to settle anyways.
- Is this something the insurer will obtain, or is the insurer relying on defence counsel to obtain the Insured's consent.
- Is the insured's verbal consent sufficient or does the insurer require the insured's written consent?
- Where consent is required, it should be obtained before initiating settlement or scheduling a mediation.

PART II

ADVISING THE INSURED

Deductibles:

- Is the deductible paid in tranches? If so at what amounts or at what stages of the litigation?
- Does the deductible apply to legal costs, indemnity payments or both?

Interplay between Civil Actions and Regulatory Matters:

- In professional liability claims, an insured may simultaneously be involved in regulatory proceedings, which can impact the defence of a civil action.
- Admissions made in regulatory proceedings may be admissible in a civil action.
- Easier to co-ordinate if defence counsel is also representing the insured in the regulatory proceedings.

PART III

The Use of Experts in Professional Liability Claims

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PART III

USE OF EXPERTS

Types of Expert Opinions:

- Three types of expert opinions which may be required in the defence of professional liability claims:
 - Standard of care: What is the applicable standard of care and did the insured meet the applicable standard of care?
 - Causation: Did the Insured cause the Plaintiff's damages?
 - Damages: Calculation of the Plaintiff's damages

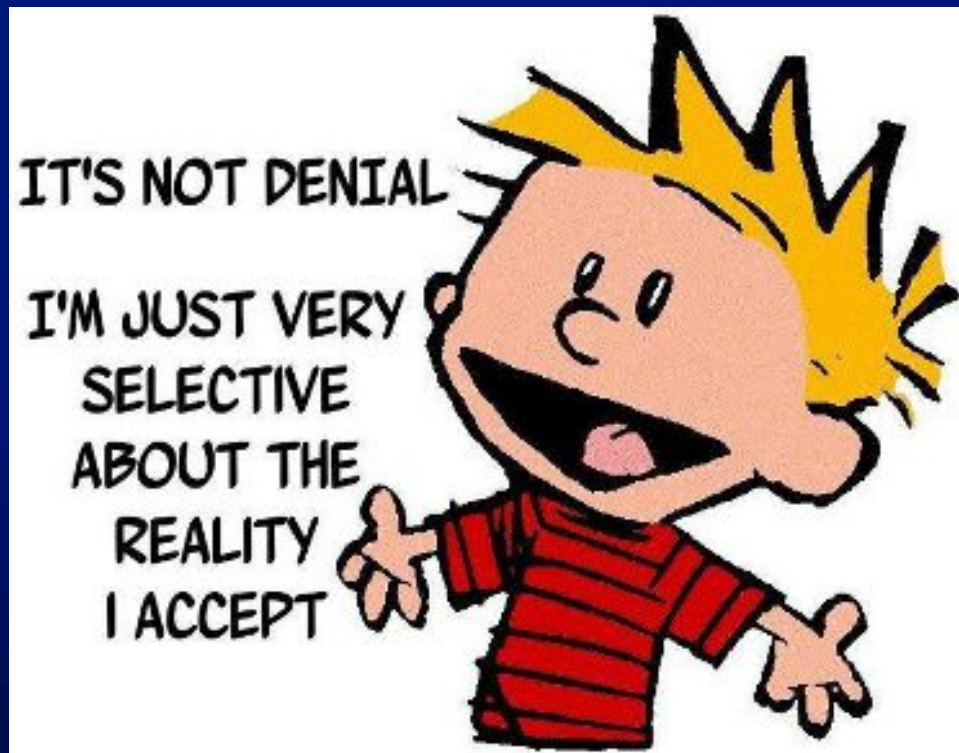
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USE OF EXPERTS

Standard of Care Opinions:

- Obtain early in the litigation – in many cases defence counsel is not able to comment intelligently on whether the insured met the applicable standard of care without the assistance of an expert.
- If the opinion is favourable, defence counsel can press for an early resolution or consider a summary judgment motion.
- If the opinion is not favourable, defence counsel can begin exploring settlement or focus on the issues of contention (contributory negligence, causation, damages).

An unfavourable standard of care opinion from another professional in the insured's field can be helpful in getting the insured to acknowledge that they may have made a mistake or, at the very least, that there is a possibility that a Court may find that the insured made a mistake.



PART III

USE OF EXPERTS

Standard of Care Opinions:

- Standard of care expert can assist with defence counsel's understanding of industry specific concepts and terms, particularly in complex medical, financial or engineering/technical claims.
- Standard of care experts can assist defence counsel in framing the issues and asking the right questions on examination for discovery.
- Standard of care experts can assist in identifying weaknesses in Plaintiff's case.

PART III

USE OF EXPERTS

Causation Report:

- Typically obtained post discovery –after all the facts known
- However, where causation is identified as a significant issue from the outset, it may make sense to retain the expert right away (to ensure the expert is not retained by the other side).

Damages Report:

- Typically obtained post discovery – usually just before Trial.
- Often will wait to respond to the Plaintiff's damages report.
- However, if you have a different theory – an earlier report can be helpful negotiating settlement

PART III

USE OF EXPERTS

Oral vs. Written Reports:

- Generally will start by getting an oral standard of care opinion.
- No need to spend money on an unfavourable written report
- Sometimes an expert will identify missing facts which can change their opinion. Obtaining an oral report first gives you the opportunity to obtain these facts for your expert before a written report is provided.
- Even though the standard of care opinion may not be favourable, talking through the issues with your expert can assist in identifying possible defences.

PART III

USE OF EXPERTS

Consulting Experts:

- In complex claims and/or where the quantum of damages is significant, retaining a consulting expert to review technical facts/documents can be extremely helpful in identifying and/or narrowing the issues.
- Consulting experts can assist counsel in translating scientific and technical concepts into understandable terms.

PART III

USE OF EXPERTS

Selecting an Expert:

- Often both defence counsel and the insurer will have a roster of experts.
- However, it is important to vet familiar experts before each retainer. Have they published any papers or made comments on social media which may give rise to an appearance of bias? Have they had been the subject of recent unfavourable judicial commentary.
- Particularly in professions where the techniques and standards change quickly, has your go to expert kept up with the changes – particularly a concern if your expert is a professional expert and longer in active practice.
- For standard of care opinions, important to get someone in the same field as the insured.
- It is important to involve the Insured in the process. While the expert must be independent, it is important that it is someone the Insured respects and feels comfortable with.

PART III

USE OF EXPERTS

Communicating with Experts: *Moore v. Getahun*:

- The recent case of *Moore v. Getahun* has clarified the role of counsel and clients in interacting with experts in the preparation of expert reports.
- **Facts:** *Moore v. Gathun* involved a medical malpractice claim, where the plaintiff suffered a fractured wrist. The defendant orthopaedic surgeon applied a full cast to the plaintiff's wrist and forearm. The plaintiff alleged that he suffered permanent damage to the muscles in his arm as a result of the defendant applying a full cast. The defendant's expert witness provided a draft report to defence counsel for review and thereafter finalized his report after an hour and a half discussion with counsel.

PART III

USE OF EXPERTS

Communicating with Experts: *Moore v. Getahun*:

- **Trial Decision:** The trial judge found that it was improper for counsel to assist with the preparation of the report as it undermined the expert's credibility and neutrality. The trial judge ultimately preferred the plaintiff's expert's evidence and found that the application of the cast was a breach of the standard of care.
- **On Appeal:** An important issue was whether the trial judge erred in her treatment of the defendant's expert evidence, and specifically her reprimand of counsel for discussing the draft report with the expert. The Court of Appeal held that the trial judge had erred in holding that it was inappropriate for counsel to review and discuss draft expert reports. The Court of Appeal recognized that consultation and collaboration between counsel and expert witnesses has been a longstanding and essential practice.

PART III

USE OF EXPERTS

Communicating with Experts: *Moore v. Getahun*:

- The Court of Appeal reaffirmed that improper conduct is not shielded by litigation privilege, but rather where there is a suggestion that an expert's objectivity has been compromised, the party seeking the production of draft reports or notes must show reasonable grounds to suspect that counsel communicated with an expert in a manner that interferes with the expert's duties.

PART III

USE OF EXPERTS

General Comments on Retaining an Expert:

- It is preferable that defence counsel rather than the insurer retain any expert so that there is no doubt that privilege attaches to all communications.
- What documents and information are provided to the expert are important and are generally carefully selected by defence counsel.

QUESTIONS?