



The Law Society of
Upper Canada

Barreau
du Haut-Canada

The Lawyers Fund for Client Compensation Committee September 4, 1997

Report to Convocation

Purpose of Report: Decision Making

Prepared by The Lawyers Fund for Client Compensation Department

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS	1
A. ELIMINATING GAPS IN PROTECTION BETWEEN THE LPIC POLICY AND THE LAWYERS FUND FOR CLIENT COMPENSATION	2
INTRODUCTION	2
Background on the Operation of the Lawyers Fund for Client Compensation	3
THE CURRENT GAP IN PROTECTION	3
Situations Involving a Breach of Policy Conditions	4
THE COMMITTEE'S VIEW	7
Changes to the Fund Guidelines	7
How Proposed Changes Benefit the Public	8
How Proposed Changes Benefit the Profession	8
Financial Implications	9
Options and Alternatives for Decision by Convocation	10

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee (“the Committee”) met on September 4, 1997. In attendance were:

Harvey Strosberg (Treasurer)
Clayton Ruby (Chair)
Bob Aaron
Nancy Backhouse
Ronald Cass
Paul Copeland
Gordon Farquharson
Gary Lloyd Gottlieb
Hope Sealy
Stuart Thom
Robert Topp
Richmond Wilson

Staff: Craig Allen, Duncan Gosnell, Malcolm Heins, David McKillop, Richard Tinsley and Jim Yakimovich

2. This report contains:
 - a policy proposal concerning the expansion of protection afforded the public who suffer a financial loss due to a lawyer’s dishonesty. The proposal would permit members of the public to make a claim to the Lawyers Fund for Client Compensation where the lawyer has negligently provided legal services but **intentionally** breaches the terms and conditions of the LPIC policy such that the claimant’s ability to receive compensation is thwarted.

***A. ELIMINATING GAPS IN PROTECTION BETWEEN THE LPIC POLICY
AND THE LAWYERS FUND FOR CLIENT COMPENSATION***

INTRODUCTION

3. In the September, 1996 report to Convocation, of the Lawyers' Professional Indemnity Company ("LPIC"), the LPIC Board of Directors indicated that representatives of LPIC and the Lawyers Fund for Client Compensation (the "Fund") had begun discussions regarding proposed changes to the compensation structure for losses sustained by the public in consequence of dishonesty on the part of any Law Society member in connection with the member's law practice or related role as trustee. This present report is in furtherance of those discussions and sets out a specific recommendation for change to the existing compensation structure.

4. This initiative has been driven by several concerns, including the need to:
 - introduce greater consistency in the amount of compensation made available to members of the public as a result of this type of loss; and,
 - provide more comprehensive and responsive protection to the members of the public suffering a loss of this nature.

5. With regard to the payment of grants as compensation under the Fund, it is recommended that the discretion under the Fund be expanded to include grants compensating those who have suffered a loss in certain circumstances where there is no coverage available under the Policy.

6. These circumstances would be restricted to situations in which the Lawyers Fund for Client Compensation Committee, as manager of the Fund, is satisfied that an underlying claim (as defined in the Policy) has been made against a member and the member has

intentionally failed to report the matter as a claim, either at all or in a timely fashion, or has intentionally failed to co-operate with the insurer or meet other Policy terms and conditions; provided that has resulted in the insurer taking an off coverage position.

Background on the Operation of the Lawyers Fund for Client Compensation

7. The Fund, as provided for in section 51 of the *Law Society Act*, R.S.O. 1990, c. L.8., provides compensation to claimants through grants, which are provided on a discretionary basis.
8. Grants are approved by Convocation in its absolute discretion "... to relieve or mitigate loss sustained by any person in consequence of dishonesty on the part of any member in connection with such member's law practice or in connection with any trust of which the member was or is a trustee...".
9. The General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation (the "Fund Guidelines"), which are established by Convocation, require that:
 - the member must have actually received the funds or property of the claimant as a lawyer; and
 - the claimant's loss must have been as a result of dishonesty, on the part of the member, in connection with the member's law practice or related role as trustee.

THE CURRENT GAP IN PROTECTION

10. Presently, members of the public who have suffered a loss at the hands of a lawyer may not have recourse against either the Policy or the Fund in some situations because of differences in criteria under which claims are paid.

Situations Involving a Breach of Policy Conditions

11. There have been several cases in recent years where the lawyer has negligently provided legal services; but:
- has failed to report the claim matter to the insurer; or
 - has failed to report the claim matter in a timely fashion, such that the insurer's position is prejudiced to the point that it is unable to defend the claim and relieving the insurer from its obligation to provide coverage; or
 - intentionally breaches other Policy terms or conditions, such as the need to co-operate with the insurer, again prejudicing the insurer's ability to defend the matter and relieving the insurer from its obligation to provide coverage.
12. The compelling need to provide better protection for the public was explicitly addressed by the Ontario Court of Appeal in 1984 in the case of Perry et al. v. General Security Insurance Co. of Canada et al. 47 O.R. (2d).
13. That case involved a Law Society member who had caused a loss to his client by negligently failing to secure the client's loan as a second mortgage. Subsequently, the solicitor refused to report the matter as a claim under the policy or to co-operate with the insurer, which the court viewed as "... a flagrant case of the flouting of the conditions of the policy by the solicitor. His ignoring of the claim and his failure to advise his insurers of the claim and to co-operate with them was, apparently, deliberate." The client was unsuccessful in executing the judgment as against the policy insurer under the *Insurance Act (Ontario)* after suing and obtaining default judgment against the solicitor.
14. MacKinnon A.C.J.O. said:
- "On the facts of this case, the result is an unhappy one. It seems also to run counter to one of the purposes for the insistence by the Law Society of Upper

Canada that its members assume this insurance as a condition of being licensed to practice. Surely, one of the main reasons for such a condition was to ensure that members of the public, in the situation of the appellants, would be protected from loss caused by the negligent action or inaction of their solicitors...”

15. Arnup J.A. described the unfairness of the circumstance as follows :
“This is an unjust result. It makes no sense that the clients of a remorseful solicitor, who co-operated with the insurer and the new solicitors of his former clients, might in an appropriate case get relief from forfeiture, whereas the clients of a callous solicitor, who first botched his clients’ affairs and then refused to lend them the slightest assistance in their efforts to recoup some of their loss, should find themselves helpless to secure relief from the forfeiture of his insurance, caused by him.”
16. The court expressed the view that the claim could not be unique, and indicated “... that immediate action should be taken by the Law Society or the Legislature, or both, so that the present unfairness to innocent clients of insured solicitors can be ended.”
17. A more recent case, which has been the subject of unfavourable commentary by the press, is that of Ziad El-amad et. al. v. Stanley D. Goldberg [1997] O.J. No.117 (Ont. Ct. Gen. Div.). That case involved an insured member who had been engaged to represent his clients regarding a motor vehicle accident. The solicitor had failed to honour his undertaking to disclose certain information to the defendants’ counsel in that action which resulted in the dismissal of the action. The clients, as well as LPIC, were unaware of the dismissal of the action until some two years later. The clients sued the solicitor, naming LPIC as a third party, seeking an order requiring that LPIC defend the matter.
18. McRae J. refused to provide this order noting that:

“The solicitor/defendant not only failed as required, to immediately notify L.P.I.C., he, in fact, never informed the insurer. Perhaps more seriously, when the client’s new solicitor Mr. Ira Book notified the Law Society two years later, Goldberg completely refused to in any way co-operate with the insurer’s investigator in spite of great efforts made to get his cooperation by the investigator. There can be no doubt that L.P.I.C. was prejudiced by his failure to report and by his failure to cooperate. If he had reported the claim it is highly likely that in the summer of 1993 the issue would have been quickly resolved by having the orders dismissing the plaintiff’s action reversed.”

19. The El-amads recently filed a claim for compensation with the Fund.

20. In a third case, Bernard Lee, et al. v. The Law Society of Upper Canada et al. [1994] O.J. No.1468 (Ont. Ct. Gen. Div.), the plaintiff’s wife and mother were killed in a motor vehicle accident. The Law Society member filed but failed to serve a statement of claim on behalf of his client’s family, but later lead his clients to believe that the action had been settled. The member was sued by his clients four years later, but failed to report the matter to the insurer as a claim.

21. In a 1994 decision, the Ontario Court of Justice refused to provide a declaration of policy coverage. The Court found that there were no damages in that the principle action had been revived and was proceeding, and that the children’s action was not statute barred. The Court indicated that regardless, there would have been no policy coverage on the basis of late reporting and the member’s misconduct.

22. The Law Society did receive a letter of notice under the Compensation Fund, but did not subsequently receive a completed application/statutory declaration from the claimants as required.

THE COMMITTEE'S VIEW

23. These cases have very clearly demonstrated the compelling need for the Law Society to provide better protection to the public. In dealing with these cases, the courts have recommended that changes be made to ensure that the public is better protected in future situations of these types. These cases have also lead to complaints to the Law Society and unfavourable commentary by the press.
24. In the view of the Committee, to the extent that the breach of Policy terms and conditions is intentional in these circumstances, this breach amounts to dishonesty on the part of the member as referred to in section 51(5) of the *Law Society Act*, and should be eligible on this basis to form a legitimate claim for compensation under the Fund.
25. A legal opinion (see Appendix A) has been obtained by the Law Society which supports the view that in the circumstances, such a breach of Policy terms or conditions may be considered to be dishonesty on the part of the member for the purposes of section 51(5) of the *Law Society Act*.

Changes to the Fund Guidelines

26. Among other criteria described under the Fund Guidelines, the claimant must show that the member actually received funds or property of the claimant in the member's capacity as a lawyer, to be eligible for compensation. The Guidelines also provide guidance in determining the amount of the grants, which are also premised upon the amount of the client's funds (or property) received by the member and any amount returned or otherwise accounted for to the claimant.

27. Since this type of loss is first precipitated by the member's negligence and subsequently by the member's ensuing breach of Policy terms or conditions, there generally is no issue of unaccounted claimant's funds or property. Rather, the claimant's loss is better approximated by the measure of the direct legal damages due to the claimant which flow from the loss.
28. In these instances the amount of the grant, if any, would be set by the Fund in its sole discretion and would reflect what component of the claimant's damages, costs or expenses the Fund deems appropriate in the circumstances. The requirement under the Fund Guidelines, that the member have received funds or property from the claimant, would not apply.
29. Due to LPIC's greater expertise in assessing the loss flowing from the negligent acts of a lawyer, LPIC, if requested by the Fund, will assist in determining an appropriate grant amount for consideration by the Committee.

How Proposed Changes Benefit the Public

30. Where a lawyer has been negligent in providing legal services, there will be elimination of gaps in protection should the lawyer fail to report the claim to LPIC, either at all or in a timely fashion, or where the lawyer fails to co-operate with LPIC [i.e., the fact situation presented in the *Perry* decision will not be repeated].

How Proposed Changes Benefit the Profession

31. Enhanced coverage under the Fund improves the reputation of the profession and maintains public confidence in the ability of lawyers to govern themselves.

32. Improved public confidence by virtue of undertaking measures designed to protect the public.

Financial Implications

33. LPIC has advised that it anticipates there will only be a small number of such claims arriving at the Fund on an annual basis (potentially two or three per year). With a per claimant limit of \$100,000, the **maximum** cost of this proposal should be \$300,000. If experience demonstrates the actual number of claims is much higher, the Committee will re-examine the policy to determine whether it should be continued.

RECOMMENDATION

34. The Committee recommends that effective January 1, 1998:
- the Fund Guidelines be expanded to cover claims denied under the Policy, if in the view of Convocation (or the Committee as provided for under the Fund), the member has intentionally:
 - failed to report a claim either at all or in a timely fashion, or
 - has failed to co-operate with the insurer in accordance with the Policy's terms and conditions;provided that, in the view of Convocation (or the Committee as provided for under the Fund), the member intended to prejudice the claimant's efforts to obtain compensation.
 - in these circumstances described, the requirement of the Fund Guidelines that the claimant show the Law Society member actually received funds or property of the claimant in the member's capacity as a lawyer to be eligible for compensation, should not apply.
 - in these circumstances described, the amount of the grant, if any, would not be

determined using the general methodology set out in the Fund Guidelines, but rather would be set by the Fund in its sole discretion reflecting what portion or component of the claimant's damages, costs and/or expenses it deems appropriate in the circumstances.

Options and Alternatives for Decision by Convocation

35. Convocation must decide whether to:
- a. **Adopt the recommendation of the Committee and permit the General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation to be expanded to cover claims denied under the LPIC Policy as a result of a member's intentional acts intended to prejudice the claimant's efforts to obtain compensation.**
 - b. **Whether to maintain the status quo such that there is no recourse for those whose claims are denied under the LPIC Policy due to the intentional acts of a member.**
 - c. **Whether an alternate policy and/or implementation scheme should be designed.**