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Liability and Lawyers

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Case Commented On: *Mraz v Herman*, 2015 ABQB 573

The recent decision of Justice W.P. Sullivan in *Mraz v Herman* succinctly disposes of claims made against two Alberta lawyers. The first claim, based on a real estate lawyer's failure to make proper disclosure to his client, Mrs. Mraz, failed because the lawyer had discussed matters with Mr. Mraz, whom the Court found was Mrs. Mraz's agent (at para 18). The second claim, based on advice allegedly received from a lawyer participating in the Law Society of Alberta's lawyer referral service, failed because the plaintiff did not provide any evidence to demonstrate that the lawyer's conduct fell below the standard of care (at para 77).

The Court's analysis is straightforward. It does, though, make a few points worth noting and also raises one question (at least for me). First, while the Court does reject the claim against the real estate lawyer on its merits, the Court acknowledges that the lawyer's fiduciary duties include the obligation to make full disclosure. As I have discussed elsewhere, this approach reflects a consistent trend in the case law on lawyers as fiduciaries, one that while troubling to some commentators properly reflects the lawyer's central obligation to facilitate a client's decision-making.

Second, the Court effectively takes the position that the failure of a plaintiff to provide expert evidence in relation to the standard of care precludes proof that the lawyer was negligent (at para 65). While I understand the Court's point of view, requiring such evidence to assess a lawyer's negligence seems unduly onerous. Unlike with many other professions – e.g., doctors or engineers – the court is generally capable of independently assessing whether a lawyer's conduct met the standard of care. The Court can determine, for example, whether a lawyer's advice was sufficiently accurate, whether the lawyer made an unacceptable error such as missing a governing statute or Supreme Court decision, or if the lawyer failed to take appropriate steps to protect a client's privileged information. In exercising its inherent jurisdiction over its own processes courts *routinely* assess the conduct of counsel. As a consequence, while in certain circumstances expert evidence may be necessary, requiring it in every case creates an unnecessary hurdle to the assessment of liability. And given the problems of access to justice, which include the expense associated with pursuing claims, creating unnecessary hurdles to assessing liability is not something the Court ought to do.

Third, the Court clarifies that lawyers participating in lawyer referral services can be liable for the advice or information they provide. The Court notes, however, that the imposition of such liability must be sensitive to the importance of referral services in fostering access to justice:

> While there has to be protection for those receiving legal advice so that they can rely on the information they are receiving, it benefits no one to go too far to the other end of the spectrum by placing too great a liability on legal referral services and their volunteers when they merely provide legal information. Such measures could have a chilling effect on participation in those services for fear of liability (at para 76).

And finally the question. One aspect of the judgment puzzles me. Specifically, the litigation in this case arose from the lawyer accepting a revised tender in a real estate sale without discussing it with Mrs. Mraz. I would have thought that the legal issue in that case would be that the lawyer acted without receiving proper instructions, not that the lawyer failed to make full disclosure. The absence of disclosure matters, but surely accepting a tender without being instructed to do so by your client is an even more obvious breach of the lawyer's duties. Nothing particularly turns on this – either way, Mr. Mraz being Mrs. Mraz's agent means that the lawyer did disclose and (presumably) received instructions to accept the revised tender. But the framing of the claim just seems odd to me because it seems much more egregious to act without instructions than to, say, act with instructions which were based on improper disclosure. The latter is bad – and a violation of the lawyer's fiduciary duties – but the former is worse, and does appear to be what was alleged (although not proven) to have happened here.