

**MITIGATING ERROR IN THE PRACTICE OF
REAL ESTATE LAW**

BY: ROBIN SENZILET

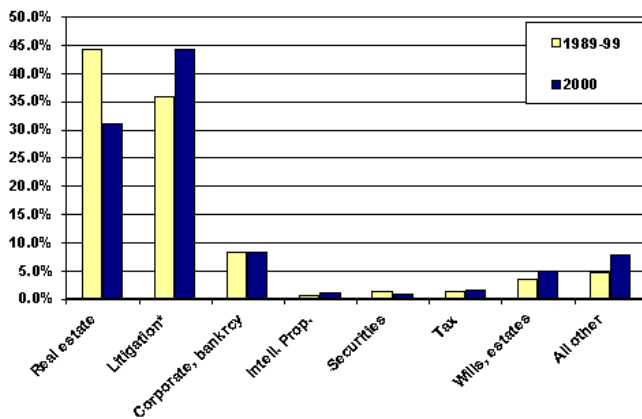
OSGOODE HALL LAW SCHOOL

“Error is all around us like the air we breathe. Error is ever present...it is how we understand and respond to it that shapes whether harm may later result.”¹ ~ James Reason, 2001

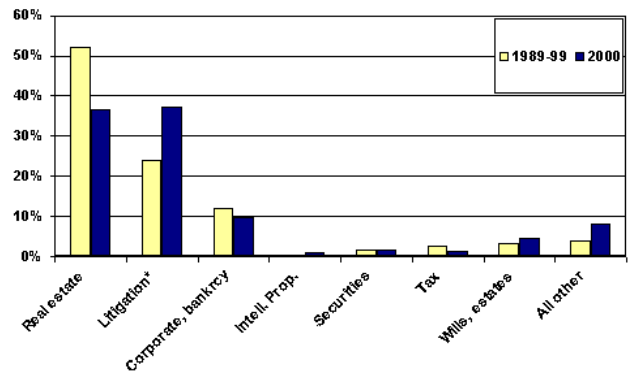
REAL ESTATE IS ONE OF THE HIGHEST RISK AREAS OF THE PRACTICE OF LAW

Historically, the practice of real estate law has resulted in more and costlier malpractice claims than most other areas of legal practice. During the early 1990s, real estate claims were responsible for up to 60 per cent of the costs of LAWPRO claims.² In the mid-1990’s, real estate claims began to decline, and in 1999 real estate fell to second place, with litigation superseding it.³ This dip in real estate claims has been attributed to several factors including a “more restrictive liability policy”⁴ and an “increased use of title insurance.”⁵ However, despite these positive developments, real estate claims remained quite high.⁶ (See the following two charts.⁷)

Distribution of Claims Count by Area of Practice



Distribution of Claims by Area of Practice (% of Gross Claim Costs)



¹ Litigation includes claims arising from civil litigation (plaintiff and defense litigation), family law, and criminal law.

¹ Litigation includes claims arising from civil litigation (plaintiff and defense litigation), family law, and criminal law.

¹ Julianne M. Morath & Joanne E. Turnbull, *To Do No Harm* (San Francisco: Jossey-Bass, 2005) at 24.

² Caron Wishart, “The Changing Nature of Real Estate” (March 2001), online: TitlePLUS <<http://www.titleplus.ca/Lawyers/Art1.asp>>.

³ *Ibid.* at 1.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ These charts are both taken directly from *Ibid.* at 2.

In 2004-2005, LAWPRO noted that while the number of real estate claims did not seem to be increasing further, the costs associated with those claims had quickly risen since 2003—from 23 per cent to 40 per cent of all claims—and real estate claims once again exceeded the cost of litigation claims. The rise in the cost of real estate claims, however, may be partially attributed to a rise in fraud claims, as well as to the fact that losses are now much higher in real estate claims overall.⁸

JAMES REASON, A LEADING WORLD EXPERT ON HUMAN ERROR AND SYSTEM FAILURE

During the past three decades British psychologist James Reason has become one of the world's leading experts on the subject of human error. He has extensively studied “the human and organisational contributions to the breakdown of complex...systems”⁹ in industries such as nuclear energy, aviation, and health care, where errors can have catastrophic results. He has developed theories regarding the causes of error, as well tools for use in error prevention.¹⁰ In this paper, Reason's theories will form the framework for a discussion of the possible explanations for the high incidence of error on the part of real estate lawyers. In addition, Reason's suggestions for error prevention, which were developed for the healthcare context, will be applied to this quandary in attempt to suggest ways in which the high incidence of such errors may be reduced in the future.

⁸ Caron Wishart, “Real estate claims on the rise: Poor communication is the culprit” *LAWPRO Magazine* 5:2 (Summer 2006) 14.

⁹ Online: British Medical Association <<http://www.bma.org.uk/forms.nsf/7a5140311fb7378080256db7003d7b42/d2b9474c5b4d10fc80256db70044316b?OpenDocumentH>>.

¹⁰ Renee Lertzman, “From absent minded to error wise: a conversation with James Reason” (3 January 2006), online: saferhealthcare <<http://www.saferhealthcare.org.uk/IHI/Topics/SafetyCulture/Literature/AbsentMinded.htm>>.

TWO APPROACHES TO ANALYZING ERROR

Reason has identified two different approaches for the analysis of error: the “person approach” and the “system approach.”

THE “PERSON APPROACH”

Reason’s “person approach” “focuses on the unsafe acts...of people...It views these unsafe acts as arising primarily from aberrant mental processes such as forgetfulness, inattention, poor motivation, carelessness, negligence, and recklessness.”¹¹ Under this approach, it is the individual person who is considered to be solely responsible for the error that has occurred.¹²

One type of failure under the “person approach” occurs when people act without paying enough attention to what they are doing. After conducting experiments where he tried to induce human error, Reason discovered that common errors may be the result of the human brain’s strong capacity to adapt. He theorized that:

people draw on existing knowledge, on contextual associations...[T]he nature of error involves under-specification. In order to get something done correctly, you have to specify your plan of actions accurately. But if we under-specify, we are looking at a hazy picture; we go into “autopilot” mode and fill in the gaps.¹³

Humans cannot function without delegating some tasks to be carried out automatically by the brain; this creates opportunities for the mind to go on “autopilot” and for errors to occur.¹⁴

Efforts aimed at combating errors under the person approach include instilling a sense of fear, threatening litigation or disciplinary procedures, and “retraining, naming, blaming, and shaming.”¹⁵

¹¹ James Reason, “Human error: models and management” (2000) 320 BMJ 768 at 768.

¹² *Supra* note 10.

¹³ *Ibid* at 1.

¹⁴ *Ibid* at 1.

¹⁵ James Reason, “Human error: models and management” (2000) 320 BMJ 768.

Drawbacks of the “person approach”

The person approach dominates the approach to error management in many fields and organizations. When something goes wrong, it is human nature to look for someone to blame. Reason theorizes that this is because it is easier and more satisfactory to place the blame on someone, rather than on the system or organization as a whole.¹⁶ However, Reason suggests that errors may not be appropriately blamed entirely on the person involved.¹⁷ Rather, errors are often the result of contextual factors:

“Errors are inherited from a circumstance. There are lots of ‘error-traps’ in the world in which we live”...The importance of acknowledging an error-trap “is that the same situation produces the same kind of error in different people...”...[T]o understand error-traps is to examine closely the influences upstream of the error-maker—the situation, the context, and how well the organisation safeguards against errors.¹⁸

If we acknowledge that the circumstances in which people are placed contribute to the cause of the error, we will be making great strides towards reducing human error.¹⁹ Punitive measures directed solely towards an individual will only help to prevent future errors in cases where the error was the result of deliberate malfeasance on the part of the individual (for example, if a lawyer acted in bad faith).²⁰

Another drawback of the “person approach” relates to hindsight bias, which occurs when the observer (in the legal context this could be a judge or a lawyer’s peers) is looking at the incident in retrospect and, knowing what the outcome was, may simplify the analysis by overlooking other relevant contextual factors and instead focus on one factor (the error of the

¹⁶ *Ibid.*

¹⁷ *Supra* note 10.

¹⁸ *Ibid.* at 2.

¹⁹ *Supra* note 15.

²⁰ Linda T. Kohn, Janet M. Corrigan & Molla S. Donaldson, eds., *To Err is Human: Building a Safer Health System* (Washington D.C.: National Academy Press, 1999).

person involved) as the cause.²¹ Future risk management is therefore much more difficult to accomplish, since blaming one individual is in conflict with making the existing system safer.²²

THE “SYSTEM APPROACH”

Under Reason’s “system approach,” the focus is placed on the contextual factors that have contributed to the error made by the individual. “Errors are seen as consequences rather than causes, having their origins not so much in perversity of human nature as in the ‘upstream’ systemic factors.”²³ One could say, for example, that a lawyer was inattentive; however, this inattentiveness may have been caused by extreme fatigue due to the lawyer working very long hours, or by his or her having an overly heavy workload. Under the system approach, the focus of error prevention is placed on changing the system as a whole, not simply the individual:

Countermeasures are based on the assumption that though we cannot change the human condition, we can change the conditions under which humans work. A central idea is that of system defences...When an adverse event occurs, the important issue is not who blundered, but how and why the defences failed.²⁴

Hence, while an event may seem as though it is the result of individual human error, “single events or errors are due most often to the convergence of multiple contributing factors. Blaming an individual does not change these factors and the same error is likely to recur.”²⁵ It is for this reason that the system approach—whereby the focus is placed on identifying potential future errors and working to militate against them in advance—is vital to future error prevention.²⁶

²¹ *Supra* note 20.

²² Richard I. Cook & David Woods “The New Look at Error, Safety, and Failure: A Primer for Health Care” (1999), online: <http://cse1.eng.ohio-state.edu/woods/error/NewLook_primer.pdf>.

²³ *Supra* note 15 at 768.

²⁴ *Ibid.*

²⁵ *Supra* note 20 at 49.

²⁶ *Supra* note 15.

“The Swiss cheese model”²⁷

During Reason’s research of high-reliability organizations (such as air traffic control systems and nuclear power plants) that have developed defences against potentially catastrophic accidents, Reason developed the so-called “Swiss cheese model.” This model illustrates the situation in which a series of events occur simultaneously to breach the defences and safeguards that have been put in place by the organization.²⁸ Reason described his “Swiss cheese model” as follows:

[I]f we were to make defences against errors out of cheese, we would use cheddar cheese. But in actuality, they are more often like Swiss cheese—the defences are full of holes...In real life, unlike cheese, the holes are dynamic, constantly opening and shutting. Dame Misfortune is out there, trying to find a way through the holes. That happens quite rarely, because they don’t line up that often.²⁹

As such, the presence of a single “hole” in the system’s defences, in and of itself, doesn’t cause the error to occur. Errors occur “only when the holes in many layers momentarily line up to permit a trajectory of accident opportunity...”³⁰

Reason has argued that a hole in the system’s defences arises for one of two reasons: active failures or latent conditions; and errors are almost always the result of a combination of the two.³¹

Active Failures

Active failures are those failures that are attributed directly to the person performing the task.³² Legal examples include lapses, such as forgetting to give a client certain information;

²⁷ *Supra* note 10 at 2.

²⁸ *Supra* note 10.

²⁹ *Ibid.* at 2.

³⁰ *Supra* note 15 at 769. This page also contains an image that illustrates the “Swiss cheese model” very well.

³¹ *Supra* note 15.

³² Patient Safety – Quality Improvement, online: <http://patientsafetyed.duhs.duke.edu/module_e/vocabulary.html>.

procedural violations, such as a missed deadline; slips, such as proceeding without the consent of the client; and mistakes, such as not properly checking title for a property. These failures are often the result of latent conditions. When active failures are combined with latent conditions, the stage is set for possible errors to occur.

Latent Conditions

Latent conditions “are often unrecognized and have the capacity to result in multiple types of...errors.”³³ Latent conditions, which “translate into error provoking conditions in the...workplace,”³⁴ often go unnoticed because the people who work with the system have become accustomed to it. Furthermore, people may have also adapted to the latent conditions that exist in order to avoid problems, possibly without even noticing that they are doing so.³⁵ Since latent conditions can often be detected in advance, an understanding of this concept can help to create “proactive rather than reactive risk management.”³⁶ The earlier such conditions are identified, the better the results will be.³⁷

Examples of latent conditions include preconditions;³⁸ preconditions consist of either human or technological factors. Examples of human factors include poor management and guidance; inexperienced or inadequately trained workers; unreasonable working hours and fatigue; time pressures; and inadequate motivation. Examples of technological factors include unreliable equipment; the inability to detect anomalies in automated systems; and the lack of skills to react when something does not go as it should.³⁹ Interestingly, while increasing the use

³³ *Supra* note 20 at 55.

³⁴ *Supra* note 15 at 769.

³⁵ *Supra* note 20.

³⁶ *Supra* note 15 at 769.

³⁷ FAA Human Factors, online: <<http://www.hf.faa.gov/Webtraining/TeamPerform/TeamCRM011.htm>>.

³⁸ *Supra* note 20.

³⁹ *Supra* note 20.

of technology seems like a way to reduce the likelihood of human error, the use of technology creates changes to which people must adapt. “Changes, however well-intended, that increase or create new forms of complexity will produce new forms of failure...”⁴⁰

APPLYING REASON’S FRAMEWORK TO ERROR PREVENTION IN THE PRACTICE OF REAL ESTATE LAW

In the following section, I will apply Reason’s framework in order to analyse some of the most common types of errors that lead to malpractice claims in the area of real estate law.

COMMUNICATIONS ERRORS

While errors related to communication are prevalent in all areas of legal practice, in 2001 it was stated that “[t]his appears to be particularly true in real estate practice, where over the last three years client relations are cited as the cause of nearly one in every two claims reported to LAWPRO.”⁴¹ Between 1995 and 2003, 37.5 per cent of malpractice claims in the area of real estate were related to communication errors of some sort.⁴² Furthermore, between the years 2003-2005, 41 per cent of real estate claims were the result of communication errors.⁴³ This trend continues today. In 2006, it was found that “[l]awyer/client communication-related errors are the biggest cause of malpractice claims...they represent one-third of [all] the claims LAWPRO handles.”⁴⁴ Communication errors usually relate to one of the following three issues: (1) “failure to follow the client’s instructions”⁴⁵; (2) “poor communications with the client”⁴⁶; and (3) “failure to obtain the clients’ consent or to inform the client.”⁴⁷

⁴⁰ *Supra* note 22 at 4.

⁴¹ *Supra* note 2 at 3.

⁴² Dan Pinnington, “Communication-related issues account for about 38 per cent of real estate malpractice claims” *LAWPRO Magazine* 3:2 (June 2004) 34.

⁴³ *Supra* note 8 at 15.

⁴⁴ Dan Pinnington, “Solo, small and large firms make same errors” (2006) 5:2 *LAWPRO Magazine* 25 at 25.

⁴⁵ *Ibid.*

Errors resulting from a “failure to follow the client’s instructions”⁴⁸ are not only the most frequent in terms of malpractice claims; they are also the most costly. Clients are often successful in their claims because they have a more specific recollection of their discussions with the lawyer than the lawyer has regarding their communications with the client. The typical client will only be involved in one or two real estate transactions during his or her lifetime.⁴⁹ Conversely, the typical real estate lawyer will “act on thousands of real estate deals.”⁵⁰ As a result, these cases are extremely hard for LAWPRO to defend because the client will seem more credible than the lawyer due to his or her ability to recall what happened in better detail.⁵¹ This problem will be compounded if the client’s instructions are not in writing, and if the lawyer did not take enough notes to back up his or her position.⁵²

Errors resulting from “poor communications with the client”⁵³ typically involve the lawyer’s failure to adequately explain “information about timing, fees and disbursements, options, implications of decisions and potential outcomes”⁵⁴ to the client. For example, the lawyer may not have properly explained to the client what the risks of not closing are, or the implications of a title defect or zoning issue. Some of these communication-related errors might be attributable to a lawyer assuming that the client is more knowledgeable than he or she actually is. For example, a lawyer may close a transaction where the frontage of the property is represented as being “50 feet more or less,” without explaining to the client what “more or less”

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Supra* note 44.

⁴⁹ Dan Pinnington “The most common malpractice error: Failure to follow the client’s instructions” (October 2002) 1:3 *LAWPRO Magazine* 24.

⁵⁰ *Ibid.* at 24.

⁵¹ *Supra* note 49.

⁵² Dan Pinnington, “Solo, small and large firms make same errors” (2006) 5:2 *LAWPRO Magazine* 25.

⁵³ *Ibid.* at 25.

⁵⁴ *Ibid.*

means. The hypothetical client would later be upset upon reading the reporting letter and learning that the property had a frontage of only 45 feet. The client would find that she has no remedy against the vendor because the discrepancy was covered by the words “more or less,” and may then wish to sue her lawyer.

Errors resulting from a “failure to obtain the clients’ consent or to inform the client”⁵⁵ typically involve a lawyer who proceeds on a transaction without obtaining the client’s informed consent. This behaviour might be attributable to lawyers who are striving to meet the current market demands for speed and efficiency, since “[t]he business climate for selling and buying homes is faster...and more competitive than ever before.”⁵⁶

What are the latent conditions underlying these communication errors? Since the issue of lack of proper documentation comes up so often as an evidentiary problem, it would seem that this failure may be attributable, at least in part, to lawyers’ heavy workloads, compounded by the fact that the low fees charged for a standard real estate transaction might cause some lawyers to have to take on too many cases in order to earn enough money. Other latent conditions might be human preconditions such as time pressures, or a possible failure to properly train some lawyers to quickly identify causes for concern (for example, any warning signs of fraud), so that they may quickly take steps to prevent the damage.

An example of a case where communication errors were made is *Enns v. Panju*.⁵⁷ In *Enns*, the client accused her lawyer of not properly educating her regarding the risks associated with her proposed course of action. In this case, the vendor had misrepresented the amount of revenue that the property produced. The lawyer failed to build provisions into the documents

⁵⁵ *Ibid.*

⁵⁶ Law Society of Upper Canada “Report to Convocation Mortgage Fraud” (24 March 2005) at 5.

⁵⁷ *Enns v. Panju*, (1978), 5 R.P.R. 248 (B.C.S.C.) [*Enns*].

regarding the vendor's representations, as well as to properly advise his client regarding the encumbrances on the title. Although the court found that there was no bad faith on the part of the lawyer, the court held that the lawyer was professionally negligent.⁵⁸

This case is an excellent example of how active and latent factors can combine to produce an undesirable result. The court treated the lawyer's conduct (the failure to properly advise the client) as an active failure for which the lawyer was at fault. While the lawyer's error may have been partially his own fault, we must also consider whether system failures contributed to this result. For example, was the lawyer properly prepared for the practice of law? Did the lawyer make these mistakes because he was under extreme time pressures or undue stress? Any of these latent factors may have combined with the lawyer's active failure to produce this communication error.

Lawyers acting for purchasers in a real estate transaction should consider providing clients, especially unsophisticated ones, with the *Working With a Lawyer When You Buy a Home* pamphlet, which is produced by the Law Society of Upper Canada (LSUC) and the Ontario Bar Association (OBA). The pamphlet outlines what a lawyer will typically advise a client of prior to signing an offer to purchase, what the lawyer will typically do for a client after the vendor accepts their offer, and the client's three options regarding assuring good title.⁵⁹

LAWPRO has outlined several ways in which lawyers can militate against malpractice claims by creating documentation that can support the lawyer's position. Lawyers "can significantly reduce...exposure to this type of claim by controlling the client expectations from the very start of the matter, [and] actively communicating with the client at all stages of the

⁵⁸ *Ibid.* at para 48.

⁵⁹ Online: OBA <<http://oba.org/en/pdf/lawyer1.pdf>>.

matter...”⁶⁰ Lawyers should also “[s]end something in writing to the client confirming what instructions were given, and what steps were taken, or not taken, further to those instructions.”⁶¹

One example of a communication-related error which could have been avoided had the lawyer followed some of the advice listed above is the case of *Turi v. Swanick*.⁶² In *Turi*, the client in question was unsophisticated. The lawyer claimed that he took notes contemporaneously, while the client claimed that the advice in question was never imparted to him, and that the notes must have been made by the lawyer afterwards in attempt to evade liability. Although the court believed the lawyer had made the notes contemporaneously, the court found in favour of the client based on the fact that the notes were incomplete, and the client had not been advised of the lawyer’s instructions in writing.⁶³ The court went on to say that the client’s level of sophistication should be taken into account when determining the appropriate standard of care for the lawyer. Because the client was unsophisticated in this case, even had the lawyer adequately verbally explained the situation to the client, this advice should have also been confirmed and explained to the client in writing.⁶⁴

Had the lawyer in this case followed LAWPRO’s advice and “carefully document[ed] client communications and instructions,”⁶⁵ that action might have gone a long way towards protecting the lawyer from liability. It is worth noting, however, that being extremely meticulous with regards to communication may increase the clients’ legal fees and may open lawyers up to liability should they fail to put something important into the memo, for whatever reason.

⁶⁰ *Supra* note 44.

⁶¹ *Supra* note 49 at 24

⁶² *Turi v. Swanick* (2003), 61 O.R. (3) 368 [*Turi*].

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ “Failure to know or apply the law: Only 6 per cent of malpractice errors” (Summer 2003) 2:2 *Law Pro Magazine* 29 at 29.

Checklists are another useful tool in the fight against malpractice claims. Using a checklist helps to ensure that lawyers ask clients all the necessary questions, and provides clients with all the necessary information.⁶⁶ An example of a case where a checklist made all the difference in the lawyer's defence was the case of *Webb v. Tomlinson*,⁶⁷ LAWPRO was successful in defending the lawyer, Tomlinson, due in large part to Tomlinson's use of the independent legal advice (ILA) checklist.⁶⁸ What was also very important to the credibility finding in favour of the lawyer was that in addition to the ILA checklist, Tomlinson had made notes, which he had written both during and after his meeting with the client, Webb.⁶⁹

TIME MANAGEMENT ERRORS AND FAILURE TO MEET DEADLINES

Errors in time management are typically the result of missing a deadline, such as a limitations period, due to lack of knowledge; a "failure to calendar,"⁷⁰ which occurs when the lawyer knows the relevant deadline but fails to properly enter it into a system that will remind him or her when the deadline approaches; or a "failure to react to calendar error,"⁷¹ which occurs when the date was properly entered into the system, but the lawyer fails to react to the system's reminder.⁷²

Such errors may be the result of an active failure, such as a failure to put the information in one's calendar due to absentmindedness; however, latent factors may contribute to the error. For example, the electronic calendar system could fail in some way, or lawyers who are not accustomed to or trained on the calendar system may fail to react to the system reminders. While

⁶⁶ *Supra* note 42. For an example of such a checklist see practicePRO online: <<http://www.practicepro.ca/practice/checklist.asp>>.

⁶⁷ *Webb v. Tomlinson*, [2006] CanLII 18192 (Ont. S.C.) [*Webb*].

⁶⁸ This checklist can be found at practicePRO online: <<http://www.practicepro.ca/ilachecklist>>.

⁶⁹ Debra Rolph, "Cases to note for litigation counsel" (Summer 2006) 5:2 *LAWPRO magazine* 19 at 21.

⁷⁰ *Supra* note 44.

⁷¹ *Ibid.*

⁷² *Supra* note 52.

the implementation of technology may help with time management, lawyers must be properly trained on the use of the system, including the ability to detect when the system is not working as expected. LAWPRO suggests that “[p]ractice management software programs such as *Amicus Attorney* and *Time Matters* are excellent tools for helping lawyers manage deadlines and tasks, and for helping them better manage client communications and relationships.”⁷³

An example of a case where a lawyer failed to meet an important deadline is *120 Adelaide Leaseholds Inc. v. Thomson, Rogers*.⁷⁴ In *Adelaide*, the lawyer failed to exercise an option to renew the client’s lease on time. The lawyer was held responsible for failing to notify the client about renewing the lease, which had caused the client to lose the lease, as well as the potential income from a sub-lease.⁷⁵

ERRORS DUE TO LACK OF INVESTIGATION

These errors, which account for nearly one-fifth of real estate claims,⁷⁶ are typically the result of a lawyer not spending enough time checking into zoning, by-laws, and other public records that may encumber the property; or the lawyer not asking the client the right questions, such as the client’s plans for the property.⁷⁷ A lawyer who fails to spend the time to appreciate what the client wants out of the property may fail to investigate certain matters that may later prove critical to the client’s use and enjoyment of the land.

For example, in *Harela v. Powell*,⁷⁸ the clients were purchasing a lakefront lot on which to build a cottage. The clients asked the lawyer to investigate potential zoning issues and the requirements for a building permit. The lawyer confirmed that the clients could obtain a building

⁷³ *Ibid.* at 25-26

⁷⁴ *120 Adelaide Leaseholds Inc. v. Thomson, Rogers* 43 R.P.R. (2d) 79 (Ont. C.J.) [*Adelaide*].

⁷⁵ *Ibid.*

⁷⁶ *Supra* note 8.

⁷⁷ *Supra* note 52.

⁷⁸ *Harela v. Powell* (1998), 183 D.L.R. (4th) 165 [*Harela*].

permit; however, he had failed to ask the clients on which specific part of the property they wished to build the cottage. The clients later discovered that they could not get a permit to build the cottage on their preferred part of the lakefront. This led to additional construction costs and a diminution in the value of the property. The court found that the lawyer should have made specific inquiries regarding the goals of the clients, and possibly have made the purchase conditional upon the purchasers obtaining a building permit that would allow them to build in accordance with their desires.

Many of these errors are the result of the same active failures and latent conditions that are discussed above regarding communication errors, and similar steps can be taken to militate against them. For example, checklists can ensure that lawyers ask the necessary questions so that they will understand what the client hopes to get out of the property and, in turn, they can do their utmost to help the client achieve his or her goals.⁷⁹

ERRORS RESULTING FROM THE DELEGATION OF TASKS

These errors are typically due to clerical mistakes, resulting from work that was delegated to the clerk and not verified or reviewed by the lawyer. Such errors should not be considered to be solely the fault of the clerk to whom the task was delegated. The lawyer should review the work, since it is he or she who will ultimately be held responsible for it.⁸⁰ It might be said that errors resulting from the delegation of tasks are due to latent conditions. For example, did the error occur partially because the clerks were not properly trained to carry out those tasks? If this was the case, some errors could be prevented through better training for support staff working in

⁷⁹ *Supra* note 52.

⁸⁰ *Ibid.*

law firms. In *835039 Ontario Limited v. Fram*,⁸¹ the lawyer had a notice that needed to be faxed to the other party in order for a closing date to be postponed. The lawyer prepared and signed the delivery notice and asked his secretary, who was about to go on vacation, to fax it for him. The secretary honestly, but mistakenly, thought that she had faxed the documents prior to going on vacation, and the documents were ultimately not delivered within the time specified in the agreement of purchase and sale. The lawyer did not instruct the secretary that she was to confirm receipt of the documents.⁸² Since the lawyer was responsible for the work that he delegated, and time was of the essence in this case, he should have instructed his secretary to confirm that the other party had received the documents on time.

FAILURE TO KEEP CURRENT WITH THE LAW

*“Only that shall happen
Which has happened,
Only that occur
Which has occurred;
There is nothing new
Beneath the sun!”
~ Ecclesiastes 1:9*

Unlike the sentiment expressed in this biblical quote, there is always something new in the legal profession. With all of the jurisprudence in real estate law, as well as the changes in legislation, it can become extremely difficult for lawyers to keep their knowledge current. In *Central & Eastern Trust Co. v. Rafuse*,⁸³ the court found the lawyer negligent for failing to know the law.

A solicitor is not required to know all the law applicable to the performance of a particular legal service...but he must have a sufficient knowledge of the fundamental

⁸¹ *835039 Ontario Limited v. Fram Development Corp.* (1994), 49 A.C.W.S. (3d) 1335 [*Fram*].

⁸² *Ibid.*

⁸³ *Central Trust Co. v. Rafuse et al.* 34 B.L.R. 187, 37 C.C.L.T. 117, 42 R.P.R. 161, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321, [1986] R.R.A. 527 Supreme Court of Canada [*Central Trust*].

issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points...⁸⁴

The good news is that a failure to know the law is only an issue in six per cent of LAWPRO claims.⁸⁵ Nevertheless, *Central Trust* demonstrates why it is important for a practicing lawyer to remember that due to the ever-changing nature of the law, a lawyer's education is not complete when he or she graduates from law school, or from the bar admission course. Lawyers are expected to meet a standard of reasonable competence throughout their careers, and the knowledge required to be reasonably competent today may not meet the standard of reasonable competence tomorrow. It is for this reason that continuing legal education (CLE) is such a high priority for the legal profession.

Jamie Trimble, Chair of Professional Development for the OBA, has stated:

As lawyers, our stock in trade is "trust." Implicitly, we ask our clients to trust that we know the law, know the procedure, and will look after their matter, with care...A poor lawyer does not keep current or does not develop good practice management skills. He fails his clients, compromises their rights, and exposes himself to claims. This problem is one that affects the profession as well as the poor lawyer. We all pay for errors through our insurance risk pool. We all suffer from the damage done to lawyers' reputations, in general. We all suffer, as a society, when one citizen's legal matter suffers for lack of good representation.⁸⁶

Professional organizations assist lawyers in keeping current

Several organizations have made great strides in assisting practicing lawyers with their CLE. For example, the LSUC assists lawyers by typically offering several CLE programs each month, some dealing specifically with real estate law. The LSUC also offers a number of courses

⁸⁴ *Ibid.* at paras. 66-67.

⁸⁵ "Failure to know or apply the law: Only 6 per cent of malpractice errors" (Summer 2003) 2:2 *Law Pro Magazine* 29.

⁸⁶ Personal communication with Jamie Trimble, Chair of Professional Development for the OBA.

in other fields that address issues that are related to real estate law such as professional responsibility, improving client service, and independent legal advice.⁸⁷

CLE courses are also offered by the Osgoode Professional Development Program (PDP). Between May 2005 and April 2006, the Osgoode PDP offered 32 CLE programs. While only one of these programs was aimed specifically at real estate lawyers, all PDP programs aim to make lawyers more aware of common pitfalls, and to educate lawyers to avoid negligence claims, while developing their knowledge of the law in various areas.⁸⁸

The OBA offers 75 full-day and half-day CLE courses per year,⁸⁹ as well as shorter section programs.⁹⁰ At least six CLE programs per year focus specifically on real estate and the Real Property Section typically has four section programs per year.⁹¹ Furthermore, “CLE programs in civil litigation, construction, environmental and municipal areas...have relevance to ...real property lawyers.”⁹² CLE programs “focus on substantive law, and practice issues...[and] [w]hen CLE programs are designed, [the OBA] reminds the designers to identify and have speakers address potential risk management issues...”⁹³

Additionally, some law firms provide in-house educational seminars. It is worth noting, however, that sole practitioners or firms with limited professional development resources could be at a disadvantage in this respect. Also, “Real Property lawyers are more likely than other lawyers to be in smaller firms, to be located outside the metropolitan area, and to have smaller budgets available for education.”⁹⁴ Because of these disadvantages, the OBA makes their

⁸⁷ Continuing Legal Education Calendar, online: Law Society of Upper Canada <<http://ecom.lsuc.on.ca/cle/calendar.jsp>>.

⁸⁸ Personal communication with Ken Jepson, Program Lawyer, Osgoode PDP.

⁸⁹ Personal communication with Heather McArthur, Director of Continuing Legal Education for the OBA.

⁹⁰ *Supra* note 86.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

programs available to lawyers through alternative methods of delivery, such as video replays, telecasts and live web cast programs.⁹⁵ Furthermore, the OBA has created a department that is charged with the task of delivering relevant programs to lawyers in regions outside the Greater Toronto Area.⁹⁶

LAWPRO also helps to encourage CLE programs by offering a CLE Premium Credit. The \$50 CLE credit (up to a maximum of \$100) is offered in order to encourage lawyers to participate in “CLE programs that include risk management content.”⁹⁷ Many LSUC, OBA, and Osgoode PDP programs are on LAWPRO’s list of courses that are approved for the credit.⁹⁸

CONCLUSION

LAWPRO should be applauded for its efforts aimed at reducing claims—be it in the form of instructive articles, on-line resources, CLE credits, or helpful checklists. These efforts have likely played an integral role in reducing the risks of claims against members of the real estate bar. The LSUC, the OBA, and the Osgoode Hall PDP should also be acknowledged for their role in assisting lawyers in keeping up to date, and reminding and cautioning lawyers about pitfalls that exist that may lead to future malpractice claims. Within Reason’s framework, it may be said that each of these efforts are defences that are part of the “Swiss cheese model.” The stronger these defences are, the less likely it is that there will be “holes” in them, and the less likely it is that active failures and latent factors will work together to create an “error trajectory” through those defences, leading to errors and malpractice claims.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ “LAWPRO CLE Premium Credit reduces Premiums up to \$100,” online: LAWPRO <<http://www.lawpro.ca/CLECredit/default.asp>>.

⁹⁸ To see the list of approved courses see online: LAWPRO <http://www.LAWPRO.ca/clecredit/CLE_Listaps>.

Despite these efforts, there are still a significant number of real estate lawyers who are being sued. Perhaps these practitioners are not using the tools that have been made available to them, for whatever reason, or perhaps one might consider the possibility that some aspect of the “system” has failed them. In the landmark decision *McAlister (Donoghue) v. Stevenson*,⁹⁹ Lord Atkin of the House of Lords remarked that the basis for negligence claims is a “general public sentiment of moral wrongdoing for which the offender must pay.”¹⁰⁰ However, James Reason’s theories suggest that placing all the blame on the person whose active failure resulted in error may not help to prevent future errors. While punishing an individual may act as a deterrent for that specific active failure, most errors are not caused by the lawyer purposely acting in bad faith. Therefore, blaming the lawyer in these instances will not necessarily prevent future errors from occurring, as other lawyers may fall into similar traps as a result of a combination of their own active failures and the latent factors that continue to lie in wait. In discussing the role that active failures play in their interaction with latent conditions James Reason once wrote: “[t]heir part is that of adding the final garnish to a lethal brew whose ingredients have already been long in the cooking.”¹⁰¹

Perhaps it would help if courts, when finding a lawyer negligent, made a point of acknowledging the other factors that contributed to the error. While this would not absolve the lawyer of responsibility, it may help to prevent future errors by prompting lawyers and law firms to take steps to militate against those contributing factors that are within their control.

⁹⁹ *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562H (U.K. H.L.).

¹⁰⁰ *Ibid.*

¹⁰¹ James Reason, *Human Error* (Cambridge: Cambridge University Press, 1990) at 173.