



# LIANSWERS

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## AVOIDING DEFAULT JUDGMENT (RULE 8) CLAIMS

Claims related to Rule 8 of the Nova Scotia Civil Procedure Rules arise when a judgment is entered by default due to a defence not being filed. A motion is required to set aside a default judgment and allow the defence to be filed. These matters can sometimes be resolved with the consent of opposing counsel. However, in some instances, that consent is not provided and the motion is contested.

Dismissal claims due to administrative errors are often preventable, and are less likely if the following measures are taken:

1. Proper overall use and accurate data entry in your tickler system.
2. Have your tickler system produce inactivity reports to identify files that have become dormant. The court will continue to monitor the case, regardless of your clients' wishes to ignore the matter for the time being. An administrative-related dismissal may cause the client to pursue an action against you.
3. Do not wait to take steps in an action while awaiting completion of medical reports, discoveries, or settlement negotiations, or while relying on an opponent's waiver. Either meet litigation deadlines or obtain a signed agreement confirming the parties' decision to extend the deadline.

4. Ensure that staff and junior lawyers are able to recognize, prioritize and immediately deliver status notices to the counsel.
5. Learn to recognize signs of stress or being overworked in your staff, as they may be at risk of missing deadlines.
6. Develop a contingency plan in the event of an illness, injury or other emergency that could interrupt your practice.

[Contact LIANS' Counsel!](#) for more information on avoiding a default judgment claim.

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NEXT ▶

Back to LIANSwers: 73

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## CONFIRMATION OF PROPERTY INSURANCE FOR LENDERS

If you act for lenders, either on a refinance or purchase, you know that their instructions will often include you providing confirmation of property insurance with appropriate coverage and limits. You should not assume what those instructions are, but review them each time so that when you receive confirmation of insurance, you can make sure it includes the confirmations your lender client requires you to provide.

For example, some insurers only provide the most basic of information in their confirmations of coverage such as the property address, policy number and coverage term, names of the insured, insurer and lender, and property limit, liability limit and deductible.

Note that absent from that list is any advice about the actual coverage, e.g., actual cash value or replacement cost. Nor does it indicate the policy form or any exclusions or sublimits. Thus, at best, based on such a confirmation, all you can probably say is that the property is insured at this time for something.

This is not to suggest that you are suddenly obliged to read the entire insurance policy. It is only to suggest that if your lender client requires confirmation of something specific, you should get that information. This may become important if there is a property loss and the coverage turns out to be less than what the lender required, and you were asked to confirm.



Though we would agree with those of you who would suggest that this is just another example of lenders offloading their own due diligence onto lawyers as they could or should get this information direct from their customer, the fact remains that if you are acting for a lender and their instructions are to provide certain information, just sending a pro forma insurance binder or confirmation of coverage may not be enough.

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NEXT ▶

Back to LIANSwers: 73

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## MEDICAL EVIDENCE IN PERSONAL INJURY CLAIMS

Plaintiffs' counsel in personal injury matters should note the caution from the Court in the opening paragraphs of the recently reported Decision of Norton, J. in *Johnson v. Touchie*, [2022 NSSC 3](#):

[1] The Plaintiff, Lloyd Johnson, seeks an assessment of damages for personal injuries following interlocutory judgement obtained against John Touchie by Order dated November 12, 2013. ...

[2] The evidence on the motion consisted of an affidavit of Lloyd Johnson sworn October 8, 2021. The affidavit attached medical and other treatment records, employment records, medical reports, and a medical-legal report prepared by a specialist in physical medicine and rehabilitation dated January 17, 2015, the author of which has since died.

### Preliminary Issue

[3] As a preliminary matter, at an assessment of damages hearing the Plaintiff bears the burden of establishing their damages as of the date of the motion through admissible evidence on a balance of probabilities. *MacKean v. Royal & Sun Alliance Insurance Company of Canada*, [2014 NSSC 33](#), reversed on other grounds, *MacKean v. Royal & Sun Alliance Insurance Company of Canada*, [2015 NSCA 33](#).



[4] At the outset of the hearing I raised my concern that the evidence before the court, other than Mr. Johnson's personal testimony, was largely hearsay. No affidavit was obtained from the authors of the medical reports or treatment records. In addition to the hearsay issue, none of the medical reports containing opinion evidence, including the medical-legal report, complied with the requirements of [Civil Procedure Rule 55](#). As to the fact that the author of the medical-legal report has died, formal proof would require the retention of a new expert in the same field of expertise to adopt the report.

[5] On a motion for assessment of damages, a defendant is placed in the difficult position whereby if they insist on these evidentiary requirements being fulfilled, the expense to the Plaintiff in obtaining the affidavit evidence and expert reports is significantly increased and the claim against the defendant for disbursements increases accordingly.

[6] In this case, the Defendant did not object to the hearsay medical, employment and opinion evidence being accepted by the court. Plaintiff counsel in other matters should be cautious to obtain advance consent of the defendant if possible, or work out with the defendant how such evidentiary concerns will be addressed.

Failure to heed Norton J's caution could result in medical evidence tendered without compliance with the [Nova Scotia Civil Procedure Rules](#) being found inadmissible.

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[◀ PREVIOUS](#)

[NEXT ▶](#)

[Back to LIANSwers: 73](#)

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## NSLAP WELLNESS: FORMS OF PRIVILEGE

*"Having 'everyday privilege' is an opportunity to speak up on behalf of those without it and to amplify their views. 'I'm not privileged! I worked hard for what I have! I didn't have everything handed to me.' The reality is, you can still experience rough times, struggles and have to work hard for your success, and still have privilege. Hardships and struggles that people face are all legitimate. But some people have privileges that no amount of hard work will make up for.*

*While White privilege (based on race) may be one of the first forms of privilege that jumps to mind, there are other types of privilege, including gender and gender identity, sexual orientation, religion, class, education, age, physical ability and language ... This article examines the different types of privileges and how you can help others if you have privilege."*

On behalf of your Nova Scotia Lawyers Assistance Program (NSLAP) provider, Homewood Health™ is pleased to provide the following newsletter "[Forms of Privilege](#)"

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If you have wellness questions, or are looking for wellness information, visit the NSLAP website at [www.nslap.ca](http://www.nslap.ca). For more information and support, along with resources and counselling on forms of privilege, register with Homewood Health™ <https://homeweb.ca/>. Please note that NSLAP is your "company" name when you register.

Call in confidence, 24 hours a day: 1 866 299 1299 (within Nova Scotia) | (See the website for details about [calling from outside Nova Scotia](#)) | 1 866 398 9505 (en français) | 1 888 384 1152 (TTY).

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◀ PREVIOUS

NEXT ▶

Back to LIANSwers: 73

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## REDUCING RISK AND IMPROVING CLIENT SERVICE IN 2022

Follow these day-to-day procedures to establish and maintain your best client service in 2022, and stay up-to-date with NSBS pandemic news and guidelines:

Review [LIANS' sample retainer agreements or engagement letters](#) to establish your terms of engagement, and to clearly identify what you have been retained to do.

Communicate with your clients in a timely manner. Whether it's returning a phone call or email, establish a policy where you or your staff return a client's message within a certain period of time (eg within 24 hours, or by the end of the following business day). Review Law Office Management Professional Standard [#2: Client Service](#)

Avoid costly malpractice claims by completing a thorough conflicts search before opening a file. Search for conflicts involving the client and other relevant parties.

Don't dabble in areas of law with which you are unfamiliar. Among others, corporate/commercial, tax, family, criminal and real estate law are complex and diverse – and you may make an error that will result in a claim. If necessary, consider retaining the services of someone who has the requisite knowledge in those areas, or simply refer the client to them directly.

For in-office appointments, keep to your scheduling and avoid making clients wait more than 20 minutes.

During meetings, don't just talk. Rather, ask the client to outline their understanding of what you've discussed so you know that they understand what you've explained to them. Also during meetings, make eye contact and watch for visual cues and body language.

Give the client a realistic indication of how long the matter will take, and identify any possible events that would delay a resolution. Provide the client with a full picture of all costs and disbursements that will or might incur. And be honest – don't quote a lower cost to please them. Review [section 3.2 "Quality of Service"](#), Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012

Avoid missing deadlines – use a tickler system for limitations periods and time-sensitive tasks. Answer all your client's questions to their satisfaction and listen carefully to address any elements that your clients don't understand or that could be another relevant issue you'll need to advise upon. Obtain written confirmation of instructions and advice. Communication errors between lawyers and clients are a key driver of claims. Keep in mind that you have hundreds of files to remember, but your client may have only one – it could be far more difficult for you to recollect what was said than it would be for them.

Immediately highlight for clients any unexpected changes that will change the process, timing, costs or outcome of a matter. This will ensure your client is aware of the change and why it took place. Confirm this advice in writing.

Send a final reporting letter at the end of every retainer to summarize the work that was done for the client. Outline the details of any documents or agreements, the outcome of the matter, as well as any obligations or continuing responsibilities of the client (visit [LIANS' Sample letters](#) page)

And finally, review the [NSBS COVID-19 Legal Profession FAQs](#) relating to society operations, practice management (including trust accounts, working remotely, courts information, financial & business concerns & more), and articling information; and keep up-to-date with the overall [NSBS COVID-19 News and Updates](#).

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NEXT ▶

Back to LIANSwers: 73

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[Home](#) → [News](#) → [LIANSwers](#)

Issue 73 | January 2022

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## SEEKING MENTORS

Do you have a minimum of nine years of experience and are interested in volunteering your time to provide support and guidance to another member? LIANS is currently seeking mentors of all backgrounds for its Mentorship Program, specifically in the areas of Immigration law, Corporate/Commercial, Administration, and Municipal law.

Advantages of being a mentor:

- renew and revitalize your own practice and strategies;
- stay current with issues and developments in the next generation of professionals;
- expand your own personal network.

The Mentorship Program offers the following advantages and opportunities:

- a semi-annual event (if permitted) where you can meet possible matches and learn more about the program
- matching based on the areas of interest and criteria identified by both mentor and mentee
- a mentorship plan created by you and your match, to identify your areas of focus and goals for the upcoming year

If you are interested in participating in the Mentorship Program, please visit: [http://www.lians.ca/rpm/mentorship\\_program/](http://www.lians.ca/rpm/mentorship_program/).

In order to participate, fill out the [Mentorship Program Application Form](#) online, or download the fillable [PDF form](#) and save to your desktop then forward to [Cynthia Nield](#), LIANS' Database and Information Officer.

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NEXT ▶

Back to LIANSwers: 73

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Home → News → LIANSwERS

Issue 73 | January 2022

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## THE BEST OFFENSE: PROTECTING AGAINST CYBER VULNERABILITIES



The vast majority of law firms in this province are small businesses.

A recent study by CyberCatch, a cyber security company (see CyberCatch Q4 2021 Small and Medium Sized Businesses Vulnerabilities Report), sampled about 2,000 small businesses in



Canada and 20,000 in the U.S. across 10 business segments for website vulnerabilities. The top three cyber vulnerabilities were: (i) spoofing (defined in the report as weaknesses that allow a website to accept invalid data with the result that the server produces client lists and passwords); (ii) clickjacking (defined as weaknesses that allow an attacker to hijack a web page to trick users and steal user credentials or account secrets for easy intrusion to install malware or ransomware); and (iii) sniffing (defined as weaknesses that do not force encryption and allow transmission of sensitive data in cleartext that an attacker can discover and steal and use to make intrusion or move laterally once inside with ease to eventually access data or infect ransomware).

Interesting for this study is that one of the 10 business segments was law firms. The results from the Canadian law firm sample are that 85.5% of their websites had spoofing vulnerabilities, 81% had clickjacking vulnerabilities and 40% had sniffing vulnerabilities. By comparison, for the U.S. law firm sample, similar vulnerabilities were found in 29.9%, 25.8% and 10.2% respectively of law firms. In other words, law firms in Canada were three times more likely than a firm in the U.S. to have these vulnerabilities. This increased level of vulnerability in Canada was higher as compared to the U.S. across all ten business segments.

The conclusion is that small businesses should scan their websites, software and web applications that face the internet to determine if there any vulnerabilities and if so, fix them.

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## TIME TO RECONSIDER: FORCE MAJEURE CLAUSES IN CONTRACTS

In the face of an ongoing event like COVID-19, issues rarely considered often arise. One such example is the force majeure clause in contracts.

Clients may ask if they can rely on it in this circumstance to end or renegotiate a contractual relationship. Force majeure occurs when business is disrupted due to factors beyond one's control. The provision excuses non-performance should a covered event occur.

Contracts often have clauses dealing with this situation. But it is probably fair to say they are rarely looked at, falling into the boilerplate category of terms. And even if they are considered, chances are it is in the context of the usual events that can give rise to force majeure such as weather and war.

If a party to a contract seeks to rely on the clause in the face of COVID-19 or any external event to get out from under their contractual obligations, they will have to satisfy various factors including

1. whether the event falls within the scope of the force majeure clause noting that the clause is narrowly interpreted and has to expressly capture the event;
2. whether the event has sufficiently impacted the obligations of the relying party such as preventing or rendering performance impossible; performance being more expensive as the



sole factor is rarely sufficient to pass the threshold;

3. whether the relying party has taken sufficient steps to avoid and mitigate the event's impact; and
4. whether additional contractual conditions, such as notice and requirements for supporting documentation, are necessary to trigger the clause.

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NEXT ▶

[Back to LIANSwers: 73](#)

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