

## ASKING A LAWYER TO GIVE AN OPINION ON THEIR OWN NEGLIGENCE? WHEN DISCOVERY GOES TOO FAR.

by [Samantha Green](#)

In *Marshall v. Jackson*, 2021 ONSC 2361 (CanLII), released April 1, 2021, Justice Morgan overturned, in part, a Master's decision to require a lawyer sued for negligence to answer two questions refused on discovery.

### Background

The questions related to the defendant lawyer's alleged negligence in the preparation and execution of a will. The first question asked the lawyer to advise "of the texts or sources that the Defendant regards as authoritative regarding the drafting of wills, including issues surrounding testamentary capacity and undue influence". The second question asked "whether the Defendant is aware of any cases or authority that indicates that a solicitor is not required to document evidence of testamentary capacity".

### Result

On appeal, Justice Morgan reversed the Master's decision on these questions and ordered that they did not have to be answered.

In concluding that the questions were inappropriate, Justice Morgan stated that while a defendant lawyer can be asked to explain their understanding of the appropriate professional standard, they cannot be asked to render an opinion on the standard of care.

### Take away

The temptation to ask a defendant lawyer (or other professional) being sued for negligence what they would or should have done differently, is understandable. An admission by the defendant that steps were missed, or a relevant authority ignored, would be close to an admission of liability. However, this case demonstrates that the Court will seek to keep the role of a defendant professional as a fact witness distinct from that of an expert witness, even though the defendant may have an opinion on the standard of care.



[Samantha Green](#)  
Partner

t: 416.860.6904  
[sgreen@foglers.com](mailto:sgreen@foglers.com)