

Limitations Act and Personal Injury Claims



Allen Wynperle

18th Annual Joint Insurance Seminar
October 6, 2004



Claims Management

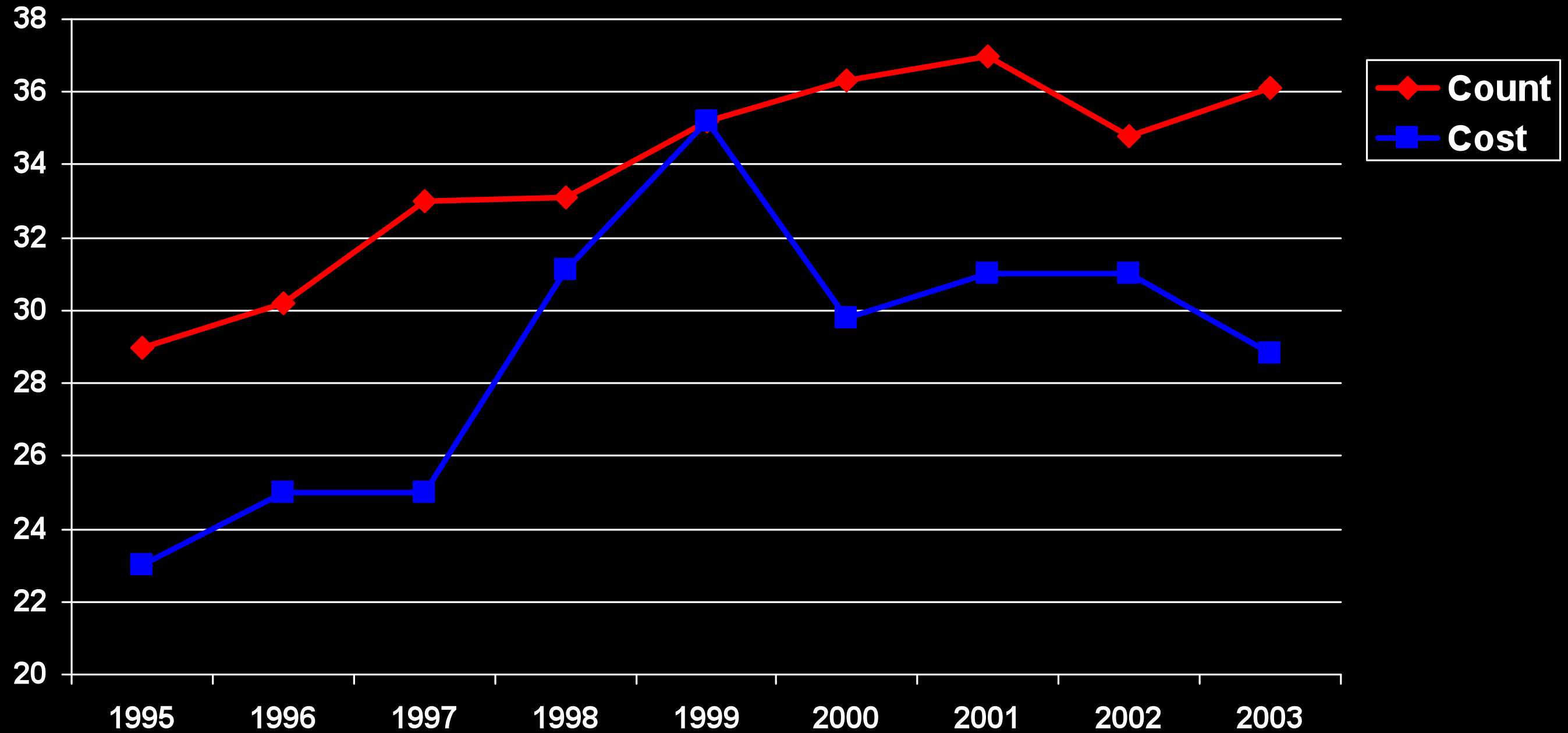


- Almost 20,000 Ontario practitioners insured
- Approx. 2,000 new claims each year
- Currently 2,900 open claims files
- Gross claims under management \$295 million
- Ave. \$65 million claims costs each year

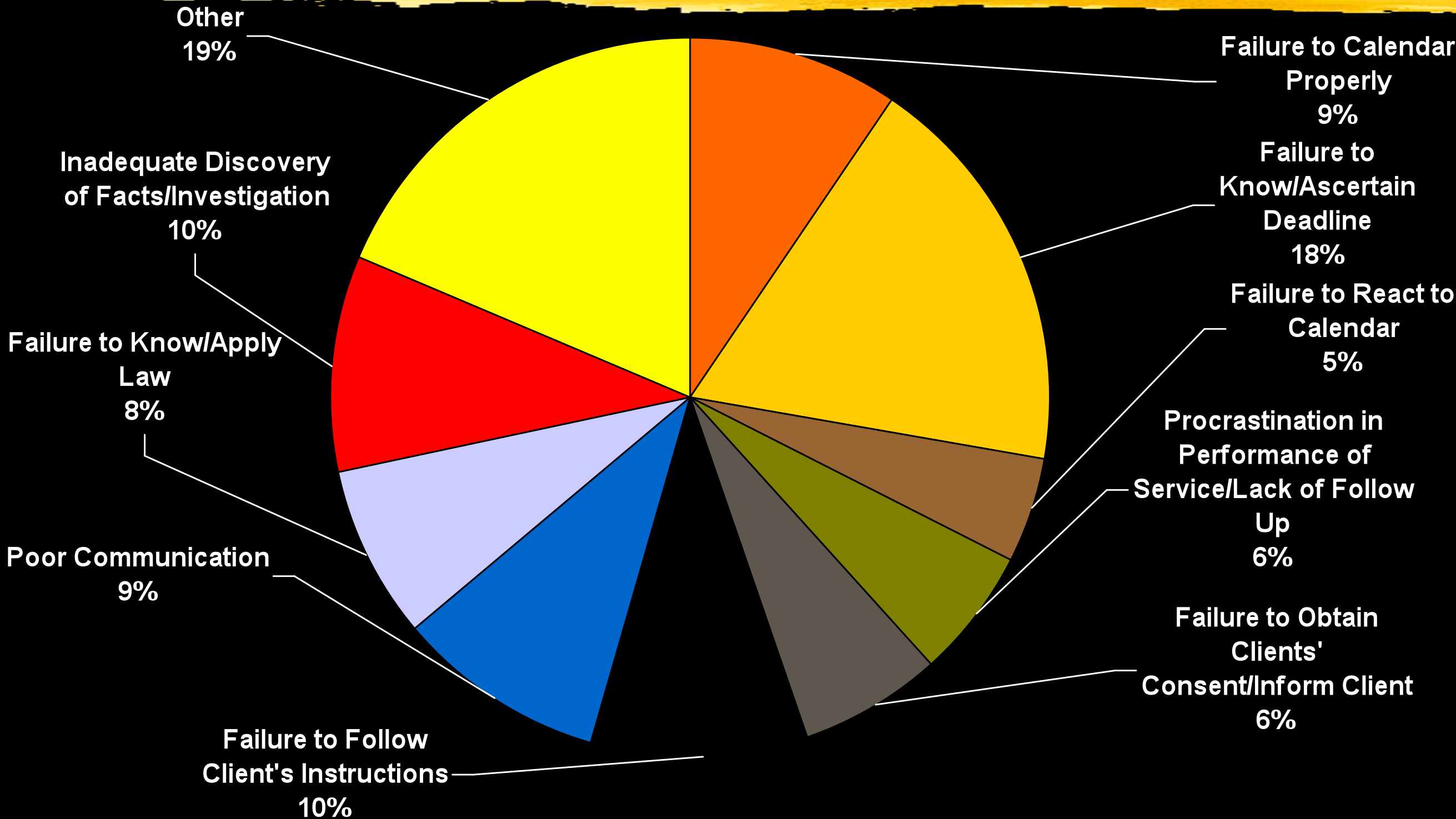
Litigation Claims in 2003

- Biggest claims area by both claim count and cost
- Count on an upwards trend
 - 36% of claims by count
- Cost trend is steady
 - 29% of claims by cost
 - Higher, but steady last 3 years

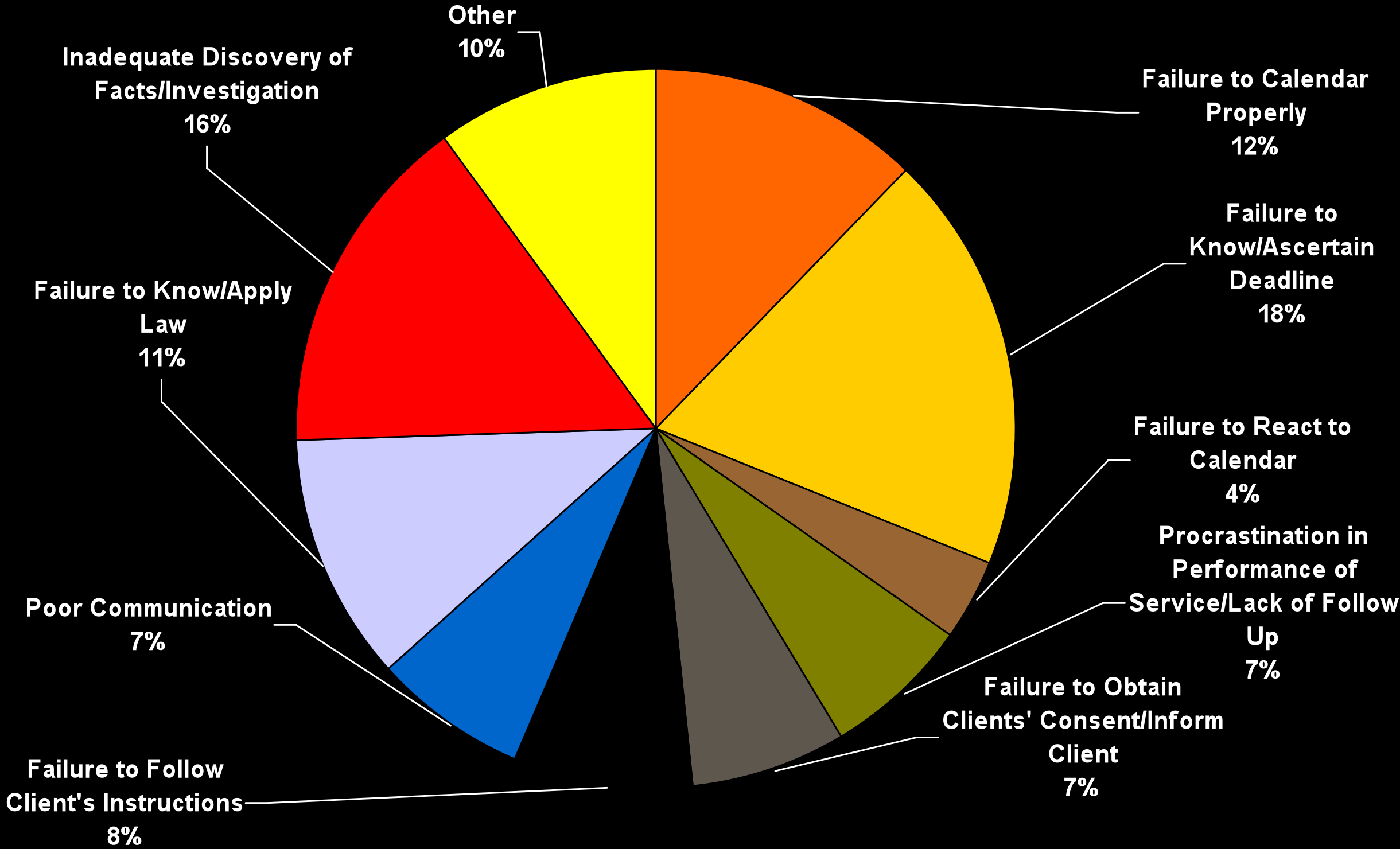
Claims Cost (%) and Count (%) Litigation (1995-2003)



Litigation Description of Loss Count Percentage (90-03)



Litigation Description of Loss Cost Percentage (99-03)



Being Proactive to Avoid Claims

- Ticklers (deadlines!)
- Time and practice management (deadlines!)
- Manage client expectations from the start
- Maintain communications with clients
- Document communications with clients
- Know the law (and get help if necessary)
- Watch for conflicts of interest
- Trust your instincts

New Limitations Act (2002)

- Basic limitation – 2 years.
- Claims governed by the New Limitation Act:
 - Motor Vehicle Accident;
 - Occupiers liability;
 - Injuries caused by public authorities;
 - Injuries resulting from negligence of the Crown;
 - Maintenance and design of highways and sidewalks;
 - Railway accidents;
 - Hospital negligence;
 - Doctors negligence;

Claims governed by the New Limitations Act Cont.

- FLA claims (except in the case of death see s.38 (3) Trustee Act);
- Assault (except sexual assault);
- Long-term disability claims;
- Product liability claims;
- Claims for contribution and indemnity pursuant to the Negligence Act;
- Boating cases (except for those actions exclusively within the jurisdiction of the Canada Shipping Act).

Exceptions to the Limitations Act

- Insurance Act; Section 148, Statutory Condition (Fire Policies).
- Insurance Act; Section 259.1 (auto property claims)
- Insurance Act; Section 281 (Accident Benefit Cases)
- Trustees Act; Section 38(3) (death cases brought by FLA claimants).
- Cases where federal jurisdiction is exclusive and not concurrent.



How to Extend the Limitation Period

Discoverability Rule – Law

s. 5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;

Discoverability Rule – Case Law

Peixeiro v. Haberman (SCC)

- Limitation starts to run when plaintiff knew, or ought to have known:
 - They suffered damages which were compensable.

Discoverability Rule – Case Law

Aguonie v. Galion Solid Waste (OCA)

- Limitation starts to run when plaintiff knew, or ought to have known:
 - The identity of the defendant.
 - The act or omission constituting negligence.

Discoverability Rule – Case Law

Ioannidis v. Hawkings (OCA)

- Trial decision.
- Limitation postponed until plaintiff knew, ought to have known she HAD a qualifying injury.
- Defence position:
 - “Possibly” had qualifying injury.
- OCA dismissed appeal.

Discoverability Rule – Case Law

Burke-Smith v. Sun

- One limitation period for all heads of damages arising from same act of negligence.

Discoverability Rule – Case Law

Chenderovitch v. John Doe (OCA)

- Same issue as decided in Burke-Smith.
- Never referred to that case.
- Different limitations for different heads of damages.

Minors and Incapable Persons

- Section 6 and 7 of the Limitations Act.
- Limitations do not run against minors or incapable persons.
- Limitation only starts when minor reaches 18 years of age.
- Limitation starts to run when person regains capacity.

Minors and Incapable Persons

Bisoukis v. The Corporation of the City of Brampton et al (OCA)

- Plaintiff may be able to manage property.
- Plaintiff may be able to do basic ADL.
- But still may be permanently or temporarily unable to instruct counsel.

Minors and Incapable Persons



- Check medical records for:
 - Drugs
 - Depression
 - Traumatic brain injury
- Evidence from doctors and lay witnesses about change in mental/cognitive function.

Proper Notice



- Section 281 (5) of the Insurance Act provides:
 - Must mediate or arbitrate (or sue) within two years after the insurer's refusal to pay benefit claimed.

Proper Notice – Case Law

Smith v. Co-operators (SCC)

- Bill 164
- Plaintiff had counsel.
- Denial received.
- Plaintiff mediated within two years.
- Lawsuits filed more than two after denial.
- “Bright line boundary” on insurer’s notice requirement.

Proper Notice – Case Law

Smith v. Co-operators (SCC) cont.

- Applies to:

- Bill 59 - Nahsari and Belair

- OMPP – Turner and State Farm

Notice Period



Municipal Slip and Fall

- Slip and fall on snow and ice:
 - Still 7 days notice.
 - Judge may extend time, if excuse is reasonable.

Transition Period

Long Term Disability Benefits

- Can't contract out of limitation period any more.
- However, if policy started before January 01, 2004, may have one year limitation in contract.
- Any group disability policies renewed after January 01, 2004 must have a two year limitation.

Conclusion



- Each firm must ensure implementation of practice management strategy incorporating new Act.
- If faced with an apparent breach of the limitation period, must check carefully for an exceptions.