Ontario Deputy Judges Association

Winter 2021

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The Loss of a Colleague

On December 15th we lost one of our own. Deputy Judge Bryan Holub passed away in his 74th year. Thank you, Don Kidd, for advising the membership of Bryan's passing.

HOLUB, David Bryan - Obituary - Guelph - Guelph News (guelphtoday.com)

Bev Martel

From the Editor

By Beverley A. Martel

It's been almost a year since I first took over as Editor following Marty Klein's departure. How much has changed, how much remains the same. We are still fighting Covid. We are still fighting for fair compensation. We are still adjusting to our new "remote" justice system. Some days I feel like Sisyphus, pushing that damned rock up the mountain. The rock is called Hope and it keeps crashing back down.

And yet…people ARE adapting. Things are changing, sometimes for the better. I am constantly amazed at the innovative, creative, often magical ways individuals have found to communicate, to inspire and to adjust to our continuously shifting concept of normal in this pandemic reality. And despite the challenges of remote hearings, I admit I do enjoy presiding in my slippers and welcome the thought of sitting "in court" in the midst of a snow storm I did not have to drive through.

Life goes on. Our work continues. We welcome new appointments and say farewell to retired colleagues; Jay State, Chris Ashby and Roland Aube amongst them and no doubt others of whom I am unaware. ODJA is in good hands with Lai at the helm and Trish and Erin working behind the scenes.

The public is largely unaware of the work we do unless they are directly involved in a Small Claims proceeding. MAG continues to underestimate/ignore the value of our contributions. And so dear colleagues I suggest we pat ourselves on the back, each and every one of us and acknowledge our own value and significant contribution to the justice system in particular and to society at large. Give yourself a big round of applause.

I hope you enjoy our year end edition of ODJA's newsletter and I wish you all a happy and prosperous new year!

The Need for Courage

By Deputy Judge Jack Zwicker

Covid 19 has impacted the courts and the public in countless ways. It should come as no surprise that the move from paper to computers and from in person appearances to virtual hearings has been compromised by tech glitches that test everyone's patience.

One of the possible impacts of the move to tech is the failure of parties to inform themselves of basic court procedures so that they don't create a 'procedural free for all' for opposed parties and for us as judges. It's fair to say that Covid 19 didn't cause this inconsiderate conduct on the part of members of the public who do not ask court staff for guidance with basic procedural information.

Nor does Covid 19 explain why so many parties do not consider googling the MAG site that provides comprehensive procedural information about our courts. It may be that the general public is so deluged by the move to tech that many simply do not think of reaching out for free and readily available information.

Or it may be that something has gone very wrong with public education. All too often the public 'feels' its way through problems convinced of their rights and the justice of their cause. I suspect that the public has overdosed on rights and that duties have gotten lost somewhere along the way. All too often, litigants just don't 'think' their way through.

Whatever the cause may be for this thoughtless behaviour, we as judges still have our duty to do. I recently disposed of a failed second settlement conference and an urgent defendant's motion for leave to issue a D1 Claim more than two years after a Defense was delivered.

I presided at the first settlement conference In October 2019. It was complicated. The Defendant complained that the Plaintiff had failed to produce crucial business records. I ordered production within 45 days, adjourned to a second conference and seized myself of the second conference.

When I hosted this conference in November 2021, only the Defendant and his counsel attended. The ordered records had not been produced. The Plaintiff who was visibly outraged by the Defendant's refusal to pay up in 2019 did not attend. Nor did his lawyer.

At the twenty-minute mark the Defendant's lawyer and his client who were clearly frustrated, assumed that I would make the usual order, namely a third conference and costs of $100.00. I didn't do so. Instead, I took a quick look at Rules 12 and 13 and decided to stay the Plaintiff's Claim. I wrote a long endorsement setting out my reasons and referred to the obligation of parties and counsel to appear and to comply with prior orders.

I considered dismissing the Claim on the basis that Plaintiffs who don't follow the rules should not be surprised if judges put their claims out on the curb for garbage pick-up. I pulled back recognizing that despite the Plaintiff's disrespect for the system, it just might have a good case. My endorsement read like a lecture. I find that the more I judge, the less patience I have for thoughtless and unprofessional conduct.

The second matter, as I mentioned, invoved an urgent motion launched more than two years after the Defendants delivered their Defense. The icing on the cake was that this so called 'urgent motion' wasn't served until the morning that the motion was to be argued. By that time a first settlement conference had come and gone a year and and half prior without any reference to a D1 Claim.

I granted the motion to issue a D1 Claim but made an unusual reverse order as to costs under Rule 57 of the Superior Court Rules, penalizing the Defendants even though they succeeded because of their procedural free for all. Needless to say, the Defendants were not happy campers. All the apologies in the world were no excuse for thoroughly wasteful and inconsiderate conduct.

The takeaway for me is that fairness and toughness are mutually inclusive in appropriate circumstances. Going with the flow is always easy. Doing the right thing demands courage. And it isn't always popular.

Managing the Courtroom: Different Strokes with Different Folks

By Deputy Judge Jack Zwicker

As members of the judiciary, we strive to be careful and even handed in our dealings with stakeholders, but judging requires us to roll with the punches. There is no single pre-defined script. We are all individuals and we each have our own personality.

Because we often deal with self-represented litigants, we need to don the mantle of teacher when some who appear are clearly overwhelmed. Showing empathy by recourse to simple, easily understood analogies help the self-represented grasp relevant legal concepts. Roughly half the time I feel like a classroom teacher and part of that function really calls for the use of plain English. Using legalese isn't helpful to the public. And acting as educators not only demonstrates our humanity but also levels the playing field.

Some deputy judges I speak with settle unnerved witnesses by leaning in toward them, telling them in a soft voice that 'they don't bite'. It is certainly an unusual interjection. But in situationally appropriate circumstances combining empathy and humour relieves tension and humanizes the judicial process making it less intimidating. The law is a conceptual discipline, but a courtroom is filled with people, many of whom are ill at ease. Effective communication means not speaking over the heads of the public. Nor does it require us to shed our humanity.

At times, overzealous representatives get off on the wrong foot by sniping and insulting one another. When that happens a stern reminder about proper decorum is necessary. Decorum isn't a mere nicety. Civilizing discussion maximizes efficiency and minimizes wasted court time, saving parties unnecessary expense. It's important to remember that our mandate imposes a duty upon us to ensure expeditious proceedings.

Zealous representation is one thing but a verbal mud slinging match is an entirely different matter. When a mild rebuke doesn't work the court can ratchet up its displeasure by suggesting that, if the parties prefer, they can always take their dispute outside and discuss it on the street. However unconventional this suggestion may be, a sharp dose of sarcasm usually puts a quick end to disruptive behaviour. As retired Justice Terrence Platana was fond of saying, when judging we need to 'choose between being the captain or the crew'.

Sometimes parties spend inordinate time and their clients' money pursuing lawsuits that are head shakers. Although small claims courts have a statutory and regulatory 'equitable mandate,' some parties pursue narrowly technical defenses that are at cross purposes to the equitable jurisdiction of these courts. One technique that makes a definitive point at just the right time is the single, open-ended question which drives home a central weakness in a party's case.

I tried a case several years ago in which the defendant profited from the Plaintiff's accounting error. The Plaintiff had issued a travel package to the defendant without ensuring that it had been fully paid. The unpaid amount was $14,000.00 and the defendant took advantage of the error. All of the defences were narrowly technical. Not one dealt with the issue of 'unjust enrichment'.

After the Plaintiff had completed its cross-examination of the defendant, I put a simple, open-ended question to the defendant. I asked him how his holiday went. The defendant provided a glowing, appreciative description. Talk about being out of touch! His answer spoke volumes. There were some students who happened to be present in the court as observers. I heard a number of audible groans. The defendant turned to look at these students and as soon as he faced front, I noticed that the grin he had displayed throughout the trial was gone, replaced by a frown. It was at that moment that he first realized he was in trouble. He lost.

Our job as judges can be very challenging. As much as we try to be helpful and empathetic sometimes our patience is sorely tested. Some years ago, I dismissed a motion by a self-represented employee to set aside a garnishment. The employee was aggressive and argumentative. He was not a good listener. His misfortune lay in filing three contradictory affidavits.

After giving him my reasons he continued to argue. I politely told him twice that I needed to move on to my next matter. He persisted and refused to leave. I warned him that I was about to summon the police officer. I told him that he could maintain his dignity and leave the court room on his own or be physically ejected. He finally realized that it was time to go. Hitting the panic button was certainly an option. But the threat of judicial power is generally sufficient to maintain control.

Managing a court room is an exercise in using different strokes with different folks. Never knowing what we are about to face, we need to improvise. And improvisation always depends upon reading the participants and using old fashioned psychology.