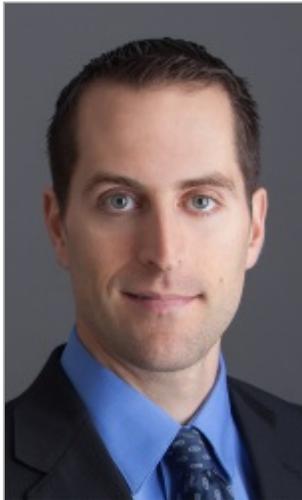


Civil Litigation

Superior Court self-parodies | Michael Lesage

By Michael Lesage



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(September 22, 2021, 11:47 AM EDT) -- Modelled after a self-licking ice cream cone or Franz Kafka novel, the Ontario Superior Court of Justice can most charitably be described as "special." Unable to match (or even approach) its peers in terms of objective performance (and seemingly unwilling to try), its astounding level of dysfunction was on full display in the recent case of *Patkaciunas v. Economical Mutual Insurance* 2021 ONSC 5945, a situation so bizarre as to likely make Kafka cringe.

Patkaciunas involved an insurance claim, where significantly, the limitations period ran on June 25, 2019. Arunas Patkaciunas (via a paralegal) had attempted to file his claim in person that day at the Toronto courthouse, arriving and obtaining a counter ticket (stamped at 4:29 p.m.) prior to closing. However, as Toronto is but a small urban centre, there was but one clerk on duty. Upon reaching the counter shortly before 5, the ever-helpful clerk informed Patkaciunas that "his computer was shutting down in 90 seconds and that he would not process the statement of claim for issuance that day." Perhaps anticipating objections, the clerk then turned around and walked away. Given that more than one-third of civil filings are rejected, the court likely saw few issues with this

conduct. However, given the imminent expiry of the limitations period, this set in process a Kafkaesque series of events, described below.

Initially, Patkaciunas had to return to the courthouse the next day, to have the claim issued. As the Superior Court is well aware, forced repetition of steps, especially basic procedural ones, is one of the best ways to secure the just, most expeditious and least expensive determination of matters on the merits. Time (and resources), especially for parties and court staff is after all limitless, as is the capacity of the Superior Court itself. Ultimately, justice is most accessible when accessed repeatedly, with the maximum of bureaucracy and redundancy. It is only by dragging the process out indefinitely that its true beauty can be appreciated by the plebes it is forced to serve.

Next, and apparently to the great shock of the Superior Court, it turns out that Economical can both add and count. Surprisingly again, I know, this led Economical to conclude that the claim had been filed after the limitations period had run. Economical then conveyed this position to counsel for Patkaciunas (including by moving for summary judgment), who almost certainly reported the matter to LawPRO (judging from counsel on record), which may or may not have triggered a deductible for Patkaciunas' counsel. Obviously, this matter was entirely the fault of Patkaciunas' counsel, who should have known better than to represent a plaintiff in the first place (unless the plaintiff is rich, in which case it's OK). In any event, LawPRO, at the expense of every private sector lawyer in the province, then began to employ counsel to attempt a repair.

Unwilling to cede its hard won and well-deserved advantage, Economical too sprang into action. In addition to employing its own counsel to press its limitations defence, it began to interview court staff (who as we all know in Toronto, are mostly idle). Eventually, Economical was able to secure an affidavit from court staff, which contained a number of groundbreaking revelations. These included that time-sensitive filings are given priority and that steps are to be taken to ensure that same are processed before the office is closed. Likewise, it was discerned that the court's computers did not automatically shut down at 5 p.m.

Again, and to the likely shock of the Superior Court, Economical continued to press its advantage,

such that motions were necessary. Unafflicted by a heavy case load and/or existing backlog, the motion date was no doubt promptly scheduled, where the court was allowed to determine the weighty question of whether the claim would be deemed filed when it was presented to clerk (a public official) who refused to carry out his legal duties.

With a laser focus on maximizing time and expense involved, cross-examinations were held and facts prepared. By this point, the failure of the clerk to accept a routine filing had almost certainly led to several tens of thousands of dollars of legal expense, and the Superior Court had in effect become a caricature of itself. Despite this, and to the apparent delight of the insurer (who benefits greatly from delay) and the court, all got to go on an exciting trip to "procedureland," entirely avoiding (at least for the time being) the messy business of determining matters on the merits.

Without apparent concern for the huge waste of judicial resources this entailed (as only partial indemnity costs were awarded), this matter was heard on Aug. 24. As common sense would dictate, the court ruled that the claim would be deemed filed as of June 25, 2019, the date when it was presented to the courthouse for issuance, but when the filing was improperly rejected.

However, given the general dysfunction within the Ontario court system, the Patkaciunas case is likely to be heavily cited going forward, standing for the proposition that steps will be deemed completed when attempted, but not completed due to the failure of court staff to do their jobs. In this regard, Justice Sean Dunphy deserves real credit for taking steps within his power to allow a badly broken system to function. Hopefully, more of the judiciary will follow his lead.

Sadly, our court system has already failed Patkaciunas, who suffered a loss in June of 2018, and is likely no closer to having his claim resolved now than when he filed, or attempted to file it more than two years ago. Ultimately, should our court system prove unable to timely address the problems of the "plebes," or to otherwise continue to behave like a modern incarnation of the legendary Sheriff of Nottingham, it will lose the support of the public. While our court system may be self-licking, it is not, however, self-funding.

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