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CIVIL LITIGATION NEWSLETTER
Big Litigation

Message from the Editors

Saba Ahmad and Stefan Case

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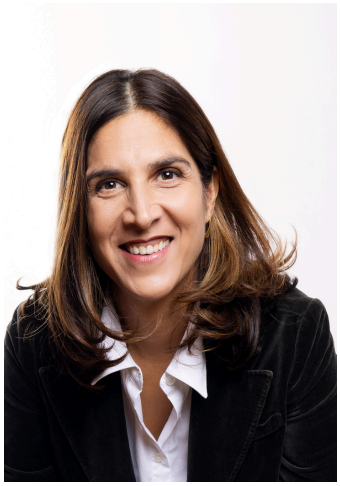

Saba Ahmad
Barrister, Saba Ahmad PC

Welcome to the 8th volume of the Civil Litigation Newsletter, published by the OBA Civil Litigation Section.

This edition explores big litigation and the stresses that come with it. While civil litigators have much in common with legal professionals practicing in other areas, we also experience unique stressors because of our unique role: it is our job to resolve disputes. This edition aims to provide insight into that role, and the pressures, responsibilities, and self-fulfillment that come with it.

The following pages explore this theme from multiple perspectives. We feature an interview with renowned litigator Sheila Block, remarks from another leader at the bar, Michael Eizenga, a piece about one of our fallen colleagues, Scott Rosen, and a substantive review of one well-known litigation stressor: limitation periods.

Warm thanks to each of our interviewees and contributors, as well as OBA staff and the members and Executive of the Civil Litigation Section, for making this newsletter possible.

Stefan Case & Saba Ahmad
February 2025

Features

INTERVIEW

A Life of Litigation: Discussion with Sheila Block

Stefan Case

Sheila Block, CM
Partner, Torys LLP

Sheila Block needs no introduction. She is one of Canada's most accomplished litigators, whose expertise is consistently sought in complex, high pressure, bet-the-company litigation. I am fortunate to have walked the same halls as Sheila for a few years at Torys, where I have been a grateful recipient of her teachings.

Sheila graduated as the gold medalist from the University of Ottawa Faculty of Law in 1972. She began her career at the Toronto litigation boutique Kimber, Dubin, which soon after merged with what was then Tory Tory DesLauriers & Binnington. It is at Torys where Sheila has spent her unparalleled 52-year career. Among her many accomplishments, Sheila has been awarded the Law Society Medal, the Advocates' Society Medal, the OBA Award of Excellence in Civil Litigation, and the Laidlaw Medal for Advocacy. She is a Fellow of the American College of Trial Lawyers, a Fellow of the International Society of Barristers, and an Honourary Bencher of Middle Temple (one of the English Inns of Court dating back to the 1300s). In 2022, Sheila was appointed to the Order of Canada for her trailblazing contributions to the legal profession.

There is no one more synonymous with big litigation than Sheila Block. On top of all of this, she is a fiercely wonderful person. Sheila is generous with her time, places a premium on mentorship, and is a champion of junior advocates. I was honoured to spend some time with her discussing her early years, how she's dealt with the pressures of the job, and the importance of great mentoring. What I learned is that stress is a natural part of what we litigators do at every stage. It is ok to feel that way. That is the consequence of having passion for this job. But keeping things in perspective, always being prepared, maintaining civility, and surrounding yourself with the support of your mentors are effective tools to manage it.

Before diving in, I would be remiss not to include Sheila's caveat upfront, which she of course delivered with a chuckle: "We started this conversation with my warning that anything I say will not be relevant or useful for somebody walking the earth right now, you know. It's a historical artifact." (I humbly disagree).

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First time up

You may be surprised to learn that Sheila initially had no interest in litigation. It was only after she and her teammate, Joyce Harris, won their moot in their third year of law school that Sheila began to consider that path.

Stefan: What drew you to litigation?

Sheila: I'm in law school, and my very good friend Joyce Harris and I ended up being moot partners. It was in the era when there were only five Ontario law schools, with the University of Ottawa being regarded, by the others, as not quite as prestigious as the rest.

And, in those days, they didn't have all these moots. In third year, there was one big moot that had all the law schools competing against each other at U of T. Joyce and I were the only women in the competition, and we were from what was then considered to be the least prestigious school. And we won the whole damn thing. So I thought, "well, maybe I can try litigation."

Sheila pursued litigation under the mentorship of Charlie Dubin and Bob Armstrong, among many others, at Kimber, Dubin. The firm soon merged with Torys, where Sheila has spent her career.

Stefan: Can you discuss what you remember from your first experiences on your feet?

Sheila: It was very daunting. I would always feel nervous. We were always sent to speak to things if your principal wanted something adjourned. And I'd walk up York Street talking to myself, "good afternoon, My Lord. I'm speaking to number four on your list." I'd be reciting what I was going to say all the way up York Street just to get an adjournment *(laughs)*. So, yes, it was nerve-racking, as I'm sure it still is. Although now it must be even more nerve-racking because there's so much more at stake. By the time you get into court, it has to count for something. I mean, in those days, it just seemed to be the part of the job of a junior to be running up and getting adjournments or speaking to the more minor matters.

Stefan: I've read you describe your first year of practice as "flailing". How did you move through the anxieties that come with that, and what kept you in love with the profession?

Sheila: Well, you really don't know what you're doing. And in 1972, there wasn't any legal education within the law firm. Sometimes a memo would be issued about "don't do this sort of thing because we'll get sued", you know. It was not "here's how you go about getting papers ready," or "how to write a compelling statement of claim." You were really just thrown into the deep end. They didn't throw you into a big deep end because that would mean they would be going themselves. But a deep end where they thought you could probably crawl to the side of the pool.

So, you did really learn by doing. You really wanted to be with good people who knew how to handle themselves in a courtroom, because you learn what you live. If you're with some cowboy who's always strutting about and snapping at the other side or not being respectful enough with the court, that's what you're going to think is what you're supposed to do. So, you would learn by watching the people you were with.

(cont'd)

You would also watch the people on the other side. You'd see the good, the bad, and the ugly. And you'd want to replicate the good and understand how it sounds when you do what Mr. X just did with the witness, or with your principal, or with the court, and you would say "I don't want to do that." So, you were consuming advocacy, and, with any luck, consuming it from the right perspective; from the perspective of the people you were working with who knew how to do it the right way.

The stresses of the job

As we continued our discussion, Sheila talked about the core role of a litigator – to help – and the pressure which that entails. Sheila emphasized the importance of serving your clients, but also about keeping things in perspective. She pointed out that a litigator ultimately needs to remember that they are a vessel for their client's case.

Sheila: It's a service profession. It's a helping profession. The people who come with litigation issues, they've got a problem. Can I make it better? Can I get them out of it? Can I make the consequences less severe than they're dreading? When you're a litigator, it just triggers that impetus you have to try and help somebody out of a jam. Because they're not doing this for the fun of it, you know. They're doing it because they've either made a bad deal or somebody's screwed them, and they're looking for a way out, so can you help them? That's what your job is.

Stefan: Does that lens through which you view your work help you when you're confronted with the challenge of a file or the stress of a case?

Sheila: Yeah. Well, eventually almost every case is stressful because you could lose it. You could lose cases you shouldn't lose. That's where the stress comes in. I mean, if you win something that was a roll of the dice, then great. If you lose that one, you're not exactly shocked. But when you've got something where some real injustice has happened, and you can't fix it, and you can't get the court to see it the way you want them to see it, that's very stressful. And of course, you don't know until the end which column a particular case is going to fall into. So, of course, it's stressful. You want to be successful for your clients, not for notches on your belt or anything like that. It's because somebody else's fortune or fate or happiness is in your hands.

Stefan: Is there a particular example that comes to mind for you?

Sheila: One case involved an entire business, and I lost it. I was just completely miserable. I was supposed to be in front of Willard Estey – Bud Estey – who went on to the Court of Appeal and became Chief Justice of Ontario, and then went to the Supreme Court of Canada. But he was a trial judge at the time, and he was supposed to be my judge on a beautiful July Friday, which is not a good day to have an important case. And instead, he wasn't there, but it was some lesser light on the bench. You didn't apply to go to the bench in those days. So, some of the people on the bench were political appointees or had donated to a particular political party and got their mediocre practice converted into a nice job up on the High Court, as it was then called. And I got one of those, who was not the least bit interested. He refused to enjoin a deal that eliminated our clients' business. And one of the partners here, this was his whole practice, that particular company. And we went down right there on the Friday.

The next day, I was going with my three kids to France for a holiday. My summer holiday. I was so excited about that. But after the hearing, I was just so depressed. And my husband rented *Das Boot*, about the German submarine that couldn't rise to the top, you know. So it's two hours of watching them know they're going to die. And I thought "okay, I can take this." It's a lot of pain for a lot of people, and I just had a really bad draw, and you're going to lose cases. But it wasn't like *Das Boot*. So, you do have to keep things in perspective.

"You want to be successful for your clients, not for notches on your belt or anything like that. It's because somebody else's fortune or fate or happiness is in your hands."

Stefan: That's what I was going to ask: is that the key? I mean I know everybody handles the stresses of the job differently and losses differently, but is that how you approach it – keeping things in perspective?

Sheila: Yeah, I mean, you have to realize, if you become successful, if you get more senior, if people are looking to call you, they're calling you on harder cases. So, your win-loss average is not going to improve just because you've been grinding away and having some success. You're probably going to have more losses.

You also have to realize – and this was a lesson it took me a long time to learn – it's not my case. It's the client's case. And you have to have that detachment from the case. I mean, you've got to throw yourself into it and really want to win, obviously, but you have to have that perspective.

I've often told the story about a client who was a partner in a big downtown firm, married to a real rounder, you know, who did deals. Never paid any taxes, and he was just a flim-flam man. And so, when they get divorced, she's got a beautiful house in Forest Hill. She used to hold grand parties, and really live high on the hog. But then when it came to dividing up the assets, I told her, "I don't do matrimonial, I don't do matrimonial." But she was very persistent. She must have been a really good lawyer *(laughs)*. She said, "it's a commercial case. That's why I need you. I don't need a matrimonial lawyer, I need a commercial lawyer..." So I took the case, and she's mortgaging her house to pay my fees, and it's just killing me.

I was really getting depressed because it was going to take forever. It was going to be a complete you-know-what show. And I was walking home. It was 10:00 at night, walking home from the office just to clear my head, and working up for the next day. And I phoned the client because there was allegedly a million dollars on the table, and I feared very strongly that she would be making a mistake not to take the money. And we had this discussion. I'm tense about the case and about the way it's going to just take forever, and she's going to lose her house, and I'm never going to forgive myself. So I'm urging her to settle. And she said, "look, Sheila. I get what you're saying. I can see where you're coming from. I know

"You also have to realize – and this was a lesson it took me a long time to learn – it's not my case. It's the client's case. And you have to have that detachment from the case."

it's logical. But I won't be able to get up in the morning if I let him get away with this. If I don't fight, I won't be able to live with myself." And all of a sudden, a light bulb goes off. Hold it, this isn't my case, it's not my sensibility. It wasn't for me to make that choice.

And knowing it's the client's case, that also relieves some of the stress. The facts, you can't change. You can dress them up. You can place them in the best light. You can contextualize the bad facts. You can do all that, but the facts are their facts. You're stuck with them on the case. So that's another perspective gaining role that will play into the way you think about yourself and think about the case.

Stefan: And so, after your 52 years of practice, do you have a framework with which you approach each big case that helps you keep your composure and keep things in perspective?

Sheila: Well, I am very dependent on you and your colleagues. You know how great the people here are. They're smart, they're hardworking, they seem to like what we do *(laughs)*. And they put up with me, which is a lot. You know, somebody asked Jon Silver [1], "what's it like working with Sheila?" "Well, she always comes to your office, and she asks a lot of questions." So that is my MO. And I'm unabashed about it because, if I don't understand something viscerally from the ground up... I mean, a lot of times I get the analytical framework, but if I don't really understand how something works in a case – and we have quite complicated cases – I will go and have it explained to me so that I can explain it if I get pressed on it by a judge. And that's the key thing

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[1] Jon is a Senior Litigation Associate at Torys who has worked closely with Sheila for many years.

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for me. You know, in the olden days, there were some very good counsel who I would watch in court. And they'd take out the typewritten submissions that some junior partner had written for them, and they had a nice delivery, but they didn't know the case in the way you have to know a case.

So, asking all my stupid questions is terribly important, so that I can really know it from the ground up. We have thousands of exhibits, and I'll know a lot of them because I've fished through them to find the ones that actually advance our theme and theory, contextualize our bad facts, and so on. As opposed to seeing them in court, when the other side pulls out something that you've never seen, and you just want to die. So, you can't operate the way at least some senior counsel did in the simpler cases of yesteryear.

Stefan: No matter how experienced you are, there's no substitute for preparation, really.

Sheila: Absolutely not.

Stefan: Preparing for our talk also got me thinking a little bit about civility. Even though what we do is adversarial, civility, I think, puts good guardrails around the anxieties that might otherwise come from the profession. Do you think civility plays that sort of role in our practice?

Sheila: It is essential. And when it isn't on the other side, don't get stressed. Do the happy rain dance, as one of my First Nations clients called it. Because your opponent is not going to look good in the forum, whichever forum you're in, if they behave with the judge the way they're behaving with you. And if they stop behaving like that in front of the judge, all to the better. But don't get into a mud fight because it'll stick on you too. Rise above it, you know: "Your Honour, I expect my friend has misunderstood this point and perhaps has gotten the wrong advice, but here's actually what happened." Why do you have to be rude about it? You're getting all of the benefit of making it clear, and that guy is losing his credibility. So, it just always pays. It's good for your case to maintain civility and maintain it in the face of people who are driving you crazy.

Being comfortable on your feet (or at least trying)

During our discussion, I was hoping to extract from Sheila the secret to being as comfortable and effortless on your feet as she is. It turns out, everyone still gets nervous. But one key, as Sheila always says, is letting the facts persuade.

Stefan: When I started out, I operated under the impression that, at some point, as I got more experienced, the nerves would go away when I got up in court. I assume they probably never do...

Sheila: No. No, no, no, no.

I was on – I think it was the Canada Post case in the Supreme Court of Canada. Our former colleague John B. Laskin had taken it brilliantly up to them, and then he gets appointed to the Federal Court of Appeal, so the poor client is stuck with me *(laughs)*. And at the Supreme Court, there's a women's washroom and change room just to the left of the court. People get to the courtroom, and they open the door around 9:00 for 9:30. Everybody's in there. Every seat is full, and there's all this buzz. And I'm in the women's washroom. And at 9:20, the bailiffs are saying to our table, "where's Ms. Block?" They come and drag me out of the washroom *(laughs)*.

You know, you've got to compose yourself. And I mean, I've been to the court a number of times. I've met most of the judges over the years. It wasn't that my knees were knocking or anything. It's just a serious thing we do, you know. We have a lot on our shoulders, and we can't screw up. That's how you think about it.

So, of course, you're going to be in a heightened state in a way, which is fine. And as soon as you get up and start, you're okay.

The case Sheila was thinking of was Canada Post Corp. v. Canadian Union of Postal Workers, 2019 SCC 67, where she and our colleagues John Terry and Jon Silver were successful.

Stefan: Is there something in particular that you do when you're up there and it's clear that the panel is against your position, or there are a couple of judges that are really not buying what you're selling?

Sheila: Sometimes I will say, “I know I'm not persuading you on this point, but let me try to give you this example of why it's our submission that the case should go here, not there.” And then give them something to think about. Or sometimes I say, “I don't mean to be annoying you. But I do want to come back to this point one more time because it's essential to our theory of the case, which is this, and this is why it's essential. And this is why it's right on this record.”

You know, one of the best things I learned over time - I didn't realize it was what I was doing or what needed to be done - it's having the facts argue for you. Piling them up in a certain way that you have to come to that conclusion. And I have an example I use. It's Ta-Nehisi Coates in 2017. He was piling up facts that led to his point that Trump's ideology was white supremacy: “You have a gentleman who, during the ‘90s, called for the death penalty for the Central Park Five, who are eventually found innocent. Trump said he didn't want Black guys counting his money, only guys with yarmulkes. You have somebody who believes a Hispanic judge can’t fairly hear a case because he’s Mexican. You have a guy who installs in the White House a gentleman who used to publish, and now has gone back to publishing, a website that is a platform for the alt-right – that's just another name for white supremacy. I think it's fair to call that person a white supremacist. That's not merely being conservative. That's not merely wanting to cut taxes. That's not a different view of the state's relationship to the individual. That's white supremacy.” So, he takes a bunch of facts – now, somebody could pile up other facts that lead to a different conclusion – but he takes the facts that lead to his conclusion and then he argues the point.

So, you should think about your arguments in terms of “how do I give some power to them?” “Can I cluster the facts and then sum it up?” And same with your lines in openings. Think about “how do you start?”

Sheila continued with the example of the Douglas case, which she often describes as one of her toughest. She, along with our two colleagues Sarah Whitmore and Molly Reynolds, acted for Lori Douglas – then Associate Chief Justice of the Manitoba Court of Queen’s Bench – in a controversial disciplinary hearing before the Canadian Judicial Council (CJC).

In a proceeding that was denounced as victim-blaming, a review panel of the CJC was convened to investigate whether nude photos of Douglas, which had been disseminated by her husband without her knowledge, undermined public confidence in the justice system. As the proceedings unfolded, the panel's independent counsel resigned, agreeing with Sheila's argument that the panel had demonstrated bias. Though a new panel was convened, the proceedings were ultimately stayed after Douglas agreed to resign from the bench.

Sheila: I remember in the Douglas case, I was sitting in 30 South [a Torys boardroom] on Saturday. I just couldn't figure out how I was going to start after the independent counsel was going to lay all these facts out about the pictures. And once I start writing, it sort of comes: "Thank you, Chief Justice. May it please the committee. One thing I expect you'll learn about Lori Douglas is that she loves being a judge. She's really good at it, and has worked incredibly hard to achieve this. As one senior judge put it to me, she has a gift for it. That's why judges and senior members of the bar encouraged her to apply to the bench, and she was encouraged to apply even after the bottom fell out of her world when her husband, Jack King, betrayed her, violated her privacy, breached the most fundamental and intimate of marital trusts, exposing their sexual relations, by conduct which is now notorious and not in dispute."

So, I was just trying to put everything I was feeling out there at the beginning to say, "look, this woman's a victim of somebody else's misconduct. Everybody knows what a quality person she is. She was encouraged, even after the whole thing exploded, to apply. She becomes a judge and then she becomes the Associate Chief Justice because she does such a great job." But it took a long time for me to figure out "how do I start?" There was so much incoming. And somehow you just have to sit there and figure out, "how do I tell this story from the point of view of the client, in a way that would make anyone with a heart think about it?" Regrettably, that panel had to resign because they … Anyway, that's one of my big regrets, that case, that I couldn't do better. But we stopped it at least – stopping it was something.

And there's a good example. You can get worked up when you really feel it, you know. I lost 13 pounds. I wasn't sleeping. My son suggested I should take up hot yoga.

So, do you ever stop getting nervous or getting anxious? No. And you shouldn't. And if you do, if you're walking out of the gowning room and you're thinking, "what the hell", go back in, put on your civvies, and let somebody else do it. You have to feel it.

On mentoring

Anyone who has worked with Sheila knows that she is an incredible mentor. She champions her juniors and puts them into positions where they can thrive. As she shared some old correspondence and mementos that she had brought with her for our discussion, I learned how much of that stems from her own experience. Sheila read through a note that she wrote to Bob Armstrong, one of her early and ongoing mentors, about being yourself and finding your place as a litigator.

Sheila: I wrote, "as I reflected on your comments, it occurred to me all these decades later that not only did I learn a hell of a lot about the practice of law from you, but what you gave me, and no doubt many others, was the confidence that you could be a non-pretentious, regular person and still carve out a place as a litigator. I think if I had grown up under certain other lawyers, with their fragile egos and pretentiousness – not folks at our firm, but I can think of a few who would have put me off litigation big time – I wouldn't have stuck it out. But Bob Armstrong the person made me realize I didn't have to take on that litigator persona that I kept running into in practice. What you modeled as a person was just as important as all the training and opportunities you provided to me. So, thanks, my friend."

So, that's another aspect of it: finding images and imagery that you want to make your own. And if you're one of these kids who was always, you know, head of the debating team, or the quarterback…

"if you're walking out of the gowning room and you're thinking, 'what the hell', go back in, put on your civvies and let somebody else do it. You have to feel it."

(cont'd)

And we've had a few quarterbacks here, who are no longer here. Lovely guys, great fun, very ambitious, and they're successful leaders at the bar. But if you're not in that mold, and I never was, you can still find your way. And I had people to look to who gave me the confidence that, yes, you can actually be a very successful lawyer. You can be yourself, and you don't have to be as dynamic and larger than life as Eddie Greenspan and other well-known, prominent litigators.

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We concluded our conversation with some parting words of wisdom for the next generation. Sheila's message is one of humility; of remembering that ours is a helping profession, and it is important to never lose sight of the human element: "you just have to relate to people. At every level. At every level of the case."

In her classic self-effacing way, Sheila explained, "I've always thought my great secret gift is my ordinariness." I can't help but smile knowing that the rest of us view her as extraordinary.

ANNOUNCEMENT

Civil Litigation Section Launches Emerging Leader Award

Samantha Green
Chair of the Civil Litigation Section Executive

The OBA Civil Litigation Section is thrilled to announce its brand-new Emerging Leader Award.

This exciting new award celebrates members of the profession who have been in practice for 15 years or less and embody the very best qualities of our legal community.

The Emerging Leader Award will annually honour an advocate who exemplifies:

- integrity, civility, and professionalism;
- mentorship of members of the bar and leadership through pro bono work, volunteer work, or involvement in professional associations; and
- sharing knowledge through any means, including lectures, writing, or presenting.

The first Emerging Leader Award will be presented at a celebratory dinner in February 2026, alongside the prestigious Award of Excellence.

The Award of Excellence has long recognized the outstanding career achievements of Ontario litigators.

In 2024, the Award of Excellence was presented to the remarkable Michael Eizenga, one of Ontario's top class action litigators. Renowned for his commanding courtroom presence and his pivotal role in shaping Ontario class actions law, Michael inspired us all with his heartfelt call to action. He urged litigators to be engaged and active members of their communities, reminding us:

> *"The antidote to exhaustion is engagement. We must stay engaged. So many of you already are. We must stay generously engaged in community groups, in public discussions, on boards, in charitable works, including those that have sightlines beyond our borders and those that serve vulnerable members of our community who so often cry out the least but suffer the most. We understand our professional work is but one piece of the social justice imperative."[1]*

Building on Michael's powerful message, the Emerging Leader Award will recognize a lawyer who is not only an exceptional advocate but also an engaged and active member of the bar and their community; someone who conducts themselves with integrity, civility, and professionalism.

We are thrilled to announce that nominations for this award are now open. Please visit the award webpage for more details.

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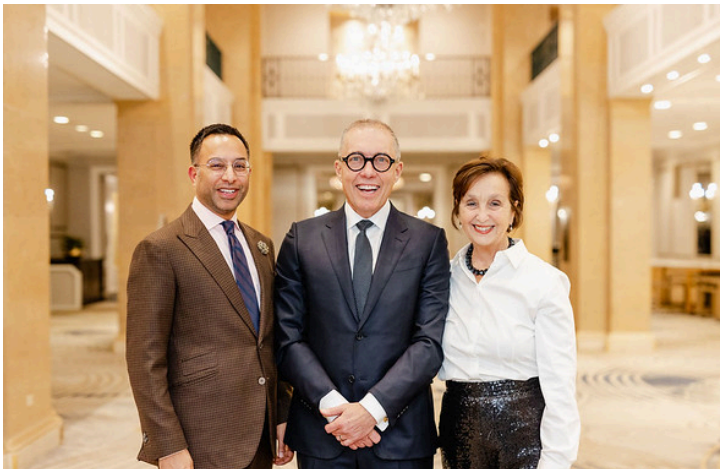
[1] A longer excerpt of Michael Eizenga's speech follows.

REMARKS

In a Fragmented Society, the Antidote to Exhaustion is Engagement

Remarks from Michael A. Eizenga, LSM
Partner, Bennett Jones LLP

The following is an excerpt from the acceptance speech that Michael Eizenga, 2024 recipient of the OBA Award of Excellence in Civil Litigation, delivered at the OBA Civil Dinner on November 25, 2024, in front of a collegial and congratulatory crowd of powerhouse litigators, justice sector leaders, rising stars of the profession, and colleagues, friends and family, at the Royal York Hotel in Toronto.



We are litigators. We *understand* the importance of a skilled and professional bar to the administration of justice. We *respect* the role that the administration of justice is meant to play in our democratic system of government – its role in maintaining accountability, social cohesion, and access to justice.

But I have to acknowledge that we often exercise our skills in a pretty controlled and rarefied environment.

When we go to court, we have an immediate right of audience. We get to calmly lay out a road map for how we intend to take the judge through the process of understanding and then being persuaded by our argument.

Of course, those of us who have appeared in front of Justice Perell know what it is like to be *just* getting to the *main verb* in the second sentence of your road map when you get asked that penetrating question that goes right to the heart of your case. (That is the moment when you're glad you have that three-sentence narrative at the ready. "Justice Perell, here's what this case is about at its core…").

But I think the point is straightforward. We operate in the dignity of wood paneled courtrooms – sometimes wearing gowns. We have rules of procedure and argument and rules of evidence that give us a shared reality to debate from.

So the question is this: In our increasingly fraught and tribal world, do the skills of the litigator apply outside the respectful context of the courtroom? In *that* world, where public discussion is so often hurtful, coarse, and shallow – where angry language is sometimes designed to strain at the crevices that already exist in our social cohesion.

My answer is that *effective* litigators spend their careers developing a set of skills and capacities and a discipline that is exactly suited to the task of restraining and even pushing back against those fragmenting forces.

We have spent our careers – inside and outside of the courtroom – cultivating our understanding of the power of words … to explain, to persuade, to move. And we are clever and trained enough to find the *right* words, and we can be disciplined and, yes, even kind enough to find ways to speak and respond that do not harden the lines between us.

From what I've seen, effective litigators have a great capacity for empathy and human connection.

That controlled courtroom context that I described a few moments ago is actually an incomplete picture of what advocates do. Both inside the courtroom and before we get there, while our cases are painstakingly being developed and scrutinized, we are engaged in a complex, very relational, attention-paying process: with our clients – as we draw out their stories and needs; with the other side and their lawyers as we listen and try to understand their wants and capacity to move; with our colleagues as we try to figure out if there is a right way forward – or at least a good one. And often we find it. All these interactions depend on a capacity for empathy and respect which are part of the stitching of the fabric of our social cohesion.

I want to make clear: this is not a question of acquiescing to "both sidesism": that caricature of the plea for civility and decency as a pitch for seeing that both sides sort of have a point and can't we just make nice?

Last year, Linda Plumpton spoke powerfully to the rising tide of hate that has manifested itself as anti-Semitism, Islamophobia, racism, homophobia, and misogyny. And the year we have just been through has been no better. There are perspectives that I want us to defeat at the ballot box and in the courtroom.

It is a question of how we engage with our fellow citizens. So I have two exhortations:

First, we must never normalize the ravaging nature of the language of the rage-farmers by responding in kind.

Of all people, we litigators are capable of doing this the right way. This is not to ask that we set down any of the tools in our tool box. Quite the contrary: There remains power in the way we can harness logic, passion, and truthful integrity. We know we can find words with genuine potential to persuade as opposed to those words whose only impact will be to inflame. And our discipline in avoiding those words – and it is a discipline because sometimes we don't feel like exercising restraint – but that discipline reflects on the system of justice we care about.

So many threads of social cohesion depend on our capacity to maintain respect for our system of justice among our fellow citizens. And in so many ways, the reputation of that system of justice is staked to the quality of the lives of all of us who work within it.

The democratic virtues of civility, restraint, communication of truth with both determination and care still enhance the reputation of our system of justice inside it and out.

Second, we must never disengage.

In her 2024 book, *At a Loss for Words: Conversation in an Age of Rage*, Carol Off writes that "the rage that has engulfed us is exhausting, rendering us almost incapable of rational conversations."

And so, we retreat

That can never be us. The antidote to exhaustion is engagement. We must stay engaged. So many of you already are. We must stay generously engaged in community groups, in public discussions, on boards, in charitable works, including those that have sightlines beyond our borders and those that serve vulnerable members of our community who so often cry out the least but suffer the most. We understand our professional work is but one piece of the social justice imperative.

But from what I've seen, the skills, disciplines, and capacities of litigators fit us for full range of activities outside the profession. The more fragmented our society feels, the more engaged with it we need to be. Social cohesion requires human connection and especially the kind that litigators, of all people, are able to engage in.

It is a genuine honour to share the mandate of being a litigator with you all.

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ARTICLE

The Civil Litigators are Not Okay: Advancing the Psychological Safety of Trial Lawyers

Saba Ahmad

Scott Rosen in a 2018 photo, provided by his widow, Elise Middlestadt

On December 18, 2020, civil litigator Scott Rosen was murdered in a commercial parkade in Toronto. He was a 52-year-old father of two, struck down by a U-Haul truck that was driven by his client's adversary, Anh Thu Chiem, after Rosen won a summary judgment motion against her. A significant costs award contributed to Chiem's financial troubles. Rosen, it appears, became the focal point of Chiem's rage; in an extreme example of the risks civil litigators sometimes face, she killed him - for doing his job too well.

Rosen's professional life ended up jeopardizing his physical safety. But did it also jeopardize his psychological safety? What is it about the work of civil litigators that might put their mental and physical health, safety, and wellness at risk?

In answer to an anonymous survey distributed to members of the OBA's Civil Litigation Section, one civil litigator answered, "We trade in conflict. Most other professions are not inherently adversarial. I think the unique type of stress that comes with practicing litigation is less about deadlines and high stakes and more about conflict."

Rosen's long-time former law clerk, Cameron Smith, and Rosen's widow, Elise Middlestadt, agree. They each shared their (rather different) insights about the risks and stresses associated with civil litigation. This article canvasses their perspectives, recent literature on the subject, and anonymous interviews with civil litigators, to help explain how the risk and stress of civil litigation is distinguishable from that of other lawyers or professionals who are not expected to redress disputes for a living.

Much of the recent literature about the mental health needs of lawyers focuses on burnout and other trends that sidestep a chief cause of stress for civil litigators: being embroiled in someone else's conflict. Compounding matters, in order to increase their effectiveness and chances of winning, litigators often downplay, discount, or even ignore those risks. It is important to treat stress due to unsafe working conditions as distinct from other causes of stress. The solutions to the former problem might be in the form of more practical safeguards, rather than coping strategies such as mindfulness, exercise, and regular vacations, which figure prominently in the literature about the latter problems.

The literature focuses on work-life balance, not conflict

In the several years before and after Rosen's death, significant attention has been paid to the mental health of lawyers in general, including civil litigators. A notable publication, *The Right Not to Remain Silent: The Truth About Mental Health in the Legal Profession*, provides first person accounts from 18 legal professionals who bravely share their mental health journeys, often caused or worsened by circumstances attributable to their work.[i] Many lawyers shared their personal stories. They cited job insecurity, the billable hour, and expectations to be immediately responsive to the demands of work as among the main causes or contributors to their mental health struggles. Others cited alcohol culture, the pressure to look good, or childhood trauma unrelated to the law as factors that exacerbated toxicity in their working lives.

One contribution by the Honourable Justice George Strathy astutely identified conflict as contributing to the mental health issues of civil litigators. In addition to overwork, and lack of mentoring, his piece in the book outlined how glorifying the myth of the gladiator-litigator leads to burnout, disillusionment, and depression.[ii] In a separate piece two years earlier, he wrote, "your opponents sometimes come across as obstreperous, uncivil, and offensive jerks. Just getting an email or phone call from them can send your blood pressure and stress level rocketing. Believe me, I've been there."[iii]

Justice Strathy explained that job expectations present an additional barrier for civil litigators seeking help for mental health issues. The effective advocate must always be in control of their emotions: "Sometimes wounded, but never defeated. Suffering in silence and quietly bandaging their own wounds, ready to fight another day." In conclusion, he suggests reducing the stigma around mental health, observing that "people often hide mental health issues and suffer in silence" citing a "culture of shame, blame, and criticism [which] leads to isolation and harm to our colleagues and our clients."

Similar themes were canvassed in a groundbreaking report published in two phases in 2022 and 2024 by, among others, the Federation of Law Societies and the CBA.[iv] The study identified the following stressors as arising from the work environments in which legal professionals operate: (1) working conditions, (2) areas of practice and work setting, (3) the impact of billable hours, (4) technostress, (5) adjustment to telework, (6) the agility of their firm or organization, and (7) the psychological consequences that may result from working with clients, such as compassion fatigue.[v]

With respect to civil litigation specifically, the study found that civil litigators (and also people who work in wills and estates) showed a more pronounced harmful impact of psychological distress from the emotional demands of the job, as compared to other professionals.[vi] In addition, emotional demands were associated with a more significant increase in depressive symptoms among legal professionals working in civil litigation, and also commercial lawyers.[vii]

The report goes on to recommend coping strategies for stress, better work-life balance, and other strategies that apply across practice areas.[viii] None of the recommended strategies seemed tailored to the unique stress that stems from the civil litigator's adversarial role: to serve as both shield and foil for our clients.[ix]

Litigators have to be tough: Interviews with people who knew and loved Scott Rosen

Rosen's former law clerk, Cameron Smith, acknowledged that civil litigators are exposed to some risks and abuse, but he considers civil litigation to be a relatively safe practice area, unlike family or criminal law, which appear more emotionally charged to him. He said the stakes for civil litigators, being only money, are usually low enough that people are not driven to violence. He admitted observing heated skirmishes between counsel, threats to credibility, or an opposing party screaming or throwing papers at you. However, he noted

that jurors on criminal trials have it worse, as they may be exposed to gruesome evidence, as do lawyers advocating about liberty or custody, where the stakes are much higher.

Smith emphasized that Rosen was professionally stoic and not the least bit fearful before he died, and his workplace was not a traumatizing or hostile environment. “He was full of warmth and humour in his practice and in dealing with opposing counsel when they didn’t make collegiality impossible.” In Smith’s view, Chiem’s conduct was a blip or outlier, and not at all representative of the safety of the practice area. In his 15 years serving as a law clerk, now at Longos Lawyers, Smith has come to expect antics in civil litigation, such as aggressive conduct by opposing counsel, or self-reps who engaged in “ridiculous” behaviour. He recalled an opposing party who once sprayed insecticide at a realtor conducting a site visit on behalf of a mortgagee. Smith also suspected Chiem of once throwing acid at Rosen in an anonymous and unprovoked attack some years before Rosen’s death. Nevertheless, he denied there was any kind of climate of fear in his office.

Smith found the circumstances of Rosen’s death to be absurd considering the “unfathomably low” amount of money that was at stake for Chiem. He noted a disconnect between what Chiem lost and the extremeness of her retribution. He questioned whether disproportionate rage is confined to litigation, given the intense misbehaviour seen at sporting events, union meetings, or condo board meetings, where tensions also flare up when people want to revel in a victory.

Elise Middlestadt, Rosen’s widow, agreed with Smith’s description of her husband as a stoic litigator. While he did not have trouble sleeping or notable mental health stress in the lead-up to his death, years earlier, general health concerns prompted Rosen to make lifestyle changes to manage the risks of mental and physical health issues. He played guitar, went fishing, rode his motorcycle, and cultivated a truly connected family life. He confided in his wife, loved his dog, and relished taking his sons to hockey practice and watching them thrive. When the pair discussed Rosen’s personal safety, including about Chiem, he brushed it off, saying “What is she going to do to me? She’s only 5 feet tall!”

Rosen was well aware that he “pissed people off” for a living. He described preparing for court as preparing for war.

Rosen projected fearlessness. He was tough. Yet, Middlestadt admitted, he was fairly cautious about his surroundings. Rosen was well aware that he “pissed people off” for a living. He described preparing for court as preparing for war. After the acid attack, he put cameras up. “When we went for walks, he looked around. That’s the kind of person he was because of the nature of what he did.” While he shielded his wife from his concerns, she noticed he watched his back. By the time of his death, the two of them had worked through many struggles, including lingering fallout from “crappy divorces” for each of them. Middlestadt and her husband were finally on the other side, “finally in a happy place, finally doing good, when it all got shattered.”

When asked about Smith’s perspective that civil litigation is a relatively safe practice area, Middlestadt said, in Canada, very few litigators are actually murdered, but that in the U.S., it’s more common.[x]

Middlestadt discussed several examples of violence, such as the murder of family lawyer Frederick Gans over 40 years ago, and also a recent case, in which civil lawyers were almost victims of a kidnapping and extortion plot. Robert Freedland similarly blamed his former civil lawyers for his troubles.[xi] In Middlestadt’s view, violence and threats of violence are on the rise.

Middlestadt admitted she told her husband to be careful. They talked about whether the acid attack was random. But in the end, Rosen felt untouchable. He never showed fear. Middlestadt said he had to embrace that mentality if he was going to win. “You can’t be effective if you don’t believe it. That was my take on it.”

Civil litigators say they must not admit vulnerability

Middlestadt's description of her husband matches the descriptions of litigators in the literature. As noted in the follow-up Consolidated Phase II National Study ("Omnibus Report") about working conditions, "Some participants say that they cannot afford to be vulnerable and that showing signs of weakness can lead to rapid exclusion from the legal community."[xii] While this comment describes social consequences of admitting vulnerability, another study participant observed "you never want your opponent to know you have a weakness."[xiii] This latter comment emphasizes more immediate requirements of the job, rather than broader professional considerations.

A good fighter projects invincibility. To persuade judges, opposing counsel, and clients, litigators must present a carefully constructed façade that conveys indefatigable confidence. The best lawyers seem to genuinely believe the positions they put forward, and the self-assurance they project.

In one testimonial cited in the Omnibus Report above, a junior litigator wrote:

> *"When friends and family ask me to describe what it is like to be a civil litigator in this province, I tell them that on a day to day basis I am forced to interact with other lawyers [...] who will put forward any argument, no matter how tenuous, to make a buck. It is rare to deal with a peer who is civil and reasonable on the other side of a dispute (and a real treat when it happens).*"[xiv]

The Phase II Omnibus Report included an Ontario-Specific Report, which had a section about incivility and violence in the workplace. In that section, a study participant stated:

> "*When you're going to court, you're dealing with stress on the other side, not wanting to play civilly. I almost equate it to you're on an island by yourself and you have sharks all around you. It doesn't matter where you turn, there's always sharks and they're out there to get you.*"[xv]

To do our jobs well, civil litigators must project strength and embrace the "gladiator" myth, which may sometimes lead us to discount the risks, or the impact on us of becoming embroiled in the conflicts of other people. It may not be social stigma that prevents civil litigators from seeking help for the causes of mental health stresses, so much as denial. The job itself requires us to embrace hubris, rather than admit vulnerability.

Catastrophizing or just doing the job?

Smith noted that small firm and sole practitioners have control over the files they take on, whereas a junior associate does not. But some lawyers may feel they have a duty not to reject high-conflict files, or abandon a client when the going gets tough. The LSO's own Rules of Professional Conduct reflect the expectation that a lawyer be willing to play David to their client's Goliath. Rule 4.1-1 provides that a lawyer shall make legal services available to the public in an efficient and convenient way. The commentary to the rule makes clear that lawyers must facilitate the public's access to justice, and must not reject a client whose cause "is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved."[xvi]

This rule requires civil litigators to stick their necks out – but at what cost? Not all civil litigators are equally well-positioned to advocate for unpopular causes. Sole practitioners, for example, might have financial or professional reasons for taking on a file that ends up being psychologically depleting. They may also be more susceptible when facing off against certain litigation tactics, such as being buried in paper when working in the absence of obvious support.

A good civil litigator is consistently on guard for more risks: in the words of the study participant above, the "sharks" are always out there, trying to get you. A skilled litigator must anticipate how a letter questioning service of a document might end up in a motion record seeking to have the lawyer removed from the record – or even in a claim by the lawyer's own client, or a complaint to the Law Society. The constant vigilance is wearing, and it stands to reason that it may lead to an overactive fight-or-flight response, which can lead to anxiety or depression, among other health issues.

It is no solution to suggest that litigators must not catastrophize when the threats are often real.[xvii]

While "catastrophizing" is a cognitive disorder that involves fixating on the "worst-case scenario", civil litigators are retained to guard against the risk of worst-case scenarios – assessing and taking protective measures.[xviii]

Safeguards and practical solutions

While many CPDs presently focus on mindfulness, exercise, and other practices and habits that help manage stress, generally applicable to all professionals, civil litigators may require additional protections tailored to reducing exposure to potentially traumatizing or unsafe situations in the first place. Risk of physical violence aside, civil litigators often endure verbal abuse and credible threats of pecuniary or reputational harm.[xix] While lawyers may sometimes perceive incivility where no bad intention is present, opposing counsel is often in fact instructed to discredit our clients, and also the lawyers who represent them. In open court and in counsel correspondence, our credibility and motives are routinely called into question. We are sometimes threatened with costs personally, along with a myriad of other consequences that could be career-destroying if not properly addressed. Before lawyers are expected to go to battle for a client, they ought to be provided with some armour beyond the advice to "suck it up".[xx]

Near the beginning of this article, Justice Strathy was quoted as describing a litigator's blood pressure spiking at the mere receipt of an email or phone call from opposing counsel. Is this just an expected side-effect of working as a civil litigator, for which the profession can offer no preventative measures? Or is it possible that such a reaction is akin to an Acute Stress Reaction (ASR), which is normal for people in other difficult professions, such as first responders and people working in law enforcement or the military? While our jobs do not usually entail the same life and death consequences as people working in actual combat zones, the coping strategies of soldiers and other professionals who are repeatedly exposed to potentially psychologically traumatic events may be instructive.[xxi]

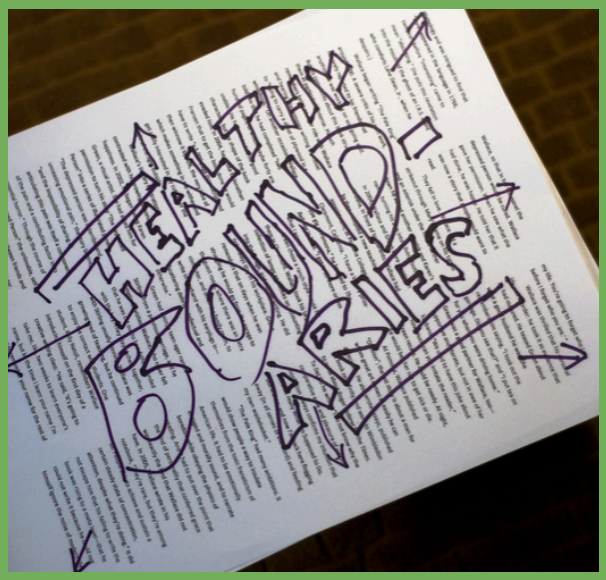
Confiding: Chief among those strategies: after a stressful event, people in these professions are encouraged to acknowledge that they are in an unsafe situation, temporarily remove themselves from reminders of it, and to talk about what they experienced.[xxii] This is not usually possible for a litigator who is, for example, mid-way through an abusive cross-examination. However, it does make sense for lawyers to confide in someone (who can maintain privilege) after a contentious or abusive encounter. The OBA's Civil Litigation mentorship program, "MentorCity", might be adapted to this purpose, in a way that protects anonymity and ensures a good match between the needs, expectations, and abilities of participants.

Boundary Setting: In a recent self-help book, psychotherapist Juliane Taylor Shore explains the importance of setting appropriate internal and external boundaries.[xxiii] We establish boundaries to ensure our own personal safety – but Shore warns that one should not attempt to convince yourself that you are safe when you are not. Based on this, it is vital that civil litigators learn to recognize what kinds of files, clients, and situations are most likely to expose them to psychologically unsafe working conditions, and to reduce exposure to those risks. A demonstration of good boundary-setting emerged from one anonymous survey answer. When asked how she protects herself from becoming personally embroiled in her client's disputes, one civil litigator answered: "I end a conversation that is getting too heated that it is becoming unproductive."[xxiv]

Porous external boundaries may allow outsiders to, for example, dominate your time or get you to perform work on unfair terms. Overly rigid boundaries may cause a person to reject work or situations that are not in fact unsafe. Having an assistant make appointments for you, or being able to invoke a firm policy, might help with appropriate boundary setting.

Porous internal boundaries allow words to hurt.[xxv] Setting appropriate boundaries can work to help a person compartmentalize when someone says something hurtful. Shore suggests asking yourself two questions when faced with verbal abuse or insults: (1) Is it true? and (2) Is it about me? Often times, an opposing lawyer's verbal abuse is demonstrably untrue.

A good litigator should not only generate a record that establishes the truth, but should also take comfort in knowing that the hurtful allegations are false. Second, the lawyer should remind themselves about the strategic reasons for the abuse. Opposing counsel may be trying to wear you down. They are paid to tear your case apart. To be effective, a civil litigator must learn how not to take the abuse personally.



While effective advocacy requires establishing strong internal boundaries, abusive conduct can have real-world consequences. An opposing lawyer might make good on their threats: they may prevail on that motion to have you pay costs personally, or be removed from the record. The professional consequences of these threats can be serious and cannot simply be ignored, notwithstanding the prevailing mental health advice that warns against catastrophizing. To properly assess risks, litigators require access to resources that allow them to treat such threats as legitimate, admit fear, and develop a strategy for dealing with threats.

Choosing Different Work Arrangements: The work of civil litigation is inherently stressful and risky, and some files are actually unsafe. One anonymous survey respondent shared that his "solution to hating the clients and positions I was taking was to move to a different firm / practice area where I wouldn't have to take on those cases." Abusive encounters are rarer, for example, if you are usually opposite government lawyers or insurance companies, as opposed to lawyers acting for individuals or small companies. Many lawyers entering the profession appear to pursue the most remunerative or prestigious opportunities. Others prefer working solo or in small-firm settings for flexibility, financial rewards, and control over hours. But when things get intense, it is worth considering that not all civil litigation work is equally intense. There are many different types of civil litigators to which one can aspire.

Conclusion

There is often a disconnect between the gladiator narrative civil litigators tell themselves and the actual risks of the job. Advancing the psychological (and physical) safety of litigators requires a more honest assessment of the risks of advocacy in high-conflict situations as a cause of stress and mental unwellness. Acknowledging unsafety as a cause of stress that litigators face permits consideration of more appropriate strategies, such as working with co-counsel and setting boundaries, as opposed to a reduced workload, mindfulness, and regular exercise, which may be unresponsive to the causes of distress experienced by civil litigators.

Endnotes

[i] The Right Not to Remain Silent: The Truth About Mental Health in The Legal Profession. Edited by Beth Beattie, Carole Dagher & Thomas Telfer. LexisNexis Canada. 2024 ("The Right Not to Remain Silent").
[ii] Strathy, George R. "It's Time to Change the Culture of Legal Practice", The Right Not to Remain Silent, supra note 1.
[iii] Strathy, George R. "The Litigator and Mental Health". Ontario Court of Appeal Website, 2022.
[iv] Towards a Healthy and Sustainable Practice of Law in Canada, Phase I | 2020-2022 Research Report, National Study on the Health and Wellness Determinants of Legal Professionals in Canada. Université de Sherbrooke ("Phase I Report").
[v] *Id*. Chapter 2.2, at p. 66.
[vi] *Id*. Chapter 2.2.2, Table 9, at p. 89.
[vii] *Id*. Chapter 2.2.2, Table 11, at p. 92.
[viii] *Id*. Part III, Table 5, at p. 347; see also Part IV, at p. 358, identifying 50 recommendations in 10 key categories. Recommendation 3.4 suggests formal and informal mentoring as a preventative measure. Recommendation 6.2 suggests targeted resources to respond to violence and incivility, such as therapists who specialize in treating victims of psychological violence. Recommendation 8.3 suggests the adoption of codes of conduct and zero-tolerance policies to prevent or redress incivility and violence. See also Towards a Healthy and Sustainable Practice of Law in Canada, Phase II | 2024 Consolidated Research Report, National Study on the Health and Wellness Determinants of Legal Professionals in Canada Omnibus Report. Université de Sherbrooke ("Phase II Omnibus Report"), at p. 43.
[ix] The Phase II Ontario-Specific Report contains a recommendation specifically about violence and incivility. It recommends "creating awareness campaigns, offering training programs, implementing strict policies, and promoting a culture of respect." Towards a Healthy and Sustainable Practice of Law in Canada, Phase II Research Report, 2022-24, Ontario. Université de Sherbrooke ("Phase II Ontario-Specific Report"), at p. 40.
[x] *See e.g.* Katz, Joette, "Facing Threats of Violence in the Legal Profession, Violence against members of the judiciary gets some public attention but the issue of violence against lawyers has received even less". The Connecticut Law Tribune. June 29, 2019.
[xi] *R. v Freedland*, 2019 ONSC 4324 (S.C.J), per Aktar, J. The sentencing decision provided: ". . . the victims in this case were civil lawyers. I view it as a matter of public policy that lawyers who represent members of the public be protected against threats of violence by disgruntled former clients or parties against whom they were acting. Mr. Freedland 's actions struck at the heart of the legal system."
[xii] Phase II Omnibus Report, *supra* note 8, at p. 28.
[xiii] Phase II Omnibus Report, *supra* note 8, at p. 28.
[xiv] Phase II Ontario-Specific Report, *supra* note 9, at p. 7.
[xv] Phase II Ontario-Specific Report, *supra* note 9, at p. 7.
[xvi] Law Society of Ontario ("LSO") Rules of Professional Conduct, Commentary to Rule 4.1-1.
[xvii] Darcy, Andrea M. "Catastrophizing – Always Assume the Worst? Why You Need to Stop". Harley Therapy Ltd. 2006. Last reviewed by Dr. Sheri Jacobson, March 6, 2023.
[xviii] Nielsen, Emily G. and Minda, John Paul, "The Mindful Lawyer Investigating the Effects of Two Online Mindfulness Programs on Self-Reported Well-Being in the Legal Profession". Journal of Occupational and Environmental Medicine. Volume 63, Number 12, December 2021, at p. 872, indicating that lawyers often may need to consider worst-case scenarios and contingency plans as part of the job.
[xix] The Phase II Ontario-Specific Report did not break violence and incivility down by practice area. However, one testimonial pointed to litigation-specific work including court appearances. *Supra* note 9, at p. 12.
[xx] Phase II Ontario-Specific Report, *supra* note 9, at p. 9.
[xxi] *See e.g.* McAndrew, Lisa M et al. "Resilience during war: Better unit cohesion and reductions in avoidant coping are associated with better mental health function after combat deployment". Psychological trauma: theory, research, practice and policy vol. 9,1 (2017): 52-61. This study finds that "unit cohesion" is associated with a reduction in "avoidant coping", which may lead to greater resilience among soldiers.
[xxii] *See e.g.* the advice of an American charity, dedicated to mental health. "Coping with the Stress of Deployment: Information for Military Families". Mental Health America (Blog). 2025.
[xxiii] Shore, Juliane T. Setting Boundaries that Stick: How Neurobiology Can Help You Rewire Your Brain to Feel Safe, Connected, and Empowered. New Harbinger Publications. 2023 ("Boundaries that Stick").
[xxiv] In a recent LinkedIn post, Virginia litigator Brian Glass offered specific tips to reduce the likelihood of abusive encounters, such as introducing yourself to opposing counsel with a phone call and not being coy about your position, when it can only inflame matters. January 15, 2025.
[xxv] Boundaries that Stick, *supra* note 20, at p. 93.

ARTICLE

Limitation Periods: Recent Cases and Practice Points

Stefan Case, Alicja Puchta, Grant Goldberg*

Litigation is a stressful profession, but one key to managing that stress is organization and practice management. Below are some helpful practice tips emerging from recent case law on one big stressor – limitation periods.

Few things worry litigators more than a missed limitation period. Over the past two years, there have been several changes in the way appellate courts have interpreted the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "*Act*"). Below, we discuss recent cases that litigators should be familiar with as they review their clients' files and strategize regarding limitations issues.

When can limitations issues be decided on a motion to strike?

A common question for practitioners is when to pursue a limitations issue on a motion to strike a pleading. The answer from the Court of Appeal for Ontario continues to be rarely, if ever.

In *Toussaint v. Canada (Attorney General)*, 2023 ONCA 117, the defendant brought a motion to strike under r. 21.01 of the *Rules of Civil Procedure*, arguing that the claim was doomed to fail because of an expired limitation period. The motion judge disagreed. However, rather than simply dismissing the motion, the motion judge went further and found that the plaintiff's claim was timely.

The Court of Appeal for Ontario overturned the motion judge on appeal. The court emphasized that limitations issues can rarely be decided on motions

to strike, since discoverability requires fact finding, which is not permitted on a motion to strike.

The court emphasized that limitations issues should only be decided on motions to strike when pleadings are closed and the limitations defence relies on undisputed facts. The court also held that the motion judge erred by going further and finding the plaintiff's claim to be timely, since this relief was not sought on the motion. In any event, the limitations issues were factually complex and disputed, and there was no evidence before the motion judge with which to resolve them.

Practice tip: Practitioners should continue to be aware of the constraints on raising limitations issues in pre-trial motions to strike. The time and expense of doing so should only be incurred where pleadings are closed and the facts relevant to the limitations issues are not controversial.

Does a claim become discoverable when capable of discovery?

Discoverability is central to properly calculating limitation periods. However, it is also often a complicated factual inquiry. In 2024, the Court of

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Appeal for Ontario addressed the question of *when* a claim becomes discoverable. In *Espartel Investments Ltd. v. Metropolitan Toronto Condo Corp. No. 993*, 2024 ONCA 18, the court held that the limitation period starts running when a claim is reasonably discoverable with due diligence, not when there is the mere possibility of discovery.

In this case, a condominium corporation and a hotel both occupied the same mixed commercial and residential complex. They operated under a utility-sharing arrangement whereby the condominium would pay the entirety of the utility bill and then invoice the hotel for its share. However, the formula that the condominium used to calculate the hotel's share was flawed, leading the hotel to overpay. Both parties were unaware of this for decades, until an engineering consultant identified the errors. When the hotel sued for unjust enrichment, the condominium argued that the hotel ought to have known of the errors years before, and its claim was therefore statute barred.

The Court of Appeal for Ontario upheld the trial judge in rejecting this argument. The errors were not apparent on the face of the invoices. Even though they were theoretically discoverable, they were not obvious at the time to the people who actually used those documents. Auditors and accountants who the hotel employed to regularly review the invoices did not realize the errors over the course of 15 years. The court held that it was open to the trial judge to conclude that the errors in the invoices were of such a technical and subtle nature that the hotel could not have been expected to find them through the exercise of reasonable diligence, even though they were capable of being discovered.

Practice tip: Be aware of the correct threshold when considering discoverability. If a claim is discoverable through the exercise of reasonable diligence, then that will likely trigger the limitation period. If a claim is merely capable of being discovered, that may not be enough.

When does a corporation discover a claim?

The Court of Appeal for Ontario and Supreme Court of Canada recently clarified for whom a claim must be discoverable to start the limitation period running when the plaintiff is a corporation. In *1819472 Ontario Corp v. John Barrett General Contractors Limited,* 2024 ONCA 333, the Court of Appeal for Ontario emphasized the bright line between a corporation and an individual. If the claim is being made by the corporation, discoverability must be assessed from the corporation's perspective; courts should not attribute the personal knowledge of a director to a corporation prior to the director being appointed as such.

In this case, James Zaza created two corporations to buy land and a nursery business from John Barrett General Contractors (JBGC), which was owned by Susan Barrett. One of Zaza's corporations (9472) purchased the land, while the other (9471) purchased the shares of 9472 and JBGC. 9471's purchase was through a promissory note secured on the land. Zaza then caused 9472 to sell the land to a third party and fraudulently disbursed the sale proceeds, before assigning 9471 and JBGC into bankruptcy in 2017. Barrett thereafter obtained 9472's shares through her entitlement as 9471's only secured creditor. In 2021, she appointed herself director of 9472 and caused 9472 to commence an action against Zaza and related defendants. The defendants argued that the claim was statute-barred because Barrett had learned of the claim in 2017, and this knowledge was attributable to 9472.

The judge below and the Court of Appeal disagreed, concluding that Barrett's knowledge could only become attributable to 9472 after she gained control over the shares and appointed herself director. Before that, there was no directing mind of 9472, and thus 9472 could not have had knowledge of the claim.

Practitioners should also remember that the doctrine of corporate attribution has a discretionary safety valve. A court may decide not to attribute the knowledge of a corporation's directing mind to the corporation at all when the public interest requires it. This was seen in *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32.

In this case, Golden Oakes Enterprises held itself out as a rent-to-own residential property business run by Joseph Lacasse, its sole officer, shareholder, and directing mind. In reality, Golden Oakes was a Ponzi scheme. Funds from new investors were used to pay existing investors. The company also paid interest to investors at criminal interest rates, and paid referral

fees (commissions) to those investors who induced others to join. When the Ponzi scheme finally collapsed, Golden Oakes and Lacasse were assigned into bankruptcy. The bankruptcy trustee for Golden Oakes commenced several actions against former investors to recoup interest and commission payments. The investors argued that these claims were statute-barred, since Lacasse knew about these payments outside the limitation period, and his knowledge should be attributed to Golden Oakes.

The Supreme Court concluded that the doctrine of corporate attribution should not apply on public interest grounds. The court reasoned that barring the trustee's claims would (1) undermine the purpose of the discoverability rules by limiting the trustee's ability to make a claim before they even knew of one; and (2) allow the investors to retain the proceedings of their wrongful conduct.

Practice tip: When assessing discoverability from the perspective of a corporation, practitioners should remember the separation between the corporation and individuals. The knowledge of a corporation's directing mind can likely only be attributed to the corporation after they become a directing mind, and this knowledge is probably not retroactive for the purpose of calculating a limitation period. Further, corporate attribution can be ignored where public interest demands it.

Does a plaintiff have to be certain they have a claim to discover it?

Another common question for practitioners is how much your client needs to know before crossing the discoverability threshold and triggering the limitation clock. In *Sanei v. Debarros*, 2024 ONCA 104, the Court of Appeal for Ontario reminded us that "certainty" is not the threshold. In this case, the appellant was injured in a motor vehicle accident and sued the respondent, arguing that the respondent caused the accident. Although the accident occurred in 2013, the appellant did not commence his claim until 2016. The respondent brought a motion for summary judgment on the basis of the limitation period. As this was a motor vehicle accident claim, discoverability hinged on when the appellant knew or reasonably could have known that his injuries met the deductible threshold of "serious and permanent impairment" under the *Insurance Act*. The appellant argued he was unaware that his injuries could meet this threshold until he received a particular type of medical evidence.

The motion judge and the Court of Appeal rejected this argument. While the appellant emphasized that he did not have physician's evidence in the particular form required by the regulations under the *Insurance Act*, the court held this was unnecessary. Even without this medical evidence, the appellant's own knowledge of his injuries and the other medical reports he did receive were enough to start the limitation period running. Requiring a heightened standard of medical evidence for discoverability purposes would "move the needle too close to certainty".

Practice tip: Practitioners in personal injury matters should remember that their clients' claims may be discoverable even without particular kinds of medical evidence. The limitation period begins running if the injuries are such that the client knows or ought to know that a claim would be an appropriate means to seek a remedy. Ambiguity over whether the client could meet particular evidentiary thresholds may not toll the limitation period.

What engages the tolling for minors when calculating the ultimate limitation period?

An important consideration when assessing a client's claim with respect to the ultimate (15-year) limitation period is section 15(4)(b) of the *Act*. Under this section, the ultimate limitation period does not run while the person with a claim is a minor and unrepresented by a litigation guardian.

However, a recent case from the Court of Appeal for Ontario has clarified that this section is only engaged where a person is a minor who has a claim. It does not toll the ultimate limitation period for persons who simply were minors at any time during the running of the limitation period.

In *Wong v. Lui*, 2023 ONCA 272, the respondents bought a house when they were adults and then discovered many latent structural defects. The respondents claimed in negligence on the basis of building permits opened in 1987. The appellant sought a declaration that section 15(4)(b) of the *Act* did not toll the ultimate limitation period, which the

appellant argued had expired by the time the respondents commenced their claim. The motion judge concluded that section 15(4)(b) did apply for the time when the respondents were minors, even though they had not accrued a claim (since they had not yet bought the house).

The Court of Appeal for Ontario disagreed and set aside the motion judge's decision. The court held that, on a proper interpretation of section 15(4)(b), the minor must have accrued a claim while they are a minor for the ultimate limitation period to be tolled. In this case, the respondents had no claim until they were adults and had bought their house. The ultimate limitation period had expired by that time.

Practice tip: If relying on section 15(4)(b) when calculating the ultimate limitation period, practitioners should ensure that their client's claim accrued when they were a minor. If it did not, then the tolling allowed by section 15(4)(b) likely cannot be taken into account.

Conclusion

The law surrounding limitation periods presents challenges even for the most experienced litigators. Keeping up with new judicial interpretations of the *Act* is a critical part of any practitioner's continuing education - and can in some cases make or break a client's case. Given that limitations issues impact every litigation matter, it is important to develop a comprehensive strategy to address these issues and recognize potential novel scenarios not addressed in the *Act* or case law.

Note that this article is a general discussion of legal developments. It is not, and should not be relied on, as legal advice.

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MESSAGE FROM THE CHAIR & VICE-CHAIR OF THE OBA CIVIL LITIGATION SECTION 2024-2025

This year, the OBA Civil Litigation Section Executive is centered on a theme of renewal. With the review of the Rules of Civil Procedure underway and the increasing digitization of the Courts, this is a time of change. We are pleased to support Ontario litigators through this period. Our primary goals for this term are:

1. Meaningfully Contributing to Policy Consultations Impacting Civil Litigators

We aim to be a proactive voice in the policy discussions that affect civil litigators. By participating in these consultations, we strive to represent the interests and perspectives of our members, advocating for improvements that enhance the practice of civil litigation in Ontario.

2. Increasing Section Engagement

We are committed to deepening our engagement with members across the province. By fostering open dialogue, supporting CPD and social events, and by enhancing our communications, we hope to strengthen the connections within our Section.

3. Promoting Diversity and Inclusion

We aim to embrace the diverse perspectives and experiences that make our Section vibrant. We have increased diversity within the Executive this year and will prioritize inclusive dialogue. Our goal is to ensure that our initiatives and programming reflect the varied backgrounds of our members.

It is a privilege to serve as your Chair and Vice-Chair of the OBA Civil Litigation Section. We value the rich insights and experiences of our members, which contribute to making our Section a dynamic and supportive community. We welcome your suggestions for policy initiatives or CPD topics that reflect your needs and interests.

We look forward to a year of renewal and growth together.

Samantha and Adil

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