



The Perils of Dealing with Self Represented Litigants: Common Sense Steps to Reach Common Ground

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This presentation will focus on common pitfalls to avoid when dealing with a self-represented litigant and provide a checklist of steps to help navigate an effective course through the litigation from claims examiner through to counsel. An examination of some recent case law (Van de Vrande v. Butkowsky, 2010 ONCA 230 and Hanna v. Polanski, 2012 ONSC 3229) will provide insight into mechanisms available to deal with the difficult and unmeritorious claim, and also assist in outlining what considerations to make when settling a claim with an unrepresented litigant.

Chief Justice Beverly McLachlin noted in 2007: “our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure.”

Fast-forward to 2013. The number of unrepresented litigants is ever-increasing. In the past, oftentimes the mere fact that an individual was representing themselves likely meant their claim was without merit. Such is no longer the case.

The Unrepresented Litigant with a Meritorious Claim

Rather, a number of claims are being pursued by individuals without legal training, but with a viable action.

This has become especially prevalent in the domain of the small claims court, following the implementation of the Osborne Report in 2010, which increased the monetary jurisdiction from \$10,000 to \$25,000. No matter who you are, \$25,000 is a significant sum. And there are distinct advantages to “going it on your own”, given that costs in small claims court will only surpass 15% of the total amount claimed in the rarest of circumstances.

The Difficult Unrepresented Litigant with a Worthless Claim

While all counsel and claims examiners (some more than others) have likely experienced moments of frustration dealing with a difficult unrepresented litigant, we must accept, as both claims examiners and counsel, that the unrepresented litigant is here to stay, and will likely increase given the rising costs of, well, everything, including the costs of pursuing or defending an action.

Common Strategies for Dealing with the Unrepresented Litigant Generally

The following will hopefully provide a useful checklist of common pitfalls to avoid and common sense steps to take when dealing with an unrepresented litigant (regardless of whether their claim is with or without merit) and help to navigate an effective course through the litigation from claims examiner through to counsel.

1) Firstly, remember, above all else, **Take the Moral High Road**. While counsel are ethically obligated under the Rules of Professional Conduct to treat unrepresented litigants with respect, in the same way as dealing with opposing counsel, so too should the unrepresented litigant be treated from the outset of the file when the claims examiner first begins interacting with that individual. Avoid at all costs snippy email exchanges or terse letters. Always assume that one of your letters or emails may find its way as an exhibit to an affidavit before a judge, or in a document brief at trial. Be vigilant to avoid written communications that may be perceived as misleading, coercive, disrespectful, unreasonable or insulting -- no matter how much you may wish to actually get things off your chest, especially when the unrepresented litigant becomes difficult, unreasonable or plain rude.

Remember, while counsel and claims examiners see countless files and facts involving individuals on a daily basis, the unrepresented litigant is one of those individuals. To them, the lawsuit (whether frivolous or not) directly impacts their life, and they correspondingly have a very vested interest in the outcome. Compound this with the confusing myriad of court procedures which doubtlessly will intimidate and confuse the everyday citizen.

Treat the unrepresented person with respect, even if you have not been extended the same courtesy in exchange. It will do wonders for the file, and will simply make you feel better about your conduct and more positive about perhaps reaching a favourable result. Remember: you get more flies with honey than you do with vinegar.

2) **Set the Ground Rules Immediately**. Spell out at the outset of your dealings with the unrepresented litigant who you represent and that you will not be providing them advice. While this is more aimed at counsel, the same principle should be applied to the claims examiner. Counsel's first letter should indicate, clearly, that you represent an adverse party and you cannot provide any advice to the unrepresented litigant. So too should the claims examiner's first contact spell out that their insured is an adverse party and they cannot advise the unrepresented litigant on what steps to take. Make it clear who your insured is. Keep it brief. Do not argue with the unrepresented individual in email exchanges. Set the ground rules from the outset in that first communication, all the while keeping tip #1 as your guidepost. And on the topic of that first communication . . .

3) **Keep Everything in Writing**. As a rule, when dealing with unrepresented litigants, all communication should be kept in writing. While this may drive up the cost and time on a file, and seems overly restrictive, it is absolutely critical to ensure nothing is misconstrued or misunderstood. Again, if problems arise later on the file (whether it be attempting to enforce a settlement reached, or bringing a motion to seek some relief vis-à-vis the unrepresented litigant due to their conduct) the written record will stand you in good stead and keep matters well documented and unassailable.

When writing to the unrepresented litigant, write like Hemmingway: Use short, declarative sentences. Short paragraphs. Be positive in your language, rather than negative. Say what needs to be said to put forth your position, and nothing more. It may not win you the Nobel Prize in Literature, but it will help to keep your dealings with the unrepresented litigant running smoothly.

4) **Be Proactive in Requesting Documentary Disclosure.** Request the documentation you need to assess the claim early. If it is a worthwhile matter, the unrepresented litigant will likely be glad to provide it. The unrepresented litigant will likely not know what to produce to help both sides have fruitful dealings on the file. If you succinctly explain what you need from that individual, and the reasonable reasons why you need it to assess their claim, it will move the yardsticks a great deal toward getting the matter resolved. If you believe the file can be resolved early, and the unrepresented litigant seems reasonable, make the request for the documents that will help you along the way. Even if the unrepresented seems unreasonable, make the simple, clear and brief request for documents to substantiate the claim (which will be useful before the court if indeed a motion is later brought seeking to dismiss the plaintiff's action as there is no substance to it).

5) **Play by the Rules.** Insist with the unrepresented litigant that the Rules be followed, especially if the individual becomes difficult. This means for counsel the Rules in the sense of the *Rules of Civil Procedure* and for both counsel and claims examiners, the rules of respect. This will limit a difficult unrepresented litigant's perceived control over a file and will also positively impress upon the court that you have taken the moral high road, despite unreasonable behaviour from the unrepresented litigant, thus setting you up for a better result and a favourable costs award.

It may appear that all too often judges are overly accommodating with an unrepresented litigant when technical breaches of the Rules occur, and the unrepresented litigant is given opportunities to correct those breaches (i.e., not complying with deadlines to file materials). While at first blush this seems unfair, remember, the judge's likely objective is to provide the unrepresented litigant with an opportunity to have their full case heard on the merits, rather than dismissing it on technical grounds. This has the effect of allowing the unrepresented litigant their day in court and access to justice. It never ceases to amaze how a day in court, and a verdict (even if it is not in the favour of the unrepresented litigant) will serve to ameliorate the unrepresented litigant's unreasonable behaviour, especially if attached to that verdict is a costs award.

6) **Recognize the Warning Signs.** There is always a possibility with a particularly difficult unrepresented litigant that your security, or that of your insured, may be at risk. Is the attitude of the individual shifting, becoming more hostile or suddenly charming? Has their communication become threatening, either subtle or overt, to you or your insured? Does the individual insist on meeting with you, or the insured, when there is no reason to do so? Does the individual keep harassing your insured? Does it seem like the matter is one of life and death for the unrepresented litigant?

If any of these signs are present, send the file to counsel. Do not attempt to continue handling it on your own. Oftentimes, the retention of counsel will quickly assist in getting the unrepresented litigant to correct their behaviour, or at the very least, provide for a number of resources to deal with their claim (and behaviour) before the courts.

And if things go awry, remember, we have mechanisms in the courts and you have talented counsel at your disposal to use those mechanisms to get you the desired result when the unrepresented litigant has become unreasonable, and their claim is without merit.

Rule 12 of the Small Claims Court and the Court of Appeal's Decision in *Butkowsky*

As the majority of unrepresented litigants reside in the small claims court, one such mechanism is the Rule 12.02 or "Butkowsky" motion to strike out a claim or defence because it (a) discloses no reasonable cause of action or defence; (b) may delay or make it difficult to have a fair trial; or (c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process.

Butkowsky was a case in which I represented the Appellant, Dr. Irwin Butkowsky. The plaintiff, Mr. Van de Vrande, was a self-represented litigant, not to mention a successful business man and well-funded. He brought an action in the context of a family law dispute over custody of his child. He alleged Dr. Butkowsky went beyond his role as an assessor appointed by the court in the context of a custody dispute between Van de Vrande and his spouse by attempting to mediate the couple's dispute, thereby breaching his contract and acting negligently. At the small claims level, we brought a motion to dismiss the claim as Dr. Butkowsky was immune from suit due to expert witness immunity (as he was a court appointed assessor) and on the ground that the limitation period expired. We were successful in having the claim dismissed.

Mr. Van de Vrande then retained counsel and appealed to the Divisional Court. The Divisional Court overturned the motion judge, finding that she "found facts", which was prohibited by analogy to R. 20 of the *Rules of Civil Procedure* of the Superior Court. However, it was not clear whether R. 20 ought to apply to the small claims court, or what the precise test, and evidentiary burden, ought to be when seeking to dismiss an unmeritorious claim in small claims court. The case did raise an interesting issue: whether a "summary judgment" type motion was even available in small claims. We sought leave to appeal to the Court of Appeal, and having interest in determining whether "summary judgment" was available in small claims, Justices MacPherson, Weiler and MacFarland granted us leave.

Our eventual appeal was allowed. The Court of Appeal held that, although summary judgment was not available in Small Claims Court proceedings, the Small Claims Court judge was entitled to consider whether or not Van de Vrande's claim should have been struck because it was a waste of time and if so, to strike his pleading. The materials before the Small Claims Court judge supported her conclusion that Butkowsky was protected by expert witness immunity from liability to Van de Vrande. The materials also supported her conclusion that de Vrande's action was statute-barred.

At paragraph 19 of the Court of Appeal decision, Rouleau J.A. states:

- 19 Conceptually, I view r. 12.02 as being situated somewhere between the rules 20 and 21 of the Rules of Civil Procedure. ... It is a motion that is brought in the spirit of the summary nature of Small Claims Court proceedings and involves an analysis of whether a reasonable cause of action has been disclosed or whether the proceeding should be ended at an early stage because its continuation would be "inflammatory", a "waste of time" or a "nuisance."

At paragraphs 20 and 21, Justice Rouleau went on to state:

- 20 In my view, the references to actions that are inflammatory, a waste of time, or a nuisance was intended to lower the very high threshold set by r. 21.01(3)(d)'s reference to actions that are frivolous, vexatious, or an abuse of process.
- 21 It bears remembering that r. 12.02 motions will often be brought and responded to by self-represented litigants who lack the extensive training of counsel. The test to be applied on such a motion ought to reflect this, and avoid the somewhat complex case law that has fleshed out the Rules of Civil Procedure.

The case is significant for a number of reasons. Firstly, it clarified that R. 20, or R. 21 of the *Rules of Civil Procedure* of Superior Court ought not apply by analogy when seeking to dismiss an unmeritorious claim in small claims court. Rather, conceptually, the small claims mechanism sat somewhere between R. 20 and 21. The Court therefore did not feel compelled to re-write the Rule, but rather emphasized that claims could be struck under the existing wording of Rule 12.02.

Secondly, the Court noted the fundamental importance of such a motion being brought, or defended by, unrepresented litigants. Noting that it is a motion “brought in the spirit of the summary nature of Small Claims Court proceedings” its aim is to examine whether a reasonable cause of action has been disclosed, or whether it is “inflammatory”, a “waste of time” or a “nuisance”, thus warranting the dismissal of an action. This language, and the Court’s acknowledgement that the motion will involve self-represented litigants, makes it easier for counsel to bring the motion on the merits and not be faced with the all-too-familiar response from the unrepresented litigant that they do not have the ability or skills to defend such motion (despite being able to navigate the court process up until that point). In fact, since the Court of Appeal clarified how an unmeritorious claim was to be dismissed in *Butkowsky*, a consistent number of reported decisions on such motions have involved at least one party that is self-represented. This has had the effect of enabling counsel to be confident in the small claims court that a worthless claim will be dismissed on its merits.

Thus, while dealing with an unrepresented litigant who advances a claim without merit may be difficult and frustrating, it is important for claims examiners to feel assured that their counsel can bring a R. 12.02 motion and seek to dismiss the claim, and post-*Butkowsky*, the small claims court has been mandated to entertain such motions and grant the appropriate relief, given that the Court of Appeal’s decision has clarified and outlined the operation of the motion. This is significant when dealing with unrepresented litigants, especially when one considers that prior to *Butkowsky* being decided, a number of small claims court judges would refuse to hear a motion to dismiss a claim and would simply move the matter on to trial. In fact, in our materials on our motion for leave to appeal to the Court of Appeal, we had cited an interview with a small claims court judge who confided that a number of his colleagues on the small claims bench would simply refuse to hear the motion as they felt it was unavailable under the small claims rules. Such is no longer the case, and post-2010 counsel can now confidently bring a motion to dismiss the unmeritorious claim of the unrepresented litigant, thus sparing the expense of being forced to proceed through until trial.

Of course, another option of resolving a matter with an unrepresented litigant prior to trial is to settle the case. When doing so, however, there are a number of considerations that must be taken into account so that the settlement will be upheld if ever challenged in the future. *Hanna v. Polanski* recently outlined these considerations, and provided some useful lessons to be learned.

The decision in *Hanna v. Polanski*, 2012 ONSC 3229 - settling a claim with an unrepresented claimant

The decision in *Hanna v. Polanski* addresses a summary judgment motion to dismiss a claim brought by a plaintiff who signed a release prior to having legal representation.

1. Facts

The plaintiff was involved as a passenger in a motor vehicle collision with a vehicle owned and operated by the defendants, who were insured by Old Republic Insurance Company. The insurer retained an adjusting firm to adjust the loss. The plaintiff, who was not represented, provided a written statement 5 days following the accident to the adjuster advising that he had not yet sought any medical attention, although he was to see his family doctor later that day. He had low back pain and headaches and had missed only 2 days from work as a drywall tapper.

The adjuster had a further conversation with the plaintiff approximately 6 weeks following the accident. He continued to complain of a sore low back but had lost no further time from work, had received no medical treatment and had not applied for statutory accident benefits. Based on this information, the adjuster believed the plaintiff had suffered minor injuries and would likely not meet the threshold then in place under the *Insurance Act*, which provided for a \$30,000 deductible. She reported to the insurer and received instructions of \$2500.00 to resolve the matter, which was offered to the plaintiff approximately 7 weeks post-accident. When cross examined on her affidavit in support of the motion, the adjuster insisted that she advised the plaintiff with respect to the definition of the threshold, the \$30,000 deductible, and the implications of a final release, and also told the plaintiff that he was entitled to seek legal advice regarding the offer. The plaintiff denied that he had received any of this information from the adjuster.

By the plaintiff's own evidence, he rejected the offer and advised the adjuster that he was going to seek legal advice, which he subsequently did. He was advised by a lawyer that it was too early for him to be able to give evidence regarding the offer and that he had 2 years to sue. Approximately one month after the offer was made, the plaintiff then contacted the adjuster, settled for \$5000.00 and subsequently executed a full and final release.

Approximately 4 months after the settlement was entered into, the plaintiff attended at a hospital complaining of pain, and for the first time had treatment approximately 6 months later (14 months post-accident).

The plaintiff argued that that the release should be set aside on the basis that it was unconscionable.

2. Court's Analysis

In order to set aside a release as being unconscionable, the following 4 elements must be satisfied:

1. A grossly unfair or improvident transaction:

To determine if a settlement is improvident, the court will look at the information available *at the time of settlement*.

Based on the information that the adjuster had at the time of the settlement, the court concluded that it was not unreasonable for the adjuster to conclude that the plaintiff's injury was minor. Based on the information provided by the plaintiff up to the time of the offer, settlement of \$5000.00 could not be considered improvident, especially when the \$30,000 deductible and verbal threshold was considered.

2. Lack of independent legal advice;

Based on the plaintiff's own evidence, he clearly did seek legal advice.

3. Overwhelming imbalance in bargaining;

Settlement negotiations between a self-represented claimant and insurance adjuster is not necessarily evidence of an overwhelming power imbalance. Such a determination is fact specific and is made having regard to the claimant's conduct throughout the negotiations.

There was no overwhelming power imbalance in the negotiations. The plaintiff knew that he could seek legal advice which he did. He was also aware that he did not have to settle and had up to 2 years to sue.

4. Other party's knowingly taking advantage of the party's vulnerability.

Although the plaintiff alleged that he was financially and emotionally vulnerable at the time of the settlement, there was no evidence to suggest that the adjuster had any knowledge of it.

As the test for unconscionability was not met, the insurer's motion for summary judgment of the plaintiff's claim was granted.

3. Lessons from *Hanna v. Polanski*

A. It is critical that the claimant be advised of their right to independent legal advice. This should be communicated in writing and the claimant should be strongly advised to seek legal advice.

B. At the time of the offer, the adjuster should make best efforts to make themselves aware of the current state of the claimant's medical and employment status. This information should be asked for in writing from the claimant with supporting documentation.

C. A condition of the settlement should include an executed comprehensive release, including provisions with respect to the claimant's knowledge of their right to legal advice and lack of duress in entering into the settlement.