QUEENSLAND LAW SOCIETY PERSONAL INJURIES LAW CONFERENCE

9 August 2024

The “Three Ps” of Personal Injuries Legal Practice: Preparation, Principles and Presentation

Hon Justice David Boddice
Richard Douglas KC

Touchstones of the PI Litigator's Task

From the moment instructions are furnished by a client to pursue or defend a personal injury claim for damages, the touchstones for the lawyer's conduct in pursuit ought be:

- The operative germane legal principles (substantive, procedural and evidentiary).
- The evidence that need be assembled in construction of the client's case theory based upon that law.
- How that case theory can – and ultimately ought – be adduced by evidence and argument to be received favourably by the court upon the trial that may ensue.

The Calculus of PI Practice – plaintiff or insurer

- **First**, identify early what are the causes of action (and their statutory time limitation) available to the plaintiff, eg also nuisance, contract or ACL, and the defences available to the defendant (or insurer) respectively.
- **Second**, identify early the true merits and the likely true value of the claim, and by contrast the likely cost of its pursuit or defence.
  - “You can dress it up in calico and call it ‘Florence’, but a pig is still a pig!” per Keane JA.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Third**, assemble the necessary evidence – documentary, lay and expert – early and often.
  - The "three Ps" are a close companion of "the three Es – evidence, evidence, evidence".
  - Canvass – and be in a position to call, depending on apparent issue contest – corroborative evidence on liability and quantum of damages eg incident witness, work mate, former and current employer, family member.
  - Expert evidence on issues often required, but do not overdo it.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Fourth**, a **written case theory** ought be at the centre of your litigious endeavour, with the above elements being part of that case theory.
  - Such case theory, in part, will evolve over time (sometimes, by necessity, upon CC or mediation or even at trial depending how they play out).
  - Think of case theory always through the focus of how your client's case would be opened at a trial even if that will never ensue.
  - The case theory ought be developed, and reviewed, in concert with counsel engaged, and shared with and explained to the client (despite any lack of sophistication on their part) as it is their case.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Fifth**, never – as a mater of prudence on behalf of the client, or having regard to ethical considerations – posit to an opponent, or in a pleading or to a court by submission, a fact or proposition bereft of a reasonable measure of confidence that it is at least sensibly arguable.
  - To do otherwise projects a stance of desperation or incompetence.
  - Even if arguable, if it is weak, strongly reconsider its retention in the case theory.
  - As the case goes on, narrow your case and stick to your stronger evidentiary (including explanatory) and submissional points.
  - Avoid hubris or pomposity by not being prepared to recognise when the evidence or argument reaches the point that, for your client, "the game is not worth the candle", prompting the need to settle (if able).

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Sixth**, always proceed with the mindset that the claim, unequivocally, will proceed to trial – as opposed to be likely to settle at compulsory conference, later mediation or before trial – because to do otherwise risks gaps in evidentiary fabric of your client's case theory.
  - You must be thorough and persevere. That is your professional obligation, in particular in a hard case.
  - Cost is always a factor, in particular with claims of relative modesty and where (for a plaintiff) cost recovery is statutorily restricted, but you still need to put your client in a position to win. That is why cases settle aptly.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Seventh**, be cautious to ensure proper and thorough document disclosure by your client.
  - Never be tempted otherwise, because it is your practising certificate which is at risk.
  - If in doubt, disclose.
  - If the client resists, advise them of the fact you will withdraw. This usually persuades the client.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Eighth**, decide relatively early when you are going to brief counsel, and the level of experience of counsel apt to the case at hand.
  - Ought counsel to advise on prospects? Usually "yes" but only when core evidence assembled, and contested issues reasonably plain.
  - Ordinarily, in any claim of substance (even where liability is admitted),the case not having settled in the pre-proceeding phase, counsel ought be briefed to plead a statement of claim or defence.
  - The proper pleading of causation of damages is a constant problem so liaise with counsel on this issue in particular.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Ninth**, when completing a pre-proceeding NOC or in later pleading your client's case – in particular, if acting for a defendant, in drafting court pleading – make sure you tell your case theory "story", to your opponent to inform settlement, and to the judge reading them on the cusp of a trial.
- **Tenth**, constantly review the pleadings – by reference to your client's case theory – and comply strictly with the "surprise" and special plea UCPR rules 149 and 150 eg, pleading material facts from which alleged knowledge – actual or constructive – ought be inferred.
  - The nightmare scenario is the trial judge saying of your pleading to your counsel: "Where do I see that point raised in your pleading, Ms Smith"?

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Eleventh**, do not deliver a request for unless there is a review of the pleadings and a thorough advice on evidence, by solicitor or counsel.
  - The salient enquiries are: what do I need to do to prove my client's pleaded case? Can we be ready for trial?
- **Twelfth**, be sensible and competitive in negotiation at compulsory conference or thereafter, and advise on making a competitive mandatory final offer, or UCPR offer, in the case of the latter do so early so as to maximise the prospect of garnering indemnity (or any) costs from offer date under the pre-proceeding statutes or 2023 amended UCPR Rules.
  - Now both plaintiff and defendant may garner indemnity costs – from date of offer only – if a UCPR offer is made and beaten.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Thirteenth**, from the get-go keep a track of your witnesses – lay or expert – to ensure they are likely to be still around by trial, eg death, disability, retirement, imprisonment.
- **Fourteenth**, be mindful of the content of court practice directions (study them), in particular those which will require compliance before the proceeding is allocated a trial date, eg witness schedules, expert conclaves, despite those unfortunately ramping up costs no doubt to the chagrin of the client (again, plaintiff or defendant).

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Fifteenth**, proving critical business or institutional documents – never assume the opponent will ultimately admit the same – is as important as being able to adduce evidence from witnesses eg, medical records (relied on and assumed by medico-legal expert as accurate) or employment records, incident reports and investigations .
  - Attend to that either by early admission or by proving the same by affidavit under the various statutory means for doing so eg, principally ss 82 to 89, and 92 of the *Evidence Act* 1977 (Qld).

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Sixteenth**, never forget the importance of doing social media searches – including in the proceeding phase, principally leading up to trial – in respect of the plaintiff, defendant and the other principal lay-witnesses (including your own!).
  - It is extraordinary how those who engage in social media talk - and indeed overstate and lie - about their involvement as a claimant, defendant or witness in forthcoming litigation.
  - Be in a position to prove same – after witness cross-examination – if favourable to you.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Seventeenth**, speak early – or at least attempt to speak, and within ethical constraints – to the opposing witnesses, lay and expert – there being no property in a witness.
  - If a witness refuses to speak they can be taxed with that in cross-examination at trial, often for profitable response from the trial judge.
  - Document those discussions if they ensue.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Eighteenth**, and importantly, early and thorough – but ethical – witness conferences are essential – with lay and expert witnesses.
  - "Schooling" of witnesses is an ethical anathema, but taxing such witnesses with the documents and propositions with which they will be put in cross-examination will allow them to reflect in advance, rather than on the run in the witness box.
  - This assists also in evaluation of close-to-trial case theory strength and weakness, and informs consideration of settlement pursuit or response.
  - Sometimes the outcome of unfavourable witness conferencing of a non-core witness is to dispense with calling (do so before court ordered exchanged witness lists finalised if possible)

The Calculus of PI Practice – plaintiff or insurer (cont'd)

In "Advocacy in Practice" (5th Edition, 2011, LexisNexis) J L Glissan KC wrote (pages 17-18) about witness conferences:

> … [T]he [case] narrative should be explored by question and answer. How this is done will depend on the individual witnesses – **some witnesses may need to be searchingly cross-examined, especially where they appear to be hedging or embellishing, or to prepare them for anticipated attacks**. From this you should build your own proof of evidence … **[It is]useful to explain to witnesses, experienced or not, how to give evidence – not what they should say, but the mechanics of giving evidence**. This advice will include where to sit, where to look, how to address the court, appropriate clothes to wear and so on … [**W]here the witness is likely to come under strong attack, it is best to recognise this in advance.** You should safeguard the case the witness is being called to support, and where possible, anticipate and shield him or her from unpleasant shocks and surprises.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Nineteenth,** decide which opposing witnesses – and to what extent and in respect of what particular issues – need be impugned as to their testimony, such that cross-examination is focused and likely efficacious.
  - Gratuitous or shallow attack is unlikely to find reward from a trial judge.
  - Remember that testimony contrary to your case need be challenged (and hopefully effectively) in cross-examination, and if can't be, think again about settling (if able).
  - Fit too the opposing witnesses into your case theory.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Twentieth**, if the matter is go to trial, the endeavour is to have the judge believe (rightly) that the party's lawyers have engaged in preparation of their client's case – with all its virtues and vices – in a thorough and sensible way, with a recognisable case theory, and by adducing admissible evidence and proffering cogent argument such as to render it as easy as possible for the judge to find in your client's favour.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Twenty-first**, at all times – even if provoked – be, and be seen to be, courteous and polite to (within reason, but remaining firm with) your opposing lawyer at compulsory conference, mediation, in correspondence, in submissions or in court.
  - Judges hate discourteous correspondence or conduct by professional lawyers (or expert witnesses for that matter).
  - Always thank the opposing lawyers at the conclusion of any exchanges, as it dissipates tension. I do!

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Twenty-second**, never engage – and never develop a reputation of engaging – in undue overstatement of your client's case (again, plaintiff or defendant) in negotiation, interlocutory hearing or at trial.
  - Tone it down in correspondence and affidavits.
  - Proper (final) concessions in pleadings and at trial usually attract judicial reward for avoidance of time wasting and adoption of "real issue" proper disposition.
  - NEVER mis-state the evidence or law in written or oral submissions.

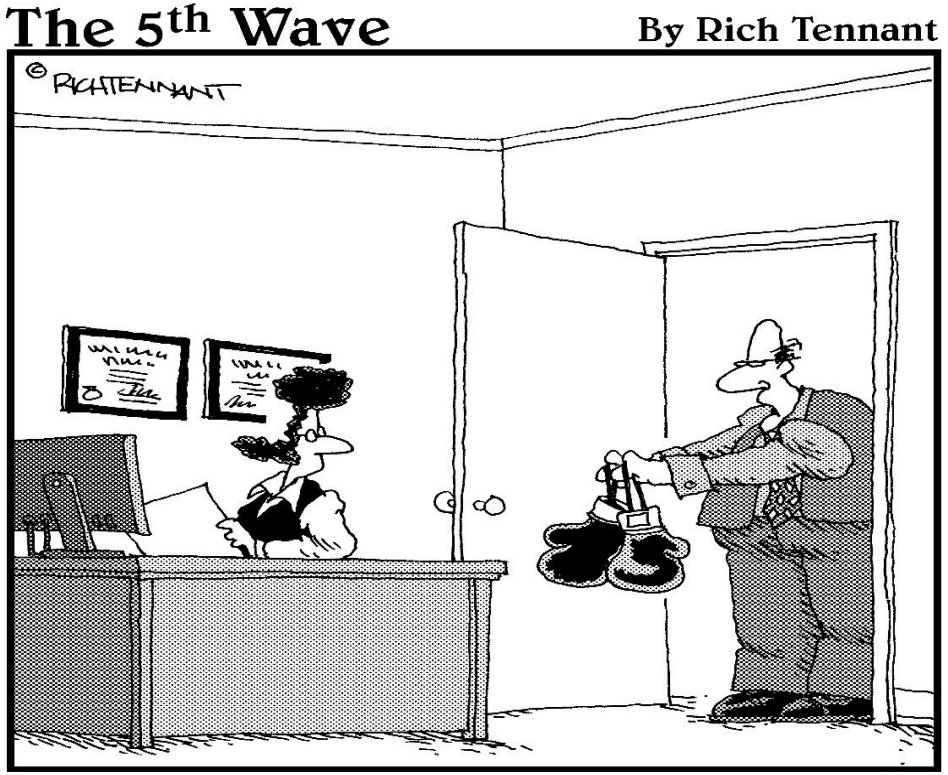
The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Twenty-third**, except where absolutely necessary, avoid adducing evidence by videolink or telephone, even if the evidence is expert medico-legal in character (see *Evidence Act* s 39PB), in particular if likely to be contested.
  - Experience dictates – despite additional expense entailed – that where evidence of any moment is adduced other than in person, the weight of that evidence diminishes.
- **Twenty-fourth**, whilst written opening and closing submissions, or submissions on evidentiary points (cf schedules) may be useful to a judge, they are no substitute for the persuasion which often emerges from oral argument, so do not overuse them.
  - Use of outlines spoken to at reasonable length, as opposed to entire written submissions, is more likely to detect the nuanced points upon which the judge might be troubled in your client's case, and thereby you can address the same.

The Calculus of PI Practice – plaintiff or insurer (cont'd)

- **Twenty-fifth**, in sum – to adopt a wider raft of "Ps" – in acting for your client you ought be provident, perspicacious, plead thoughtfully and thoroughly, persevere, be polite, prepare well, and you ought always maintain perspective. You should avoid pointless pursuit of arid points, prevarication, protraction, pedantry, pomposity and prolixity.

What you are hoping to avoid …

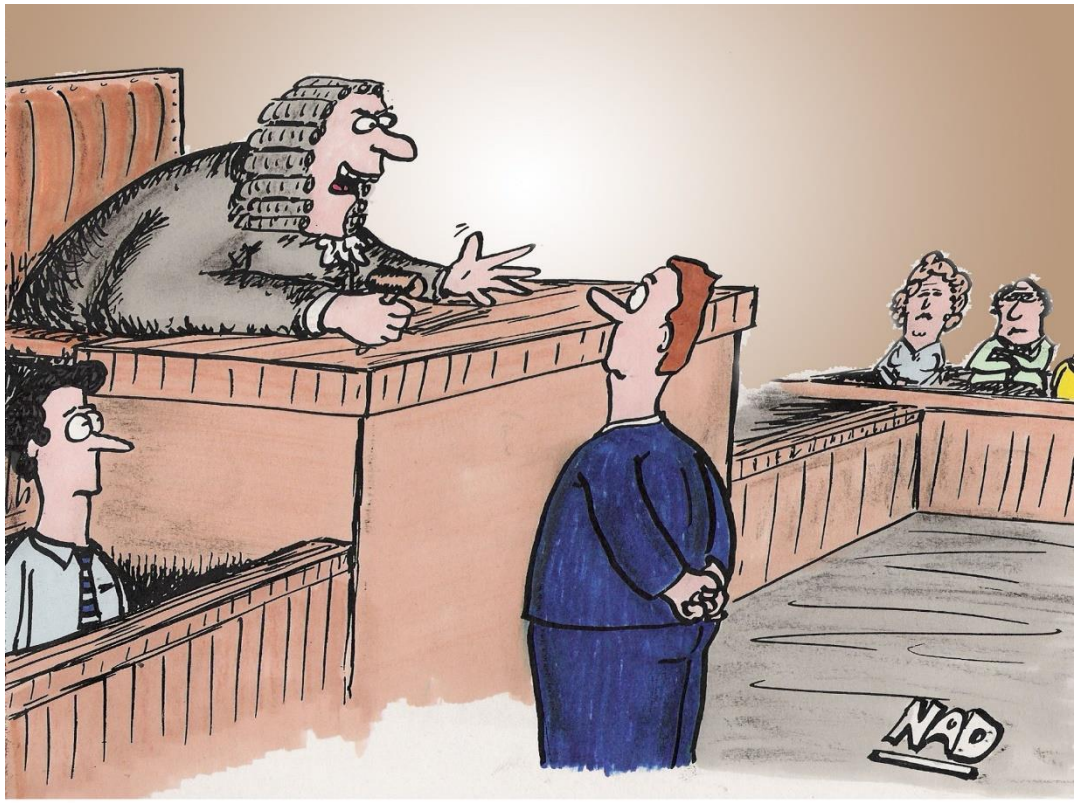


What you are hoping to avoid … (cont'd)

'I believe my trainee is putting together the trial bundle for you now.'

CartoonStock.com

What you are hoping to avoid … (cont'd)



"Seven years of Law at Harvard and the best you can do is 'liar, liar, pants on fire?!'"

QUESTIONS?