

# Preparing a case for trial: A judge's perspective

The advocate tries to persuade a judge to decide a case in a way that favours the advocate's client. Much has been written about the art of the advocate and the power of persuasion. Not so much has been written about advocacy and persuasion from the judge's perspective.

The judge looks at advocacy from quite a different perspective from that of the advocate. The judge is not so concerned about which side should succeed, but rather in achieving a just result, based on the evidence and correct application of legal principle. The judge would not be human unless having a concern, too, to give a judgment that will withstand attack on appeal.

A judge has different day-to-day pressures from the advocate. An advocate, especially senior counsel, will commonly spend long periods out of court seeing witnesses, conducting research and preparing other aspects of their case. A judge at first instance typically begins hearing a case knowing only what appears in the pleadings. Whether or not the case is heard on circuit, the judge will probably start hearing a new case as soon as addresses have been completed in the previous one.

In the New South Wales District Court, daily transcript is not usually

available. A wait of four to six weeks for transcript is not uncommon. A number of judges suffer from repetitive strain injuries through excessive note-taking. Original pleadings, affidavits and exhibits should not be used by a judge to make notes on or to highlight significant matters. In the District Court, a judge does not have the research facilities available elsewhere.

I mention these matters to show how much good documentary preparation by legal practitioners can greatly assist in the smooth and efficient running of a case. My practice is to mention some of these matters during the running of most civil cases I hear. My words usually fall on deaf ears.

The following pointers in the running of any civil case are equally applicable to the representation of plaintiffs and defendants. They will help the judge to understand and follow the case. They will make the judge's life easier and will assist judgment preparation. A judgment will be given sooner. It will be more likely to withstand appellate

attack. The judge will be happier and the courtroom will be a more relaxed place.

1. Provide the judge with working copies of every significant document tendered, at the time of tender. Obviously with bulky documents this will not always be practicable, in which case only copies of relevant pages should be given.
2. A common court scene is of counsel tendering documents from subpoenaed bundles in court, explaining that there are no working copies as these had to be subpoenaed. Yet copy access is almost always given to solicitors, and documents are available for inspection and copying weeks or months before the hearing. Copies are frequently in counsel's brief, and sometimes the latter end up as the judge's working copies after gentle judicial prodding.
3. When bundles of documents are tendered, it should not take much imagination to put them in chronological order, yet that order is chosen in the minority of cases. Where ►

medical reports are concerned, a judge will make much more sense of them if they are all put in one mixed bundle, ordered chronologically. It is usually of no assistance to the judge to have a set of reports of one doctor, then another, yet that is how most are tendered.

- Judges are assumed to like reading documents from back to front, unlike the case of a book. This applies typically to sets of clinical notes. That view is incorrect in most cases. Chronologies, if accurate, are helpful in every case, and are usually provided. A chronology that is uncontroversial, and verified by a plaintiff, can be of great help to a judge, forming the introduction to the judgment, and avoiding the need for the judge to take notes of the matters covered.
- The best-prepared case will have a paginated set of documents, including pleadings, in chronological

order, with a chronology, and with copies of this set for the opponent and for witnesses.

- It should not be assumed that judges are familiar with authorities. Further, some judges are not computer literate. Even if they are, the authorities are not necessarily easily available to the judge. Copies of relevant cases should be provided.
- A judge will be expected to make factual findings. A carefully prepared written set of factual findings can safely be given to most judges as part of one's submissions, especially if supported by references to the evidence giving support to them. Not only will they help in the persuasion process, they will also help the advocate to refine the issues and see potential dangers for the case. Further, they can help the judge to avoid falling into error.
- Judges appreciate documents from both parties that suggest figures for

each head of damage. Calculations done correctly and in line with the evidence make the judge's task lighter, and the judgment less likely to go wrong, either by miscalculation or by leaving out a head of damage.

- Credit is a frequently under-prepared issue. Giving evidence is a frightening and intimidating experience for most people, especially if credit is attacked. A witness's time in the witness box may be made much easier, and credit rendered less vulnerable, by taking careful instructions about matters such as pre-accident disabilities, and by dealing with vulnerable areas in chief.

Attention to these issues will not guarantee success, but will make the case run much more freely. The judge will have less to complain about. The assistance should contribute to an early and less vulnerable judgment. The judge will have less pressure and will be more likely to see the justice in the case. ■



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Mark is a professional engineer, a qualified ergonomist and has been an APLA member for several years. His consulting group has advised about 2000 enterprises since 1977 in safety, engineering and ergonomics. He also assists many Australian law firms in their personal injuries matters, and has prepared over 5000 reports on public and workplace accidents. Mark appears regularly in court in several States, giving independent expert opinion, most commonly on **back and upper limb strains; machinery incidents; slips and falls; RSI; and vehicle accidents.** Fee options for plaintiffs include deferred payment, with special arrangements for regular clients. Details, a brief CV and a searchable list of cases can be found at [www.ergonomics.com.au](http://www.ergonomics.com.au)

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