Case theory and marshalling evidence

By Gerard Mullins

Developing a case theory and marshalling evidence doesn't start when a case is listed for trial. A fair and equitable settlement for your client is achieved by ensuring the case is adequately prepared. Marshalling evidence and presenting the best case for your client in the negotiation phase provides a far better opportunity to achieve settlement. Richard Douglas SC's thought-provoking paper to the Queensland State Conference of the Australian Lawyers Alliance on 18 February 2006 canvassed this issue. Here is an edited extract:[1]

'Most trials are disputes about the facts. Compared to factual uncertainty, uncertainty about the law is often relatively minor. That said, as noted below, what facts ought be marshalled will ordinarily be determined by what are the relevant legal considerations.

A common law trial is essentially an adversarial contest between two or more parties, each of which is determined to persuade the court to accept its version of events. A case theory is a version of events put forward by a party – it is a theory about what happened. It is a story but it is a legally significant story – that is, it is a story which, if accepted, has legal consequences.

A case theory is directed towards answering the first of the two questions subject to which a case must be formulated:

- what do we have to prove in order to succeed?
- how are we going to prove that?

The case theory is that which one sets out to prove. Knowing that, one then looks to identify what evidence one needs to adduce (if available), both in one's own case and in cross-examination of an opponent's witnesses.

The case theory has at its core an identification of each cause of action potentially available, the elements of that cause of action, and the elements of any defence to that cause of action which may have to be confronted.

The facts of any particular case have to be reviewed, at least ephemerally, to identify and develop the case theory.

For example, if the case involves a person electrocuted while operating a game in an amusement parlour, the case theory may be developed as follows:

- There was an electrical fault in the machine.
- The actual or potential defendants are the occupier of the premises, and the manufacturer of the machine.
- As against the occupier, the claim is in contract, under an implied term thereof, and tort.
- The claim against the manufacturer is both in tort and under the *Trade Practices Act* 1974 (Cth).
- In the case of the occupier, the duty was to exercise reasonable care, by reference to foreseeable risks, to monitor the amusement machine to ascertain it was safe.
- In relation to the manufacturer, there was either a defect in the machine per se for which there is strict liability under the *Trade Practices Act*, a breach of a duty of reasonable care, or the machine was not otherwise of merchantable quality or fit for purpose, in either case yielding liability.
- The case put against the plaintiff may be that he was misusing the machine at the time and thereby may be guilty, at the very least, of contributory negligence. But he knew nothing of the electrical fault.
- Serious injury resulted.
- What, precisely, were the various prospects open to the plaintiff – but for the injury – in relation to quality of life, economic loss and care, and what are his out-of-pocket expenses, and what is the position now due to the injury?

This case theory needs to be formulated **in writing**. It is **too late** to formulate that theory in the pleadings which follow the pre-proceeding protocol. To the contrary, an understanding of that case theory will be required (as will the evidence by which it has to be proved) for the purposes of preparing for the statutory compulsory settlement conference (in Queensland). Such theory, and in turn the identification of the evidence supporting it, will need to be available to the pleader (whether or not that be counsel) so he or she can effectively and comprehensively plead and particularise the case.

It is no different acting for a defendant. The case theory for a defendant must not just address matters in respect of which the defendant bears the onus of proof (for example,

volenti, contributory negligence) but must identify by reference to the various elements of the case for the plaintiff, a case that 'trumps' the plaintiff's legal case.

From the defendant's perspective, not only must any flaws in the legal framework of the plaintiff's case theory be identified, but a defendant's theory must be adopted (if possible) that impugns the persuasiveness of the factual theory underlying the plaintiff's case theory.

Putting it, perhaps, in more simple terms: the defendant develops a case theory which is either at odds with the plaintiff's case theory, or proceeds on the footing that the plaintiff cannot satisfy the persuasive onus in order to succeed.

Palmer says that there are six broad elements in preparing the case theory:

- Ensure the case has a solid legal foundation.
- Identify all the elements of the legal case.
- Carry out any legal research into areas of uncertainty associated with the legal case (not just as to substantive law but procedural law – for example, ensure that the evidence likely to be canvassed is in fact admissible).
- Check that the legal case, if successful, will provide the plaintiff with the remedy he or she is seeking (for example, search for further defendants if there is a prospect that the most obvious target defendant may be without insurance cover or independent means sufficient to meet any judgment, thereby avoiding a pyrrhic victory).
- Match the factual theory to the legal case.
- Analyse the evidence from the point of view of proving the case.

I now move to the factual theory and the canvassing of the evidence. Rarely will you be able to fit the facts within any decided case. Each case is different. What this points up is the importance of ensuring that the factual theory developed is consistent with the over-arching instructions from the plaintiff who will generally (but not always – for example, a child) be your most important witness.

In some cases the factual theory by which the case theory is to be proved will be unduly complex. Most times it won't be, but the same effort is required.

When preparing the factual theory, keep in mind the touchstones of plausibility, simplicity, consistency, clarity and flexibility.

Try not to pin all your hopes on one witness or piece of documentary evidence, although often that will be unavoidable. Always try to line up fall-back positions on any factual issue, including damages.

In preparing the factual theory, you should always formulate a view (intellectually change sides to do this) as to what the case and factual theory for the opponent is likely to be. Be mindful of addressing the evidence on your case theory by reference to the other theory. Without such care, you may inadvertently end up proving the opponent's case for it by identifying and ultimately leading certain evidence.

Upon concluding that marshalling of the evidence for the factual theory, you must be prepared to change the case theory.

In essence what is being developed, in this regard, is a 'battle plan' for the conduct of your case, both at the settlement conference and, if necessary, ultimately through pleadings and at trial. ■

Note: 1 Richard Douglas SC acknowledged extensive use of the text by Andrew Palmer, *Proof in the Preparation of Trial*, (Thomson, 2003). He described the book as "truly an excellent text which any litigating practitioner ought to read".

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