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Case analysis - approaches and outcomes by me (Supreme Court of Western Australia)

Before embarking upon any attempt at case analysis or case theory, I need to lay down some underlying bedrock premises concerning the nature of a barrister's task at trial.

After doing that I will then proceed to make some brief observations about case theory or case analysis on a two-fold basis, first at the macro level and then, secondly, as to a more detailed minutiae or, as you will see tomorrow, micro analysis.

First are the preliminary bedrock matters:

1. As Winston Churchill said when he took over as Prime Minister of Great Britain in the early phases of World War II: 'All I have to offer is blood, sweat and tears'. What I say here is although the process is subjective and there are many ways of going about the task, hard work and toil is unavoidable. If you are not prepared to accept or cannot deliver that level of commitment then do not accept the brief.
2. How a barrister goes about his or her task can be compared to how an artist goes about painting a picture on a blank canvas. The exercise is pure art. There are no prescriptive or mechanic structures to be enforced. We will all have our own different approaches. The uniquely subjective nature of the process and the individualistic styles in which the task is performed is what makes it so rich.
3. Never underestimate the magnitude of the task at hand in running a case to trial. You always need more time then what you think. Even if you are briefed early in a case and live with it as it works its way to trial, the last phase is always heavily time intensive. There are disadvantages as

well as advantages to being briefed early in a matter. Early assumptions and strategies need to be questioned. Furthermore, more often than not there are last minute changes from your opponent as they also gear up for trial and recognise earlier tactical errors. Ground shifting invariably occurs as the more intense focus is deployed. Make allowances for that in your busy schedules.

4. Do not put unnecessary pressure on yourself. There will be enough legitimate pressure. What do I mean? Accepting briefs in back-to-back cases; doing cases without a junior, when you really do need that assistance; squeezing yourself for time by doing other matters at the same time; putting in conferences on other matters at the end of a long day or before the trial day starts.

   Sometimes these things are unavoidable but dangers involved in terms of unnecessary pressure must be recognised. Every client thinks that their case is the most important case you will ever do. You will never be able to persuade them to the contrary. They need to get the message that they have your full undivided 100% commitment to their case.

   Of course one of the common ways of putting unnecessary pressure on yourself is by creating unrealistic expectations in the mind of the client at an early point and then horrifically concluding later that things are not as rosy as the client has been led to believe. A cautious and reserved approach to the client's prospects at trial is generally wise. Robust advice may result in you receiving crates of champagne at Christmas time but I assure you that a brief love affair with the client will rapidly crumble when less optimistic advice or, worse, the catastrophic defeat emerges.

5. You need to give yourself time to think about a case or to worry about it. Worry about it from different perspectives. Try and put yourself in the

mind of your opponent. Why are they fighting? What is their secret weapon that means this is going to be one of the few cases that actually goes to trial? What have you missed? These are the sort of things that keep us awake at night.

6. Put your stamp on the case. If I may be forgiven for invoking a military analogy, the position of the barrister running the case is like a General on the battlefield. Clients and solicitors may be compared to the government that engages the general for the battle but the battlefield decisions are the General's and the General's alone. In the courtroom the buck stops with you and you must accept that responsibility. There is nothing worse than a command confusion whereby various participants look at each other blankly, unsure of who is making the decisions. If you are engaged, it is your case and you take responsibility for it. Run it the way you see fit. That does not mean that the views or opinions of the solicitor and the client are not listened to and respected. They are. But at the end of the day it is your call.

7. It is a good idea but more than that an ethical responsibility these days to run a case efficiently. The process should be about reduction, to invoke a culinary analogy. Get down to the key essential distillation of your case. Be looking to jettison witnesses, unnecessary documents, redundant or duplicitous causes of action or unnecessary, or worse, inconsistent experts. Your responsibilities as barrister are indispensible to the court. You owe what is a paramount responsibility as an officer of the court, not only to act with ethical integrity but also these days to pursue an efficient case.

8. An unethical win, is no win at all. Take a long view of your career in the law. This is an area where a selfish approach is fully justified. You can lose a case in the short term and then move on to the next one. Time will

heal the pain of losing. But if you lose your reputation and your integrity then you have probably lost your career.

9. To the moves by your opponent. They probably tell you what the opposition is worried about and where it sees its strengths and weaknesses. Look to the reason behind late amendments and late witnesses being deployed. It is a fact of life. Expect it. Do not get angry about it and think of a strategy to cope with it. There is nothing easier to hit than a stable unmoving target on the battlefield.

10. For all the blood, sweat and tears associated with a thorough preparation, freshness and flexibility during the trial in order to seize an unexpected opportunity or meet an unexpected challenge is, in my view, about 40% of the task. Devise a strategy whereby you can prepare thoroughly but also stay fresh so that you can be responsive, cross-examine and pick up on the unexpected opportunities which will invariably arise.

11. Be realistic and always evaluate your performance after the event. Very few barristers if they are being honest will tell you after a case that they conducted it perfectly. Reflect on the hard lessons that are learnt along the way on the battlefield and commit to excellence. In that way you will make yourself a stronger performer at each ensuing battle.

I move then now to case analysis, or case theory as it is sometimes called. In this context there is a divide into what is known as macro and micro analysis.

Again, forgive me for speaking mainly from the perspective of a civil trial but that is where my background lies. From my observation of conducting as a judge criminal trials in front of a jury it seems to me to be the same essential tasks are involved from a preparation perspective.

Macro analysis

I start with the question of a case concept or case theory. At its essence this can be distilled down to the question as follows: 'How do I win this case?' The question is the same from the perspective of plaintiff or defendant and prosecution or defence in a criminal trial.

From a plaintiff's point of view there are a series of sub-questions which follow: What are my causes of action? Breach of a duty of care, breach of contract, a statutory remedy for misleading or deceptive conduct? Equitable relief for breach of fiduciary duty or for injunctive relief or prerogative relief of some kind?

You should be able to answer the question, 'What is my cause of action?' without opening your notes. It should fly off the tip of your tongue and you should expect that question from a judge early on the opening day.

Almost equally as fundamental is the question, 'What relief do I want?' Is it damages, is it a permanent injunction, is it an order quashing some sort of governmental or quasi-governmental decision?

Sadly, the end remedy is frequently neglected by reason of the allurement of the task associated with fashioning the cause of action but it is probably the most important question that needs to be addressed and a judge these days will usually ask it early - 'What do you want?'

An indispensible discipline early in the preparation phase is to draft out a minute of final orders. This is particularly important in injunction cases where the framing of the order can be problematic even in the face of theoretical success.

From the defendant's point of view, what are you defences? Are they factual, or is there a killer point of law that you rely upon? If so, is there a need to run a 5-day trial in order for the point to be evaluated?

Some observations about the present fact problems in terms of a case theory on behalf of the plaintiff and defendant can follow. We will explore them tomorrow.

Could a theory be, for instance, Lafayette is an opportunistic crook out to cash-in on the credibility and good will of the applicant's reputation?

From the respondent's point of view this is a case about freedom; freedom of competition and the efforts of an antiquated business to stop a fresh idea from being as successful as it should be.

The case concept is something of a safe harbour to fall back on in those difficult times when you have to think on your feet and ask yourself, 'What question do I ask this witness?' If you measure the witness' evidence against your case theory it helps you to evaluate whether you need to attack, defend or whether there is anything useful to be gained from the witness. It also helps your opening and your closing. But it needs to work.

And remember that someone's case theory is going to be rejected.

Once the case theory is in place then you can descend to the causes of action. For instance, a negligence case. From there you need to break down the elements of that cause of action in to the existence of a duty, the breach of the duty, damage caused by that breach and then damages. From the elements of the cause of action you can look to then the evidence to show that you can make good each of the elements of your cause of action. They should find their way into your statement of claim in the case of the plaintiff/applicant or your pleaded defence in terms of how you want to kick away as a defendant one or more of those essential building blocks upon which the causes of action are based.

The macro analysis then must involve a comparison of the parties' pleadings, in cases where there are pleadings. It is a little harder in corporations matters where each side files a raft of affidavits but somehow you need to find a skeletal basis for a case or a defence in that mess of material. Where there are

pleadings the task is easier and you can separate what is accepted and not in contention from what is. At that point you really reach what I regard as the more micro analysis of the case.

Micro analysis

This generally boils down to two things in answering the question, 'What evidence do I need to win?'. I refer to documents and witnesses.

There are different ways of winning - am I going to win on the facts, in which case that might give me an edge in defending any subsequent appeal, or am I going to win on a legal point? Do I need any witnesses? Can I prove this case on documents which are business records which can go in early? That is an increasingly used tactic these days where the amenability of courts to receive documents is much greater than it was in days gone by.

An indispensible tool in this process of micro analysis is an evidentiary chronology. This is a chronology sourced by reference to either documents or witness evidence in order to prove the elements of the cause of action you need to win.

Here the case can also be divided into - to adopt a basketball analogy - offence and defence, hence from the perspective of cross-examination. What are the minimum bases that I need to touch in order to satisfy the rule in ***Browne v Dunn***? This is DEFENCE. What are the cross-examination areas that have to be put?

But, having satisfied that minimalistic obligation, then, where can I ATTACK? Where are the vulnerabilities in the other witnesses from my sources that I can use to destroy their case? Do I have that destructive document that is signed by the witness which is directly inconsistent with what they have told the court on oath? If I do, how am I going to deploy it? Early in the case or late? Possibly even in opening and put some doubts in the judge's mind even

before the other side's witness gets in the witness box. Be thinking about that all.

Also at the end of the micro analysis, revisit your overall battlefield strategy plan. Does my case theory still work? Are my pleadings comprehensive or do they need a final tweaking? What has my opponent done that I need to respond to? How long will the case go? Are there any local rules in the court that I am appearing in that need to be met?

From the defendant's point of view the same process is taking place except inherently from a negative perspective. Usually the defendant is asking, 'How do I get in to this case at an early time, rather than sit there and let the applicant roll over me?'

There are ways of addressing that that I will be happy to talk to you about as the course progresses.

Those are thoughts only. I just reiterate that the nature of this course is not about the imposition of 'Do's and Don't's'. It is about helping you bring out the best in yourself.

Good luck this week.