UNSW CENTRE FOR CONTINUING LEGAL EDUCATION

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TOPIC 2 – PILLARS OF LITIGATION: CASE THEORY

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OVERVIEW

This paper is an outline for a one-hour seminar which considers the utility of a case theory to a practitioner for the effective conduct of litigation on behalf of a client.

This paper does not purport to be the first or last word on the topic. Legal practitioners will be mindful of the importance of the unique nature of each dispute, due to the particular factual and legal issues which arise, to allow the practitioner to determine the appropriate conduct of litigation in an individual matter.

Legal practitioners are cautioned to rely on their own research and enquiries to advise clients.

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A. Introduction

> "*… it is not the case law which determines the result; it is a clear and definite solution, if one can be found, of the difficulty the case presents – a solution worked out in advance by an apparently sound reconciliation of fact and law.*"[1]

1. Civil litigation in a court or tribunal[2] provided by the state is a vehicle for the resolution of disputes between adverse parties by an impartial decision maker[3].

2. Judicial decision making technique involves a judge applying the law to factual findings specific to the instant case with an aim to resolve the dispute[4].

3. A court affords to each party an opportunity to be heard as to its contentions as to facts, law and relief. A practitioner representing a party seeks to persuade the court of the justness of the party's case, including the manner in which the dispute ought to be resolved by the court. A practitioner aims to have his or her party's case adopted by the court, in preference to the opponent's case.

4. Defining success in litigation requires an early assessment of the more likely legal outcome arising from the factual matrix underpinning the dispute, to understand what might be achievable for a client.

5. It is only by a realistic and objective assessment of possible outcomes that the practitioner may give practical advice to a client as to outcomes. Early identification to a client of challenges and of potential adverse outcomes allows an achievable goal to be established in the case, which will be a means to measure success. The alternative approach of engendering in a client an overly optimistic expectation of the outcome of litigation, which is not met upon the resolution of the dispute, is likely to lead to discord between practitioner and client.

6. Thus a prudent and sensible practitioner will aim to define success in litigation for a client well before the dispute is heard by a court. Necessarily such a definition will be susceptible to change with new facts and information as the litigation progresses. For a client, such intelligence allows a client to make informed decisions, including as to the possible personal and commercial ramifications for the client arising from the potential outcomes to the dispute.

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1 Sir Owen Dixon *Jesting Pilot* (Law Book Co, Sydney, 1965) at page 250
2 For convenience referred to as "the court"
3 For convenience referred to a "judge"
4 "… *the central concern of the exercise of judicial power is the quelling of controversies.* …"

7. A theory of a case or a "case theory" is a practitioner's statement of the means to achieve a realistic outcome for a client. In essence it is the strategy by which a practitioner will run a client's case to the conclusion of the litigation.

8. A case theory has been likened to the plans for the construction of a house. Alternatively, it is analogous to an artist painting a picture from a fixed perspective, in that a practitioner prepares and presents a client's case from the perspective of the case theory.

9. The case theory is a cogent statement of a practitioner's philosophy and the means by which a client will be entitled to the desired judgment from the court that he or she is seeking on behalf of the client. Like using a map to reach a destination, a case theory provides guidance for a practitioner.[5]

10. A case theory informs every aspect of the pre-trial preparation and in court conduct of a client's case.

11. For a practitioner effectively to advocate a client's position to the court, that position must be understood long before trial. Furthermore, trial advocacy begins long before the parties take a hearing date. Rules of court often will inhibit the amendment of an existing case or the advancement of a new case at a later stage. At best the client will suffer an adverse costs order, at worst any necessary amendment may not be permitted for reasons such as prejudice to the opponent or the descent of a limitation bar.

12. A case which is presented to a court in a cohesive and consistent manner which develops and reinforces a client's position from opening to closing submissions is more likely to be understood both by the practitioner and the judge.

13. Summary: A case theory is a statement by a practitioner of a client's strategy for the litigation. During the course of litigation it is an efficient and effective means for the conduct of, and to address issues arising, in the course of running a client's case.

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[5] *If you don't know where you're going, you'll end up someplace else*: Yogi Bera

B. Developing the case theory: elements and methods

14. Conventionally the case theory has two limbs:

    (a) Legal case: this is an articulation of the essential elements of law which found a client's case to be advanced by a practitioner in the litigation.

    (b) Factual theory: The factual theory is a recitation of the relevant matters of fact which are relied upon to advocate a client's case. A contest as to differing accounts of factual matters is frequently the catalyst for, and the driver of, civil litigation.

15. Each limb of a case theory is indispensable to the other. The content of each informs the other. Without one there is no use to the other.

16. The development of an effective case theory requires a practitioner to know what the dispute is about, in the sense of the overall factual matrix and the basis for the competing claims.

17. This may be achieved by a practitioner carrying out a case analysis prior to developing a case theory for a client.

Case analysis

18. A case analysis is most effectively performed by a practitioner adopting an objective approach to the factual and legal contentions made by each party.

19. In one sense, the practitioner looks at the matter from the detached perspective of a judge. During this process first impressions gained are invaluable and if possible should be preserved in writing. This will allow a practitioner to identify potential impressionistic challenges to the client's case which may arise for the court when a judge first hears the case. It will also identify problems requiring solutions for the further effective conduct of a case for a client.

20. If the dispute has been defined by pleadings, the preparation of a document containing an analysis of agreed facts and issues in dispute allows a degree of focus to be brought to the conception of a case theory.

21. There are many good questions to ask and answers to be sought at this early stage. It is prudent to write down questions which do not have an answer, as

the issue which informs the question will endure long after the thought has passed.

22. A specific analysis of the legal issues and the factual issues may be performed after a practitioner achieves a degree of awareness of the scope and nature of the proceedings.

23. In litigation one party usually will claim an entitlement to a remedy or relief (**relief**) from another party arising from equitable principles, or arising at common law, or from rights pursuant to a statute (**a cause of action**).

24. Three essential legal concepts arise in regard to a cause of action. *First*, the legal elements of the cause of action asserted. *Second*, the nature of the relief claimed, including whether the cause of action gives rise to such relief. *Third*, the jurisdiction of a particular court to grant the relief claimed.

25. Of relevance to each will be the operation of, and often the construction of, the provisions of legislation engaged by the matter in hand. Examples are the *Limitation Act 1969*, or apportionability legislation, eg: *Corporations Act 2001* Div 2A, "*Proportionate liability for misleading and deceptive conduct*".[6]

26. An analysis of legal issues requires the practitioner to understand the overall factual matrix to identify the relevant facts and the facts that are in dispute.

27. As part of this process a detailed chronology is an indispensable tool for civil litigation, particularly if the matter is complex or there are complex factual disputes. This is a document which will invariably evolve during the course of the litigation.

28. If the dispute is founded upon the effect and meaning of contemporaneous documents, an early and considered analysis of the genesis and content of each document will be beneficial to the long-term conduct of the matter.

29. Creation of a document library at an early stage will assist to convert unknown facts into known facts. Surprise is rarely an enjoyable experience in litigation.

30. Actively reading all available witness statements or affidavits with a sceptical and critical eye, and marking up facts which appear improbable or matters

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[6] See eg: *Selig v Wealthsure Pty Ltd* [2015] HCA 18

which may be subject to cross-examination further assists in the process of understanding the dispute.

31. The analysis of expert reports advanced by each party is best achieved by focusing on the qualification, the claimed expertise, the assumptions relied upon, the reasoning process set out by the expert and the content of the opinion, including whether it lies within the area of the expert's expertise.

32. From this process a practitioner is likely to develop an understanding of who are the key persons and likely witnesses for the case advanced by each party and what factual issues each party is likely to rely upon.

33. The case analysis should provide to a practitioner an understanding in broad terms of the client's case theory and also the opponent's likely case theory.

Case theory

34. With the benefit of the case analysis the practitioner may then develop the case theory. This process may be guided by the Occam's razor principle: in explaining a thing no more assumptions should be made than are necessary.

35. The legal application of this principle when applied to the case theory is to limit its content to the relevant issues in dispute and only the facts necessary to establish the client's case. Recourse to the KISS Rule will assist. This approach presupposes the identification of the real issues in dispute.

36. The case theory is best captured in a document. Even the very best minds are fallible with the passage of time and the potential for important details to be lost. It is difficult to recall that which has been forgotten.

37. The case theory (and that document recording it) is highly likely to change during the course of a case. It is a mistake to draft an initial case theory document with the precision and detail of closing submissions. It remains a work in progress for the entire case.[7]

38. An early draft of the case theory may be brief and should express concisely the compelling propositions for a finding by the court in favour of the client, eg:

[7] *A good plan today* is better than a perfect *plan* tomorrow" ... U.S. General George S. *Patton*, Jr.

> The plaintiff seeks to recover monies from the defendant guarantor pursuant to a higher purchase contract which obligation the plaintiff says arises from the terms and conditions of a written contract. The defendant denies that he is indebted to the plaintiff. The defendant says that there is no evidence to allow the plaintiff to prove the terms of the guarantee alleged by the plaintiff to recover the monies claimed.

39. The client's legal case may be articulated on a propositional basis for the components of the relevant cause of action, supported by authority for each proposition. Performing this task at an early stage has great advantage to inform the content of opening and closing submissions.

40. The client's factual theory is in essence the version of events contended for as findings by the court. A chronological approach is the simplest and most easily received way to tell the client's story.

41. Ongoing testing of the client's factual theory, particularly against contemporaneous documents and other irrefutable facts is essential.

42. An objective approach to the evidence of witnesses to be relied upon by the client at trial is essential. The practitioner will be sceptical and test claimed recollections of events from many years ago which are not supported by contemporaneous notes or documents.

43. One area of evidence for particular care is the assertion of conversations the content of which are relied upon as containing actionable representations uncorroborated by contemporaneous evidence. See: *Watson v Foxman* (1995) 49 NSWLR 315 at 318 to 319:

> *Where in civil proceedings, a party alleges that the conduct of another was misleading or deceptive, or likely to mislead or deceive (which I will compendiously describe as "misleading") within the meaning of s52 of the Trade Practices Act (or s42 of the Fair Trading Act), it is ordinarily necessary for that party to prove to the reasonable satisfaction of the Court (1) what the alleged conduct was, and (2) circumstances which rendered the conduct misleading. Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the Court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often*

> *subconsciously, by perceptions of self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.*
>
> *…*
>
> *Considerations of the above kinds can pose serious difficulties of proof for a party relying upon spoken words as the foundation of a cause of action based on s52 of the Trade Practices Act (or s42 of the Fair Trading Act), in the absence of some reliable contemporaneous record or other satisfactory corroboration. …*
>
> *I have the clear impression that Mr Foxman's memory of conversations in 1990 between himself and Mr Cross is not sufficiently clear to enable him to actually recall any of the critical words said to have been used by Mr Cross in the conversation deposed to in para 8 of his affidavit. I believe that his account of that conversation is predominantly a reconstruction made some years after the event.*
>
> *What I have said above as to the cause of action based on s52 of the Trade Practices Act (or s42 of the Fair Trading Act) is equally applicable, mutatis mutandis, to the causes of action based on contract and on equitable estoppel (with the added requirements, in the case of contract that any consensus reached was capable of forming a binding contract and was intended by the parties to be legally binding, and in the case of equitable estoppel that any representation alleged was clear and unequivocal and was relied on to the substantial detriment of the representee). (my underlining)*

44. The case theory must be identified and adopted long before trial. It is only with the benefit of the strategy expressed in the case theory that effective preparation for trial can be completed.

45. The development of the case theory will also inform as to the strength or otherwise of the client's evidentiary case as well as the need for additional evidence to improve the client's prospects of success.

46. The case theory cannot be a rigid or static expression of the client's strategy. Changes to the perception of the case due to the receipt of new information and discovery of the existence of previously unknown facts is commonplace in contested litigation. The occurrence of such matters during the conduct of litigation for a client requires a practitioner to be alive to the need to review and adapt the case theory to accommodate new information. This process will continue until the conclusion of the litigation.

47. Summary: The development of an effective case theory requires a practitioner: *first*, to perform a case analysis to understand the nature and detail of the facts and matters underpinning the dispute; *second*, to identify the relevant legal and factual matters in dispute between the parties; *third*, to articulate a cogent statement of the law and factual findings and the consequent relief from the court contended for by the practitioner in a client's case; and *fourth*, to adapt the case theory to take into account new information arising during the progress of the litigation.

C. Use in making forensic decisions

48. The case theory informs forensic decision-making both prior to and during the trial.

49. The early identification of the client's case theory will allow causes of action to be identified, proper parties to be joined, cross-claims to be filed, interlocutory applications to be brought, notices to be served, and necessary evidence to be obtained.

50. During the pre-trial phase of litigation, the case theory will inform the conduct of the client's case at trial. This will include identifying necessary witnesses to be called or not called, and for the development of a trial plan.

51. The case theory will provide the structure and identify the relevant content of written submissions required to be filed prior to the trial.

52. The case theory will inform the conduct of the client's case at trial, including the first articulation of the client's case theory in the course of opening submissions.

53. During the trial the case theory is likely to be tested and to be adapted to accommodate new information such as new facts becoming known, or witnesses failing to come up to proof.

54. In the event of irrefutable evidence which undermines the client's existing case theory, decisions may be necessary as to whether an adapted case theory is sustainable or not, and whether settlement discussions ought to be explored.

55. New facts often require reassessment of perceptions previously held. An example is provided by the following radio case conversation released by US chief of naval operations:

- Please divert your course fifteen degrees to the north to avoid a collision.
- Recommend you divert *your* course fifteen degrees to south to avoid a collision.
- This is the captain of a US Navy ship. I say again, divert *your* course.
- No. I say again, you divert *your* course.
- THIS IS THE AIRCRAFT CARRIER *ENTERPRISE*. THIS IS A LARGE WARSHIP OF THE US NAVY. DIVERT YOUR COURSE NOW!
- This is a lighthouse. Your call."[8]

56. Summary: a case theory provides an important tool to decision-making in both the pre-trial and trial phases of litigation. It does so by being a ready reference for decision-making at short notice which is an occurrence well-known to litigation practitioners. By updating the case theory for a client during the course of litigation it also provides an effective measure as the basis for assessing a client's prospects of success.

D. Clarifying the likely evidentiary contest

57. The case theory should identify which party bears the onus of proof to establish the existence of the facts relevant to the cause of action in contest.

58. A client's case may then be prepared for trial by obtaining all necessary evidence for its case, such as relevant corroborating documents and expert reports in regard to economic loss.

59. The case of *Watson v Foxman*, which is considered above, demonstrates the need for careful preparation and if possible the obtaining of corroborating evidence to prove an oral representation which is the foundation for the client's cause of action.

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[8] Dabashi, Hamid, *Iran A People Interrupted*, The New Press, 2007, p 214

60. In the matter of *Toyota Finance Australia Ltd v Gardiner* [2016] NSWCA 162 McColl JA provides helpful guidance regarding the necessity for a plaintiff seeking to recover a debt from a defendant pursuant to an alleged guarantee, to advance probative and thereby persuasive evidence to establish the terms of the guarantee.

61. In the *Toyota* case circumstances caused the plaintiff to seek to rely upon inferences as to the guarantor entering into terms contained in a standard form booklet. Her Honour's reasons included the following:

> [1] **McCOLL JA**: …
>
> [2] The only issue at trial and on appeal was whether the appellant, Toyota Finance Australia Limited (Toyota), proved that the respondent, Mr Gardiner, had guaranteed the obligations of Gardiner Petroleum Pty Limited (in liquidation) (Company) under a number of hire purchase agreements entered into between July 2007 and August 2009 and varied on 20 July 2011 (variation). Toyota's pleaded cases at trial were that Mr Gardiner's liability as guarantor arose from the variations.
>
> [3] Toyota sought to establish Mr Gardiner was so bound as guarantor in the terms of a document described as "the Booklet 'Terms and Conditions'" (Booklet) referred to in Term Purchase Schedules (Schedule) Mr Gardiner signed in his personal capacity as guarantor in respect of each hire purchase agreement and variation. In a section of each Schedule headed "Receipt of documents", Toyota, as supplier, and Mr Gardiner acknowledged that the latter had received from Toyota a copy of the relevant Schedule and a copy of the Booklet (receipt clause).
>
> [4] Toyota did not call any evidence to establish that anyone on its behalf gave the Booklet to Mr Gardiner on any occasion he signed a Schedule or variation. Rather, Toyota called evidence from one of its employees, Mr Anagnostou, a "loss recovery manager", paragraph 13 of whose two affidavits (sworn in the separate proceedings Payne JA has described) asserted that each of the six hire purchase agreements Toyota claimed Mr Gardiner had guaranteed "incorporated a booklet of 'Terms and Conditions'" in the form of a document exhibited to his affidavit (Anagnostou exhibit). Mr Anagnostou's affidavits did not refer to the Booklet being incorporated into the variations, however Toyota submitted paragraph 13 should be read as "looking to … the form of the booklet" relevant to them.
>
> [5] The primary judge treated Mr Anagnostou's evidence, insofar as it asserted a conclusion of law on the issue of incorporation of the Booklet, as being "a matter for submission". In this Court, Toyota submitted that Mr Anagnostou's affidavit was "the recovery manager's understanding of the booklet that applied at that time in respect of these contracts".

[6] Toyota sought to establish through Mr Anagnostou's evidence that the Anagnostou exhibit, a "blank pro forma document entitled 'Term Purchase Agreement'", [1] was the Booklet referred to in the receipt clause. Clause 14 of the Anagnostou exhibit set out the provisions of the guarantee Toyota sought to propound as binding Mr Gardiner.

[7] …

[8] As Payne JA has explained, there was no evidence that Mr Anagnostou was in any way involved in any of the transactions Toyota effected, or purported to have effected, with Mr Gardiner. Further, the title of the Anagnostou exhibit did not correspond to what appeared to be the title of the Booklet referred to in the receipt clauses, whether those originally executed or those executed as variations. It is apparent, however, as can be seen from [7] above, that the words "Booklet … Terms and Conditions", which were used in the receipt clauses purporting to identify the Booklet, appeared on the face of the pro forma document, albeit not as its title.

[9] Mr Gardiner contended, and Toyota accepted, that the Anagnostou exhibit was created in December 2009, as evidenced by the printer's mark "TFS053 (12/2009)" which appeared on its last page. As will be apparent, that post-dates all the hire purchase agreements Toyota alleged Mr Gardiner had guaranteed. However, Toyota submitted that that date linked the Anagnostou exhibit to the 2011 variations, and that was sufficient to establish its case. Toyota also submitted that, having regard to the substantive identity between the description in the receipt clauses of the document Mr Gardiner acknowledged receiving and his failure to give evidence, the Court would infer that the Anagnostou exhibit was the Booklet referable to each variation.

…

[14] As I have said, Toyota also submitted that the court could be more confident in drawing an inference that the Anagnostou exhibit was the Booklet because Mr Gardiner did not give evidence. I would reject that submission.

[15] In considering whether an inference favourable to a party should be drawn, a court should have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so. This reflects the proposition that "evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." Thus, where a person bearing the onus of proof does not give or call evidence which that person is plainly in a position to give or call; and unless some explanation is given of this failure, the tribunal of fact is entitled to infer that this evidence would not have assisted that person's case.10

[16] The corollary is, as Hodgson JA explained in *Cook's Construction Pty Ltd v Brown*, that:

"[42]

> …where a party has to prove something and prima facie has available evidence that would directly deal with the question, a court will be very hesitant in drawing an inference in that party's favour from indirect and second-hand evidence, when the party doesn't call the direct evidence that prima facie it could have called, at least unless some explanation is given, or the circumstances themselves provide an explanation … "

[17] The rule in *Jones v Dunkel* only applies where a party is required to explain or contradict something: no inference can be drawn unless evidence is given of facts requiring an answer. The absence of a defendant "cannot be used to make up any deficiency of evidence". Rather, where an inference is open and the defendant fails to call evidence, the defendant's absence entitles the court "to be bold" in drawing an inference adverse to the defendant.

[18] Mr Anagnostou deposed in his affidavits sworn on 13 March 2015 in each proceeding that Toyota's system of record-keeping primarily consisted of electronic records, such that if Toyota received any documents "in hard copy", they were "usually scanned onto the computer system and the originals … destroyed." He also said that "from time to time, there may be some hard copy documents in addition to the electronic records". He added that all the documents to which he referred in each affidavit "have been sourced from the business records maintained by [Toyota]" in accordance with the system I have described.

[19] In a later affidavit sworn on 18 August 2015 Mr Anagnostou went into further detail about Toyota's computerised record system, apparently with a view to establishing the comprehensive nature of the records kept. Unsurprisingly, those records included the "[c]ustomer name, including and any guarantors" [sic, as in original], the "type of contract" and the "[t]ransaction history in respect of a contract". In addition, he deposed that Toyota's computer records stored "contracts [and] security documents".

[20] I would infer from Mr Anagnostou's evidence that documents such as the Booklet attributable to each hire purchase agreement and/or variation transaction between Toyota and Mr Gardiner would, or should, have been kept on Toyota's computer system. If it was not, the original should have been in Toyota's records, as the Schedule recorded that Mr Gardiner only received a copy.

[21] It is apparent from the Anagnostou exhibit that, assuming it to be one which related to the transactions with the Company and Mr Gardiner, the Booklet was supposed to identify in each case, the customer to whom it related. So completed, it formed part of Toyota's business records. It should, therefore, in accordance with its system, have been electronically available. If not, as I have said, the original should have been retained.

[22] Having gone out of its way to demonstrate the comprehensive nature of its computerised record keeping, Toyota did not call any evidence to explain why it did not, or could not, produce any electronic version, or the original, of any Booklet apparently completed at the time of each hire purchase agreement or,

relevantly, any variation which was the Booklet Toyota said it had supplied to Mr Gardiner. This is despite the fact that, as Payne JA has explained, it was given leave to re-open its case after the deficiencies in its case were identified on the first day of the trial.

[23] In my view, absent any evidence to that effect from Toyota, and when the Court is unable to connect the Anagnostou exhibit with the Booklet, the foundation for drawing a bold inference in Toyota's favour was not established.

62. Summary: establishing the evidentiary foundation for a client's case at trial – what has to be proved – is essential to a successful outcome. So too is undermining the evidentiary foundation for an opponent's case. The case theory provides to a practitioner the strategy and basis for both, which will guide the conduct of a client's case during litigation.

E. Informing cross-examination strategy

63. The strategy identified by the case theory will in its pre-trial development have necessitated a forensic consideration of issues and matters to be raised in the course of cross-examination of the opponent's witnesses.

64. One fundamental aim of cross-examination of an opposing party's witness is to obtain concessions favourable to your client's case. Such evidence is highly persuasive at trial and usually carries substantial weight with the judge.

65. The case theory allows the practitioner to identify facts and issues upon which relevant concessions may be sought from an opposing party's witnesses.

66. A second fundamental aim of cross-examination is to challenge an opposing party's witness as to matters of credibility and that witness's account of relevant facts. A practitioner must also identify facts or issues upon which the witness must be challenged to avoid the inferences which might otherwise be sought by the operation of the rule in *Browne v Dunn.*

67. The nature of a particular case may well identify that a better strategy is not to cross-examine an opposing witness, either at all or on a particular matter in issue.

68. Two examples show where such an approach is the more effective forensic course.

(a) *First*, where the evidence of a witness does no harm to a client's case, see the *Toyota* case considered above.

(b) *Second*, where the witness has failed to come up to proof as to an aspect of his or her evidence. An example is the omission by a key witness for the opponent to give evidence as to a relevant conversation relied upon for an actionable representation.

Raising the conversation brings the high risk that the omission made in chief will be rectified in either during the cross-examination and if not, by the opponent in re-examination of the witness.

69. Such forensic opportunities usually arise quite unexpectedly. They must be seized or they will be soon lost.

70. Summary: Swift and confident decision making during cross-examination is facilitated by a practitioner having the advantage of having developed an effective case theory for the client's case.

F. Identifying the content of submissions

71. Conventionally submissions are made orally and also in writing. A case theory allows each means of advocating a client's case to the judge to have cohesion. Dissonance as to the client's case arising from the content of submissions at different stages of the litigation is likely to undermine the strength of a client's case. The theme of the client's case may be seen as confused or uncertain.

72. In a trial there can be five major opportunities to make submissions to the judge and incidentally to the opponent. *First*, an outline of written submissions provided to the judge in advance of the trial. *Second*, an oral opening by the practitioner at the commencement of a party's case. *Third*, oral submissions at the conclusion of the trial. *Fourth*, a written outline of closing submissions to which the practitioner speaks at the conclusion of the trial. *Fifth*, written submissions exchanged after trial. In addition there may interlocutory applications prior to trial and during the trial. Contests as to admissibility of evidence or amendment applications which will require submissions to be made on behalf of a client.

73. The process of developing a case theory for a client educates a practitioner as to the subtle nuances by which a client's case may be advocated at its highest and may also avoid internal inconsistencies in the case advanced.

74. A case theory provides a unifying theme to oral and written submissions.

75. It is a rare case where a party's written submissions made before the trial are the same in content as a party's written submissions at the conclusion of the trial. Between the two events much has occurred in a forensic sense and undoubtedly new information has become exposed to both parties to require modification to the case theory developed prior to the trial. The receipt of oral evidence from witnesses is one example of likely new information.

76. The adaptation of a case theory to incorporate such new information will ensure that final submissions address the relevant evidence upon which the judge will make findings of fact to which the judge will apply the relevant law.

77. The effort committed to preparing cogent written submissions is rewarded by their utility to assist the judge after the court has reserved its judgment better to understand a party's case.

78. Summary: a case theory provides a cogent theme for a client's case and informs the content of submissions on behalf of a party to ensure a consistency to their content. A prudent practitioner will adapt a client's case theory to accommodate new information during the conduct of a case. This will inform the theme and content of submissions made on behalf of a client.

G. Conclusion

79. A case theory contains the strategy in civil litigation by which the practitioner will seek to influence the judge on matters of law and fact which are in issue with the aim of having those matters resolved in a manner favourable to the client. It is one of the key elements in successful litigation.

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