COLLEGE OF LAW

LITIGATION MASTER CLASS

21 MARCH 2019

TOPIC 4: CASE THEORY
CONSISTENCY AND CHANGE DURING THE COURSE OF LITIGATION

M J WALSH SC

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, and the challenge to adapting to change during its course.

Legal practitioners will be mindful of the unique nature of legal disputes due to the specific factual and legal issues which arise in each case. Prudent legal practitioners will rely on their own analysis of the facts and relevant law to advise clients as to any dispute and the appropriate conduct of litigation in an individual matter.

Table of Contents

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 an Australian court or tribunal[2] is a vehicle for the resolution of disputes between adverse parties by an impartial decision maker[3]. A court affords to each party an opportunity to be heard as to its contentions as to facts, law and relief.

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. Thus, a lawyer appearing before a court for a party aims to persuade the court of the justness of the party's case, and its proposed solution to the dispute, in preference to that of the opponent's case.

4. The proposition informing this paper is that a lawyer who understands strengths, weaknesses and nuances each party's case, and who can adapt to new facts and information, can more effectively achieve that goal.

B. Use of a case theory to achieve success in litigation

5. Clients and their lawyers aim to achieve a successful outcome from litigation. However, confusion can arise between them as to what the word "success" means in an individual case. Defining success in litigation requires an early, but also an ongoing, assessment of the more likely legal outcome arising from the factual matrix underpinning the dispute, to understand what might be achievable for a client.

6. A realistic and objective assessment of the possible outcomes that the lawyer 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, by which success may be measured. The alternative approach of engendering in a client an overly optimistic expectation

---

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

of the outcome of litigation, which is not met upon the resolution of the dispute, is likely to lead to discord between the client and the lawyer.

7. A prudent and sensible lawyer 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 awareness of 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 potentially adverse outcomes to the dispute.

8. A theory of a case or a "case theory" is a lawyer's statement of the means to achieve a realistic outcome for a client. It is the strategy which will guide the running of the client's case to the conclusion of the litigation.

9. A case theory provides guidance for the conduct of litigation for a practitioner, similar to using a map to reach a destination[5]. It informs every aspect of the pre-trial preparation and in-court conduct of a client's case and the means by which a client will be entitled to the desired judgment from the court.

10. For a lawyer effectively to advocate a client's position to the court, that position must be understood well before trial. Trial advocacy begins long before the parties take a hearing date.

11. 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.

12. Summary: A case theory is a statement by a lawyer 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, the client's case.

---

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

C. Developing the case theory: elements and methods

13. Conventionally the case theory has two limbs:

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

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

14. Each limb of a case theory is indispensable to the other. Without one, there is no utility in the other.

15. The development of an effective case theory requires a lawyer to know what the dispute is about, in the sense of a detailed knowledge of the factual matrix and the basis for the competing claims of facts and law. This may be achieved by a lawyer carrying out a case analysis prior to developing a case theory for a client.

Case analysis

16. A case analysis is performed by adopting an objective or neutral approach to the factual and legal contentions made by the disputing parties. An analysis of the legal issues and the factual issues may only be performed after a lawyer achieves a degree of awareness of the scope and nature of the proceedings.

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

18. 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 the case theory.

19. 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.

20. 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**).

21. Three essential legal concepts arise in regard to a cause of action.

    (a) *First*, the legal elements of the cause of action asserted.

    (b) *Second*, the nature of the relief claimed, including whether the cause of action gives rise to such relief.

    (c) *Third*, the jurisdiction of a particular court to grant the relief claimed.

22. 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 proportionate liability legislation, eg: *Corporations Act 2001* Div 2A, "*Proportionate liability for misleading and deceptive conduct*".[6]

23. An analysis of legal issues requires the lawyer to understand the overall factual matrix to identify the relevant uncontested facts and also the facts that are in dispute.

24. 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 likely will evolve during the course of the litigation.

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

26. 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.

27. Actively reading all available witness statements or affidavits with a sceptical and critical eye, and marking up facts which appear improbable, or matters which may be subject to cross-examination, further assists in the process of understanding the dispute.

28. The analysis of expert reports advanced by each party is best achieved by focusing on the qualification, the claimed expertise, the assumptions relied

---

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

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[7].

29. From this process a lawyer is likely to develop an understanding of who are the key persons and the likely witnesses for the case advanced by each party, and also what factual issues each party is likely to rely upon. The case analysis should provide to a lawyer an understanding in broad terms of the client's case theory, and importantly also the opponent's likely case theory.

Case theory

30. 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.

31. 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 to the facts necessary to establish the client's case.

32. The case theory is best captured in a document. 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.[8] An early draft of the case theory may be brief and should express concisely the basis for the relief claimed, eg:

> The plaintiff seeks to recover monies from the defendant guarantor pursuant to a hire 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.

33. 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.

34. 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. Ongoing testing of the client's factual

---

7 See *Museth v Windsor Country Golf Club* [2016] NSWCA 327

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

theory, particularly against contemporaneous documents and other irrefutable facts is essential.

35. 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.

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

> 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. … 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.
>
> …
>
> 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. …
>
> (my underlining)[9]

37. The client's 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.

38. The development of the case theory also will 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.

39. Summary: The development of an effective case theory requires a lawyer:

    (a) *first*, to perform a case analysis to understand the nature and detail of the facts and matters underpinning the dispute;

---

[9] See also *Coote v Kelly* [2016] NSWSC 1447 at [99]-[102]

(b) *second*, to identify the relevant legal and factual matters in dispute between the parties;

(c) *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

(d) *fourth*, to adapt the case theory to take into account new information arising during the progress of the litigation.

D. Use in making forensic decisions

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

41. Thus, 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.

42. During the pre-trial phase of litigation, the case theory will inform preparation for 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.

43. 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.

E. Case theory and bias

44. Bias is a tendency to respond to circumstances based on perception or belief. Bias often can arise from intuitive responses to problems, as opposed to a rational analysis of the facts and issues.

45. An example of the folly of intuitive thinking arises from the bias referred to by the acronym WYSIATI (what you see is all there is). This arises from thinking fast, ie intuitively, as opposed to thinking slow, to reach a decision in regard to what can be seen, even if that is not substantial. A more rational approach will identify the existence of unknown information relevant to making a decision, and maintain an open mind.

46. Another example of bias is diagnostic momentum, which is the tendency to accept a diagnostic label provided by another without critically reviewing the facts or demanding sufficient proof.

47. For example, in a hospital what might have started as a possible diagnosis by a paramedic or a triage nurse, which gathers increasing momentum as the patient proceeds through different departments, without gathering increasing evidence, until it becomes an accepted diagnosis for a patient, with little or no attention being paid to other possibilities.

48. A bias termed as the framing effect occurs when professionals are strongly influenced by the way the problem is framed and its context. The particular way in which a legal problem is expressed will significantly influence how the problem is perceived and developing suitable strategies and solutions for the problem.

49. Anchoring is the tendency to fixate on specific features of a case too early in the process of developing a case theory, and to base the likelihood of a particular event on information available at the outset. Thus, initial impressions exert an overly powerful effect for some people who are unable to adjust sufficiently, in the light of later information. In a sense, anchoring leads to premature closure of thinking.

50. Confirmation bias is a manifestation of such an unwillingness to let go of a failing case theory. It is the tendency to seek confirming evidence to support a case theory, rather than look for disconfirming evidence to refute it, despite the latter (falsification of a case theory) often being the more rationally sound strategy.

51. Thus in difficult cases, confirming evidence feels good, whereas disconfirming evidence undermines the hypothesis, and means that the thinking process may need to be restarted, that is looks like more work, requiring more mental effort.

52. Confirmation bias may seriously compound errors that arise from anchoring where a prematurely formed hypothesis is inappropriately bolstered.

53. Hindsight bias occurs when knowing the outcome influences the perception of past events and prevents a realistic appraisal of what actually occurred, and leads to an erroneous allocation of responsibility.

54. A further example of bias is the effect of sunk costs. Thus, the more that clients and lawyers invest in a particular case theory, the less likely they may

be to release it, and consider the need to change it. This is an entrapment form of bias more associated with investment and financial considerations.

55. An awareness of the need to adopt a rational and fact-based approach to decision-making, including to accommodate new information to reassess the existing case theory, will avoid unhelpful outcomes in litigation.

F. Recognising and adapting to new information

56. 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.

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

58. New facts often require reassessment of perceptions previously held[10].

59. 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.

60. 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 means to re-assess the client's prospects of success.

G. Identifying the likely evidentiary contest

61. 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.

---

[10] See Annexure A

62. 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.

63. 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.

64. 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[11].

65. Summary: proof of the evidentiary foundation for a client's case at trial is essential for 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.

H. Informing cross-examination strategy

66. 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.

67. 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.

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

69. 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 lawyer 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.*

---

[11] See Annexure B

70. 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. 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 an opponent to lead evidence from a key witness regarding a relevant conversation which is relied upon for an actionable representation by a plaintiff.

        The peril of even raising the fact of conversation runs the high risk that the plaintiff's omission made in chief will be rectified, either by the key witness giving unhelpful evidence during the cross-examination, and also, by the opponent remediating the omission in the course of re-examination of the witness.

71. Such forensic opportunities usually arise quite unexpectedly. They must be seized or they will vanish.

72. 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.

I. Identifying the content of submissions

73. 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.

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

75. In a trial there can be seven major opportunities to make submissions to the judge and incidentally to the opponent.

    (a) *First*, an outline of written submissions provided to the judge in advance of the trial.

    (b) *Second*, an oral opening by the practitioner at the commencement of a party's case.

(c) *Third*, oral submissions at the conclusion of the trial.

(d) *Fourth*, a written outline of closing submissions to which the lawyer speaks at the conclusion of the trial.

(e) *Fifth*, written submissions exchanged after trial.

(f) *Sixth*, in interlocutory applications prior to trial and during the trial.

(g) *Seventh*, in contests as to admissibility of evidence or amendment applications which will require submissions to be made on behalf of a client.

76. The process of developing a case theory for a client educates a lawyer 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.

77. 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.

78. 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.

79. 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.

80. 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 lawyer will revise the 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.

J. Allowing more accurate costs estimates

81. Settling the case theory document at the start of a matter necessarily will identify the scale of, and likely forensic course of, pre-trial and trial legal services to be required for a matter.

82. This will more effectively allow a law practice to meet its obligations pursuant to the *Legal Profession Uniform Law* (**Uniform Law**), including pursuant to Part 4.3. Legal Costs, which in section 169 identifies the Objectives of the part to be:

> *(a) to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and*
>
> *(b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and*
>
> *(c) to provide a framework for assessment of legal costs.*
>
> (my emphasis)

83. The Uniform Law in section 174(1) "*Disclosure obligations of law practice regarding clients*", which is in Part 4.3 Legal Costs, includes the following obligations on a law practice:

> *A law practice –*
>
> *(a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and*
>
> *(b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client—*
>
> *together with the information referred to in subsection (2).*

84. The forensic analysis of a matter by a structured process such as developing a case theory will allow a law practice to comply with its obligations under the Uniform Law by providing a basis to estimate total legal costs to allow the client to make an informed choice as required by the Uniform Law.

85. Summary: a case theory provides a foundation to estimate the total legal costs to be incurred in a matter, to fulfil a practitioner's obligations pursuant to the *Uniform Law*. It also goes far to eliminate the risk of what can be a difficult conversation at the conclusion of litigation, if the client is surprised by unexpected news as to costs.

K. Conclusion

86. A case theory contains the strategy in civil litigation by which a lawyer 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.

M J Walsh SC
walsh@7thfloor.com.au
21 March 2019

Annexure A

An analogy for litigation 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."[12]

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

Annexure B

1. 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.

2. The only issue at trial and on appeal was whether Toyota Finance proved that Mr Gardiner, had guaranteed the obligations of the Company under a number of hire purchase agreements. 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 bound as guarantor in the terms of a document described as "*the Booklet 'Terms and Conditions'*" (Booklet) referred to in Term Purchase Schedules (Schedule) because Mr Gardiner had signed in his personal capacity as guarantor for each hire purchase agreement and variation.

4. Toyota did not call any evidence to establish that anyone on its behalf gave the specific Booklet to Mr Gardiner on any occasion he signed a Schedule or variation.

5. Rather, Toyota called evidence from one of its employees, Mr A, a "*loss recovery manager*", who 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.

6. However, there was no evidence that Mr A was involved in any of the transactions Toyota effected, or purported to have effected, with Mr Gardiner. Further, the title of his 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.

7. Mr Gardiner contended, and Toyota accepted, that Mr A's exhibit was created in December 2009, which appeared on its last page, and which post-dated all the hire purchase agreements Toyota alleged Mr Gardiner had guaranteed.

8. Toyota submitted that that date linked the Mr A's exhibit 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 Mr A's exhibit was the Booklet referable to each variation.

9. The Court said that in considering whether an inference favourable to a party should be drawn:

   (a) 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.

   (b) The absence of a defendant cannot be used to make up any deficiency of evidence.

10. 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.

11. This is despite the fact that Toyota was given leave to re-open its case after the deficiencies in its case were identified on the first day of the trial.

12. Thus the Court was unable to connect the Mr A's exhibit with the Booklet which was part of Mr Gardner's guarantee, as the foundation for drawing a bold inference in Toyota's favour was not established.