From Birth to Burial: The Lifecycle of a Litigated Civil Action

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Foreword

Choosing to be a litigator can be a challenging career path: the risks for our clients are usually high, the process is adversarial, desks are never clear, the workdays can be long (particularly when in trial), and the work often follows us home.

The personal cost is great, but the reward is correspondingly great, too.

I thoroughly enjoyed my practice as a defence litigator for more than a decade; I had the opportunity to work with sophisticated clients from Whitehorse to New York to the United Kingdom, and I continue to count many of those former clients as friends today.

I have especially enjoyed being on the plaintiffs' side of the bar for these past five years, too. The opportunity to work with vulnerable individuals has allowed me to appreciate how strong advocacy can truly make a difference in people's lives, and this experience has been exceptionally rewarding.

Getting retained

My practice with regard to client intake varies, depending on the client and the nature of the legal problem at hand.

The most common question I hear from motor vehicle accident victims is, "What is my claim worth?" My answer: "It is not my job to tell you". I go on to explain that the only person who can answer that question is the trial judge (or jury). This answer naturally invites a conversation about risk, procedure, time, and my role as counsel; it also allows me to manage my client's expectations early. I explain that my role has three phases: 1.Gather the evidence to support the theory of the case, which takes time, particularly if the injuries and losses have not yet 'crystallized'; 2. Give advice about risk when the settlement negotiation phase arrives; and 3. Proceed to trial, if so instructed.

My intake with regard to survivors of sexual assault differs. The client intake usually involves *at least* two meetings, in some cases, many more. Some clients who reach out to me are disclosing their trauma for the very first time. Others are terrified and uncertain about litigation, about challenging their abuser or the institution that allowed the abuse to happen. Many are not interested in money but, rather, accountability; they want to achieve some sense of peace about what happened to them. Sexual violence is about power, and survivors are vulnerable and often have low self-esteem. I explain that the process can re-empower them, as much as that may be possible, but that is certainly my goal for them. For more information specific to how I work with sexual assault survivors, the litigation journey for sexual assault plaintiffs, and thoughts on how to improve access

to justice for survivors, in December 2020 I participated with my client, Rosemary Anderson, in a two-part podcast for the Tort Law class at Thompson Rivers University: "We're Doing What We're Doing for the Client" – interview with Rosemary Anderson and Sandy Kovacs – Torts Podcast (trubox.ca) In Part 2 of that podcast, Ms. Anderson invaluably shares her own perspective of the retainer process, and she explains how she made her decision to ultimately retain me.

During the client intake process it is critical to ensure the client has a clear understanding of the retainer agreement.

On the plaintiff's side, I work on a contingency fee basis. I explain what that means, and I walk each client through the agreement to ensure the client understands the fee arrangement and financial risk(s), including exposure to disbursements, before they sign. I often invite them to take the agreement home, speak to their spouse, and consider whether they are ready to proceed. Pressuring a client to sign the retainer agreement does not help to instill confidence and trust in the lawyer-client relationship. This is especially true with sexual assault survivors.

On the defendants' side, of course, the retainer process is different. In insurance defence or corporate litigation matters, you may well be instructed by a sophisticated client.

Whether you are working for personal defendants or corporate institutions, to avoid soured relations and complaints, it is critical from the outset to establish clear communication. This includes communication of the applicable hourly rate(s), an estimated budget for legal expenses (an important practice that many of my former clients appreciated), your preliminary estimate of the liability exposure, and a discussion of your strategy for an economical and efficient resolution of the file. It is important to remember that you owe a fiduciary duty to your client, no matter how sophisticated the client, and any economic incentive you may have arising from the billable hour fee structure must come second to your duty to act in the best interests of your client. This means not wasting their money.

In all, the client intake process for a civil matter is all about communication and ensuring the client fully appreciates the nature of the retainer, the financial risks, and the anticipated path forward into litigation and, ultimately, toward resolution.

The theory of the case

It is important, as early as possible in the process, to identify your theory of the case. This defines how you draft your pleading, the evidence you need to gather, your strategy for pre-trial procedures, your choice of lay witnesses and experts, if any, and your evaluation of the claim, or if you are on for the defendant, the liability exposure.

Defining the theory of the case early on does not mean you have to stick with that theory if the evidence does not support it. As a litigator, you have to be dynamic and look for the available arguments that will assist your client's position as the evidence unfolds, no

matter the stage of litigation – even if it's at trial. Every file has unexpected warts: learn to work with them.

Pleadings

Pleadings are the foundation for the lawsuit. While busy practices may invite a *pro forma* approach to pleadings, it is critical that counsel, and not just paralegal staff, play a role in their drafting.

A recent employment law decision from the Supreme Court of British Columbia emphasizes the importance of pleadings. In *Ossudallah v. Swiss Consulting Management Ltd.,* 2020 BCSC 567, the plaintiff pled extraneous facts that did not support the cause of action, namely for wrongful dismissal. The defendant employer brought a motion to strike. The court concluded that the pleading was deficient. There were no specifics or details pled – no date, time, or place. The court also found that the use of "and/or" rendered the pleading "meaningless", commenting that "the defendant does not have to disprove a fact that the plaintiff does not specifically allege happened". The plaintiff argued the defendant should have first issued a demand for particulars before bringing a motion to strike, but the court reminded the plaintiff that it was her onus to plead her case and "it is not incumbent upon the defendant to take steps to try to make sense of the pleadings or to try to tease out of the plaintiff the specific allegations it will need to answer at trial." (at para. 32). While those paragraphs that disclosed no cause of action were struck, the court nonetheless gave the plaintiff an opportunity to otherwise amend her pleadings. As noted by the court at paragraph 41, "the bar for granting leave to amend is a low one," particularly where there is no prejudice to the defendant. Ms. Ossudallah was granted leave to apply to amend her pleading.

After sixteen years of practice, I will concede that my own pleadings are still not perfect. Sometimes they lack brevity or specificity, without me realizing so. Sexual assault claims in particular are often difficult to plead, because the client may not have a recollection of dates, places, or other details. I have received demands for further and better particulars even recently. In *Anderson v. Molon, supra,* I sought leave to amend my pleading *at the close of the trial* to ensure it accurately pled the facts underlying the claim for punitive damages.

The lesson is that pleadings are important. Do your best to ensure they are accurate at the outset, but be sure to revisit them occasionally as you proceed with the litigation. Do not perceive a demand for particulars or a motion to strike as a mark of failure or incompetence on your part: take the opportunity to learn.

Perfection is impossible and most errors are fixable. Do not waste your energy stressing over something that is already done; fix the problem and move on.

Document disclosure

The document discovery process is a critical step in the action that cannot be overlooked; it allows you to gather (and requires you to produce to the other party) the relevant documents that allow each side to assess the merits of the lawsuit and the risk of proceeding to trial.

I confess that in my busy practice, and because I practice mostly in personal injury, my staff are largely responsible for preparing my own lists of documents. However, they are trained to recognize when I need to have a look at a particular document, particularly when reviewing for redactions for relevance or privilege; these latter concerns *must involve the exercise of judgment by the lawyer.*

Equally important to your own client's discovery process is to train your critical eye on the opposing party's list of documents. Have they listed all relevant documents? Have they appropriately described the documents over which privilege is claimed, so that you can assess the merits of their claim for privilege? Be familiar with the rules, and use them. The rules are our tools; we can use them to 'mine' for the information we need to prove or defend our client's position, as the case may be.

Examinations for discovery

Preparing your client for oral discovery is obviously important, but it is not a stage production; your client should not be rehearsed. I prepare my clients for discovery by starting with a simple explanation of what it is: it is an opportunity for each party to "discover" the other party's evidence short of trial. It is not a test that needs to be studied for. While I certainly review documents with my client in preparation to flag information that I anticipate they will be questioned about, the client should not feel they need to memorize the contents of documents. The client need only follow three golden rules: 1. Tell the truth (and you never get into trouble); 2. Do not guess (if you do not know the answer, it is perfectly okay to answer, "I don't know" or "I don't remember"); and 3. Keep your answers concise, and make the inquiring lawyer do his or her job and ask follow up questions if they want more detail. The last rule allows me to explain the purpose for which the discovery transcript can be used, namely to impeach the party at trial if their evidence is inconsistent, which circles me back to the first two golden rules. But it is important for a plaintiff especially to understand that discovery is not his or her opportunity to tell their story – that comes later, at mediation or trial. Discovery is instead an opportunity for the other side to commit their evidence under Oath, and to potentially use it against the client at trial, if the client is not truthful or consistent.

I further explain to my plaintiff clients that until discovery, he or she is a pile of paper on the other lawyer's desk. When I acted as insurance defence counsel, my very first paragraph in my post-discovery reporting letter was headed, *Observations of the plaintiff as a witness*. As defence counsel, I used the opportunity to size up the plaintiff, assess their credibility and reliability as a witness, which naturally guided my advice to my client on whether they ought to defend through trial. Human impressions are important.

Whether your client is the plaintiff or the defendant, it is important that they appreciate this reality.

With respect to counsel's role at discovery, it is my practice to offer my opposing counsel the same courtesy I expect from them: treat them and the opposing party respectfully, and do not interrupt with baseless or frequent objections.

In B.C., there is a well known case about counsel's conduct at discovery. Every young lawyer should read it: *Colbeck v. Kaila et al.*, 2007 BCSC 689.

Experts

As a litigator you must be able to identify the need for, select, instruct, prepare, object to, and cross-examine expert witnesses. The success of any lawsuit often depends upon expert opinion evidence.

First, it is important to understand the role of an expert witness at trial. An expert's function is to provide a ready-made inference which the trier of fact, whether judge or jury, is unable to formulate due to the technical nature of the information that is beyond their knowledge or experience (Justice Dickson, *R v Abbey*, [1982] 2 SCR 24 at page 42). A properly qualified expert must be shown to have acquired some special knowledge through study or experience in respect of what he or she intends to testify on.

However, the expert's job is *not* to offer the ultimate conclusions: the trier of fact takes the opinion and the inference, and must draw their own factual conclusions.

An understanding of the expert's role allows you to assess whether you need an expert at all: is the issue something a judge or jury can draw an inference from based on their ordinary experience? For example, see *Uy v. Dhillon,* 2019 BCSC 1136, at paragraphs 14 through 20*,* where Marzari, J. confirmed she did not require standard of care opinion evidence with regard to commercial truck driving where the nature of the negligence alleged, namely crossing over into a lane of travel without warning, is common to all motor vehicle operators.

When selecting an expert, it is important to look at the expert's history before the courts. You may have found the right expert in terms of qualifications, but if he or she carries baggage into the case then it might be a real problem – you must look at their history as an expert before the courts with several questions in mind: Have they been well-received? Have they previously been labelled an advocate? If so, how long ago was the adverse treatment? Have the findings or allegations been reversed or addressed in later appearances before the court? Sometimes, your choice of expert is limited due to availability or qualifications. If so, you have to find a way to work with that expert and maximize his or her credibility with the trier of fact, which means working with them to ensure their report is admissible and that it does not leave them unduly exposed on cross-examination: See *Moore v. Getahun,* 2015 ONCA 55, at para. 62: "It is not only appropriate but essential for counsel to consult and collaborate with [and not just instruct] expert witnesses in the preparation of expert reports. Counsel must explain to experts

their duties to the court, clarify the relevant legal issues, and assist experts in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case."

Every litigator should also be thoroughly familiar with the decision in *White Burgess Langille Inman v. Abbott and Halliburton Co.,* 2015 SCC 23, wherein the Supreme Court of Canada clarified the two-step analysis for assessing the admissibility of expert opinion evidence. The first step, or threshold requirements, are the four factors set out in *R. v. Mohan*, 1994 2 SCR 9: relevance, necessity, absence of an exclusionary rule, and the need for the expert to be properly qualified. The second step is a "discretionary gatekeeping step" where "the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks". It is important to keep this admissibility test in mind both when serving your own experts' reports and when making your objections to the admissibility of the opposing party's expert reports.

Your own expert also can and should assist you to prepare for cross-examination of the opposing expert at trial. Ask your expert to keep a separate file for any communications of this nature, so that litigation brief privilege over that advice is preserved: see *Conseil scolaire francophone de Colombie-Britannique v. British Columbia (Minister of Education)*, 2014 BCSC 741.

When you cross-examine an expert, there are four main areas where you can have a fight:

1. The expert does not have the **qualifications** to opine on all areas of comment in the report;

2. The expert is **biased** and engages in advocacy (cherry-picking facts, etc);

3. The expert **does not have all the facts** (and you are the master of the facts and the evidence before the court);

4. **Polarize the case**: Push the Expert's opinion to the extreme (for example, if a defence expert says the plaintiff has non-organic findings, you should put the following to the expert: "You're not saying he's lying, are you?", a proposition they should readily agree with, and instead suggest there is a psychological or subjective component to the pain complaints, which is not something they can dispute).

Pre-trial settlements

A pre-trial settlement can be in the parties' best interests, both financially and emotionally. Vulnerable plaintiffs with psychological injuries from trauma are often triggered by the adversarial process, and this, too, must be considered before committing to proceed to trial.

It is important that clients understand that trial is a difficult process, where the parties themselves and a line-up of collateral witnesses are tested by the vagaries of cross-examination. I often tell my clients that the only person who enjoys trial is me, because I love being in the courtroom, but it is my observation that my clients do not enjoy it at all.

Alternative dispute resolution measures – whether mediation, judicial settlement conferences, or simple negotiations – offer an opportunity for the parties to have some control over the resolution of their dispute before handing the decision-making over to a third party, namely the trial judge or jury. Mediation in particular can offer a safe setting for the parties, and their counsel, to address risk directly with the other party. This is why, in British Columbia, if a party serves a Notice to Mediate, attendance by all parties at mediation is mandatory, and parties can be held in default with cost consequences: see Crossin, J.'s unreported oral reasons in *Crawford v. Nazif,* 20190809, Action S132325, Vancouver Registry, Supreme Court of British Columbia.

It is important that each party state their positions at the opening of any mediation, but it is advisable not be too adversarial in nature: the goal is to find a resolution, not deter one. A helpful approach is to identify the issues not in dispute and those that are, and then try to address the opposing party's concerns regarding the issues in dispute.

First offers are irrelevant. In most personal injury actions, the plaintiff will start with their 'best case' number, while the defendant starts with their 'best case' number, which could be a zero. While this early stand off is rather unhelpful, it is the unfortunate *status quo*.

The important offer is the last one left on the table – that is the offer that you have to advise your client on. What is the client's risk on that offer? Can you 'beat' the number? Is the financial upside of going to trial worth the time, effort, and delay?

This is exactly the moment when phase two of your role as an experienced advocate comes to fruition: you must be able to give your client sound advice about their risk on the settlement offers exchanged, and either recommend settlement or trial.

Preparing for trial

Some cases are simply not amenable to settlement and must proceed to trial.

Do not be afraid of trial. Your client deserves an advocate who is prepared to cross the finish line for them. Moreover, trial is where you will find out if litigation is truly your calling. While it is normal to feel some nervousness about trial (indeed, you should be worried if you do *not* feel any jitters), you should on the whole be *excited* about the opportunity to exercise your skillset in the courtroom.

But a trial can be enjoyable if you are well prepared. You must be a master of the facts and the law at issue by the time your matter proceeds to trial. Ensure that each and every one of your witnesses is well-prepared. Create a 'hit list' of the issues that you think your opposing counsel will attack each of your witnesses on, and prepare them for those questions.

A good rule is to assume that *every* file will go to trial. Otherwise, you will find yourself scrambling at the 11th hour to gather the documentary and oral evidence you need to prove or defend the case. Scrambling is not a fun experience for any litigator, because it is usually a reflection of one's negligent handling of the file and can be excruciatingly stressful. Having said this, *every* file has its warts; no file is perfect. You must find the confidence to be able to manage those warts, sometimes on the fly.

Trial

On the plaintiff's side, good trial advocacy tells a compelling story, whether the trier of fact is a judge or jury.

The opening is not an opportunity to be wasted. It is *not* an opportunity for argument, but it is an opportunity to introduce the story to the trier of fact, to 'hook' his or her interest. For excellent advice on how to conduct an opening for the plaintiff, I highly recommend reading Michael Slater, QC's article, "Effective Opening Statements (slatervecchio.com)" which references David Ball's approach.

The trier of fact should be involved in the story rather than simply being told the story. In addition to calling witnesses and putting in paper documents, consider whether real evidence might help the trier of fact to experience the story. Will 9-1-1 audio transport the courtroom to the critical moment? Will photographs or a 'day in the life' video help palpably demonstrate what you are trying to explain in words? If so, use it!

In *Crawford v. Nazif,* 2019 BCSC 2337, I was lead counsel for an elderly plaintiff who suffered a severe traumatic brain injury after she was assaulted by a psychotic man on the streets of downtown Vancouver. We sued the psychiatrist who had decertified him less than 24 hours before the assault. We sought to introduce some of the 9-1-1 audio and a photograph of the perpetrator immediately following his arrest, after he had stripped down to his underwear. The defendant Dr. Nazif objected, arguing the evidence would be "inflammatory" to the jury. Mr. Justice Voith allowed the evidence to go before the jury, saying:

> [59] … I consider that the obvious distress of the witnesses to the Plaintiff's attack can inform the violent nature and potentially the irrationality of that attack and Mr. Osuteye's subsequent behaviour.
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> [60] In addition, I was informed by counsel for the Plaintiff that there were ten witnesses to the Plaintiff's attacks and that there were ten 9-1-1 calls, although I did not understand counsel to be giving me a precise number in either instance. The point is that the Plaintiff, in seeking to introduce the 9-1-1 Evidence from two such witnesses, does not seek to inflame the jury or to prejudice the Defendants. Nor has counsel for the Plaintiff chosen the most graphic or descriptive of the 9-1-1 calls that were made. I was advised that in one such call that was not chosen, the caller, in describing

> Mr. Osuteye's attack on the plaintiff, said "he kicked her head like a soccer ball".
>
> [61] The 9-1-1 Evidence, though frantic and panicky in tenor, does not use such language. The object of the 9-1-1 Evidence is not to exaggerate the evidence of the Plaintiff's attack nor, conversely, to dilute or sanitize that evidence. Rather it is to provide the trier of fact with both a full and accurate description and sense of what took place. Accordingly, I consider the 9-1-1 Evidence is admissible.
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> [62] Next, the Defendant objects to a single photograph of Mr. Osuteye in his underwear. It appears the photograph was taken at a police station. The Defendant again argues that this photograph is inflammatory and unnecessary. I do not agree. It is a single photograph out of many such photographs. There is nothing in the photograph that is exaggerated or distressing or otherwise inflammatory. It allows the jury to not only hear a description of how Mr. Osuteye was dressed after he attacked the Plaintiff but to fix that image accurately. The photograph is admissible.

Witnesses, what they have to say, and how they say it are critical to the outcome of any trial. A case is only as good as its facts, and the facts are usually solicited from the witnesses.

You have to be strategic in the witnesses you call. Each should advance the story you are telling. You do not need three witnesses who all say the same thing. Generally, I open with the plaintiff and anchor the close of the case with the plaintiff's spouse or another family member who can remind the trier of fact of the plaintiff's plight, and I usually sandwich the expert witnesses in the middle. But the evidence must flow, as much as scheduling allows that to happen.

When it comes to cross-examination of the opposing party's witnesses, remember the *purpose* of cross: to seek admissions or denials that will assist your client's case. Every question must have a purpose. Every question must contribute to building your client's case or undermining the opposing case. Effective cross-examination can have a profound impact on the evidence a witness gave in chief and their credibility.

Remember that you need not always cross-examine every witness your opposing counsel calls. If you cross-examine, the goal is to get in and out with surgical precision. Do not ask any question you do not know the answer to.

Adjust your style and temperament for each witness. With some witnesses, you can secure admissions through a soft approach, like attracting bees with honey. Others, you have to intimidate into submissiveness. Your approach may involve a bit of both: start with the former approach, lead the witness 'down the garden path', and then flip the switch.

Last, do not forgot about the rule in *Browne v. Dunn*. If you intend to argue that the witness is not credible on a particular issue, you have to put that allegation to the witness in fairness, to permit him or her to rebut it.

If you want to review transcripts of some cross-examinations I have conducted, you can find them on our website:

- *Uy v. Dhillon,* 2019 BCSC 1136: Cross-examination of defendant commercial driver Dhillon
- Archbishop Emeritus Exner in *Anderson v. Molon*: October-17-2019-cross-examination-of-Exner.pdf (kazlaw.ca) and October-18-2019-cross-examination-of-Exner.pdf (kazlaw.ca)

A witness can be re-examined by the counsel who called him or her but the scope of re-examination is limited to points that arose during cross-examination. Approach re-examination with caution: if it is not altogether an important issue, and if you are not confident in what your witness will say, it is usually better to leave well enough alone.

Post-trial or post-settlement procedures

A file is not over when a settlement or judgment is achieved; the due diligence continues.

If the matter resolved by way of trial, is there any merit in an appeal? Be sure to diarize the deadline for appeal, and seek instructions, as appropriate. Appeals are complex, and it may be wise to seek outside counsel to review the trial judgment to determine the merits of appealing.

Is your client entitled to, or obligated to pay, costs and disbursements? Were there any formal offers to settle that invite cost consequences?

Consider what steps still also need to be taken to document the resolution of the claim (consent dismissal orders, trial orders, releases, settlement agreements, et cetera) and if any non-parties need to be contacted. Are there any subrogated interests that need to be satisfied (e.g. a long term disability insurer)?

Are there undertakings on the funds being transferred and, if so, ensure they are followed.

Lastly, consult your Law Society's rules and guidelines with respect to file closure and retention of documents.

In BC, for detailed guidance, see Practice Resource: Closed Files - Retention and Disposition (lawsociety.bc.ca).

In Yukon, see Rule 179 of Division 17 of the *Rules*:

> Record keeping and retention
>
> 179. (1) A lawyer must obtain and retain a copy of every document used to verify the identity of any individual or organization for the purposes of subrule 174(1).

> (2) The documents referred to in subrule (1) may be kept in a machine-readable or electronic form, if a paper copy can be readily produced from it.
>
> (3) A lawyer must retain a record of the information, with the applicable date, and any documents obtained for the purposes of rule 171 and subrules 177(1) and 181(b), and copies of all documents received for the purposes of subrule 174(1), for the longer of
>
> > (a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing services to the client, and
> >
> > (b) a period of **at least six years** following completion of the work for which the lawyer was retained.

When in doubt, look at your Law Society's rules: LSY-Rules-EN-Final-Approved-June-1-2021.pdf (lawsocietyyukon.com). For ethical matters, refer to your Code of Conduct: Code-of-Conduct.pdf (lawsocietyyukon.com). Undertakings are serious, and if you give one, it must be honoured:

> 7.2-11 A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.

Concluding remarks

This paper offers only an overview of the journey of a litigated file from its 'birth to burial'. Each stage could be the subject of its own CLE.

This leads me to mention yet another joy in the advocate's overall journey: as a litigator, I have never stopped learning. Each file, each client, is a new opportunity to learn something new. A career in litigation is certainly never boring.

Even sharing this paper and presentation has been an opportunity for me to learn.

True success, in my respectful view, is not measured by how much you *earn* for a living. Success is more appropriately measured by how much you *learn* for a living – how much you grow as a human being because of enriching experiences. And success is accurately reflected not in the car that you drive or the home that you own, but in the difference you make in others' lives.

I wish to express my sincere gratitude to the Law Society of Yukon for inviting me to present this paper to its members.

*This paper and the corresponding presentation provide an overview only and do not constitute advice. If in doubt, call a mentor for advice on procedural or substantive matters arising in the course of a file, and a Law Society Bencher for guidance on any ethical questions that may arise.