



Identifying and Focusing on the Issues

Identification of Issues

There is nothing worse at trial than hearing something for the first time or hearing a view of the evidence, an argument on liability or a position on the medical evidence that you have not had an opportunity to consider previously. In my experience, it is never as straightforward as the simple question of did the plaintiff suffer an injury or not. There is always something unique to each case.

Keeping track of all the issues that arise throughout the life of a file requires an organized method of tracking them. David Osborne a number of years ago shared at a TLABC Seminar his Trial Notebook. I still use his format. As soon as a file is opened I start putting information into the Trial Notebook. By the time the case goes to trial you have all of the information at your fingertips. With David's permission I have reprinted his index to his Trial Notebook and attached it to this paper.

In terms of identifying the actual issues, there are a number of steps which will help you identify what the issues in your case may be:

1. Talk to your client and really listen to what they are saying. Hear what is important to them without judgment. Focus on how their life is different because of the injury they have suffered. Listen to everything they have to say about the impact that their injuries has had on their life. TLABC has done seminars in the past on the uncommon diagnosis. These are a gold mine in terms of maximizing recovery for your client. Listening carefully to what your client has to say may uncover a problem that the treating practitioners have not do date focused on.
2. Talk to the people close to your client about what changes they have seen. Again, talk to them without filtering out what you think is important. Try to find out as much as you can about your client and how their life has changed since the motor vehicle accident.
3. Read all the documents that are available and know what they say. Get as much of the adjusters notes as possible. Know what documents you should be getting from ICBC and if you are not provided with them, follow up and get the adjuster to either provide them or to confirm that they do not exist. I ask the adjuster to provide the following documents:
 - i. Statements of all parties;
 - ii. Statements of witnesses;
 - iii. Material damage information including photographs;
 - iv. Police reports;



- v. Photographs of the scene;
 - vi. Any medical or wage loss information obtained by ICBC regarding my client.
4. Ensure that the defendant is complying with the requirements of Rule 26.
- a. Remember that the test for disclosure of documents is whether they are relevant to any matter in question in the action and are or have been in the party's possession or control.
 - b. The test for whether a document is relevant to the matters at question in the litigation is if it may enable the other party to either advance his or her own case or damage the case of his adversary, or may lead him to a train of inquiry that may have either of these two consequences. (*Cie Financiere du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B. 55). This test applies equally to the disclosure required by the defendant as it does to the plaintiff.
 - c. Possession or control exists where a party has an enforceable right to obtain the documents (*Wolansky v. Davidson* (1992) 67 B.C.L.R. (2d) 211). Consider what documents the defendant himself would have an enforceable right to obtain and make sure that you are provided with all of those documents.
 - d. Consider what documents might be in the possession or control of a non party and whether an application under R. 26(1.1) should be made. Under this rule you will have to demonstrate some "real relevance to the litigation". (*V. (K.L.) v. R. (D.G.)* (1993), 83 B.C.L.R. (2d) 217)
 - e. The test for upholding a claim of privilege over a document in the solicitor's brief was described in *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254 as a two pronged test of:
 - i. Litigation must be in "reasonable prospect" at the time that the document is produced, meaning that a reasonable person would conclude that the claim for loss could not be resolved without litigation; and
 - ii. The dominant purpose for the production of the document must be for the litigation.
 - f. Rule 26(2.1) requires the nature of any privileged documents to be described. If you can't determine what the document could be from the description given, request compliance with the rule. *Leung v. Hanna* (1999), 68 B.C.L.R. (3d) 360 has circumscribed the requirement of Rule 26(2.1) such that if the date, the identity of the sender and/or recipient, the



9. Research the issues, both legal and medical. In looking at cases that have considered similar issues it will help you understand what is important in deciding the issues. Make sure you understand the particular medical condition that you are dealing with and all the factors that are relevant to that condition.
10. Once I really know what a case is about, I talk to my friends, family and staff about the case. These people are more like the potential jurors who will be judging your case. This is similar to doing a focus group, except without the cost. You can use these informal discussions to do a number of things:
 - a. To discuss your case with people who know nothing about it, requires you to be able to clearly and succinctly say what a case is about;
 - b. When you tell friends, family and staff about your case, they will ask you questions. Those questions give you a good idea about what types of things might be important to a jury;
 - c. Get feed back from your friends, family and staff about their view of your case and what types of things might change their view of the case;
 - d. Practice your opening statement and closing argument on your friends and family and get their concrete feedback on it;
 - e. Tell them the defence theory of the case and ask them what might convince them of this view;
 - f. Tell them the weaknesses that you perceive in your case and find out whether they view them as a problem or not. If they do, ask them what sorts of things would help change their view;
 - g. Tell them what your theory of the case is and see if it makes sense to them;
 - h. After describing your case to your friends and family, ask them what they think is important about the case and what sorts of things they would want to know if they were the ones making the decisions.

Narrowing the Issues

Don't overlook the importance of using a Notice to Admit. Use it to your advantage. Once you have identified potential issues, send a Notice to Admit to get the defendant to commit to their position on those issues. Take a look at the statement of defence and narrow the issues that have been raised. If there continues to be a denial that you do not expect, take another look at the evidence to make sure that you have not overlooked something.

Rule 31 enables a party to request another party to admit either the truth of a fact or the authenticity of a document. Use this rule to narrow the issues so that trial time is spent on matters that are truly at issue. This rule also will help you clarify what evidentiary issues you have in terms of admissibility of documents. If a refusal to admit is made,



reasons must be given for the refusal to admit. The reason may include the grounds that the fact or document is irrelevant or privileged. The failure to respond to a Notice to Admit properly and appropriately, including providing the reason for failure to admit, can result in a deemed admission of the requested fact (*Skillings v. Seasons Development Corporation* (1992) 70 B.C.L.R. (2d) 14. An unreasonable refusal to admit a fact may result in a penalty of costs.

Focussing on the Issues

Trials are a lot easier to do once you have identified and focussed on the issues in your case. The time required for trial can be shortened significantly through identification of the issues. You can spend your time at trial on the true issues in your case rather than presenting your evidence in an unfocussed manner, covering every potentiality for fear that an issue might arise in the defence case.

Identification of the issues helps you to develop the themes for your trial. Use your themes throughout your trial, in your opening statement, your questioning of witnesses, your cross examination and your closing argument.

Once you have done the work to identify the issues, you can proceed to trial with confidence. You are able to tell your trier of fact what it is that has to be decided in your case and you can know that you are ready and able to respond to any issue that might be raised at trial.