

**OVERCOMING OBSTACLES TO YOUR CASE –
A PLAINTIFF AND DEFENDANT PERSPECTIVE**

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I. DENIAL OF LIABILITY – PLAINTIFF’S PERSPECTIVE

In general, from a Plaintiff’s perspective, the primary concepts to be discussed in our presentation includes the following:

1. Case/Client Selection is key to know your case – strengths and weaknesses.
2. Know your client – History, Health, Personality, Litigation Experience, Injuries
3. Communicate - With Plaintiff and with Defendant Adjuster/Counsel
4. Plan for litigation upon retention.

From a Plaintiff’s perspective the primary issues in dealing with denial of liability can be addressed as follows:

A. Know your case:

- Client interview -“examine” your client;
- Review claim from Defence perspective;
- Advise client as to risks; and
- Immediately upon retention obtain the following:
 - i. A full police report or incident report;
 - ii. Witness statements through Private Investigators;
 - iii. Police statement by Plaintiff and witnesses; and
 - iv. Any material arising from i – iii; and
 - v. Do not “file” this information- read it and react to it – win your case in the first few weeks.

B. Complex cases:

- Liability is always an issue in large quantum cases;
- Be smart enough to “know what you do not know”;
- Experts, experts, experts; and
- For motor vehicle collisions or industrial collisions, the following are

essential experts to retain immediately upon commencement of the case:

- i. Reconstructionists – Visit the scene with the Reconstructionist, listen to the Reconstructionist, obtain ranges from the Reconstructionist - know your “upside” and “downside”; and
- ii. Bio-mechanical specialist – Discuss all aspects of the case with this expert over the phone, know your ranges - know your “upside” and “downside”.

- Special Considerations – Find experts to suit your specific case, for example:
 - i. Semi-trucking expert, industrial/industry expert, social host expert, engineer/videographer expert, etc.
- Medical Negligence Claims:
 - i. Upon retention, obtain medical opinions as soon as possible;
 - ii. Plan for every case to go to Trial;
 - iii. If your case resolves it will be because you proved your case; and
 - iv. Within medical negligence cases all advice/guidelines herein, must be followed. Any shortcuts will be punished.
- As Plaintiff Counsel – know what you need to prove and prove it.

C. Know the law:

- “Your best case”;
- “Your worst case”; and
- Communicate with your client the ranges for the case.

D. Communicate with the Defendant Adjuster/Counsel:

- Do not be surprised by denials.

E. Practical points:

- Plaintiff Counsel:
 - i. Can you afford to take the case?;
 - ii. Can you afford to be wrong about taking the case?; and
 - iii. Win the case early and proceed to litigate.

II. DEFENDING TO TRIAL – DEFENDANT PERSPECTIVE

- The key element to successfully defending a case is to properly understand the case. You should never be surprised by the Plaintiff’s case;
- How to understand the case;
- Do not leave “a stone unturned”;
 - i. Interview witnesses and preserve evidence and recollections;
 - ii. Ensure proper production (both pre and post loss);
 - iii. Conduct a thorough Examination for Discovery/Undertakings;
 - iv. Give thought to the legal issues and the evidence required:
 - Liability;
 - Contributory Negligence;
 - Causation;
 - Damages; and
 - Future Claims;
 - v. Consider experts and “Proof” requirements:
 - May require additional information; and
 - vi. Consider surveillance – not as a “crutch” but a “tool” for assessment (credibility);
- Always have a realistic and evolving assessment of the Claim;
- Do it at various stages especially after more information gathered;
- Have a game plan;
- Employ strategy for Resolution/Trial:
 - i. Jury Trial;
 - ii. Summary Trial; and
 - iii. Mediations/JDR Conference.
- Use formal offers as a tool for settlement and also to protect costs;
- Proper Disclosure of Expert reports – Rule 218.1;
 - i. For Trial; and

- ii. To force settlement.
- Proper use of surveillance and disclosure:
 - i. For Trial; and
 - ii. To force settlement.
- Trial:
 - i. Prepare, prepare, prepare;
 - ii. Agree to points that need to be conceded (agreed statement of facts, agreed book of exhibits, agreed reports);
 - iii. Understand evidence needed from cross-examination of witnesses;
 - iv. Understand onus requirements and evidence needed to support your position;
 - v. Give proper thought to evidentiary objections;
 - vi. Tie in evidence to your position in closing argument; and
 - vii. Create a road map for the evidence needed to establish your case (know what you need, and from whom you need to get it).

II. DEFENDING TO TRIAL – PLAINTIFF PERSPECTIVE

A. Keys for Plaintiff Counsel:

- Know your case;
- Know your client;
- Plan to litigate case from the date of retention and advise client this is the plan;
- Obtain and review all records – Ambulance, sweep logs, draft opinion letters, all medical charts and any other relevant document;
- Review all of these documents and be proactive with the information therein; and
- Do not prepare for a Discovery the day before, or leave it to undertakings to provide relevant information to the Defence.

B. Prepare for Trial from one day one of retention:

- Keep up with Plaintiff developments (rehab, employment, mitigation, etc.);
- Communicate with Defendants – Do not be surprised that a matter is being defended to Trial;
- Use Court process to your advantage – schedule, plan and set deadlines;
- Be pro-active:
 - i. Utilize case management;
 - ii. Utilize 218 rules;
 - iii. Utilize notice to admit facts;
 - iv. Utilize Formal Offers of Settlement;
 - v. Utilize alternative dispute resolutions; and
 - vi. Choose carefully.

C. Do not fold. If the foregoing points have been followed you will – know your case – know your client- know your risk – keep the case moving:

- On the basis of the foregoing you should have the advantage moving towards Trial.

III. DISCLOSURE OF INFORMATION – PLAINTIFF PERSPECTIVE

A. GENERAL POINTS

- Know your case;
- Know that Plaintiff information that is relevant and material will be produced in due course throughout litigation;
- Be aware of the “skeletons in the closet”;
- Plead carefully;
- Claim reasonably;
- Know your client; and
- Know your obligations.

B. Legal obligations of discovery of records:

- General Principles¹
 - i. Rule 186 of the *Alberta Rules of Court* defines “record” expansively;
 - ii. It includes the physical representation or record of any information, data or other thing that is or is capable of being represented or reproduced visually or by sound.
- Obligation to disclose records through Affidavit of Records exists if:
 - i. If records are in the Plaintiff’s possession, custody or power²;
 - ii. Documents are in custody or power whether or not they are privileged³;
 - iii. When the records are relevant and material⁴.
- Note – The obligation is to “disclose” – not to “produce” the record;
- Discovery of records to relevant and material is defined in that Rule 186.1:

186.1 For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected:

 - (a) to significantly help determine one or more of the issues raised in the pleadings, or
 - (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.
- Fishing expeditions are to be limited⁵;
- Materiality - is the degree to which a fact is related to the issues of the lawsuit⁶;
- A document will be relevant if it assists in proving or disproving that particular fact⁷;
- Power and possession of Plaintiff;
 - Price v. Labossiere*⁸, and cases following deem:
 - i. where the medical or mental condition of a party is at issue in the lawsuit, the medical and hospital records, including clinical notes and records obtainable by a party, ought to be listed in the affidavit if records;

- ii. Note that one need only list and produce what is relevant to the medical condition at issue or what is related to the matter disputed; and
 - iii. If the whole medical and emotional history is at issue, everything must be produced.
- Medical record production obligations are as follows⁹:
 - i. Notes and records in question are in the “power” of the Plaintiff in the sense that it would be reasonable for her to request them from health care provider;
 - ii. Denial leads to Rule 209 Application; and
 - iii. Similar considerations apply to the notes and records in the possession of the physiotherapists/chiropractors.
- If only a part of the medical records are relevant the entirety of records need not be produced. See *Micheli v. Sheppard*;
- Psychiatric records¹⁰:
 - i. Must be relevant to the Plaintiff’s claim, pleaded as an injury by the Plaintiff and disclosure must be in the interest of the injured party; and
 - ii. Will not be producible if not in the best interests of Plaintiff.
- WCB records – follow WCB disclosure rules as provided by WCB;
- Insurance records:
 - i. Must be in the power of the Plaintiff to be produced. A similar reasoning was recently stated in *Brown v. Nguyen*:

[24] The plaintiffs section “B” Disability file is not producible. The disability file represents an insurers assessment of their insured’s claim. It is not the property of the plaintiff and he has no color of right to possess it. The defendants acknowledge that their request for the entire disability file was perhaps overreaching but ask me to order the production of more discreet portions of the file¹¹.
- Employment Insurance/Statutory Files and Employment Files Production:
 - i. The requirement to inform oneself has been limited to matters within the control of the Plaintiff;
 - ii. If no control exists over documents, no duty arises¹².

- Following the above, Section B files, Employment Insurance and Statutory Files need not be produced.

C. In regards to reviewing production of Defendant documents:

- Know your case;
- Read Defendant Affidavit of Records – What’s missing – why is it missing;
- Surveillance:
 - i. Review Affidavit of Records to determine if it is privileged;
 - ii. Ask specifically as to whether surveillance exists;
 - ii. Bring application to produce surveillance information that will be utilized during trial;
 - iv. Pay attention to documents within Defendant Affidavit of Records; and
 - v. Prep Discovery from receipt of these documents.

IV. **DEMANDS FOR JURY TRIALS – DEFENDANT PERSPECTIVE**

A. Why a Jury Trial:

- Strategy – “low speed collision” and “credibility”;
- Judge’s perception – lower awards;
- Righteous cause; and
- Could force settlement considerations.

B. The Application :

- Section 17 of the *Jury Act*;
- Q.B. Civil Practice Note 2;
- Prima facie right to a Jury Trial;
- Onus on Respondent to show case “cannot conveniently be tried by a jury”;
- Opportunity to re-apply if evidence/circumstances change; and
- Two Justices in Calgary hear application.

C. To defeat the Application:

- I. Section 17(2) of the *Jury Act*
 - (a) *Prolonged examination of documents or accounts*
 - (b) *A scientific or long investigation.*

D. Criteria:

- Examining Exhibits;
- Complexity;
- Conflicting Evidence;
- Number of experts;
- Interpreter; and
- Number of court days required

II. Cross- Application for Summary Trial

III. Amend Pleadings in Pre- March 1, 2003 claims

IV. DEMANDS FOR JURY TRIALS – PLAINTIFF PERSPECTIVE

Plaintiff considerations for Jury Trials:

- Pick cases carefully if you can;
 - i. Know strengths and accept weaknesses;
- Look at why Defence wants Jury Trial;
- Look at what arranges for case with Plaintiff acknowledging increased risk;
- If motion is brought and Jury Trial is not an option, re-plead – amend Pleadings;
- If Jury Trial is to occur – plan – prepare – know ranges – discuss with Judge – know limits of what can be done in Jury Trial; and
- Do not fold.

¹ With thanks to Barb Cotton at Bottom Line Research & Communications as well as Craig Gillespie of Cuming, Gillespie & Raymaker.

² *Price v. Labossiere* (1985), 64 A.R. 74 (Q.B.) (*Price v. Labossiere*”).

³ The issue of disclosure must be distinguished from the issue of production see *Caskey v. Guardian* (1994), 148 A.R. 251 (Q.B.M.).

⁴ For the way that the documents should be described in an affidavit of record see *Dorchak v. Krupka* (1997), 196 A.R. 81 (C.A.).

⁵ (2003), 333 A.R. 270 (Q.B.) aff’d (2003), 346 A.R. 78 (C.A.).

⁶ S.F.J. Curran, “Relevance and materiality: Setting the Scope of Discovery” in *Rediscovering Discoveries* (Edmonton: Alberta Civil Trial Association, 2005) Supplementary paper G at 7. (“*Rediscovering Discoveries*”); A.A. Fradsham, *Alberta Rules of Court Annotated 2006*, (Toronto: Carswell, 2005) at 477.

⁷ S.F.J. Curran, “Relevance and materiality: Setting the Scope of Discovery” in *Rediscovering Discoveries* (Edmonton: Alberta Civil Trial Association, 2005) Supplementary paper G at 7. (“*Rediscovering Discoveries*”); A.A. Fradsham, *Alberta Rules of Court Annotated 2006*, (Toronto: Carswell, 2005) at 477.

⁸ *Price v. Labossiere*. See also T.L. Archibald & J.C. Morton, *Discovery: Principals in Practice* (Toronto: CCH, 2004) at 17, 41-42; Master Quinn in *Murphy V. Bouilly* (1987), 77 A.R. 276 (Q.B.M.) held that the principles in *Price v. Labossiere* only applied where there has been an independent medical examination for the defendant.

⁹ (1994), 30 C.P.C. (3d) 297 (Ont. Gen. Div.).

¹⁰ 2005 ABQB 953.

¹¹ 2006 ABQB 783 (Q.B.M.).

¹² (1992), 135 A.R. 58 (C.A.).